CAPITAL PUNISHMENT:
RACE, POVERTY & DISADVANTAGE

Yale University
Professor Stephen B. Bright

Class Nine - Part Three: Peremptory Strikes

Robert SWAIN
v.
STATE OF ALABAMA

United States Supreme Court
380 U.S. 202, 85 S.Ct. 824 (1965)

Mr. Justice WHITE delivered the opinion of the Court.

The petitioner, Robert Swain, a Negro, was indicted and convicted of rape in the Circuit Court of Talladega County, Alabama, and sentenced to death. His motions to quash the indictment, to strike the trial jury venire and to declare void the petit jury chosen in the case, all based on alleged invidious discrimination in the selection of jurors, were denied.

In support of his claims, petitioner invokes the constitutional principle announced in 1880 in *Strauder v. State of West Virginia*, 100 U.S. 303, where the Court struck down a state statute qualifying only white people for jury duty. Such a statute was held to contravene the central purposes of the Fourteenth Amendment. * * * Although a Negro defendant is not entitled to a jury containing members of his race, a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.

* * *

But purposeful discrimination may not be assumed or merely asserted. It must be proven, the quantum of proof necessary being a matter of federal law. It is not the soundness of these principles, which is unquestioned, but their scope and application to the issues in this case that concern us here.

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II

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In Talladega County the petit jury venire drawn in a criminal case numbers about 35 unless a capital offense is involved, in which case it numbers about 100. After excuses and removals for cause, the venire in a capital case is reduced to about 75. The jury is then "struck" – the defense striking two veniremen and the prosecution one in alternating turns, until only 12 jurors remain. * * * In this case, the six Negroes available for jury service were struck by the prosecutor in the process of selecting the jury which was to try petitioner.

In the trial court after the jury was selected, petitioner moved to have the jury declared void on Fourteenth Amendment grounds. * * * The main thrust of the motion according to its terms was the striking of the six Negroes from the petit jury venire. No evidence was taken, petitioner apparently being content to rely on the record which had been made in connection with the motion to quash the indictment. We think the motion, seeking as it did to invalidate the alleged purposeful striking of Negroes from the jury which was to try petitioner, was properly denied.

* * * Alabama contends that its system of peremptory strikes – challenges without cause, without explanation and without judicial scrutiny – affords a suitable and necessary method of

securing juries which in fact and in the opinion of the parties are fair and impartial. This system, it is said, in and of itself, provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes. Based on the history of this system and its actual use and operation in this country, we think there is merit in this position.

* * *

In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross-section of a heterogeneous society. The voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted. The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. Although "[t]here is nothing in the Constitution of the United States which requires the Congress (or the States) to grant peremptory challenges," nonetheless the challenge is "one of the most important of the rights secured to the accused." The denial or impairment of the right is reversible error without a showing of prejudice. "[F]or it is, as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose."

The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. * * * Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause. * * *

The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. It is often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," upon a juror's "habits and associations," or upon the feeling that "the bare questioning [a juror's] indifference may sometimes provoke a resentment." It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. It is well known that these factors are widely explored during the voir dire, by both prosecutor and accused. * * * Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. * * *

In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case

before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. * * *

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II

Petitioner, * * * presses a * * * claim[30] * * * that not only were the Negroes removed by the prosecutor in this case but that there never has been a Negro on a petit jury in either a civil or criminal case in Talladega County and that in criminal cases prosecutors have consistently and systematically exercised their strikes to prevent any and all Negroes on petit jury venires from serving on the petit jury itself. * * *

We agree that this claim raises a different issue and it may well require a different answer. * * * [W]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. In these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purpose of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify.

We need pursue this matter no further, however, for even if a State's systematic striking of Negroes in the selection of petit juries raises a prima facie case under the Fourteenth Amendment, we think it is readily apparent that the record in this case is not sufficient to demonstrate that the rule has been violated by the peremptory system as it operates in Talladega County.

The difficulty with the record before us * * * is that it does not with any acceptable degree of clarity, show when, how often, and under what circumstances the prosecutor alone has been responsible for striking those Negroes who have appeared on petit jury panels in Talledega County. The record is absolutely silent as to those instances in which the prosecution participated in striking Negroes, except for the indication that the prosecutor struck the Negroes in this case and except for those occasions when the defendant himself indicated that he did not want Negroes on the jury. Apparently in some cases, the prosecution agreed with the defense to remove Negroes. There is no evidence, however, of what the prosecution did or did not do on its own account in any cases other than the one at bar.[31] In

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30. This claim was not set forth in the motion to quash the venire or the motion to declare void the petit jury selected, the only motions in which the Alabama strike system was challenged in the trial court. However, the decision of the Alabama Supreme Court may be read to have ruled on the challenge to the exercise of strikes against Negroes in its broadest form. "As to the contention that Negroes are systematically excluded from trial juries, the evidence discloses that Negroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury. It has long been held that, where allowed by statute, peremptory challenges may be used without any assigned or stated cause. Both the federal and Alabama jurisdictions have statutes providing for peremptory challenges. The fact that the prosecution peremptorily strikes every Negro from the jury panel in a case where the defendant is a Negro does not constitute a violation of the defendant's constitutional rights * * *."

31. The prosecutor testified that on occasion he would ask defense counsel if he wanted Negroes on the jury; if the defense did not, and the prosecutor agreed, "what

one instance the prosecution offered the defendant an all-Negro jury but the defendant in that case did not want a jury with any Negro members. There was other testimony that in many cases the Negro defendant preferred an all-white to a mixed jury. One lawyer, who had represented both white and Negro defendants in criminal cases, could recall no Negro client who wanted Negroes on the jury which was to try him. The prosecutor himself, who had served since 1953, said that if the Negro defendant wanted Negroes on the jury it would depend "upon the circumstances and the conditions and the case and what I thought justice demanded and what [it] was in that particular case," and that striking is done differently depending on the race of the defendant and the victim of the crime. These statements do not support an inference that the prosecutor was bent on striking Negroes, regardless of trial-related considerations. The fact remains, of course, that there has not been a Negro on a jury in Talladega County since about 1950. But the responsibility of the prosecutor is not illuminated in this record. There is no allegation or explanation, and hence no opportunity for the State to rebut, as to when, why and under what circumstances in cases previous to this one the prosecutor used his strikes to remove Negroes. In short, petitioner has not laid the proper predicate for attacking the peremptory strikes as they were used in this case. Petitioner has the burden of proof and he has failed to carry it.

* * * Total exclusion of Negroes by the state officers responsible for selecting names of jurors gives rise to a fair inferences of discrimination on their part, an inference which is determinative absent sufficient rebuttal evidence. But this rule of proof cannot be woodenly applied to cases where the discrimination is said to occur during the process of peremptory challenge of persons called for jury service. Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system * * *. It is for this reason that a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State. * * * We see no reason * * * why the defendant attacking the prosecutor's systematic use of challenges against Negroes should not be required to establish on the record the prosecutor's conduct in this regard, especially where the same prosecutor for many years is said to be responsible for this practice and is quite available for questioning on this matter.[32] Accordingly the judgment is affirmed.

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we do then is just to take them off. Strike them first." The record makes clear that this was not a general practice and the matter was not explored further:

Q. Let me ask you this. You stated that the defendants generally do not want a negro to serve on a jury that is sworn to try him?

A. I didn't say that. I didn't – they generally didn't want it. I said in the past there has been occasion here where that has happened.

Q. Have there been any cases where they did want negroes to serve on juries in their behalf?

A. I wouldn't know if there has been. Not to my knowledge, because I am not representing defendants. I am representing the State. Do you see what I mean?

Q. Yes.

A. In other words, that would be between attorney and client, privileged, and I wouldn't know what they wanted. You would have to ask these defense attorneys about that.

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32. We also reject the assertion that the method of selecting veniremen in Talladega County, with its lower proportion of Negroes on the venire list, when considered with the system of peremptory strikes establishes a prima facie case of discrimination. Absent a showing of purposeful exclusion of Negroes in the selection of veniremen, which has not been made, the lower proportion of Negroes on the venire list sheds no light whatsoever on the validity of the peremptory strike system or on whether the prosecutor systematically strikes Negroes in the county. Moreover, the constitutional issue in regard to the prosecutor's systematic use of strikes against Negroes remains much the same whatever the number of Negroes on the venire list.

Mr. Justice GOLDBERG, with whom The CHIEF JUSTICE and Mr. Justice DOUGLAS join, dissenting.

* * *

* * * The United States Commission on Civil Rights in its 1961 Report, Justice 103, after exhaustive study of the practice of descrimination in jury selection, concluded that "[t]he practice of racial exclusion from juries persists today even though it has long stood indicted as a serious violation of the 14th amendment." * * *

Regrettably, however, the Court today * * * creates additional barriers to the elimination of jury discrimination practices which have operated in many communities to nullify the command of the Equal Protection Clause.

* * *

Since it is undisputed that no Negro has ever served on a jury in the history of the county, and a great number of cases have involved Negroes, the only logical conclusion from the record statement that only on occasion have Negro defendants desired to exclude Negroes from jury service, is that in a good many cases Negroes have been excluded by the state prosecutor, either acting alone or as a participant in arranging agreements with the defense.

* * *

* * * [T]he evidence showed that while Negroes represent 26% of the population generally available to be called for jury service in Talladega County, Negroes constituted a lesser proportion, generally estimated from 10% to 15%, of the average venire. * * * [The] method of venire selection cannot be viewed in isolation and must be considered in connection with the peremptory challenge system with which it is inextricably bound. When this is done it is evident that the maintenance by the State of the disproportionately low number of Negroes on jury panels enables the prosecutor, alone or in agreement with defense attorneys, to strike all Negroes from panels without materially impairing the number of peremptory challenges available for trial strategy purposes.

Finally, it is clear that Negroes were removed from the venire and excluded from service by the prosecutor's use of the peremptory challenge system in this case and that they have never served on the jury in any case in the history of the county. On these facts, and the inferences reasonably drawn from them, it seems clear that petitioner has affirmatively proved a pattern of racial discrimination in which the State is significantly involved.

* * *

[T]he Court's reasoning on this point completely overlooks the fact that the total exclusion of Negroes from juries in Talladega County results from the interlocking of an inadequate venire selection system, for which the State concededly is responsible, and the use of peremptory challenges. All of these factors confirm my view that no good reason exists to fashion a new rule of burden of proof, which will make it more difficult to put an end to discriminatory selection of juries on racial grounds * * * [T]he Court today allies itself with those "that keep the word of promise to our ear and break it to our hope."

* * *

While peremptory challenges are commonly used in this country both by the prosecution and by the defense, we have long recognized that the right to challenge peremptorily is not a fundamental right, constitutionally guaranteed, even as applied to a defendant, much less to the State. * * *

Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former. But no such choice is compelled in this situation. The holding called for by this case, is that where as here, a Negro defendant proves

that Negroes constitute a substantial segment of the population, that Negroes are qualified to serve as jurors, and that none or only a token number has served on juries over an extended period of time, a prima facie case of the exclusion of Negroes from juries is then made out; that the State, under our settled decisions, is then called upon to show that such exclusion has been brought about "for some reason other than racial discrimination[.]" * * *

* * *

McCray v. New York

Justice Marshall, joined by Justice Brennan, argued that the Court should reconsider the standard of proof adopted in *Swain* in dissenting from the denial of certiorari in *McCray v. New York*, 461 U.S. 961 (1983). Justice Marshall stated:

> In the nearly two decades since it was decided, *Swain* has been the subject of almost universal and often scathing criticism. Since every defendant is entitled to equal protection of the laws and should therefore be free from the invidious discrimination of state officials, it is difficult to understand why several must suffer discrimination because of the prosecutor's use of peremptory challenges before any defendant can object. Moreover, *Swain* is inconsistent with the rule established in other jury selection cases that a prima facie violation is established by showing that an all-white jury was selected and that the selection process incorporated a mechanism susceptible to discriminatory application, irrespective of when in the selection process that opportunity arose. Finally, the standard of proof for discrimination in *Swain* imposes a nearly insurmountable burden on defendants.

Justice Stevens, joined by Justices Blackmun and Powell, issued an opinion concurring in the denial of certiorari saying that they did not disagree with Justice Marshall's assessment of the importance of the issue, but felt that "further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date." That date came three years later when the Court decided the case that follows.

James Kirkland BATSON, Petitioner,
v.
KENTUCKY

Supreme Court of the United States
476 U.S. 79, 106 S. Ct. 1712 (1986)

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to reexamine that portion of *Swain v. Alabama* concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury.

I

Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. * * * The prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Counsel requested a hearing on his motion. Without expressly ruling on the request for a hearing, the trial judge observed that the parties were entitled to use their peremptory challenges to "strike anybody they want to." The judge then denied petitioner's motion, reasoning that the cross-section requirement applies only to selection of the venire and not to selection of the petit jury itself.

The jury convicted petitioner on both counts. * * *

II

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A

More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. * * * Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court * * * recognized, however, that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race." "The number of our races and nationalities stands in the way of evolution of such a conception" of the demand of equal protection. But the defendant does have the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria. The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors.

* * *

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

B

* * * While decisions of this Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury. Since the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice, the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at "other stages in the selection process."

* * * Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

III

* * * A recurring question [in equal protection cases] * * * was whether the defendant had met his burden of proving purposeful discrimination on the part of the State. That question also was at the heart of the portion of *Swain* v. *Alabama* we reexamine today.

* * *

B

Since the decision in *Swain*, we have explained that our cases concerning selection of the venire reflect the general equal protection principle that the "invidious quality" of governmental action claimed to be racially discriminatory "must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 299, 240 (1976). As in any equal protection case, the "burden is, of course," on the defendant who alleges discriminatory selection of the venire "to prove the existence of purposeful discrimination." In deciding if the defendant has carried his burden of persuasion, a court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Circumstantial evidence of invidious intent may include proof of disproportionate impact. We have observed that under some circumstances proof of discriminatory impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." For example, "total or seriously disproportionate exclusion of Negroes from jury venires," "is itself such an 'unequal application of the law . . . as to show intentional discrimination.'"

Moreover, since *Swain*, we have recognized that a black defendant alleging that members of his race have been impermissibly excluded from the venire may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. Rather, the State must demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result."

The showing necessary to establish a prima facie case of purposeful discrimination in selection of the venire may be discerned in this Court's decisions. The defendant initially must show that he is a member of a racial group capable of being singled out for differential treatment. In combination with that evidence, a defendant may then make a prima facie case by proving that in the particular jurisdiction members of his race have not been summoned for jury service over an extended period of time. Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the "result bespeaks discrimination."

* * * In cases involving the venire, this Court has found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination." This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse. When circumstances suggest the need, the trial court must undertake a "factual inquiry" that "takes into account all possible explanatory factors" in the particular case.

Thus, since the decision in *Swain*, this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*. These decisions are in accordance with the proposition, articulated in *Arlington Heights* v. *Metropolitan Housing Development Corp*., that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions." For evidentiary requirements to dictate that "several must suffer discrimination" before one could object, would be inconsistent with the promise of equal protection to all.

C

* * * To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are

merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption – or his intuitive judgment – that they would be partial to the defendant because of their shared race. Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. * * * Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or "[affirming] [his] good faith in making individual selections." * * * The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination.

IV

The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge * * * [and] that the privilege of unfettered exercise of the challenge is of vital importance to the criminal justice system.

While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice. The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

* * *

V

In this case, petitioner made a timely objection to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed.

JUSTICE WHITE, concurring.

* * *

* * * *Swain* itself indicated that the presumption of legitimacy with respect to the striking of black venire persons could be overcome by evidence that over a period of time the prosecution had consistently excluded blacks from petit juries. This should have warned prosecutors that using peremptories to exclude blacks on the assumption that no black juror could fairly judge a black defendant would violate the Equal Protection Clause.

It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when

this occurs. * * *

The Court emphasizes that using peremptory challenges to strike blacks does not end the inquiry; it is not unconstitutional, without more, to strike one or more blacks from the jury. The judge may not require the prosecutor to respond at all. If he does, the prosecutor, who in most cases has had a chance to *voir dire* the prospective jurors, will have an opportunity to give trial-related reasons for his strikes – some satisfactory ground other than the belief that black jurors should not be allowed to judge a black defendant.

* * *

JUSTICE MARSHALL, concurring.

I join JUSTICE POWELL's eloquent opinion for the Court, which takes a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries. * * * The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

I

* * *

Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics showing the extent of that practice, but the few cases setting out such figures are instructive. * * * An instruction book used by the prosecutor's office in Dallas County, Texas, explicitly advised prosecutors that they conduct jury selection so as to eliminate "'any member of a minority group.'" In 100 felony trials in Dallas County in 1983-1984, prosecutors peremptorily struck 405 out of 467 eligible black jurors; the chance of a qualified black sitting on a jury was 1 in 10, compared to 1 in 2 for a white.

* * * JUSTICE REHNQUIST, dissenting, concedes that exclusion of blacks from a jury, solely because they are black, is at best based upon "crudely stereotypical and . . . in many cases hopelessly mistaken" notions. Yet the Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes – even an action that does not serve the State's interests. * * *

II

* * * Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.

Evidentiary analysis similar to that set out by the Court, has been adopted as a matter of state law in States including Massachusetts and California. Cases from those jurisdictions illustrate the limitations of the approach. First, defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case. This means, in those States, that where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race. * * * Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an "acceptable" level.

Second, when a defendant can establish a prima facie case, trial courts face the difficult burden of assessing prosecutors' motives. Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed "uncommunicative,"or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case,"? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Nor is outright prevarication by prosecutors the

only danger here. "[It] is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As JUSTICE REHNQUIST concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels – a challenge I doubt all of them can meet. It is worth remembering that "114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole."

III

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system. Justice Goldberg, dissenting in *Swain*, emphasized that "[were] it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former." I believe that this case presents just such a choice, and I would resolve that choice by eliminating peremptory challenges entirely in criminal cases.

Some authors have suggested that the courts should ban prosecutors' peremptories entirely, but should zealously guard the defendant's peremptory as "essential to the fairness of trial by jury," and "one of the most important of the rights secured to the accused." * * * I would not find that an acceptable solution. * * * We can maintain that balance [between prosecution and defense], not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptories as well.

* * *

CHIEF JUSTICE BURGER, joined by JUSTICE REHNQUIST, dissenting.

* * *

II

* * *

The Court never applies [a] conventional equal protection framework to the claims at hand, perhaps to avoid acknowledging that the state interest involved here has historically been regarded by this Court as substantial, if not compelling. Peremptory challenges have long been viewed as a means to achieve an impartial jury that will be sympathetic toward neither an accused nor witnesses for the State on the basis of some shared factor of race, religion, occupation, or other characteristic. * * *

* * *

* * * Our system permits two types of challenges: challenges for cause and peremptory challenges. Challenges for cause obviously have to be explained; by definition, peremptory challenges do not. It is readily apparent, then, that to permit inquiry into the basis for a peremptory challenge would force "the peremptory challenge [to] collapse into the challenge for cause." * * *

* * * I am at a loss to discern the governing principles here. * * * Anything short of a challenge for cause may well be seen as an "arbitrary and capricious" challenge, to use Blackstone's characterization of the peremptory. Apparently the Court envisions permissible challenges short of a challenge for cause that are just a little bit arbitrary – but not too much. While

our trial judges are "experienced in supervising *voir dire,"* they have no experience in administering rules like this.

* * *

A further painful paradox of the Court's holding is that it is likely to interject racial matters back into the jury selection process, contrary to the general thrust of a long line of Court decisions and the notion of our country as a "melting pot." * * *

* * *

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

I cannot subscribe to the Court's unprecedented use of the Equal Protection Clause to restrict the historic scope of the peremptory challenge, which has been described as "a necessary part of trial by jury." In my view, there is simply nothing "unequal" about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so on. This case-specific use of peremptory challenges by the State does not single out blacks, or members of any other race for that matter, for discriminatory treatment. Such use of peremptories is at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken. But as long as they are applied across-the-board to jurors of all races and nationalities, I do not see – and the Court most certainly has not explained – how their use violates the Equal Protection Clause.

* * *

The use of group affiliations, such as age, race, or occupation, as a "proxy" for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges. Indeed, given the need for reasonable limitations on the time devoted to *voir dire*, the use of such "proxies" by both the State and the defendant may be extremely useful in eliminating from the jury persons who might be biased in one way or another. * * *

* * *

Other Decisions on Discrimination in the Use of Peremptory Strikes

The Court held that a white defendant may invoke *Batson* to challenge the racially discriminatory use of peremptory challenges in *Powers v. Ohio*, 499 U.S. 400 (1991). It held that *Batson* applies to discrimination on the basis of gender in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). It also extended *Batson* to the exercise of peremptory strikes in civil cases. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). And the Court held that prosecutors may challenge peremptory strikes by defense lawyers on the ground that they are racially motivated. *Georgia v. McCollum*, 505 U.S. 42 (1992).

The Court rejected a challenge to peremptory strikes based upon the fair cross section guarantee of the right to a jury trial of the Sixth Amendment in *Holland v. Illinois*, 493 U.S. 474 (1990). Holland's claim was rejected because his lawyer relied only on the fair cross section argument and not the equal protection clause of the Fourteenth Amendment. The Court held that because Holland did not assert the equal protection clause, he was not entitled to relief.

Thus, to succeed on a *Batson* claim a party must prove *intentional* racial discrimination by the party that exercised the strike and the assertion of a false reason – a pretext – for the strike instead of the true reason. It is no small matter to establish these facts with regard to an attorney. There is a general reluctance on the part of many judges to make such findings with regard to lawyers who appear before them regularly and may be friends of the judge and respected by the judge.

The Philadelphia District Attorney's Training on Jury Selection

Jack McMahon, a former Assistant District Attorney in Philadelphia won the Republican nomination in 1997, to challenge Philadelphia's incumbent District Attorney, Lynne Abraham, a Democrat. On March 31, 1997, Abraham released a videotape made in the late 1980s, after *Batson* had been decided, which showed McMahon giving a training session on jury selection to other prosecutors in the District Attorney's Office.

Among other things, McMahon advised other prosecutors:

> The blacks from the low-income areas are less likely to convict. * * * There's a resentment for law enforcement. There's a resentment for authority. And as a result, you don't want those people on your jury. And it may appear as if you're being racist, but again, you're just being realistic.
>
> * * *
>
> My experience, young black women are very bad. There's an antagonism. I guess maybe because they're downtrodden in two respects. They are women and they're black . . . so they somehow want to take it out on somebody and you don't want it to be you.[1]

However, McMahon did not suggest striking all blacks. He suggested a racial mix of eight whites and four blacks or nine and three. He described acceptable blacks as follows:

> In selecting blacks, you don't want the real educated ones. This goes across the board. All races. You don't want smart people. If you're sitting down and you're going to take blacks, you want older black men and women, particularly men. Older black men are very good.
>
> Blacks from the South. Excellent. . . . If they are from South Carolina and places like that, I tell you, I don't think you can ever lose a jury with blacks from South Carolina. They are dynamite.[2]

The Pennsylvania Supreme Court, found that the videotape was circumstantial evidence that could be used to support a *Batson* claim and ordered a new hearing in *Commonwealth v. Basemore*, 744 A.2d 717, 727-734 (Pa. 2000).[3] McMahon prosecuted William Basemore in 1988, the year before the tape was made. McMahon used nineteen peremptory strikes, all against blacks – fourteen women and five men – in selecting Basemore's jury. The jury had only two blacks – one man and one woman. Basemore was convicted and sentenced to death.

After the video tape came to light, Basemore alleged in a post-conviction petition that the tape revealed that McMahon was of a "mind to discriminate" based on race and gender-based stereotypes. On remand in 1991, the trial court found that the evidence "manifested a conscious pattern of discrimination and denied defendant equal protection of the law. * * * The record indicates a conscious strategy to exclude African-American jurors." The court found McMahon's explanations for his peremptory strikes "insufficient," concluded that "the jury selection procedure manifested a conscious pattern of discrimination" and ordered a new trial. Basemore received a life sentence in 2003 when the jury in his case was unable to reach a unanimous verdict with regard to sentence.

A federal court granted habeas relief in *Wilson v. Beard*, 314 F. Supp.2d 434 (E.D. Pa. 2004), another capital prosecution by McMahon which resulted in a sentence of life imprisonment. At the trial, two years before he gave the videotaped lecture, McMahon struck at least nine black jurors

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1. L. Stuart Ditzen, et al., *Avoid Poor Black Jurors, McMahon Said*, PHILA. INQUIRER, Apr. 1, 1997.

2. *Id*.

3. However, in some other cases, the Pennsylvania Supreme Court refused to order a hearing based on the tape.

(voter registration information as to the race of three other stricken jurors was ambiguous) while empaneling a jury of ten whites and two African Americans.

The Court found that the videotape provided both support for the prima facie case of discrimination and circumstantial support that factors other than race might have been responsible for strikes. The Court of Appeals for the Third Circuit affirmed. "There can be no doubt that if McMahon practiced in Wilson's trial what he preached in the tape, he violated *Batson*," Judge Edward R. Becker wrote in an unanimous opinion for a three-judge panel of the Court. *Wilson v. Beard*, 426 F.3d 653, 670 (3d Cir. 2005).

The Philadelphia Court of Common Pleas found in January 2003, that McMahon had discriminated in the exercise of his peremptory strikes in the capital trial of Harold Wilson in 1989. Before Wilson's retrial, new DNA evidence became available, containing blood that did not belong to Wilson and suggesting the presence of someone other than Wilson or any of the victims. After an initial mistrial, Wilson was acquitted on all charges.

The Philadelphia Court of Common Pleas granted post-conviction relief in another capital prosecution by McMahon, *Commonwealth v. Spence* (March 22, 2004). The court found that McMahon had exercised his peremptory challenges to strike at least one African-American juror on the basis of race. In ruling the judge said:

> I don't think Mr. McMahon's a racist. This is something that has been going on in the DA's Office even before Mr. McMahon got there. He gave out other information that other people told him about. I don't think Mr. McMahon is a racist, but, of course, in striking people the way he struck in particular one prospective juror, who was a black lady, whose son was on the police force, he was an FBI agent, he was in DEA and all that, no way do I believe that if this prospective juror was Caucasian, would she have been struck by the District Attorney's office.

However, the Pennsylvania Supreme Court rejected claims based on the videotape in a cases prosecuted by other assistant district attorneys, holding that the tape was not sufficient to establish a policy of discrimination in jury selection by the prosecutors in the Philadelphia District Attorney's Office. *Commonwealth v. Rollins*, 738 A.2d 435, 433 n. 10 (1999). The Court held that the videotape and a another prosecutor's use of ten of 14 peremptory strikes against African-Americans was insufficient to require an evidentiary hearing in *Commonwealth v. Lark*, 746 A.2d 585, 589-590 (Pa. 2000).

A study published in 1998 found evidence of discrimination in the imposition of the death penalty in Philadelphia. *See* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1742-45 (1998).

The Prima Facie Case

STATE of Louisiana
v.
Felton Dejuan DORSEY.

Supreme Court of Louisiana.
74 So.3d 603 (2011).

KIMBALL, C.J.

On May 17, 2006, Felton Dejuan Dorsey and Randy Wilson were indicted by a Caddo Parish grand jury for the first degree murder of Joe Prock and attempted first degree murder of Bobbie Prock. * * * In the week proceeding trial, Wilson entered a plea agreement with the state, agreeing to testify at defendant's trial in exchange for pleading guilty to murder, thereby avoiding a capital murder trial, and receiving a sentence of life imprisonment without benefit of probation, parole, or suspension of sentence.

* * * Defendant exercised all twelve of his peremptory challenges, while the state only exercised eleven. The defense asserted a *Batson* challenge, alleging the state used peremptory challenges to strike five of the seven black prospective jurors who remained after death qualification. * * * The racial composition of the jury was eleven whites and one black.

* * *

* * * When determining whether the defendant has made the requisite prima facie showing, the court in *Batson* held the trial court should consider all relevant circumstances, including a pattern of strikes against black jurors and the prosecutor's questions and statements during voir dire examination and in exercising his challenges. The Court refused to provide guidance beyond these two illustrations, choosing instead to rely upon experienced trial judges to decide whether the circumstances surrounding the prosecutor's use of peremptory challenges creates a prima facie case of discrimination. Because the trial judge's findings in this context will largely turn on evaluations of credibility, a reviewing court ordinarily should give those findings great deference.

This Court, however, has provided additional guidance by enumerating several other factors Louisiana courts may consider in determining whether a defendant has made a prima facie case of purposeful discrimination. * * * Such facts include, but are not limited to, a pattern of strikes by the prosecutor against members of a suspect class, statements or actions by the prosecutor that indicate the peremptory strikes were motivated by impermissible considerations, the composition of the venire and of the jury finally empanelled, and any other disparate impact upon the suspect class which is alleged to be the victim of purposeful discrimination. This Court has also taken into consideration whether the nature of the case presented overt racial overtones, the timing of the defendant's objection, and whether the trial judge thought the issue of purposeful discrimination was "very close."

In this case, the defense claims it established a prima facie case of discrimination numerically because the state used peremptory challenges to strike five of seven prospective black jurors (71%) and only six of twenty-seven prospective white jurors (22%), thereby striking black jurors at a rate of more than three times that of white jurors. The district court clarified there were eight prospective black jurors available for jury selection and the state had challenged five, one was excused by the defense, one was selected for the jury, and one was available as an alternate. The district court then found the defense had established a prima facie case of purposeful discrimination and ordered the state to provide race-neutral reasons for striking the jurors. The state objected to the court's order and * * * argued it only struck five out of eight black jurors, thereby lowering the percentage of black jurors struck from 71% to 62.5%. The state further claimed it struck every juror who rated himself as a "four" on the state's five-point scale, regardless of race, indicating a preference towards imposing a life sentence. When the court asked whether this was the state's race neutral reason, the state responded "it is a component of it," but further explained, "that is not a race neutral reason, that is a correction of the factual basis set for the prima facie case." Throughout its objection, the state repeatedly emphasized it was not providing its race neutral reasons for the strikes. After hearing the state's explanation, the court set aside its previous order and denied the *Batson* challenge, finding there was no systematic pattern of exclusion based upon race.

Upon review, we find no abuse of discretion in the district court's ruling. As the state noted, this Court has held bare statistics are insufficient to support a prima facie case of discrimination. *State v. Duncan,* 802 So.2d 533, 550 (La. 2001). In *Duncan,* the defendant argued racial discrimination could be inferred from the record, which showed that the state had struck 84% of the prospective black jurors and only 12% of the prospective white jurors, using five of its eight peremptory challenges to strike black jurors. This Court held, "there is not a per se rule that a certain number or percentage of the challenged jurors

must be black in order for the court to conclude a prima facie case has been made out." However, the Court explained "such number games, stemming from the reference in *Batson* to a 'pattern' of strikes, are inconsistent with the inherently fact-intense nature of determining whether the prima facie requirement has been satisfied." This Court further held it is important for the defendant to come forward with facts, not just numbers alone, when asking the district court to find a prima facie case. Consequently, in *Duncan* this Court held the defendant's reliance on bare statistics to support a prima facie case of race discrimination was misplaced.

Applying *Duncan* to the instant case, we hold the defendant's reliance upon statistics alone does not support a prima facie case of race discrimination. The record reveals the state struck 62% of the prospective black jurors and about 22% of the prospective white jurors, using roughly the same number of strikes to excuse members of each race. Although there is a disparity in the state's use of its peremptory challenges, defendant failed to present any facts to support a prima facie case of purposeful discrimination, as required in *Duncan.* The defense correctly asserts *Johnson v. California*[, 545 U.S. 162, 171, n. 6 (2005)] held a prosecutor's refusal to provide race-neutral reasons provides additional support for a prima facie case of discrimination[.]

[H]owever, a prosecutor's refusal is not sufficient to raise an inference of discrimination, but may provide *further* support when a defendant has *already* set forth sufficient facts to establish a prima facie case. In this case, the state did not object to the district court's order to provide race-neutral reasons for its peremptory challenges, but rather requested clarification for the factual basis of the prima facie case. We find the state's request for clarification was motivated by a desire for the court to make a more complete record of the basis upon which the order was made before deciding whether to seek appellate review or provide its race-neutral reasons. Thus, we find the state's request provides no support for defendant's claim of discrimination.

* * *

[D]efendant does not cite, nor do we discern from the prosecutor's statements, questions, or comments during voir dire any inference the state exercised its peremptory challenges based on race. After reviewing the record, it is clear the state posed the same questions in the same manner to all prospective jurors, regardless of race. * * *

* * * When the state objected to the district court's order requiring the state to give its race-neutral reasons, the state asserted it struck * * * eight * * * jurors, representing a mixture of white and black men and women, because they all rated themselves as a "four" on the state's scale. Since a rating of "four" or higher on the State's scale indicates these jurors favored life imprisonment over a death sentence, an unfavorable position to the state, the record clearly supports a race-neutral reason for the state's peremptory challenges[.]

[The Court then discussed five of the black juror struck, finding that they either were reluctant to impose the death penalty, had "mixed emotions" about it, or did not comprehend the questions asked about it.]

Theresa Williams is the only prospective black juror peremptorily challenged by the state who rated herself as a "three" on the state's scale, indicating she was neutral and open to imposing either penalty. * * *

Although nothing during her voir dire testimony suggested Williams would be an unfavorable juror to the state, we find the district court did not abuse its discretion by denying defendant's *Batson* challenge of Williams. Our recent decision in *State v. Draughn*[, 950 So.2d 583, 603 (La. 2007)] is instructive on the matter[.] [T]his Court concluded the defense in *Draughn* failed to raise any relevant evidence to support an inference of discrimination beyond the number of whites and blacks excluded [the prosecutor struck four blacks; one black served on the jury], explaining:

Our review of the entire voir dire convinces us

that the mere invocation of *Batson* when minority prospective jurors are peremptorily challenged in the trial of a minority defendant does not present sufficient evidence in this case to lead to an inference of purposeful discrimination. There is nothing in *Batson*, or indeed in *Johnson*, which would require such an automatic finding. Otherwise, there would be no need for the first *Batson* step in the trial of any defendant who was a member of a cognizable racial group whenever a peremptory challenge was raised to a prospective juror who was also a member of that racial group[.] * * *

* * *

We find *Draughn* factually similar and therefore, directly applicable to this case. The only support offered for defendant's *Batson* challenge here was a comparison of the number of white versus black jurors against whom the state exercised peremptory challenges. As in *Draughn,* we conclude there was nothing from which the district court could have drawn an inference of purposeful discrimination. Moreover, the four additional factors we considered in *Draughn,* including the nature of the case, timing of the defense objection, racial makeup of the jury, and the trial judge's opinion on the issue of discriminatory intent, similarly negate a finding of discriminatory intent on the state's part. Although the nature of this case does present overt racial overtones because it involves a black defendant and a white victim, the other three factors weigh against a finding of discriminatory intent.

The timing of the defense's objection, which was made after the state exercised eleven peremptory challenges, stands in stark contrast to other cases in which the defense raises an objection immediately after the prospective juror is challenged. In *Draughn,* we found such a late objection, while still timely under Louisiana law, weighed against an inference of discrimination. Similarly, here and in *Draughn,* the actual jury that heard defendant's case was composed of eleven whites and one black juror. This Court has consistently held "although the mere presence of African American jurors does not necessarily defeat a *Batson* claim, the unanimity requirement of a capital case sentencing recommendation may be considered." Further, the district court in this case, like that in *Draughn,* knew the state had one remaining peremptory challenge and did not use it to remove the black juror, thereby distinguishing this case from others in which all of the prospective black jurors were stricken. Lastly, * * * the district judge in this case clearly stated he found no systematic pattern of exclusion based on race.

Based on the voir dire questioning, the additional factors from *Draughn*, and giving due deference to the district court's factual determination on the issue, we find the district court did not abuse its discretion in concluding defendant failed to establish a prima facie case of purposeful discrimination by the state. Consequently, we find defendant's arguments on this issue unpersuasive.

* * *

State v. Holland

The Louisiana Supreme Court reversed a decision by the state's Court of Appeals finding a *prima facie* case and remanding a case for the prosecution to give reasons in *State v. Holland*, 2011 Westlaw 6153193 (La. App. Nov. 18, 2011). It explained:

> [T]he state used 11 peremptory challenges to exclude 10 African-Americans of which 9 were women, raw numbers alone the court of appeal found sufficient to establish a prima facie case of discrimination. The court of appeal conceded that the record was "devoid of any indication of the race (or gender) of either the venire or the jury that was ultimately impaneled." * * * [A]lthough "unable to accurately assess what impact the State's exercise of its peremptory challenges had on the composition of the jury ultimately impaneled," the court of appeal concluded that "the State's use of ten of its eleven peremptory challenges to strike African-Americans – nine of whom were women –

was sufficient to establish a prima facie case of discrimination racial, gender, or both." * * *

However, this Court has held that bare statistics alone are insufficient to support a prima facie case of discrimination. * * * Furthermore, the value of numbers alone, without any indication of the race or gender composition of the jury selected or the pool from which it was drawn, is limited at best.

* * *

[I]t is not possible to determine from the raw number of strikes exercised, without some context, that the circumstances gave rise to a reasonable inference of discriminatory purpose[.]

* * * Here, the defendant alleged no additional facts beyond the raw number of strikes and failed to develop the record beyond these numbers.

Race Neutral Reasons

Hernandez v. New York

In *Hernandez v. New York,* 500 U.S. 352 (1991), the Supreme Court held that a prosecutor's reasons for striking four Latinos based on their ability to speak Spanish was race neutral. The prosecutor said he struck the potential jurors because he felt

there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury.

The Court found the reason to be race neutral, explaining;

The prosecutor here offered a race-neutral basis for these peremptory strikes. As explained by the prosecutor, the challenges rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals. The prosecutor's articulated basis for these challenges divided potential jurors into two classes: those whose conduct during voir dire would persuade him they might have difficulty in accepting the translator's rendition of Spanish-language testimony and those potential jurors who gave no such reason for doubt. Each category would include both Latinos and non-Latinos. While the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor's actions into a per se violation of the Equal Protection Clause.

The Court acknowledged:

"[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another." *Washington v. Davis*, 426 U.S., at 242. If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination.

The Court described the factors to be considered:

In the context of this trial, the prosecutor's frank admission that his ground for excusing these jurors related to their ability to speak and understand Spanish raised a plausible, though not a necessary, inference that language might be a pretext for what in fact were race-based peremptory challenges. This was not a case

where by some rare coincidence a juror happened to speak the same language as a key witness, in a community where few others spoke that tongue. If it were, the explanation that the juror could have undue influence on jury deliberations might be accepted without concern that a racial generalization had come into play. But this trial took place in a community with a substantial Latino population, and petitioner and other interested parties were members of that ethnic group. It would be common knowledge in the locality that a significant percentage of the Latino population speaks fluent Spanish, and that many consider it their preferred language, the one chosen for personal communication, the one selected for speaking with the most precision and power, the one used to define the self.

> The trial judge can consider these and other factors when deciding whether a prosecutor intended to discriminate. For example, though petitioner did not suggest the alternative to the trial court here, Spanish-speaking jurors could be permitted to advise the judge in a discreet way of any concerns with the translation during the course of trial. A prosecutor's persistence in the desire to exclude Spanish-speaking jurors despite this measure could be taken into account in determining whether to accept a race-neutral explanation for the challenge.

The Court reiterated the deference to be given the findings of the trial judge:

> The trial judge in this case chose to believe the prosecutor's race-neutral explanation for striking the two jurors in question, rejecting petitioner's assertion that the reasons were pretextual. In *Batson*, we explained that the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal[.] * * *
>
> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding will "largely turn on evaluation of credibility." In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."* * *

* * *

> In the case before us, we decline to overturn the state trial court's finding on the issue of discriminatory intent unless convinced that its determination was clearly erroneous. * * *
>
> We discern no clear error in the state trial court's determination that the prosecutor did not discriminate on the basis of the ethnicity of Latino jurors. We have said that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." * * *

Justice Stevens, joined by Justice Marshall dissented, arguing proof of "discriminatory purpose" was to be inferred from a prima facie case, and that "[u]nless the prosecutor comes forward with an explanation for his peremptories that is sufficient to rebut that prima facie case, no additional evidence of racial animus is required to establish an equal protection violation." He suggested that

> The Court overlooks * * * the fact that the "discriminatory purpose" which characterizes violations of the Equal Protection Clause can sometimes be established by objective evidence that is consistent with a decisionmaker's honest belief that his motive was entirely benign. "Frequently the most probative evidence of intent will be objective evidence of what actually happened," * * * including evidence of disparate impact. * * *

> The line between discriminatory purpose and discriminatory impact is neither as bright nor as critical as the Court appears to believe.

Under his analysis, Justice Stevens would find an equal protection violation:

> Neither the Court nor respondent disputes that petitioner made out a prima facie case. Even assuming the prosecutor's explanation in rebuttal was advanced in good faith, the justification proffered was insufficient to dispel the existing inference of racial animus.
>
> The prosecutor's explanation was insufficient for three reasons. First, the justification would inevitably result in a disproportionate disqualification of Spanish-speaking venirepersons. An explanation that is "race-neutral" on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice. Second, the prosecutor's concern could easily have been accommodated by less drastic means. As is the practice in many jurisdictions, the jury could have been instructed that the official translation alone is evidence; bilingual jurors could have been instructed to bring to the attention of the judge any disagreements they might have with the translation so that any disputes could be resolved by the court. * * * Third, if the prosecutor's concern was valid and substantiated by the record, it would have supported a challenge for cause. The fact that the prosecutor did not make any such challenge, should disqualify him from advancing the concern as a justification for a peremptory challenge.

James PURKETT, Superintendent,
Farmington Corrections Center
v.
Jimmy ELEM.

Supreme Court of the United States
514 U.S. 765, 115 S.Ct. 1769 (1995)

PER CURIAM.

Respondent was convicted of second-degree robbery in a Missouri court. During jury selection, he objected to the prosecutor's use of peremptory challenges to strike two black men from the jury panel, an objection arguably based on *Batson v. Kentucky*. The prosecutor explained his strikes:

> I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. Those are the only two people on the jury . . . with facial hair. . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.

The prosecutor further explained that he feared that juror number 24, who had had a sawed-off shotgun pointed at him during a supermarket robbery, would believe that "to have a robbery you have to have a gun, and there is no gun in this case."

The state trial court, without explanation, overruled respondent's objection and empaneled the jury. On direct appeal, respondent renewed his *Batson* claim. The Missouri Court of Appeals affirmed, finding that the "state's explanation constituted a legitimate 'hunch'" and that "[t]he circumstances fail[ed] to raise the necessary inference of racial discrimination."

Respondent then filed a petition for habeas

corpus under 28 U.S.C. §2254, asserting this and other claims. * * * [T]he District Court denied respondent's claim.

The Court of Appeals for the Eighth Circuit reversed and remanded with instructions to grant the writ of habeas corpus. It said:

> * * * In the present case, the prosecutor's comments, "I don't like the way [he] look[s], with the way the hair is cut. . . . And the mustache[ ] and the beard[] look suspicious to me," do not constitute such legitimate race-neutral reasons for striking juror 22.

It concluded that the "prosecution's explanation for striking juror 22 . . . was pretextual," and that the state trial court had "clearly erred" in finding that striking juror number 22 had not been intentional discrimination.

Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination. *Hernandez v. New York*, 500 U.S. 352 (1991); *Batson, supra*. The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."

The Court of Appeals erred by combining *Batson's* second and third steps into one, requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, *i.e.*, a "plausible" basis for believing that "the person's ability to perform his or her duties as a juror" will be affected. It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge may choose to disbelieve a silly or superstitious reason at step 3 is quite different from saying that a trial judge must terminate the inquiry at step 2 when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

The Court of Appeals appears to have seized on our admonition in *Batson* that to rebut a prima facie case, the proponent of a strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," and that the reason must be "related to the particular case to be tried." This warning was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith. What it means by a "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection.

The prosecutor's proffered explanation in this case – that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard – is race-neutral and satisfies the prosecution's step 2 burden of articulating a nondiscriminatory reason for the strike. "The wearing of beards is not a characteristic that is peculiar to any race." And neither is the growing of long, unkempt hair. Thus, the inquiry properly proceeded to step 3, where the state court found that the prosecutor was not motivated by discriminatory intent.

* * *

Justice STEVENS, with whom Justice BREYER joins, dissenting.

In my opinion it is unwise for the Court to announce a law-changing decision without first ordering full briefing and argument on the merits

of the case. The Court does this today when it overrules a portion of our opinion in *Batson v. Kentucky*.

* * *

Today, without argument, the Court replaces the *Batson* standard with the surprising announcement that any neutral explanation, no matter how "implausible or fantastic," even if it is "silly or superstitious," is sufficient to rebut a prima facie case of discrimination. A trial court must accept that neutral explanation unless a separate "step three" inquiry leads to the conclusion that the peremptory challenge was racially motivated. The Court does not attempt to explain why a statement that "the juror had a beard," or "the juror's last name began with the letter 'S'" should satisfy step two, though a statement that "I had a hunch" should not. It is not too much to ask that a prosecutor's explanation for his strikes be race neutral, reasonably specific, and trial related. Nothing less will serve to rebut the inference of race-based discrimination that arises when the defendant has made out a prima facie case. That, in any event, is what we decided in *Batson.*

* * *

TOOMER
v.
The STATE.

Supreme Court of Georgia.
734 S.E.2d 333 (2012)

NAHMIAS, Justice.

Appellant Kasaem Toomer challenges his 2009 convictions for malice murder and other crimes in connection with the death of Justin Cox. We affirm.

* * *

Appellant contends that the trial court erred in rejecting his *Batson* claim that the prosecutor used three peremptory strikes to exclude prospective jurors solely because of their race, thereby violating his right to equal protection of the law. * * *

* * *

* * * Appellant's *Batson* claim focuses on step two.[4] According to Appellant, the State failed to offer permissible race-neutral justifications for striking Jurors 12, 20, and 28, and the trial court therefore erred in proceeding to step three of the *Batson* analysis, where the court ultimately found that Appellant had failed to prove the prosecutor's discriminatory intent.

The prosecutor told the court that he struck Juror 12 because "while he was in the courtroom at all times pretty much [he] kept his hand – his head in his hand and was not giving his full attention, either he was tired or disinterested." The prosecutor said that he struck Juror 20 because of "her demeanor that she was also disinterested in – in the case. I mean, she just – just seemed disinterested." The prosecutor said that he struck Juror 28 because, "[I]f I recall correctly . . . I felt some pattern of sympathy . . . in responding to [defense counsel's] questions and just to my question I felt that it's hard to articulate it was just a feeling that this particular juror . . . was perhaps more sympathetic to the defense." The court then asked, "Well, what do you base that on? I mean, was it – some body motion . . . ?" The prosecutor replied, "[b]ody language." The court said, "body language, facial expressions," and the prosecutor said, "Yes, sir." The court said, "Got to tell me what you're basing it on," and the prosecutor responded, "what the court just said. It was body language, facial expressions. And among the jurors that I could see it's something that as a lawyer you just have to feel and that's what I felt."

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4. There were 30 prospective jurors – 13 African–American persons and 17 white persons – and each party was allowed nine peremptory strikes. The defense used all nine of its strikes, including three against African–Americans, and the State used eight of its strikes, including five against African-Americans. As a result, the trial jury had four African-American jurors and eight white jurors. * * *

(b) * * * Appellant claims that these race-neutral explanations were inadequate at *Batson* step two because they were "'based almost entirely on . . . demeanor,'" and demeanor is not the "'kind of concrete, tangible, race-neutral, case-related and neutrally applied reason[ ] [that is] sufficient to overcome'" a *Batson* challenge. * * * This argument rests on statements originating in some of our older cases suggesting that at *Batson* step two, the proponent of the challenged strike can carry his burden of production only by offering an explanation that is "case-related" and "specific" in addition to being race-neutral. * * *

However, * * * the suggestion in some of our cases that *Batson step two* requires an explanation that is not only race-neutral but also "case-related" and "specific," are not correct statements of the law. To the contrary, both the United States Supreme Court and this Court have squarely held that a peremptory strike based upon a juror's demeanor during voir dire may be race-neutral at *Batson* step two. [Citing *Snyder v. Louisiana,* 552 U.S. 472, 476 (2008) and *Purkett v. Elem*, 514 U.S. 765, 768 (1995).] * * *.

* * *

[T]o carry the burden of production at step two, the proponent of the strike need not offer an explanation that is "concrete," "tangible," or "specific." The explanation need not even be "case-related." The explanation for the strike only needs to be facially race-neutral. See *Purkett,* 514 U.S. at 766. Any statements to the contrary in [prior precedents] and any other Georgia case are hereby disapproved.

We emphasize, however, that case-relatedness, specificity, and similar considerations remain relevant to a *Batson* challenge. If the proponent of the strike carries its burden by providing a race-neutral explanation for the peremptory strike, the trial court must advance to *step three* of the *Batson* analysis and decide whether the opponent of the strike has proven the proponent's discriminatory intent in light of "all the circumstances that bear upon the issue of racial animosity." This involves an evaluation of the credibility of the strike's proponent, which in turn may depend on the specificity and case-relatedness of the explanation for the strike given at step two. The trial court may conclude that a vague explanation, or one that is in no way case-related, signals an unwillingness by the proponent to provide the real reason for the strike. * * *

* * *

With respect to Juror 28, Appellant offers an additional argument in support of his claim that the State failed to carry its burden of production at step two of the *Batson* analysis. * * * According to Appellant, Juror 28's "body language" and "facial expressions" cannot count as race-neutral reasons at *Batson* step two because these reasons originated with the trial court and not the prosecutor. * * *

The purpose of *Batson* step two is to uncover the actual thinking behind the proponent's decision to strike a prospective juror, including any unconscious bias or stereotypes, so that the trial court can determine at step three whether the opponent of the strike has proven the proponent's subjective discriminatory intent. Observing the proponent of the strike as he struggles to put his thoughts into words provides the court with information that may prove important in evaluating his credibility at step three of the analysis. Interrupting the proponent with the court's suggestions of possible race-neutral explanations short-circuits this process, making it more likely that the proponent will provide pretextual reasons and thus less likely that invidious discrimination will be revealed and eliminated from the jury selection process. It is also unseemly for the trial court to "be perceived as providing the very rationale which the judge must then adjudicate as racially neutral or racially based." * * *

However, * * * [n]othing in *Batson* or its progeny suggests that an appellate court is prohibited from considering a proponent's race-neutral explanation for a peremptory strike offered at *Batson* step two solely because the

words used to articulate the explanation were first uttered by the trial court rather than the proponent. * * * [Under the defense argumet,] if the proponent has a perfectly valid and credible race-neutral explanation for a peremptory strike but does not express it before the trial court does, that explanation cannot be considered, and a strike that was not in fact motivated by racial discrimination nonetheless is invalidated as a violation of equal protection. A *Batson* violation does not turn on perceptions of the trial court; it requires that the party exercising a peremptory strike actually did so with invidious discriminatory intent. We therefore decline Appellant's invitation to impose such an addition to the three-step analysis set forth in *Batson*. * * *

The trial court observed first-hand both the challenged jurors' demeanor during voir dire and the prosecutor's demeanor as he explained the reasons for the peremptory strikes before finding, at step three of the *Batson* analysis, that Appellant failed to carry his burden to prove discriminatory intent on the part of the prosecutor in striking Jurors 12, 20, and 28. The prosecutor's explanations may not be compelling, but the trial court's ultimate finding is entitled to great deference on appeal, and Appellant has not demonstrated that it was clearly erroneous. * * *

* * *

BENHAM, Justice, concurring specially.

* * * I can agree only in judgment as to [the *Batson* issue]. * * * A little background information may be helpful in considering the approach taken by this concurring opinion. The legal journey to a destination in the law where race and gender are impermissible factors in determining whether a person is allowed to serve on a jury, and a litigant's right to have a jury untainted by race and gender consideration, has been long and arduous. * * * It has moved at a snail's pace through treacherous paths with pitfalls, barriers and obstacles along every step of the way. The journey from *Swain v. Alabama* to *Batson v. Kentucky* has taken over twenty years. During that period, countless citizens were denied opportunities to serve on juries throughout this country merely because of their race or gender. This history is indelibly impressed in the minds of hundreds of thousands of hard-working, law-abiding, and self-respecting citizens who were denied opportunities to serve on juries merely because of race or gender. I can remember when the first African-American in my community was allowed to serve on a jury, and the effect that this had on the community as a whole.[1]

As a young lawyer I watched as prospective jurors were stricken from the jury pool time and time again merely because of their race or gender. As president of my local bar association I would watch the prospective jurors, with subpoena in hand beaming with pride and anticipation that they too would be allowed to become a part of government as jurors. As they entered the jury box they made sure that they were well-groomed, polite and well-mannered. They would look up at the judge and out at the lawyers with pride and respect. But, as the process began, their joy turned to gloom as white citizens were retained and black citizens were stricken even though they gave almost identical answers. Looking disappointed and dejected they would leave the jury box crestfallen, sad and feeling less than a full citizen.[2]

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1. It was the early 1950s when our neighbor, Rev. Joseph Slocum, became the first black person to serve on a jury in our circuit. His service was a moment of celebration for our entire community. Rather than becoming angry as to the lack of service, we looked to a brighter day when more would be allowed to serve. * * *

2. It was on one of these many occasions that an African-American woman approached me as the president of the local bar association. She said the following:

> "I dropped everything that I was doing just to come to court and serve on the jury. I was well-dressed, well-mannered, well-educated and respectful. It was my chance to finally become a part of the government of a country and state that I love and honor. I answered all of the questions posed to me, the same as the other white jurors. Yet the whites were

It is with this background in mind that I consider the action of the majority in disapproving the efforts in a line of cases that sought to flesh out, in a more meaningful and practical way, the right to jury service.

* * * I acknowledge that as a state we must accept the U.S. Supreme Court's determinations as to the United States Constitution as well as federal statutes and regulations. However, as the Supreme Court of Georgia, we are free to interpret the Georgia Constitution in a manner that acknowledges the federal floor, but nevertheless raises that floor to provide our citizens with greater rights. * * * Regarding the point of contention in this case, multiple states have held that their state constitution demands more of the proponent of a strike than is required under the United States Constitution after the *Purkett* holding. *See People v. Jamison*, 50 Cal.Rptr.2d 679, 686 (1996) [ordered not published] ("it is appropriate to require that the prosecutor's explanation be race neutral, reasonably specific, and trial related ... because California law is controlling, we are not required to go down the path created by the *Purkett* majority"). See also *Looney v. Davis,* 721 So.2d 152, 164 (Ala.1998) (declining to follow "*Hernandez* and *Purkett*" regarding the scrutiny applied to reasons given by a proponent of a peremptory strike, instead relying on "adequate and independent state law").

The position taken by these states is not foreign to Georgia. In *Parker v. State,* 464 S.E.2d 910 (Ga. 1995), a case heard six months after *Purkett* was decided, our Court of Appeals reversed a trial court's rejection of a criminal defendant's *Batson* challenge, stating:

> We cannot condone the exclusion of the three prospective African-American jurors based almost entirely on their demeanor. The prosecution's reasons for striking these African-American prospective jurors were not the kind of concrete, tangible, race-neutral, case-related and neutrally applied reasons sufficient to overcome Parker's prima facie case.

* * * Judge Pope authored a concurring opinion in which he argued that the majority's ruling could only be valid as an interpretation of the Georgia Constitution, given the recent *Purkett* decision which demanded a different outcome under federal law. [O]ur courts continued for many years to require that justifications for peremptory strikes be "specific," "case-related," and "concrete."

The reluctance of Georgia courts to accept "silly" and "superstitious" justifications suggests agreement with the dissent in *Purkett,* which states "it would take little effort for prosecutors who are of such a mind to adopt rote 'neutral explanations' which bear facial legitimacy but conceal a discriminatory motive." The dissenters in *Purkett* * * * sought * * * to adhere to the law developed in *Batson* itself: "the prosecutor therefore must articulate a neutral explanation *related to the particular case* to be tried." *Batson v. Kentucky*, 476 U.S. at 98.

* * *

Note: For other decisions regarding reasons based on demeanor, *see*, *e.g. United States v.*

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accepted and I was rejected. I feel I have been subpoenaed to court to be made a fool of."

> She then paused and said, "If I am not good enough to serve as a juror, then I am not good enough to cooperate with the administration of justice. In the future, if I see a crime committed I will not volunteer to be a witness. If I am asked to be a part of neighborhood watch I will refuse to do so. If I am asked to be a part of some community activity designed to support the court system I will decline the opportunity. And if I am subpoenaed to come to court again to serve on a jury, I will refuse to do so."

I realized then that the damage done when legitimately qualified citizens are denied service goes beyond the denial of a fair trial to those who appear before the bar of justice. The damage is done to the very foundation of justice itself. It erodes respect for our legal process. It causes citizens not to cooperate with law enforcement and those who administer our system of justice. This damage can be long-term and deep-seated.

McMath, 559 F.3d 657, 666 (7th Cir. 2009) (observing that, "the district court made no findings regarding the prosecutor's race-neutral demeanor-based justification of the strike" and remanding for further proceedings); *People v. Collins*, 187 P.3d 1178, 1183 (Colo. App. 2008) (where reason given was "body language and her sleeping during voir dire," court holds, "the district court did not make any finding crediting these reasons" and therefore they do not rebut the inference of discrimination).

The PEOPLE of the State of Illinois,
Plaintiff-Appellee,
v.
Sherdale RANDALL, Defendant-Appellant.

Appellate Court of Illinois,
First District, Third Division.
671 N.E.2d 60 (1996)

Justice GREIMAN delivered the opinion of the court:

Sherdale Randall (defendant) was convicted by a jury of first degree murder and sentenced to 47 years in prison. * * *

* * *

After jury selection, defendant moved the trial court to recognize a *Batson* violation arising from the State's use of four of its seven peremptory challenges to remove blacks from the venire. * * * [T]he trial court found that the State had provided race-neutral explanations for each of its peremptory challenges and defendant, therefore, had failed to prove purposeful discrimination.

* * *

Batson provides a three-step process for the evaluation of racial discrimination claims in jury selection. * * *

A race-neutral explanation is one based upon something other than the race of the juror. * * * The reasons given by the State need not rise to the level necessary to justify exclusion for cause, but they must constitute more than a mere denial of discriminatory motive. * * * A trial court's finding that the State excused black venire members for race-neutral reasons will not be reversed unless it is clearly erroneous.

Having made these observations, we now consider the charade that has become the *Batson* process. The State may provide the trial court with a series of pat race-neutral reasons for exercise of peremptory challenges. Since reviewing courts examine only the record, we wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, "Handy Race-Neutral Explanations" or "20 Time-Tested Race-Neutral Explanations." It might include: too old,[1] too young, divorced,[2] "long, unkempt hair,"[3] free-lance writer, religion,[4] social worker,[5] renter,[6] lack of family contact, attempting to make eye-contact with defendant, "lived in an area consisting predominantly of apartment complexes,"[7] single, over-educated,[8] lack of maturity, improper demeanor,[9] unemployed, improper attire,[10] juror lived alone,[11] misspelled

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1. *People v. Smith*, 630 N.E.2d 1068 (Ill. App.1994).

2. *People v. Kindelan*, 572 N.E.2d 1138 (Ill. App. 1991).

3. *Purkett v. Elem*, 514 U.S. 765 (1995).

4. *People v. Hope*, 658 N.E.2d 391 (Ill. 1995).

5. *People v. Mitchell*, 604 N.E.2d 877 (Ill. 1992).

6. *Mack v. Illinois*, 493 U.S. 1093 (1990).

7. *People v. Fauntleroy*, 586 N.E.2d 292 (Ill. App. 1991).

8. *People v. Gaston*, 628 N.E.2d 699 (Ill. App. 1993).

9. *People v. Wiley*, 651 N.E.2d 189 (Ill. 1995).

10. *People v. Campbell*, 608 N.E.2d 229 (Ill. App. 1994).

11. *People v. Young*,, 538 N.E.2d 453 (Ill. 1989).

place of employment, living with girlfriend,[12] unemployed spouse, spouse employed as school teacher, employment as part-time barber, friendship with city council member,[13] failure to remove hat,[14] lack of community ties,[15] children same "age bracket" as defendant,[16] deceased father[17] and prospective juror's aunt receiving psychiatric care.[18]

Recent consideration of the *Batson* issue makes us wonder if the rule would be imposed only where the prosecutor states that he does not care to have an African-American on the jury. We are reminded of the musing of Justice Cardozo, "We are not to close our eyes as judges to what we must perceive as men."

In the present case, the trial court found that the defendant had made a prima facie showing of discrimination and required the State to present race-neutral reasons for its exclusion of four black venire members. The sufficiency of those explanations will be examined below.

* * *

Ms. Bond was excused because she was a public high school principal and "we [the State] believe Chicago employees who work with students are much more forgiving." This reason has been found to be race-neutral. Defendant observes, however, that the State did not challenge Wesley Smith, a white school teacher from Wilmette, or Stephanie Garrison, a white school teacher who sat on defendant's jury. Moreover, Ms. Bond had other, favorable characteristics, including having been the victim of a crime, having a close friend who was a crime victim and having a friend who was a police officer. Ms. Garrison had a family member who was the victim of a crime. Ms. Garrison also had formerly been a juror.

The State, both at trial and throughout its argument in this court, has identified "favorable" characteristics of potential jurors, including: (1) crime victim; (2) having friends or family who were crime victims; and (3) friendship with police officers. Similarly, the State has identified prior jury experience as a "negative" characteristic.

Ms. Bond and Ms. Garrison, both educators, are distinguished in that Ms. Bond has been a crime victim and has a friend employed as a police officer. Ms. Garrison also has the "negative" characteristic of previous jury service. Since, using the State's own reasoning, these additional or distinguishing factors seem to favor Ms. Bond, we are at a loss as to why she, and not Ms. Garrison, was excused. The conclusion which best explains the State's use of a peremptory challenge to excuse Ms. Bond is that the challenge was racially motivated. The State's explanation for the exclusion of a black venire member cannot be considered race-neutral if the State failed to exclude a white venire member having the same or similar characteristic and there are no further characteristics meaningfully distinguishing the white venire member who was retained from the challenged black venire member. This we cannot excuse in the course of paying homage to the mandates of *Batson*.

Accordingly, since we are unable to find a race-neutral reason for Ms. Bond's dismissal from defendant's jury, we reverse defendant's conviction and grant him a new trial. * * *

For the reasons set forth above, we reverse defendant's conviction and remand for a new trial. * * *

[Opinion of Justice GALLAGHER, concurring in part and dissenting in part omitted.]

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12. *People v. Caine*,, 630 N.E.2d 1037 (Ill. App. 1994).

13. *People v. Harris*, 647 N.E.2d 893 (Ill. 1994).

14. *People v. Williams,* 645 N.E.2d 844 (Ill. 1994).

15. *People v. Morgan*, 534, 568 N.E.2d 755 (Ill. 1991).

16. *People v. Andrews*, 614 N.E.2d 1184 (Ill. 1993).

17. *People v. Fair*, 636 N.E.2d 455 (Ill. 1994).

18. *People v. Hudson*, 626 N.E.2d 161 (Ill. 1993).

NC Prosecutors Distribute List of Race-Neutral Reasons

Just as the Illinois Court of Appeals had suspected in *Randall*, prosecutors have been provided with "Time-Tested Race-Neutral Explanations" before they have ever seen a juror. Such a list of "pat race-neutral reasons for exercise of peremptory challenges" came to light in North Carolina. A one-page handout, titled "*Batson* Justifications: Articulating Juror Negatives," containing a list of race-neutral reasons a prosecutor could give for strikes was distributed at a North Carolina Conference of District Attorneys' statewide trial advocacy course called *Top Gun II*.[1]

A North Carolina court found that Cumberland County prosecutor Margaret B. Russ had used reasons from the list to justify striking African Americans in four capital cases, including *State v. Parker*, in which the trial judge had sustained a *Batson* objection to her strike of a black man, Forrester Basemore. Reviewing the case under North Carolina's Racial Justice Act, the Superior Court of Cumberland County found:

> 68. * * * Russ proffered reasons based on a handout she received at a prosecution training on *Batson*. * * * The training, *Top Gun II*, was a trial advocacy course. Russ was asked several times whether she had gone to the *Top Gun II* training. Russ did not have a clear recollection, but each time Russ was asked, she became more insistent that she had not attended. Russ' final answer on the subject was, "[M]y recollection is that I did not go to this seminar – the DAs' conference. I was in trial."
>
> 69. Records maintained by the North Carolina Bar * * * contradict Russ' testimony. According to her 1995 CLE Record, Russ reported to the Bar that she had attended *Top Gun II* and she received 25 hours of CLE credit[.]
>
> 70. Among the materials distributed at *Top Gun II* was a one-page handout titled "*Batson* Justifications: Articulating Juror Negatives." Thereafter follows a list of reasons a prosecutor might proffer in response to a *Batson* objection. It is clear from reading the transcript of the *Parker* case that Russ utilized the *Top Gun II* "cheat sheet" in attempting to justify her strike of African-American venire member Bazemore.
>
> 71. The "*Batson* Justifications: Articulating Juror Negatives" training sheet lists ten categories of justifications for striking venire members. The categories include in relevant part:
>
> Age – Young people may lack the experience to avoid being misled or confused by the defense
>
> Attitude – air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney
>
> Body Language – arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies
>
> Juror Responses – which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination
>
> 72. The explanations Russ offered in *Parker* track this list, even using some of the identical language from the handout. * * * Russ began her attempted justification of the Bazemore strike by citing Bazemore's age. She then moved to his "body language" and noted that Bazemore "folded his arms," and sat back in his chair. Russ then described Bazemore as "evasive" and "defensive" and said he gave "basically minimal answers."

1. State v. Golpin, Cumberland Co., NC, Superior Nos. 97 CRS 42314-15, 98 CRS 34832, 35044, 01 CRS 65079, at 73-77, ¶¶ 68-78 (Dec. 13, 2012), https://www.aclu.org/files/assets/rja_order_12-13-12.pdf.

73. Moreover during the colloquy with the trial judge, Russ used language and unwieldy phrases that leave little doubt that she was reading from the handout. At one point, Russ said, "Judge, just to reiterate, those **three categories for *Batson* justification** we would **articulate** is the age, the attitude of the defendant (sic) and the body language." The fact that Russ chose to summarize her explanations as "categories," and then used the precise language for those category titles provided on the handout, rules out coincidence as an explanation. Similarly, it is very convincing evidence that Russ used the title of the handout when addressing the trial judge. Later, Russ referred to "body language and attitude" as **"*Batson* justifications, articulable reasons** that the state relied upon." At another point, after the trial judge asked Russ to show him case law concerning demeanor-based reasons, Russ said, "Judge, I have the summaries here. I don't have the law with me." It is apparent to the Court that the so-called "summaries" included the *Top Gun II* handout and that Russ was unwilling to share that handout with the trial judge.

74. The Court has considered additional cases in which Russ appears to have utilized the demanor-based reasons listed on the *Top Gun II* handout when striking minotiry venire members. * * *

* * *

76. The reasons Russ offered [for striking blacks in three other cases], and Russ' accompanying verbiage in *Parker* are nearly verbatim renditions of the *Top Gun II* handout. Based on all of the evidence in the record, the Court finds that Russ used the *Top Gun II* handout in a calculated – and largely successful – effort to circumvent *Batson*. The fact that Russ relied on a training handout to avoid *Batson*'s mandate is evidence of Russ' untrustworthiness. In addition, it is evidence of her inclination to discriminate on the basis of race.[2]

The court also found that in capital cases in North Carolina, "prosecutors strike African Americans at double the rate they strike other potential jurors."[3] The probability of such a disparity occurring in a race-neutral process is less than one in ten trillion.[4] The court found a history of "resistance" by prosecutors "to permit greater participation on juries by African Americans." It continued:

> That resistance is exemplified by trainings sponsored by the North Carolina Conference of District Attorneys where prosecutors learned not to examine their own prejudices and present persuasive cases to a diverse cast of jurors, but to circumvent the constitutional prohibition against race discrimination in jury selection.[5]

The court found that race had been a significant factor in the capital prosecutions and granted relief under the Racial Justice Act. However, the North Carolina legislature repealed the Act after just two decisions finding that race was a significant factor.

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2. *Id*. at 73-76, ¶¶ 68-74, 76 (emphasis original).

3. *Id*. at 112-201, ¶¶ 171-393. The Court found that prosecutors statewide struck 52.8 per cent of eligible black venire members and 25.7 per cent of all other eligible venire members. *Id*. at 153, ¶ 254.

4. *Id*.

5. *Id*. at 4-5.

The Decision on Discrimination

Because it deals with intentional discrimination and the credibility of the prosecutor, a *Batson* challenge is a uniquely personal one. In making a *Batson* challenge, defense counsel is asserting that the prosecutor intentionally discriminated on the basis of race and lied about it by giving pretextual reasons. As United States District Judge Mark Bennett has pointed out, "'[T]he defendant's practical burden [is] to make a liar out of the prosecutor.' Most trial court judges will only find such deceit in extreme situations."[1]

Beyond that, judges, prosecutors and defense lawyers may know each other and encounter each other frequently in many cases. A defense lawyer may be as hesitant to accuse a prosecutor of discrimination and lying about it as a judge is to find it. The lawyer may not make a *Batson* objection or aggressively pursue it by making a record of disparate treatment in the prosecution's striking of jurors.

Many judges served as prosecutors before becoming judges. The prosecutors now before them may be their former colleagues and friends. Some judges routinely struck prospective jurors on the basis of race when they were lawyers. They may have racial biases of their own.

Judges, who are elected in most states, may have political reasons for not sustaining a *Batson* challenge. Some judges dislike the *Batson* decision for various reasons. Some judges are much more likely to find that a defense lawyer violated *Batson* by striking a prospective white juror than to find that a prosecutor discriminated in striking blacks.

1. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: the Problems of Judge-dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 162 (2010) (*quoting Munson v. State*, 774 S.W.2d 778, 780 (Tex. Crim. App. 1989)).

Miller-El I & II

The practices of the Dallas District Attorney's office, discussed by Justice Marshall in *Batson* came before the Supreme Court in habeas corpus review of a case in which that office secured the death penalty for Thomas Miller-El. Prosecutors used peremptory strikes against 10 of the 11 qualified black venire members.

Because his trial took place before *Batson*, Miller-El challenged the practices of the Dallas District Attorney's office at a pretrial hearing held pursuant to *Swain v. Alabama*. At that hearing, Miller-El's lawyers put on evidence of the practices of the District Attorney's office in striking blacks and introduced a manual which instructed prosecutors to strike blacks. *Batson* was decided while the case was on direct appeal. As a result, it was remanded to the trial court for the prosecutor to give reasons for the strikes and for analysis of the issue under *Batson*. The case did not come to the United States Supreme Court until federal habeas corpus review. The Court first determined whether the Fifth Circuit properly denied a certificate of appealability finding that the district court's denial of the claim did not warrant appellate review.

Justice Kennedy, writing for the Court, summarized the evidence of discrimination:

> A comparative analysis of the venire members demonstrates that African-Americans were excluded from petitioner's jury in a ratio significantly higher than Caucasians were. Of the 108 possible jurors reviewed by the prosecution and defense, 20 were African-American. Nine of them were excused for cause or by agreement of the parties. Of the 11 African-American jurors remaining, however, all but 1 were excluded by peremptory strikes exercised by the prosecutors. On this basis 91% of the eligible black jurors were removed by peremptory strikes. In contrast the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner's jury.

* * * During *voir dire,* the prosecution questioned venire members as to their views concerning the death penalty and their willingness to serve on a capital case. Responses that disclosed reluctance or hesitation to impose capital punishment were cited as a justification for striking a potential juror for cause or by peremptory challenge. *Wainwright v. Witt,* 469 U.S. 412 (1985). The evidence suggests, however, that the manner in which members of the venire were questioned varied by race. * * *

Most African-Americans (53%, or 8 out of 15) were first given a detailed description of the mechanics of an execution in Texas[.]

* * *

Only then were these African-American venire members asked whether they could render a decision leading to a sentence of death. Very few prospective white jurors (6%, or 3 out of 49) were given this preface prior to being asked for their views on capital punishment. * * *

There was an even more pronounced difference, on the apparent basis of race, in the manner the prosecutors questioned members of the venire about their willingness to impose the minimum sentence for murder. Under Texas law at the time of petitioner's trial, an unwillingness to do so warranted removal for cause. This strategy normally is used by the defense to weed out pro-state members of the venire, but, ironically, the prosecution employed it here. The prosecutors first identified the statutory minimum sentence of five years' imprisonment to 34 out of 36 (94%) white venire members, and only then asked: "If you hear a case, to your way of thinking [that] calls for and warrants and justifies five years, you'll give it?" In contrast, only one out of eight (12.5%) African-American prospective jurors were informed of the statutory minimum before being asked what minimum sentence they would impose. * * *

* * *

Furthermore, petitioner points to the prosecution's use of a Texas criminal procedure practice known as jury shuffling. This practice permits parties to rearrange the order in which members of the venire are examined so as to increase the likelihood that visually preferable venire members will be moved forward and empaneled. With no information about the prospective jurors other than their appearance, the party requesting the procedure literally shuffles the juror cards, and the venire members are then reseated in the new order. Shuffling affects jury composition because any prospective jurors not questioned during *voir dire* are dismissed at the end of the week, and a new panel of jurors appears the following week. So jurors who are shuffled to the back of the panel are less likely to be questioned or to serve.

On at least two occasions the prosecution requested shuffles when there were a predominant number of African-Americans in the front of the panel. * * *

Next, we turn to the pattern and practice evidence adduced at petitioner's pretrial *Swain* hearing. Petitioner subpoenaed a number of current and former Dallas County assistant district attorneys, judges, and others who had observed firsthand the prosecution's conduct during jury selection over a number of years. Although most of the witnesses denied the existence of a systematic policy to exclude African-Americans, others disagreed. A Dallas County district judge testified that, when he had served in the District Attorney's Office from the late-1950's to early-1960's, his superior warned him that he would be fired if he permitted any African-Americans to serve on a jury. Similarly, another Dallas County district judge and former assistant district attorney from 1976 to 1978 testified that he believed the office had a systematic policy of excluding African-Americans from juries.

> Of more importance, the defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service. A 1963 circular by the District Attorney's Office instructed its prosecutors to exercise peremptory strikes against minorities: "'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" A manual entitled "Jury Selection in a Criminal Case" was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial.

The Court found that Miller-El had shown "a substantial showing of the denial of a constitutional right" required to obtain a certificate of appealability by demonstrating that jurists of reason could disagree with the district court's resolution of his case or that the issues presented were adequate to deserve encouragement to proceed further. The Court acknowledged the deference required to state court findings of fact and to its reasonable conclusions, but noted "[d]eference does not by definition preclude relief." *Miller-el v. Cockrell*, 537 U.S. 322, 340 (2003). The Court first reversed the denial of a certificate of appealability by the Fifth Circuit. Justice Scalia filed a concurring opinion. Justice Thomas filed the only dissent.

On remand, the Fifth Circuit considered the issue on the merits, but found that there was no *Batson* violation. The Supreme Court reversed and held that *Batson* had been violated in *Miller-El v. Dretke*, 545 U.S. 231 (2005) by a vote of 6-3.

In addition to the indicia of discrimination identified in *Miller-El I*, Justice Souter, writing for the majority, also made "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve," observing that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." The Court concluded that the prosecution's reasons for striking two African Americans applied equally to whites who were permitted to serve, and thus the reasons were pretextual.

The Court held that the evidence was sufficient to overcome the presumption of correctness afforded state court factfindings in federal habeas corpus and was an unreasonable application of *Batson* by the Texas Courts:

> It blinks reality to deny that the State struck [two black venirepersons] * * * because they were black. The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State. The State's pretextual positions confirm Miller-El's claim, and the prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.
>
> The state court's conclusion that the prosecutors' strikes * * * were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous. * * *

Justice Thomas, in a dissent joined by Chief Justice Rehnquist and Justice Scalia, argued that Miller-El had not argued the comparisons made by the majority to the state courts and thus was barred from doing so on federal habeas. In addition, he argued that the majority treated "potential jurors as 'products of a set of cookie cutters,' – as if potential jurors who share only some among many traits must be treated the same to avoid a *Batson* violation."

Rice v. Collins

The following year, in *Rice v. Collins*, 546 U.S. 333 (2006), the Court reversed a decision by the Ninth Circuit Court of Appeals that a *Batson* violation had occurred. The Court held that the Court of Appeals had not given sufficient deference to the state courts as required by the Anti-terrorism and Effective Death Penalty Act:

> * * * Under AEDPA * * * a federal habeas court must find the state-court conclusion "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Thus, a federal habeas court can only grant [the] petition if it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge. State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by "clear and convincing evidence." § 2254(e)(1). * * *
>
> * * *
>
> * * * In this case there is no demonstration that either the trial court or the California Court of Appeal acted contrary to clearly established federal law in recognizing and applying *Batson's* burden-framework. The only question * * * is whether the trial court's factual determination at *Batson's* third step was unreasonable. * * *

Justice Bryer, joined by Justice Souter, concurred and reiterated the view that he expressed in *Miller-El II* that consideration should be given to eliminating preliminary strikes:

> [T]he case before us makes clear that ordinary mechanisms of judicial review cannot assure *Batson's* effectiveness. The reasons are structural. The trial judge is best placed to consider the factors that underlie credibility: demeanor, context, and atmosphere. And the trial judge is best placed to determine whether, in a borderline case, a prosecutor's hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision. Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation. These circumstances mean that appellate courts will, and must, grant the trial courts considerable leeway in applying *Batson*. As the present case illustrates, considerations of federalism require federal habeas courts to show yet further deference to state-court judgments. See 28 U.S.C. § 2254(d)(2) (state-court factual determination must stand unless "unreasonable").
>
> The upshot is an unresolvable tension between, on the one hand, what Blackstone called an inherently "'arbitrary and capricious'" peremptory challenge system, and, on the other hand, the Constitution's nondiscrimination command. Given this constitutional tension, we may have to choose. * * *
>
> I have argued that legal life without peremptories is no longer unthinkable. I continue to believe that we should reconsider *Batson's* test and the peremptory challenge system as a whole. * * *

The Supreme Court summarily reversed the Fifth Circuit's failure to give deference to a state court's decision upholding the exclusion of a juror in *Thaler v. Haynes*, 559 U.S. 43 (2010). Two judges had presided over the jury selection; one observed the questioning of jurors and the second took over when peremptory strikes were exercised. The defense challenged the strike of an African American juror. The prosecutor gave a reason based on demeanor – that the juror had been "somewhat humorous" and her "body language" belied her "true feelings." The challenge was denied.

The Fifth Circuit said that the second judge's decision upholding the prosecution's explanation was not entitled to deference because he had not observed the voir dire of the juror and could not fairly evaluate the *Batson* challenge. It concluded the juror was improperly excluded based on the juror's race. But the Supreme Court reversed. In

a *per curiam* decision, it held that none of its cases clearly established a rule that a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalls the relevant aspect of the prospective juror's demeanor. It remanded the case for reconsideration by the Fifth Circuit under the proper standard.

Snyder v. Louisiana

Snyder was on direct appeal from the Louisiana Supreme Court and thus did not involve deference required in habeas corpus cases. Excerpts from the jury selection are included in "Class 9 Part 2 Snyder Jury Selection.pdf.

Allen SNYDER, Petitioner,
v.
LOUISIANA

Supreme Court of the United States
552 U.S. 472, 128 S.Ct. 1203 (2008).

Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Stevens, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined.

Justice ALITO delivered the opinion of the Court.

Petitioner Allen Snyder was convicted of first-degree murder in a Louisiana court and was sentenced to death. He asks us to review a decision of the Louisiana Supreme Court rejecting his claim that the prosecution exercised some of its peremptory jury challenges based on race, in violation of *Batson v. Kentucky*. We hold that the trial court committed clear error in its ruling on a *Batson* objection, and we therefore reverse.

I

* * * At approximately 1:30 a.m. on August 16, * * * [Snyder] repeatedly stabbed [Howard Wilson and [Snyder's] wife, Mary Snyder], killing Wilson and wounding Mary.

The State charged petitioner with first-degree murder and sought the death penalty based on the aggravating circumstance that petitioner had knowingly created a risk of death or great bodily harm to more than one person.

Voir dire began on Tuesday, August 27, 1996, and proceeded as follows. During the first phase, the trial court screened the panel to identify jurors who did not meet Louisiana's requirements for jury service or claimed that service on the jury or sequestration for the duration of the trial would result in extreme hardship. More than 50 prospective jurors reported that they had work, family, or other commitments that would interfere with jury service. In each of those instances, the nature of the conflicting commitments was explored, and some of these jurors were dismissed.

In the next phase, the court randomly selected panels of 13 potential jurors for further questioning. The defense and prosecution addressed each panel and questioned the jurors both as a group and individually. At the conclusion of this questioning, the court ruled on challenges for cause. Then, the prosecution and the defense were given the opportunity to use peremptory challenges (each side had 12) to remove remaining jurors. The court continued this process of calling 13-person panels until the jury was filled. In accordance with Louisiana law, the parties were permitted to exercise "backstrikes." That is, they were allowed to use their peremptories up until the time when the final jury was sworn and thus were permitted to strike jurors whom they had initially accepted when the jurors' panels were called.

Eighty-five prospective jurors were questioned as members of a panel. Thirty-six of these survived challenges for cause; 5 of the 36 were black; and all 5 of the prospective black jurors were eliminated by the prosecution through the use of peremptory strikes. The jury found

petitioner guilty of first-degree murder and determined that he should receive the death penalty.

* * *

[The Louisiana Supreme Court rejected the *Batson* issue on direct appeal.]

II

* * *

On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous. The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge." In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.,* nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "'peculiarly within a trial judge's province,'" and we have stated that "in the absence of exceptional circumstances, we would defer to [the trial court]."

III

* * *

When defense counsel made a *Batson* objection concerning the strike of [Jeffrey] Brooks, a college senior who was attempting to fulfill his student-teaching obligation, the prosecution offered two race-neutral reasons for the strike. The prosecutor explained:

> I thought about it last night. Number 1, the main reason is that he looked very nervous to me throughout the questioning. Number 2, he's one of the fellows that came up at the beginning [of *voir dire*] and said he was going to miss class. He's a student teacher. My main concern is for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase. Those are my two reasons.

Defense counsel disputed both explanations, and the trial judge ruled as follows: "All right. I'm going to allow the challenge. I'm going to allow the challenge." We discuss the prosecution's two proffered grounds for striking Mr. Brooks in turn.

A

With respect to the first reason, the Louisiana Supreme Court was correct that "nervousness cannot be shown from a cold transcript, which is why . . . the [trial] judge's evaluation must be given much deference." As noted above, deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike. Here, however, the record does not show that the trial judge actually made a determination concerning Mr. Brooks' demeanor. The trial judge was given two explanations for the strike. Rather than making a specific finding on the record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation. It is possible that the judge did not have any impression one way or the other concerning Mr. Brooks' demeanor. Mr. Brooks was not challenged until the day after he was questioned, and by that time dozens of other jurors had been questioned. Thus, the trial judge may not have recalled Mr. Brooks' demeanor. Or, the trial judge may have found it unnecessary to consider Mr. Brooks' demeanor, instead basing his ruling completely on the second proffered justification for the strike. For these reasons, we cannot presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous.

B

The second reason proffered for the strike of Mr. Brooks – his student-teaching obligation – fails even under the highly deferential standard of review that is applicable here. At the beginning of *voir dire,* when the trial court asked the members of the venire whether jury service or sequestration would pose an extreme hardship, Mr. Brooks was 1 of more than 50 members of the venire who expressed concern that jury service or sequestration would interfere with work, school, family, or other obligations.

When Mr. Brooks came forward, the following exchange took place:

> MR. JEFFREY BROOKS: . . . I'm a student at Southern University, New Orleans. This is my last semester. My major requires me to student teach, and today I've already missed a half a day. That is part of my-it's required for me to graduate this semester.
>
> [DEFENSE COUNSEL]: Mr. Brooks, if you – how many days would you miss if you were sequestered on this jury? Do you teach every day?
>
> MR. JEFFREY BROOKS: Five days a week.
>
> [DEFENSE COUNSEL]: Five days a week.
>
> MR. JEFFREY BROOKS: And it's 8:30 through 3:00.
>
> [DEFENSE COUNSEL]: If you missed this week, is there any way that you could make it up this semester?
>
> MR. JEFFREY BROOKS: Well, the first two weeks I observe, the remaining I begin teaching, so there is something I'm missing right now that will better me towards my teaching career.
>
> [DEFENSE COUNSEL]: Is there any way that you could make up the observed observation *[sic]* that you're missing today, at another time?
>
> MR. JEFFREY BROOKS: It may be possible, I'm not sure.
>
> [DEFENSE COUNSEL]: Okay. So that –
>
> THE COURT: Is there anyone we could call, like a Dean or anything, that we could speak to?
>
> MR. JEFFREY BROOKS: Actually, I spoke to my Dean, Doctor Tillman, who's at the university probably right now.
>
> THE COURT: All right.
>
> MR. JEFFREY BROOKS: Would you like to speak to him?
>
> THE COURT: Yeah.
>
> MR. JEFFREY BROOKS: I don't have his card on me.
>
> THE COURT: Why don't you give [a law clerk] his number, give [a law clerk] his name and we'll call him and we'll see what we can do.

* * *

Shortly thereafter, the court again spoke with Mr. Brooks:

> "THE LAW CLERK: Jeffrey Brooks, the requirement for his teaching is a three hundred clock hour observation. Doctor Tillman at Southern University said that as long as it's just this week, he doesn't see that it would cause a problem with Mr. Brooks completing his observation time within this semester.
>
> (Mr. Brooks approached the bench)
>
> THE COURT: We talked to Doctor Tillman and he says he doesn't see a problem as long as

it's just this week, you know, he'll work with you on it. Okay?

MR. JEFFREY BROOKS: Okay.

(Mr. Jeffrey Brooks left the bench).

Once Mr. Brooks heard the law clerk's report about the conversation with Doctor Tillman, Mr. Brooks did not express any further concern about serving on the jury, and the prosecution did not choose to question him more deeply about this matter.

The colloquy with Mr. Brooks and the law clerk's report took place on Tuesday, August 27; the prosecution struck Mr. Brooks the following day, Wednesday, August 28; the guilt phase of petitioner's trial ended the next day, Thursday, August 29; and the penalty phase was completed by the end of the week, on Friday, August 30.

The prosecutor's second proffered reason for striking Mr. Brooks must be evaluated in light of these circumstances. The prosecutor claimed to be apprehensive that Mr. Brooks, in order to minimize the student-teaching hours missed during jury service, might have been motivated to find petitioner guilty, not of first-degree murder, but of a lesser included offense because this would obviate the need for a penalty phase proceeding. But this scenario was highly speculative. Even if Mr. Brooks had favored a quick resolution, that would not have necessarily led him to reject a finding of first-degree murder. If the majority of jurors had initially favored a finding of first-degree murder, Mr. Brooks' purported inclination might have led him to agree in order to speed the deliberations. Only if all or most of the other jurors had favored the lesser verdict would Mr. Brooks have been in a position to shorten the trial by favoring such a verdict.

Perhaps most telling, the brevity of petitioner's trial – something that the prosecutor anticipated on the record during *voir dire* – meant that serving on the jury would not have seriously interfered with Mr. Brooks' ability to complete his required student teaching. As noted, petitioner's trial was completed by Friday, August 30. If Mr. Brooks, who reported to court and was peremptorily challenged on Wednesday, August 28, had been permitted to serve, he would have missed only two additional days of student teaching, Thursday, August 29, and Friday, August 30. Mr. Brooks' dean promised to "work with" Mr. Brooks to see that he was able to make up any student-teaching time that he missed due to jury service; the dean stated that he did not think that this would be a problem; and the record contains no suggestion that Mr. Brooks remained troubled after hearing the report of the dean's remarks. In addition, although the record does not include the academic calendar of Mr. Brooks' university, it is apparent that the trial occurred relatively early in the fall semester. * * * When all of these considerations are taken into account, the prosecutor's second proffered justification for striking Mr. Brooks is suspicious.

The implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'. We recognize that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable. In this case, however, the shared characteristic, *i.e.,* concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause.[2]

---

2. The Louisiana Supreme Court did not hold that petitioner had procedurally defaulted reliance on a comparison of the African-American jurors whom the prosecution struck with white jurors whom the prosecution accepted. On the contrary, the State Supreme Court itself made such a comparison.

A comparison between Mr. Brooks and Roland Laws, a white juror, is particularly striking. During the initial stage of *voir dire,* Mr. Laws approached the court and offered strong reasons why serving on the sequestered jury would cause him hardship. Mr. Laws stated that he was "a self-employed general contractor," with "two houses that are nearing completion, one [with the occupants] . . . moving in this weekend." He explained that, if he served on the jury, "the people won't [be able to] move in." Mr. Laws also had demanding family obligations: "[M]y wife just had a hysterectomy, so I'm running the kids back and forth to school, and we're not originally from here, so I have no family in the area, so between the two things, it's kind of bad timing for me."

Although these obligations seem substantially more pressing than Mr. Brooks', the prosecution questioned Mr. Laws and attempted to elicit assurances that he would be able to serve despite his work and family obligations. ([The] prosecutor ask[ed] Mr. Laws "[i]f you got stuck on jury duty anyway . . . would you try to make other arrangements as best you could?"). And the prosecution declined the opportunity to use a peremptory strike on Mr. Laws. If the prosecution had been sincerely concerned that Mr. Brooks would favor a lesser verdict than first-degree murder in order to shorten the trial, it is hard to see why the prosecution would not have had at least as much concern regarding Mr. Laws.

The situation regarding another white juror, John Donnes, although less fully developed, is also significant. At the end of the first day of *voir dire,* Mr. Donnes approached the court and raised the possibility that he would have an important work commitment later that week. Because Mr. Donnes stated that he would know the next morning whether he would actually have a problem, the court suggested that Mr. Donnes raise the matter again at that time. The next day, Mr. Donnes again expressed concern about serving, stating that, in order to serve, "I'd have to cancel too many things," including an urgent appointment at which his presence was essential. Despite Mr. Donnes' concern, the prosecution did not strike him.

As previously noted, the question presented at the third stage of the *Batson* inquiry is "'whether the defendant has shown purposeful discrimination.'" The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent. * * *

In other circumstances, we have held that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. See *Hunter v. Underwood,* 471 U.S. 222, 228 (1985). We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context. For present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution. * * *

* * *

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

* * * The evaluation of a prosecutor's motives for striking a juror is at bottom a credibility judgment, which lies "'peculiarly within a trial judge's province.'" "[I]n the absence of exceptional circumstances, we [should] defer to state-court factual findings." None of the evidence in the record as to jurors Jeffrey Brooks and Elaine Scott demonstrates that the trial court clearly erred in finding they were not stricken on the basis of race. Because the trial court's determination was a "permissible view of the evidence," I would affirm the judgment of the Louisiana Supreme Court.

* * *

* * * The Court second-guesses the trial court's determinations in this case merely because the judge did not clarify which of the prosecutor's neutral bases for striking Mr. Brooks was dispositive. But we have never suggested that a reviewing court should defer to a trial court's resolution of a *Batson* challenge only if the trial court made specific findings with respect to each of the prosecutor's proffered race-neutral reasons. To the contrary, when the grounds for a trial court's decision are ambiguous, an appellate court should not presume that the lower court based its decision on an improper ground, particularly when applying a deferential standard of review.

The prosecution offered two neutral bases for striking Mr. Brooks: his nervous demeanor and his stated concern about missing class. * * * The Court concedes that "the record does not show" whether the trial court made its determination based on Mr. Brooks' demeanor or his concern for missing class, but then speculates as to what the trial court *might* have thought about Mr. Brooks' demeanor. As a result of that speculation, the Court concludes that it "cannot presume that the trial court credited the prosecutor's assertion that Mr. Brooks was nervous." Inexplicably, however, the Court concludes that it *can* presume that the trial court impermissibly relied on the prosecutor's supposedly pretextual concern about Mr. Brooks' teaching schedule, even though nothing in the record supports that interpretation over the one the Court rejects.

* * *

The Court also concludes that the trial court's determination lacked support in the record because the prosecutor failed to strike two other jurors with similar concerns. Those jurors, however, were never mentioned in the argument before the trial court, nor were they discussed in the filings or opinions on any of the three occasions this case was considered by the Louisiana Supreme Court.[1] Petitioner failed to suggest a comparison with those two jurors in his petition for certiorari, and apparently only discovered this "clear error" in the record when drafting his brief before this Court. We have no business overturning a conviction, years after the fact and after extensive intervening litigation, based on arguments not presented to the courts below.

* * *

Review of *Batson* Claims after *Miller-El II* and *Snyder*

An analysis of *Batson* strikes concludes that a prospective juror is more likely to be struck by lightning than to be seated as a result of a *Batson* challenge. It finds that *Batson* is easily avoided through the articulation of a purportedly race-neutral explanation for juror strikes and, as a result, there is no reason to believe that *Batson* is achieving its goal of eliminating race-based jury exclusion and little hope that it will ever do so. It proposes a modest alteration of the *Batson* framework. *See* Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075 (2011).

Some appellate courts which had deferred almost completely to trial courts after *Batson* and, if not after *Batson*, after *Purkett*, have given more scrutiny to *Batson* challenges after *Miller-El* and *Snyder* at least in extreme cases. The Eleventh Circuit found a *Batson* violation in such a case, *McGahee v. Alabama Department of Corrections*, 560 F.3d 1252, 1261 (11th Cir. 2009). The

1. While the Court correctly observes that the Louisiana Supreme Court made a comparison between Mr. Brooks and unstricken white jurors, that is true only as to jurors Vicki Chauffe, Michael Sandras, and Arthur Yeager. The Court, on the other hand, focuses on Roland Laws and John Donnes, who were never discussed below in this context.

prosecutor challenged nine black jurors for cause – eight were granted by the trial judge – and then struck all 16 blacks left in jury venire to get an all-white jury in a Dallas County, Ala., which is 55 % African American. The trial could did not respond to reasons based on demeanor: "The State's explanation that [a prospective juror] was glaring at the State's attorneys is unsupported by the record. While it is possible that [the juror] was glaring, we have no way of determining the accuracy of that claim because the trial court did not respond to it."

The Court also noted that "the State's claim that several African-Americans were of 'low intelligence' is a particularly suspicious explanation given the role that the claim of 'low intelligence' has played in the history of racial discrimination from juries." The Court found the denial of the claim by the Alabama courts was an unreasonable application of *Batson* as required for habeas relief because the "legal standard requires a state court to review all of the relevant evidence" and the Alabama courts failed to do so. *See also Adkins v. Warden*, 710 F.3d 1241 (11th 2013) (finding *Batson* violation where state courts did not consider all relevant circumstances). *But see Lee v. Commissioner*, 726 F.3d 1172, 1192 (11th Cir. 2013) (rejecting *Batson* challenge even though prosecutor used all 21 of his peremptory challenges against blacks).

The Sixth Circuit also granted habeas relief because the state court did not consider all of the circumstances which bear on the issue of racial bias. *Harris v. Haeberlin*, 526 F.3d 903, 912 n. 3 (6th Cir. 2008). The Court held that the Kentucky Supreme Court unreasonably applied clearly established federal law when it upheld the trial court's *Batson* finding without allowing it to consider a videotape acquired after the ruling because the videotape was an ideal piece of evidence with which to assess prosecutorial credibility).

Justice Thomas argued in dissent in both *Miller-El v. Dretke* and *Snyder* that the comparisons of the black jurors struck with similar white jurors who were accepted by the prosecution were never made to the trial courts and therefore should not have been considered. The Supreme Court majority in footnote 2 of *Snyder* observes that the Louisiana Supreme Court did not find a procedural default with regard to Snyder's failure to argue the comparison of the strike of Jeffrey Brooks and the acceptance of similar white jurors to the trial judge, but engaged in such comparisons itself. Justice Thomas points out in his footnote in dissent in *Snyder* that the jurors discussed by the U.S. Supreme Court majority are different ones than the ones discussed by the Louisiana Supreme Court. Snyder had not argued the comparison with juror Laws, the one the Supreme Court found most compelling, to the Louisiana Supreme Court.

Despite *Miller-El* and *Snyder*, some courts have strictly limited consideration of *Batson* claims to what was argued to the trial judge. For example, the Court of Appeals for the Eleventh Circuit refused to consider a argument based on comparisons of black jurors struck and white jurors accepted because "conspicuously absent from the trial record is some argument or evidence of comparability at the time that the *Batson* challenge was made to refute the prosecutor's reason for the strike." *Atwater v. Crosby*, 451 F.3d 799, 805 (11th Cir. 2006). The Court also refused to consider a comparison argument in *Hightower v. Terry*, 459 F.3d 1067 (11th Cir. 2006), for the same reason, even after the case was remanded to the Court for reconsideration in light of *Miller-El v. Dretke*. However, the Ninth Circuit has held that a defendant may rely upon a comparison of the prosecution's strikes of African-Americans and similarly situated white venire members even though he had not relied upon the comparison before the state trial courts. *Boyd v. Newland*, 467 F.3d 1139, 1148 (9th Cir. 2006).

Multiple Reasons and Dual Motivation

Some courts have held that "[w]hen the motives for the striking a prospective jurors are both racial and legitimate, *Batson* error arises only

if the legitimate reasons are not in themselves sufficient reason for striking the juror." *King v. Moore*, 196 F.3d 1327, 1335 (11th Cir. 1999). In *Moore*, the prosecution's reason for striking an African American was: "She is a young black female[;] the Defendant is a young black male. Her response to the Court's inquiry with regard to her feelings about the death penalty we felt were sufficient for us to have concern about how she would apply the law." *Id*. at 1333. The federal court of appeals rejected the *Batson* claim based on the state court's finding "that the State had mixed motives, but that the nonracial motives – principally [the prospective juror's] equivocation on her death-penalty views – independently sufficed to exclude her." *Id*. at 1334.

This "dual motivation" approach encourages the party exercising the strike to give several reasons for striking a juror in hope that one will be sufficient. In addition, if many reasons are proffered, some of them are bound not to apply to other jurors, making difficult – if not impossible – side-by-side comparisons of jurors struck and jurors accepted.

Other courts have taken the opposite view, holding that if a party gives several reasons and some are found to be pretexts for discrimination, it militates against the sufficiency of the other reasons proffered. *See*, *e.g.*, *Ali v. Hickman*, 584 F.3d 1174, 1192 (2009). *See also e.g.*, *Kesser v. Cambra*, 465 F.3d 351, 360 (9th Cir. 2006) ("court need not find all nonracial reasons pretextual in order to find racial discrimination"); *Robinson v. United States,* 878 A.2d 1273, 1284 (D.C. App. 2005) ("[E]ven if the prosecutor acted from mixed motives, some of which were non-discriminatory, his actions deny equal protection and violate *Batson* if race or gender influenced his decision"); *State v. McCormick*, 803 N.E.2d 1108, 1112-13 (Ind. 2004) (finding that the non-race neutral reason proffered by the State, despite the State's offering of other race-neutral reasons, impermissibly tainted the jury selection and violated *Batson*). The Georgia Court of Appeals has concluded that a "laundry list" of reasons is evidence of discrimination. *Sheets v. State*, 535 S.E.2d 312, 315 (Ga. App. 2000); *McGlohon v. State*, 492 S.E.2d 715, 717-18 (Ga. App. 1997).

Race of judge

The United States Court of Appeals for the Eleventh Circuit rejected as "wholly irrelevant" a factor relied upon by the Alabama Supreme Court – the fact that "a black [trial] judge was not convinced that the state's strikes were racially motivated" – in rejecting a *Batson* claim. *Bui v. Haley*, 321 F.3d 1304, 1317 (11th Cir. 2003). The Court granted habeas corpus relief because of the *Batson* violation.

The ongoing practice and its impact on those struck.

The Equal Justice Initiative of Alabama has issued a report on the continuing practice of striking African Americans from juries, *Illegal Racial Discrimination in Jury Selection: a Continuing Legacy*, Aug. 2010.