

NO. 01-17176

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff/appellee,

v.

RUBEN CAMPA, et al.

Defendant/appellant.

**On Appeal from the United States District Court
for the Southern District of Florida**

**PETITION FOR REHEARING *EN BANC*
OF APPELLANTS RUBEN CAMPA, RENE GONZALEZ,
ANTONIO GUERRERO, AND LUIS MEDINA**

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

**United States v. Ruben Campa
Case No. 01-17176**

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Acosta, R. Alexander

Alejandre, Armando

Bandstra, Ted E.

Blumenfeld, Jack

Bryn, Brenda

Buckner, David M.

Campa, Ruben

Cohen, Eric Martin

Costa, Carlos

de la Peña, Mario

do Campo, Orlando

Dubé, Hon. Robert L.

Garber, Barry L.

Certificate of Interested Persons
and Corporate Disclosure Statement
U.S. v. Campa, No. 01-17176

Golder, Randee J.

Gonzalez, Rene

Guerrero, Antonio

Hernandez, Gerardo

Horowitz, Philip R.

Jiménez, Marcos Daniel

Kastrenakes, John S.

Klugh, Jr., Richard C.

Lenard, Hon. Joan A.

Lewis, Guy A.

McKenna, Paul A.

Medina, Luis

Mendez, Joaquin

Miller, Caroline Heck

Mixon, Donnal Shannon

Morales, Pablo

Norris, William M.

Palermo, Peter R.

Certificate of Interested Persons
and Corporate Disclosure Statement
U.S. v. Campa, No. 01-17176

Sabin, Barry

Sanchez, Eduardo

Schultz, Anne R.

Scott, Thomas E.

Shirley, Madeleine

Turnoff, William C.

Weinglass, Leonard I.

Williams, Kathleen M.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance:

Whether, under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) and its progeny, a court is precluded from evaluating a party's proffered "race-neutral" reasons for striking a particular juror, and considering whether other members of the venire share the stricken juror's characteristics, if the party allows other jurors of the stricken juror's race to be seated on the jury.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this court:

Snyder v. Louisiana, __ U.S. ___, 128 S.Ct. 1203 (2008)

Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317 (2005)

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986)

United States v. Dennis, 804 F.2d 1208 (11th Cir. 1986)

United States v. David, 803 F.2d 1567 (11th Cir. 1986)

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___ U.S. ___, 128 S.Ct. 1203 (2008) i, 7-8

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STATEMENT OF THE ISSUE

Whether, under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), and its progeny, a court is precluded from evaluating a party's proffered "race-neutral" reasons for striking a particular juror, and considering whether other members of the venire share the stricken juror's characteristics, if the party allows other jurors of the stricken juror's race to be seated on the jury.

STATEMENT OF THE CASE

The relevant facts and procedural history are set forth in the panel decision, *United States v. Campa*, ___ F.3d ___, 529 F.3d 980 (11th Cir. 2008), a copy of which is attached as Appendix A, with the following additional relevant background.

During the course of the jury selection, counsel for the defendants moved under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), to direct the government to give a racially neutral reason for a pattern of striking black jurors. R28:1496-97. At the time that the challenge was made, the government had used four of its six peremptory challenges on black jurors. All together, during the jury selection process, the issue of the racially-motivated striking of black prospective jurors pursuant to *Batson* was raised on five separate occasions. *See* R28:1498 (government counsel responds: "It is true we have struck four African-Americans. We have sat two. There is no pattern here."); R28:1500-11.

The panel understood the district court's ordering the government to provide race-neutral reasons for its five strikes of black jurors to reflect the trial court's implicit ruling "that the defendants had made a *prima facie* showing of racial discrimination." 529 F.3d at 998. Although not addressed by the panel, the reasons proffered by the government were inherently questionable. From being unhappy with jurors for having their hands folded, R28:1506, to rejecting a normally prosecution-desired corrections officer, R28:1500, to rejecting a juror for a simple laugh, R28:1511, the reasons given appeared facially contrived.

On appeal, the defendants focused on the government's explanation for its strike of the black corrections officer, *see* R23:46, after the district court had implicitly concluded that the government's disproportionate strikes established a *prima facie* case of discrimination. R28:1498.¹ The government had strongly opposed, *see* R24:387, the striking of a white prison employee who worked in the very prison in which the witness whom the government was calling was incarcerated, the Federal Detention Center in Miami, and who was familiar with defendants in the case. R24:298-99. The defense contended that the government's explanation of the strike of the black juror McCollum was not facially neutral and, in any event, insufficient to

¹ This issue was raised in Rene Gonzalez's Initial Brief at 18-22 and Reply Brief at 26-27, and adopted by all of the defendants. It was addressed again in the Joint Supplemental Initial Brief at 33-37 and the Joint Supplemental Reply Brief at 27.

overcome the *prima facie* case of discrimination and that, in light of the record with respect to other jurors, the proffered reason instead betrayed the discriminatory exercise of a peremptory challenge. R28:1500-01 (defense counsel: “The point is, when we had somebody that knew the defendants and worked at the Federal Detention Center, obviously familiar with prisoners and movement within the prison obviously far more than Mr. McCollum, they didn’t have a problem with him. Now they say they have a problem with Mr. McCollum?”).

The panel, addressing solely the question of whether the district court erroneously found that a *prima facie* case had been established, concluded that because the government had not sought to strike all of the black jurors and had not used all of its peremptory challenges, there was no *prima facie* case and no *Batson* error. 529 F.3d at 998 (“As occurred in *Dennis*, the government did not attempt to exclude as many black persons as it could from the jury. The government chose not to use two of its peremptory challenges at all, and the jury included three black jurors and an alternate black juror. No *Batson* violation occurred.”) (citing *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986)).

ARGUMENT AND CITATIONS OF AUTHORITY

The panel erred in denying appellants’ *Batson* claim on grounds that the defense, as a matter of law, did not establish a *prima facie* case of discrimination.

In denying the *Batson* claim, the panel relied on a single decision, *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986). See *United States v. Campa*, 529 F.3d 980, 997-998 (11th Cir. 2008). *Dennis*, however, is both factually and procedurally inapposite to this case; moreover, in placing its reliance exclusively on *Dennis*, the panel failed to address controlling Supreme Court precedent on the *Batson* issue. The panel’s interpretation of circuit precedent conflicts with Supreme Court authority and compels rehearing by the *en banc* Court.

In *Dennis*, the government struck three black males from the jury panel, but when defense counsel raised a *Batson* objection and asked the court to inquire into the government’s reasons, the court denied that request. *Dennis*, 804 F.2d at 1209. The defendant appealed the court’s finding that he had not made a *prima facie* showing, and this Court rejected his statistics-based suggestion of purposeful discrimination – *i.e.*, that a “pattern” was shown merely from the number of black jurors the government struck – because two black jurors were eventually seated. See *id.* at 1211. *Dennis*, however, is distinguishable from this case both factually and procedurally. The panel’s holding here that “no *Batson* violation occurred” because “the government

chose not to use two of its peremptory challenges at all, and the jury included three black jurors and an alternate black juror,” 529 F.2d at 998, is not properly supported by *Dennis*, in light of the very different claim the appellants have presented to the Court – which, unlike *Dennis*, was *not* purely statistics-based – and the very different state of the record and circumstances before the district court and this Court.

Notably, and by contrast to *Dennis*, the district court here *agreed* with the defendants that they had made a *prima facie* case of purposeful discrimination based on the striking of black jurors *and* there was record evidence that one juror was comparable to, and in fact, more government-favorable than, a white juror the government fought to retain (against a defense peremptory strike). R24:387. Accordingly, while the *Batson* challenge in *Dennis* never progressed beyond the first prong of the *Batson* procedure to the point of the government’s proffering its alleged “race-neutral” reasons for its strikes (the second prong of *Batson*), the challenge in this case did: the district court forced the government to explain its strikes (the second prong), and the defendants thereafter argued that the government had not met its burden of proof because its reasons, at least vis-à-vis the black corrections officer, were *not* race-neutral (the third prong of *Batson*). R28:1500-01. It is the third prong of *Batson*, rather than the first prong, that is the basis of this appeal.

Dennis is inapposite in a “third prong” case like this one, where the issue is *not* whether the mere number of black jurors struck establishes purposeful discrimination, but whether there is “other relevant evidence” demonstrating that at least *one* of the strikes is not race-neutral. And indeed, it is a misreading of *Dennis* for the panel to suggest that a defendant can never establish a *prima facie* case of discrimination, so long as even one black juror is seated on the jury. That, in fact, is contrary to the prior holding of *United States v. David*, 803 F.2d 1567 (11th Cir. 1986), explaining that “under *Batson*, the striking of one black juror for a racial reason violates the Equal Protection Clause, *even where other black jurors are seated*, and even when valid reasons for the striking of some black jurors are shown.” 803 F.2d at 1571 (emphasis added). The Court clarified in *David* that while “statistics showing discriminatory impact may in themselves constitute a showing of intentional discrimination, *see Batson*, 476 U.S. at [93-94], 106 S.Ct. at 1721, a statistical showing is not the sole means for establishing a *prima facie* case of discrimination,” but rather, the “totality of the relevant facts [may give] rise to an inference of discriminatory purpose.” 803 F.2d at 1571 (citations omitted). The Court remanded in *David* (which had been tried prior to *Batson*), to give the defendant an opportunity to point to “other relevant circumstances” – other than the “pattern of peremptory strikes” – to establish a *prima facie* showing of racial discrimination. *Id.*

Here, however, unlike both *Dennis* and *David*, the case progressed well beyond the “first prong” *prima facie* showing, and there was substantial “other relevant evidence” in the record – which the defendants argued to the district court and to the panel, but the panel did not consider. In *Snyder v. Louisiana*, ___ U.S. ___, 128 S.Ct. 1203 (2008), the Supreme Court reaffirmed the holding of *David* – and of other circuits – holding consistently and correctly that “the Constitution forbids striking even a single prospective juror for a discriminatory purpose.” *Snyder*, 128 S.Ct. at 1208 (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994); also citing *David*, 803 F.2d at 1571; *United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989); *United States v. Clemons*, 843 F.2d 741, 747 (3rd Cir. 1988); *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987)). And indeed, in *Snyder* the Court also reaffirmed its prior decision in *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317 (2005), where it had made “clear that in . . . reviewing a ruling claimed to be *Batson* error, *all of the circumstances* that bear upon that issue of racial animosity must be consulted.” *Snyder*, 128 S.Ct. at 1208 (citing *Miller-El*, 545 U.S. at 239, 125 S.Ct. at 2324) (emphasis added).

This case is both factually and procedurally analogous to *Snyder*, and *Snyder* should control its disposition. In *Snyder*, the government proffered two purportedly “race-neutral” reasons for striking a black juror. The first was based on the juror's

demeanor – his nervousness – but since the trial judge made no specific finding in that regard, the Supreme Court explained, it could not “presume that the trial judge credited the prosecutor’s assertion.” 128 S.Ct. at 1209. The Court therefore focused upon the second justification for the strike – that the juror's student-teaching obligations might make him want “to go home quickly” – and reviewed that justification for “plausibility,” by comparing the black juror to white jurors who were not struck, despite sharing the “characteristic” that was the pretext for the strike. *See* 128 S.Ct. at 1210-1212. Ultimately, after considering “all of the circumstances” of record, the Supreme Court held that the proffered justification for striking the black juror was not merely “suspicious,” but simply “implausibl[e],” given the failure to strike white jurors who were either similarly, or less-favorably situated, with regard to the asserted characteristic. *Id.* at 1211-1212. That was precisely the argument appellants raised on appeal here, and the panel erred under *Snyder* in not considering it, or any “relevant circumstances” of record *other than* the number of black jurors struck and seated.

Accordingly, the Court should vacate the panel opinion as to this issue, grant rehearing, and reconsider the *Batson* claim under the apposite and controlling precedents of this Court and the Supreme Court.

CONCLUSION

For all of these reasons, appellants respectfully request that the Court grant their petition for rehearing *en banc*.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was served by mail this 24th day of July, 2008 upon Caroline Heck Miller, Assistant United States Attorney, 99 NE Fourth Street, Miami, Florida 33132-2111.

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APPENDIX A