IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

USCA Case No. 16-16345
United States District Court, Southern District of Florida
4:15-cv-10001-JLK

RAYMOND BERTHIAUME,

Plaintiff/Appellant,

v.

DAVID T. SMITH, individually, and the CITY OF KEY WEST,
a Florida Municipal Corporation,

Defendants/Appellees.

PRINCIPAL BRIEF OF APPELLANT RAYMOND BERTHIAUME

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United States District Court, Southern District of Florida
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Raymond Berthiaume v. David Smith, et al

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE PURSUANT TO FRAP 26.1 AND 11TH CIR. R. 26.1-1

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, and 11th Circuit Rule 26.1-1, Appellant certifies that the following persons have an interest in the outcome of this appeal, listed in alphabetical order with descriptions:

1. Akerman LLP (Attorneys for Appellant)
2. Berthiaume, Raymond (Plaintiff/Appellant)
3. Burke, Michael T. (Attorney for Appellees)
4. City of Key West, a Florida Municipal Corporation (Defendant/Appellee)
5. Hugh L. Koerner, P.A. (Trial Attorneys for Appellant)
6. Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, P.A. (Attorneys for Appellees)
7. King, James Lawrence (Senior U.S. District Court Judge)
8. Koerner, Hugh L. (Trial Attorney for Appellant)
9. Giddings, Katherine E. (Appellate Counsel for Plaintiff/Appellant)
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12. O'Connor, Ryan D. (Attorney for Appellant)

United States District Court, Southern District of Florida
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13. Smith, David T. (Defendant/Appellee)

14. Untiedt, Whitney M. (Attorney for Appellant)

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Eleventh Circuit Rules 28-1(c) and 34-3(c), Appellant Raymond Berthiaume requests oral argument. The issues in this appeal include (**1**) whether, in trials involving a gay party and numerous gay witnesses, proper *voir dire* requires inquiry into the prospective jurors' biases and prejudices against gay people, and (**2**) whether peremptorily striking a seemingly gay juror may survive a *Batson* challenge without any showing by the striking party of a non-prejudicial reason for the strike. These issues are nuanced, complex, and critically important to countless litigants nationwide. The second issue raises a question of first impression in this Circuit. Mr. Berthiaume respectfully submits that this Court's decisional process will be aided by oral argument addressing these issues.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over Mr. Berthiaume's appeal of the final judgment and order denying his motion for new trial pursuant to 28 U.S.C. § 1291.

The district court had federal question jurisdiction over this action pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1331, and 28 U.S.C. § 1343.

STATEMENT OF THE ISSUES

I. Whether the district court improperly refused to ask jurors whether they harbor any biases or prejudices against gay people in a case where a party and several witnesses are gay, and the judge knew their sexual orientation would be exposed to the jury during trial.

II. Whether the district court improperly overruled Mr. Berthiaume's *Batson* objection after the City of Key West and Officer Smith struck two seemingly gay jurors without identifying any non-prejudicial purpose for the strike.

STATEMENT OF THE CASE

Nature Of The Case

This case concerns whether Raymond Berthiaume—a gay man—received a fair trial before an impartial jury of his peers in his case against Officer David T. Smith and the City of Key West. Like countless gay litigants around the country, Mr. Berthiaume was concerned that some or all of the prospective jurors may hold biases or prejudices against him merely because of his sexual orientation and would be unable to serve as fair or impartial jurors. He attempted to ensure the jury was composed only of people who would not prejudge him by urging the court to ask during *voir dire* whether any of the jurors harbored any biases or prejudices against gay people or whether they believed homosexuality was a sin. While the court asked the jurors whether they could be fair to police officers like Officer Smith, it refused to ask Mr. Berthiaume's proposed question and took no steps to ensure the jurors could be fair to a gay litigant.

When Officer Smith and the City of Key West struck two jurors Mr. Berthiaume recognized as gay men, Mr. Berthiaume objected. He explained to the court that he believed the jurors were gay based on his observations and because one of them stated he was in a "domestic relationship." The court rejected Mr. Berthiaume's argument and overruled the objection without inquiring into whether

the prospective jurors were indeed gay or whether the City of Key West and Officer Smith had a non-prejudicial purpose for their peremptory strike.

By blocking all of Mr. Berthiaume's attempts to ensure his trial was fair and impartial, the district court indisputably committed reversible error. A new trial is warranted.

Course of Proceedings Below

Mr. Berthiaume filed suit in the district court for the Southern District of Florida on January 5, 2015 against Officer Smith and the City of Key West (collectively, "**City**"). [DE 1.] Mr. Berthiaume alleged the City engaged in excessive force, false arrest, battery/unnecessary force, and malicious prosecution when Officer Smith attacked, arrested, and falsely charged him with a crime. [*Id.*]

After the City filed its answer and affirmative defenses, the case proceeded to trial on May 4, 2016. [DE 5-6, 12.] The parties submitted proposed *voir dire* questions before trial. [DE 13 (City's proposed questions); DE 14-1 (Mr. Berthiaume's initial proposed questions); DE 17 (Mr. Berthiaume's supplemental proposed question).] Mr. Berthiaume specifically requested the court ask the jurors: "Do you harbor any biases or prejudices against persons who are gay or homosexual—or believe that homosexuality is a sin?" [DE 17.]

After considering the proposed questions, the court asked several questions aimed at ensuring the jurors would be fair to the City and do not hold any bias or

prejudice toward police officers, but did not ask whether the jurors could be fair to a gay litigant. [*See, e.g.*, DE 39 at 14–15, 28, 47 (asking whether the jurors believe they can be fair and unbiased in a case involving police).] The court excused numerous jurors who stated they did not believe they could be fair in a trial involving police officers. [*See id.*]

During *voir dire*, Mr. Berthiaume recognized that two of the potential jurors were gay men. [DE 30 at 2; DE 39 at 52.] In particular, one of the jurors stated he was in a "domestic relationship" without reference to any gender, which Berthiaume determined was a likely reference to a same-sex relationship and further confirmation of the potential juror's sexual orientation. [DE 30 at 2; DE 39 at 49.]

Following the *voir dire* questions, the Defendants used their peremptory challenges to eliminate the potential jurors that Berthiaume recognized as gay men. [DE 39 at 49–53.] Berthiaume objected timely and specifically argued that the City had impermissibly used its peremptory challenges in a discriminatory manner based on sexual orientation. [DE 39 at 51–54.] The court rejected the argument and refused further inquiry, finding a potential jurors' sexual orientation is not "obvious" like race and is "none of our business as long as it doesn't affect their ability to be fair and impartial." [DE 39 at 52–54.] The court further stated that it

did not understand the basis for Berthiaume's objection and overruled it. [DE 39 at 54.]

With the jury finalized, the trial proceeded as scheduled. [DE 39 at 49–78.] It lasted three days, after which the jury returned a verdict finding the City did not falsely arrest Mr. Berthiaume and did not intentionally commit acts that violated Mr. Berthiaume's constitutional right not to be subjected to excessive force during the arrest. [DE 24.] Final judgment was entered in the City's favor. [DE 27.]

Mr. Berthiaume filed a timely motion for new trial on June 7, 2016, which the trial court denied on September 1, 2016, [DE 30, 35]. This appeal followed. [DE 36.]

Statement of the Facts

Mr. Berthiaume was severely injured by David T. Smith, a City of Key West police officer, during Fantasy Fest in 2013—a large festival held annually in Key West. [DE 1][1] Mr. Berthiaume and Nelson Jimenez, Jhon Villa, and Corey Smith—all of whom are gay men—had participated in the celebrations for an entire day. [DE 40 at 181–83.] Although Mr. Berthiaume and Mr. Jimenez were previously involved in a romantic relationship, the relationship had ended and they remained good friends. [DE 40 at 176–77.] Mr. Berthiaume was at that time in a relationship with Villa, who is now Mr. Berthiaume's husband. [*Id*.]

[1] *History*, FANTASY FEST 2016, http://www.fantasyfest.com/info/#history (last visited Jan. 30, 2017).

At 3:00 a.m. on October 27, 2013, Berthiaume, Villa, and Smith were ready to end the evening. [DE 40 at 183–84.] Jimenez, though, was not. [*Id*.] When Jimenez learned that the others wanted to go back to his car and leave the festival, he attempted to avoid leaving by running into an open gay bar. [*Id*.] Berthiaume went into the bar to find Jimenez so that they could leave while Villa and Smith returned to the vehicle. [*Id*.]

After exiting the bar together, the two argued and Jimenez grabbed the car keys from Berthiaume, who had them in his waistband, and ran away down an alley. [DE 40 at 185.] Frustrated and tired, Berthiaume slammed his hand against a "Dead End" street sign and walked after Jimenez so that the four could leave. [DE 40 at 186.] After Berthiaume struck the street sign, his friend told him that police were coming and Berthiaume walked away, towards Jimenez. [DE 40 at 187.] Before Berthiaume could catch up with Jimenez, he was intentionally pushed down to the ground by Officer Smith. [DE 40 at 146, 183–88, 207–16.] The severe injuries Mr. Berthiaume suffered due to Officer Smith's push required that he be taken by ambulance to a hospital. [DE 40 at 189.] He suffered a fractured wrist and a fractured jaw. [DE 40 at 193–95.] Both injuries required surgery. [DE 40 193–196.]

The City maintained that Mr. Berthiaume, who was wearing flip flops at the time, was running away from police officers. [DE 40 at 145.] The City claimed

the officers had seen Berthiaume and Jimenez in a physical altercation and believed that the two were involved in a domestic dispute. [DE 40 at 139–40, 149–50, 167–69.] Officer Smith tried to force Jimenez to write a statement in support of the Officer's story, but Jimenez refused. [DE 40 at 64–66.] Officer Smith arrested Mr. Berthiaume for aggravated battery [Trial Exhibit 4 (Key West Police Department Incident Report)], but the state attorney's office declined to file any charges. [*See* DE 1 at 5.]

Mr. Berthiaume filed a complaint against Officer Smith and the City of Key West, claiming excessive force, false arrest/false imprisonment, battery/unnecessary force, and malicious prosecution. [DE 1]. The parties attended a three-day trial beginning May 4, 2016 in front of Judge James Lawrence King. [DE 30.] Despite the fact Mr. Berthiaume and all of his witnesses are gay men and the City claimed Mr. Berthiaume's arrest arose out of a "domestic dispute" with another man, the court refused to question whether the jurors possessed any biases or prejudices against gay people. [DE 30 at 1; DE 40 at 139–40, 149–50, 167–69.] The court also allowed the City to strike two jurors who Mr. Berthiaume recognized were gay men over Mr. Berthiaume's *Batson* objection without requiring the City to identify any non-prejudicial basis for the strike. [DE 39 at 54]

Defendants' counsel stated during his opening and closing statements that there was a factual dispute regarding whether Mr. Berthiaume was wearing a "loin cloth" and no shirt or "boxers" and no shirt at the time of the incident—despite the fact that this distinction was completely irrelevant to the case. [DE 39 at 101; DE 41 at 42–43.] As part of their defense theory, the Defendants described the incident as a "domestic situation" between two men. [DE 40 at 165.] As expected, Mr. Berthiaume's sexual orientation was directly before the jury at trial.

At the end of the three-day trial, the jury found that the evidence did not support Mr. Berthiaume's allegations. [DE 24.] Mr. Berthiaume filed a motion for a new trial, but it was denied. [DE 30; DE 35.] This appeal followed. [DE 36.]

Standard Of Review

This Court reviews the district court's conduct of *voir dire* for abuse of discretion, but reviews "questions of law that arise during the course of voir dire . . . *de novo*." *United States v. Reyes*, 764 F.3d 1184, 1188 (9th Cir. 2014); *see also United States v. Elliot*, 849 F.2d 554, 561 (11th Cir. 1988) (reviewing for abuse of discretion whether the district court properly conducted *voir dire*).

Although this Court typically reviews a district court's resolution of a *Batson* challenge for clear error, it reviews the issue *de novo* where, as here, the district court employed the wrong legal standard. *United States v. Foots*, 658 F. App'x 1010, 1012 (11th Cir. 2016); *United States v. Collins*, 551 F.3d 914, 919

(9th Cir. 2009); *Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co.*, 236 F.3d 629, 635 (11th Cir. 2000).

SUMMARY OF THE ARGUMENT

Mr. Berthiaume—a gay man who suffered extensive injuries as a result of Officer Smith's illegal attack—indisputably was denied a fair trial. The district court thwarted his attempt to seek redress for his injuries via trial before an impartial jury of his peers by refusing to inquire into whether the jurors harbored prejudices toward gay people and by refusing to conduct a proper *Batson* analysis when two jurors Mr. Berthiaume recognized as gay men were stricken. This Court should reverse the final judgment and remand for a new trial.

First, the district court abused its discretion by refusing to ask the jurors whether they held any biases or prejudices against gay people. The district court knew that issues of Mr. Berthiaume's sexual orientation were inescapable at trial yet refused to ask whether the jurors "harbor[ed] any biases or prejudices against persons who are gay or homosexual—or believe that homosexuality is a sin." The court likewise failed to ask any variation on this question, ask whether the jurors would find testimony by gay witnesses believable or unbelievable, or otherwise inquire into whether the jurors could be impartial toward a gay litigant. Because the district judge knew the jurors would be confronted with facts demonstrating Mr. Berthiaume's and his companions' sexual orientations, and because this Court

has recognized that there is a substantial likelihood of juror prejudice where a gay litigant's sexual orientation is at issue, it clearly committed reversible error.

Second, the district court improperly allowed the City to strike two male jurors whom Mr. Berthiaume recognized as gay without requiring the City to demonstrate any non-prejudicial basis for the strikes. The Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79, 89 (1986)—which traditionally applied to prohibit the striking of jurors due to their race—has been expanded in recent years to also prohibit the striking of jurors due to their sexual orientation.

Mr. Berthiaume informed the court that one of the reasons he believed one of the stricken jurors was gay was because the juror stated he was in a "domestic relationship." Since the term "domestic relationship" frequently is used to describe homosexual relationships, and since the juror did not state that his relationship was with a woman, his statement suggested he was gay. Mr. Berthiaume's recitation of the juror's statement and contention that the juror was stricken solely due to his sexual orientation gave rise to an "inference" of prejudice. Although the burden should have shifted at that point to the City to demonstrate a non-prejudicial basis for the strike, the court summarily overruled Mr. Berthiaume's *Batson* challenge.

Mr. Berthiaume was forced to try his case before a jury that almost certainly held prejudices against him. This Court should not permit the verdict rendered by a fundamentally flawed jury to stand. A new trial is warranted.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY REFUSING TO QUESTION JURORS REGARDING THEIR BIASES AND PREJUDICES AGAINST GAY PEOPLE.

To present his case against the City of Key West and Officer Smith, Mr. Berthiaume had to inform the jury that he is a gay man—his pleadings referenced his romantic relationships with two male partners, his key witnesses were gay men, and he was attacked by Officer Smith after exiting a gay bar. Although facts demonstrating Mr. Berthiaume's sexual orientation permeated this case, and despite widespread discrimination against LGBT individuals, the district court refused to ensure the jurors did not harbor any prejudices against gay people. This was a clear abuse of discretion.

The purpose of *voir dire* is to allow the parties "to evaluate and select an impartial jury capable of fairly deciding the issues presented by applying the law as instructed by the court to the facts as produced during the trial." *United States v. Miller*, 758 F.2d 570, 571 (11th Cir. 1985). When trial judges conduct *voir dire* themselves, they must conduct it "so competently, completely, and thoroughly that the prospective jurors' histories and personal prejudices are revealed." *Lips v. City of Hollywood*, 350 F. App'x 328, 338 (11th Cir. 2009) (citing *Vezina v. Theriot Marine Serv., Inc.*, 610 F.2d 251 (5th Cir. 1980)).

Uncovering prejudices of prospective jurors is crucially important—and requires careful and particularized *voir dire* examination—in cases that have a "significant likelihood" of juror prejudice. *See Ristaino v. Ross*, 424 U.S. 589, 598 (1976) (finding that although courts need not ask jurors whether they harbor racial prejudices in all cases involving racial minorities, they must do so when racial issues will be directly before the jury); *see also United States v. Mixon*, 845 F.2d 1029, 1029 (9th Cir. 1988) (acknowledging "[t]here may be a need for specific *voir dire* questioning if the case involves (1) racial overtones; (2) matters on which the community is commonly known to harbor strong feelings; or (3) other forms of bias and distorting influence which have become evident through experience with juries).

This Court has found there is a significant likelihood of juror prejudice where a gay litigant's sexual orientation is at issue. *See United States v. Bates*, 590 F. App'x 882, 886-87 (11th Cir. 2014). In *Bates*, a gay criminal defendant urged the court during *voir dire* to question the potential jurors regarding any biases or prejudices they may hold against gay people, but the court refused. *Id.* at 885. The defendant was ultimately convicted. *Id.* On appeal, this Court acknowledged "that there will be, on virtually every jury, people who would find the lifestyle and sexual preferences of a homosexual or bisexual person offensive." *Id.* at 886 (quotations and internal alterations omitted) (emphasis added). Because the judge

knew the jury likely would see evidence demonstrating the defendant was gay, the Eleventh Circuit found the trial judge should have asked the jurors whether they harbored any prejudices against gay people. *Id.* at 887. The questions it asked "in general terms about the jurors' ability to be impartial" did not suffice because they "were not calculated to reveal latent prejudice" of which Mr. Bates was concerned. *Id.* (citation and internal quotations omitted). The conviction was reversed. *Id.* at 891.

Like the defendant in *Bates*, Mr. Berthiaume urged the court to ask the potential jurors whether they harbored any biases or prejudices against gay individuals. [DE 17.] Since the judge conducted the *voir dire* himself (*i.e.*, he did not allow the attorneys to ask questions directly to the proposed jurors but instead allowed the attorneys to submit proposed questions), he was required to do so "with sufficient thoroughness [so] that the duty to learn a prospective juror's past history and personal prejudices is fulfilled." *Vezina*, 610 F.2d at 252. By refusing to ask Mr. Berthiaume's proposed question or otherwise inquire into the jurors' prejudices against LGBT individuals—in a trial where Mr. Berthiaume's sexual orientation would be front and center—the district court "fail[ed] to reach the imporant concerns highlighted" by Mr. Berthiaume. *Bates*, 590 F. App'x at 887. This was an abuse of discretion. *See also United States v. Anekwu*, 695 F.3d 967, 978 (9th Cir. 2012) (acknowledging litigants preserve challenges to a district

court's failure to properly question jurors during *voir dire* "by submitting proposed *voir dire* questions").

Any doubts regarding the necessity of asking Mr. Berthiaume's proposed question were put to rest at trial. The City repeatedly highlighted Mr. Berthiaume's sexual orientation despite its irrelevancy to the City's defense. [*See, e.g.*, DE 40 at 165, 255 (police officer testifying Mr. Berthiaume was arrested because he was involved in a "domestic situation" with Mr. Jimenez; City's counsel analogizing Mr. Berthiaume's dispute with Mr. Jiminez to a domestic violence situation between a husband and wife).]

The City attempted to inflame any juror prejudice by injecting a salacious undertone to the proceedings—the City suggested that Mr. Berthiaume and Mr. Jimenez were romantically involved despite Mr. Berthiaume's existing relationship with Mr. Villa, and repeatedly claimed that Mr. Berthiaume was wearing a loin cloth at the time of his arrest. [*See* DE 40 at 98 (police officer testifying he believed Mr. Berthiaume was wearing a loin cloth and women's underwear at the time of his arrest); DE 40 at 169 (police officer acknowledging he arrested Mr. Berthiaume for "domestic" battery); DE 41 at 43 (City's counsel arguing Mr. Berthiaume was a "shirtless man in either boxer shorts or a loin cloth [who went] up to a street sign and [went] wham and yell[ed] something out, and it gets everybody's attention for sure"); *see also* DE 40 at 200 (Mr. Berthiaume testifying

"I was told I was being arrested for domestic violence, domestic battery. I said domestic? How was that domestic? I have to have a partner, and I wasn't fighting or arguing with my partner.").]

The City's insistence on sexualizing Mr. Berthiaume's attire and highlighting Mr. Berthiaume's sexual orientation demonstrates the fact it knew this would have a negative impact on the jurors. *United States v. Delgado–Marrero,* 744 F.3d 167, 205 (1st Cir. 2014) ("As evinced in part by the government's persistence in hammering the largely irrelevant point of Delgado's same-sex relationship, evidence of homosexuality has the potential to unfairly prejudice a defendant."); *Neill v. Gibson,* 263 F.3d 1184, 1201 (10th Cir. 2001) ("As the prosecutor knew, emphasizing that Neill was gay likely had a tremendous negative impact on jurors."); *United States v. Yazzie,* 59 F.3d 807, 811 (9th Cir. 1995) ("[E]vidence of homosexuality can be extremely prejudicial . . . ."). If the court had asked the jurors whether they could be impartial in the face of such inflammatory evidence and argument, any juror who was unable to do so could have been excused from jury service and the harm avoided. Its refusal to ask the question effectively stacked the deck against Mr. Berthiaume before trial began.

II. THE TRIAL COURT'S FAILURE TO SUSTAIN BERTHIAUME'S *BATSON* OBJECTION WAS CLEARLY ERRONEOUS.

In addition to the district court's failure to take any steps to ensure the jury would not be prejudiced against Mr. Berthiaume merely because of his sexual orientation, the court also ensured the jury would not be one of Mr. Berthiaume's peers. The court improperly allowed the City to strike from the venire the only two jurors Mr. Berthiaume recognized as gay. This was clear error.

A. The Striking of Potential Jurors Based on Sexual Orientation or Identity is Subject to Heightened Scrutiny.

A party in a civil lawsuit may not use peremptory strikes in a discriminatory manner. *Batson*, 476 U.S. at 89; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (extending *Batson* to civil disputes). Although initially applied to protect jurors from being stricken solely due to their race, *Batson* has been extended to preclude peremptory strikes against members of any constitutionally protected group entitled to greater than rational-basis review. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994) (extending *Batson* to preclude discriminatory peremptory challenges based on gender, and stating "[p]arties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review.").

Although the Court did not explicitly extend *Batson* beyond the gender context, "[t]he *J.E.B.* majority . . . strongly suggested [*Batson* bars peremptory

strikes] on any classification otherwise receiving 'heightened scrutiny' under the [Equal Protection] Clause." *Rico v. Leftridge-Byrd*, 340 F.3d 178, 182 (3rd Cir. 2003) (emphasis added). Justices Thomas and Scalia acknowledged as much while writing in dissent in another case. *Davis v. Minnesota*, 511 U.S. 1115, 1115 (1994) ("[G]iven the Court's rationale in *J.E.B.*, no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause. The Court's decision in *J.E.B.* was explicitly grounded on a conclusion that peremptory strikes based on sex cannot survive 'heightened scrutiny' under the Clause . . . because such strikes 'are not substantially related to an important government objective[.]' ") (Thomas, J., dissenting).

State actions which infringe on the rights of gay people are subject to heightened scrutiny. The Supreme Court has found that heightened scrutiny applies to classes of people who have suffered a "long and extensive history of . . . discrimination." *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003) (discussing heightened scrutiny in the context of gender discrimination). The Court recognized that gay people have suffered a long and extensive history of discrimination:

> This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid–20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this

reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. . . .

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. . . . Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law. . . .

. . . . Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7.

Obergefell v. Hodges, 135 S. Ct. 2584, 2596–97 (2015) (internal citations omitted). This Court has recognized that homosexual and bisexual individuals face discrimination and that a homosexual litigant faces a likelihood of risk of discrimination by jurors. *Bates*, 590 F. App'x at 886. Because gay people have suffered extensively throughout history and continue to suffer discrimination today, the rationale for applying heightened scrutiny to gender discrimination should likewise apply to sexual orientation discrimination.

The Ninth Circuit has explicitly found heightened scrutiny applies to issues of sexual orientation and held that *Batson* protections are afforded to gay jurors. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014). The *SmithKline* court based its decision, in part, on its interpretation of the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). There, the Supreme Court found the Defense of Marriage Act—which excluded same-sex partners from the definition of "marriage" and "spouse" for practically all purposes under federal law—violated the Fifth Amendment's Equal Protection Clause. *Id.* at 2695-96. Although the Court did not articulate which level of scrutiny should be employed when a gay litigant's equal protection rights are at issue, it applied something higher than rational basis review. *SmithKline*, at 481-82 (finding the Court applied a heightened scrutiny rather than a rational basis review because it did not consider hypothetical justifications for the Defense of

Marriage Act, but instead considered the "demonstrated purpose" of the state action in finding that the federal government had failed to justify its disparate treatment of homosexuals). The *SmithKline* court found that *Windsor* requires heightened scrutiny for any government action—including jury selection—which infringes on the rights of homosexuals. *Id*.

Although this Court previously found that homosexuals are not a "suspect class" and only are entitled to rational basis review of equal protection claims, that decision is no longer good law. *See Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004). *Lofton* cannot be sustained because *Windsor*—decided after *Lofton*—requires courts to look at the demonstrated purpose of a law in its treatment of members of the LGBT community *Windsor*, 133 S. Ct. at 2693–94. This is a heightened scrutiny review. *See SmithKline*, at 481-82. Accordingly, *Lofton*'s suggestion that rational basis review applies to such cases no longer is applicable.

Although this Court has not opined on whether gay people are a protected class entitled to heightened scrutiny under the Equal Protection Clause post-*Windsor*, it has held in an analogous context that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender." *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011). This Court further stated that an "individual

cannot be punished because of his or her perceived gender-nonconformity" and that "government acts based upon gender stereotypes—which presume that men and women's appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny because they embody 'the very stereotype the law condemns.' " *Id*. at 1319–20 (citing and quoting *J.E.B.*, 511 U.S. at 138). Such protections for gender-nonconformity naturally extend to protections for individuals whose sexuality, or perceived sexuality, are inconsistent with traditional norms.

As explained in Section I above, this Court also has recognized that homosexual and bisexual individuals face discrimination and that a homosexual litigant faces a high risk of discrimination by jurors. *Bates*, 590 F. App'x at 886 (recognizing that there "will be, on virtually every jury, people who would find the lifestyle and sexual preferences of a homosexual or bisexual person offensive") (internal citation and quotation marks omitted). Because this Court has recognized that history of discrimination against gay people, it should adopt the Ninth Circuit's well-reasoned decision in *SmithKline*, find that heightened scrutiny applies to infringements on the rights of gay people, and find that *Batson* protects gay jurors from being peremptorily stricken due to their sexual orientation.

Such a finding would avoid a negative impact on the community and the "individual jurors who are wrongfully excluded from participation in the judicial

process." *J.E.B.*, 511 U.S. at 140. Allowing parties to strike gay jurors solely because of their sexual orientation would undermine the public's confidence in our judicial system by suggesting that state actors believe gay people to be inferior or incapable of deciding important issues. *See id.* at 142 (finding peremptory strikes based on gender improper; stating "[t]he message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree."). Potential jurors who are members of the LGBT community, subjected to historic and ongoing discrimination, are entitled to protection against discrimination that "serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes." *See id*. at 131.

Because infringements on homosexuals' rights are subject to heightened scrutiny, *Batson* precludes jurors from being peremptorily stricken from the venire on the basis of their sexual orientation. Thus, Mr. Berthiaume's *Batson* challenge was colorable and should not have been summarily rejected.

B. The District Court Failed to Shift the Burden to the Defendants to Provide a Neutral Explanation for Having Stricken the Jurors.

When a party objects to peremptory challenges of potential jurors, the district court must follow a three-step process when ruling on the objection:

1. The objecting party must establish a *prima facie* showing that the peremptory strike was made on an impermissibly discriminatory basis.

2. The burden then shifts to the challenging party to provide a neutral explanation for having stricken the juror(s).

3. The district court determines whether the objector carried its burden in proving there was purposeful discrimination.

See United States v. Allen-Brown, 243 F.3d 1293, 1297 (11th Cir. 2001) (citations omitted); *see also J.E.B.*, 511 U.S. at 131 (extending *Batson* to preclude discriminatory peremptory strikes of potential jurors based on gender); *SmithKline*, 740 F.3d at 481 (finding *Batson* precludes discriminatory peremptory strikes of potential jurors based on sexual orientation).

An objecting party need not conclusively prove the strike was exercised discriminatorily—he "satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005) (emphasis added). Because a mere inference is all that is required, the objecting party may satisfy this requirement and shift the burden to the striking party fairly easily. *Boyd v. Newland*, 467 F.3d 1139, 1151 (9th Cir. 2004) (acknowledging the burden of establishing a *prima facie* showing of prejudice is "not an onerous one").

When analyzing this step, the district court is required to "consider all relevant circumstances." *United States v. Stewart*, 65 F.3d 918, 925 (11th Cir.

1995) (internal citations and quotation marks omitted). This means considering factors such as the pattern of the potential jurors excused, the statements and questions raised during *voir dire* examination, and the subject matter of the case at hand. *Id*.

Although the facts and circumstances of this case clearly give rise to an "inference" of discrimination, the district court failed to consider any of the relevant circumstances. The judge indicated that he did not understand Mr. Berthiaume's objection and refused to consider altogether whether the jurors stricken by the City were stricken because of perceived or actual sexual orientation. [*See* DE 39 at 52-54.] The judge ignored the fact that (**1**) Mr. Berthiaume and the other witnesses were gay men, (**2**) Mr. Berthiaume had submitted a proposed *voir dire* question in which he urged the court to ask whether any of the potential jurors harbored any biases or prejudices against homosexuals or believed that homosexuality is a sin, and (**3**) the City had accused Mr. Berthiaume of domestic violence against another man. These considerations clearly indicated that sexual orientation was pertinent to this case, and any attempts to strike potentially gay jurors should be closely scrutinized.

It was in this context that Mr. Berthiaume's counsel informed the court that he believed two of the jurors peremptorily stricken by the City were gay. [DE 39 at 52 ("Your honor, the evidence in the case will show that my client and all of his

witnesses are gay. The defense just excused the only two prospective jurors who are gay.")] In particular, one of the jurors had stated he was in a "domestic relationship." [DE 39 at 49.] Mr. Berthiaume indicated that this was a likely reference to a homosexual relationship. [DE 39 at 52.]

During the *voir dire* colloquy in *Smithkline*, one of the potential jurors ("Juror B") referred to his "partner" but did not initially reference his partner's gender or expressly state that he was gay. 740 F.3d at 474. It was not until the judge asked additional questions that it became apparent that the stricken juror's partner was a man and that he was in a homosexual relationship. *Id*. ("When the district judge followed up with additional questions, the prospective juror referred to his partner three times by using the masculine pronoun, 'he,' and the judge subsequently referred to Juror B's partner as 'he' in a follow-up question regarding his employment status."). Because the juror "identified himself as gay on the record," and because "the subject matter of the litigation presented an issue of consequence to the gay community," the Ninth Circuit found a *prima facie* showing of prejudice under *Batson*. *Id.* at 476.

Like the juror in *SmithKline's* reference to his "partner," one of the jurors at issue in this case suggested he was gay by stating he was in a "domestic relationship"—a term frequently used to describe gay relationships. [DE 39 at 49 (juror stating he is in a "domestic relationship")]; *Alman v. Reed*, 703 F.3d 887,

891 (6th Cir. 2013) (describing a gay couple as "domestic partners"). Like the litigation in *SmithKline*, this case involves an "issue of consequence to the gay community"—it directly impacts a gay party and involves several gay witnesses. This establishes, at minimum, an "inference" of discrimination in striking the juror. *SmithKline*, 740 F.3d at 476.

Mr. Berthiaume was unable to elicit additional testimony to further verify that any potential juror was gay due to the fact the judge asked all *voir dire* questions himself and expressly refused to allow Mr. Berthiaume to "establish[] a record" concerning the jurors' sexual orientation. [DE 39 at 54 ("I'm sorry, this is not going to be an issue in this case. If you don't -- if you would like to get a preliminary ruling on this from the Appellate Court, you are welcome to do so. But I'm not going to get involved with establishing a record about -- in this case about citizens as to whether they are gay or not gay or whatever your client may think or whatever he may have signaled back and forth to somebody or something or interpreted as a signal from the juror to him or something. That's nonsense.") (emphasis added).] Although no further verification of the jurors' sexual orientation was required in order to shift the burden to the City, any lack of testimony in this area stems entirely from the court's refusal to properly question the jurors or to permit Mr. Berthiaume further opportunity to present his *prima facie* case.

Mr. Berthiaume acknowledges the impropriety of "outing" as homosexual members of a jury pool and understands that special precautions must be taken when conducting a proper inquiry. *See SmithKline*, 740 F.3d at 486 ("No one should be 'outed' in order to take part in the civic enterprise which is jury duty.") (internal citations and quotation marks omitted). However, "[c]oncerns that applying *Batson* to sexual orientation will jeopardize the privacy of gay and lesbian prospective jurors can be allayed by prudent courtroom procedure." *Id*. at 487. If more information was required for Mr. Berthiaume to establish his *prima facie* case to the court's satisfaction, it should have provided an opportunity for him to develop the information. Summarily overruling his objection was improper.

Further, as discussed in Section I above, the trial court failed to explore any potential juror prejudices against homosexuals. If the court had asked the question as requested, the jurors likely would have realized the relevance of sexual orientation to the case which may have prompted some jurors to voluntarily disclose their sexual orientation. *See id.* at 474 (follow-up questions by the judge of a potential juror who had referenced his "partner" during *voir dire* led to voluntary disclosure of that potential juror's homosexuality). It is entirely inequitable for a party to be denied the ability to conduct its own *voir dire*, for the trial court to fail to ask the *voir dire* questions presented to it in order to identify any potential biases, and then also for the court to deny that party the ability to

challenge the striking of a juror because the discriminatory striking involved a characteristic that was "non-obvious" to the court but clearly apparent to the affected party. In such a scenario, a party would never be able to establish a *prima facie Batson* challenge based on a non-obvious and protected characteristic without a voluntary and unsolicited disclosure. Nor should members of the gay community forfeit their right to serve on juries unless they fortuitously stand up and proclaim—"I am gay."

Because Mr. Berthiaume clearly identified information supporting an "inference" of prejudice, the burden should have shifted to the City to prove a non-discriminatory basis for the strikes. The court's refusal to shift the burden was clear error.

CONCLUSION

The district court knew (**1**) that Mr. Berthiaume and several witnesses were gay, (**2**) that Mr. Berthiaume's injuries were sustained after he and his companions had been celebrating at a gay bar, (**3**) that Mr. Berthiaume is married to a man and had a prior romantic relationship with another male witness who was the alleged victim of domestic violence, and (**4**) that all of this would be considered by the jury. Nonetheless, the district court refused to question whether any of the jurors held any biases or prejudices against gay people and refused to conduct a proper *Batson* inquiry after the City of Key West and Officer Smith struck two jurors Mr.

Berthiaume recognized as gay men. Because the district court's actions effectively denied Mr. Berthiaume a fair trial, Mr. Berthiaume respectfully requests this Court reverse the final judgment and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 6,772 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 8, 2017, I electronically filed the foregoing Initial Brief and Appendix with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all parties in this case whom are registered through the CM/ECF.

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