

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

ROBERT BOWERS

Criminal No. 18-292

**UNITED STATES' SUPPLEMENTAL NOTICE REGARDING PROPOSED
PROCEDURES FOR EXERCISING PEREMPTORY STRIKES**

AND NOW comes the United States of America, by its attorneys, Troy Rivetti, Acting United States Attorney for the Western District of Pennsylvania, Soo C. Song, Eric G. Olshan, and Nicole Vasquez Schmitt, Assistant United States Attorneys for said district, Mary J. Hahn, Trial Attorney, Civil Rights Division, and Barry K. Disney and Aaron J. Stewart, Trial Attorneys, Capital Case Section, and respectfully submits this supplemental notice regarding the Joint Proposed Procedures for Exercising Peremptory Strikes, Doc. No. 1253.

As the Notice explains, the parties are generally in agreement as to the procedures for exercising peremptory strikes and empaneling jurors and alternates. However, the United States opposes the defendant's proposal for delaying resolution of potential challenges under Batson v. Kentucky, 476 U.S. 79 (1986). The defendant's proposal is inefficient, would delay the empanelment of the jury, and would cause inconvenience to jurors.

All Batson challenges can be resolved at the time the peremptory strikes are exercised. Voir dire ended on May 17, 2023. The parties have had ample time to review the record, analyze their potential strikes, and get a firm sense of the individuals in the jury pool. Allowing an additional evening will offer little benefit to the Court.

It will, however, pose an inconvenience to jurors. Under the defendant’s plan, the jury cannot be empaneled until after the resolution of the Batson challenges. That resolution would not occur until at least May 26, 2023. This would mean that, should the Court sustain a challenge¹, the entire jury pool would conceivably have to come to the courthouse on both May 25 and one additional day, likely May 30. Further, because jurors would not be officially excused until after the Batson challenges are resolved, those jurors would also not be able to plan ahead regarding their employment, childcare or other contingencies. To require jurors to remain in limbo over the holiday weekend is both unnecessary and burdensome.

The defendant’s reference to United States v. Saipov, Cr. No. 17-722 (S.D.N.Y. Dec. 19, 2022), does not provide this Court with any meaningful guidance. As the cited portion of the transcript explains, giving additional time for briefing is not a universal practice. See Doc. No. 1253 at 5. In fact, in United States v. Tsarnaev, which involved 21 days of individual voir dire over the course of a month and a half, Judge O’Toole resolved the government’s Batson challenges at the time they were raised. When Judge O’Toole requested the defense proffer non-discriminatory reasons for their challenged strikes, the defense requested a short recess to “put every permissible basis and actual reasons for these strikes on the record.” Transcript of Jury Trial, Day 26 at 26-5:14-26-6:22, United States v. Tsarnaev, Cr. No. 13-10200-GAO (D. Mass. Mar. 3, 2015). Judge O’Toole instead briefly paused the proceedings to allow defense counsel to prepare and present their argument. Id. The government then immediately responded and argued that race played a role in the defense strikes, and Judge O’Toole denied the challenges. Id. at 26-8:21-26-9:3. While Tsarnaev involved a different procedural posture—the government raised the Batson

¹ There is no required method by which courts must remedy a sustained Batson challenge, but it will likely require altering the makeup of the empaneled jury. See United States v. Walker, 490 F.3d 1282, 1294-95 (11th Cir. 2007) (discussing the procedures following a successful Batson challenge).

challenge and the Court denied the defense a recess to fulfill their burden of providing non-discriminatory reasons for the strikes—that case makes clear that Batson challenges can be resolved without protracted, overnight briefing.

The Court should take the same approach here. Rather than placing additional burdens on the jury pool, prolonging their involvement, and potentially stretching these proceedings over multiple days, the Court should resolve all issues while the jurors are present on May 25, 2023. The United States therefore respectfully requests that the Court deny the defendant’s request for additional briefing on Batson challenges.

Respectfully submitted,

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