NEW YORK STATE BAR ASSOCIATION

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form—you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees please complete, sign and return this form along with your evaluation, to the registration staff **before you leave** the program.

Please turn in this form at the end of the program.

Trial Lawyers Section:
Jury Selection, Peremptory Challenges, Challenges for Cause, Batson & Beyond
March 9, 2018 - Albany Law School, Albany, NY

Name:_____
(please print)

I certify that I was present for the entire presentation of this program

Signature:_____Date:_____

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NYSBA

Jury Selection, Peremptory Challenges, Challenges for Cause, Batson & Beyond

Trial Lawyers Section

March 9, 2018

Albany Law School

Albany, NY

Thank You! This program is made possible by the generous donation of time and expertise by members and volunteers. Thank you to our volunteers—and to you, for choosing NYSBA Programs.

This program is offered for educational purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials, including all materials that may have been updated since the books were printed or distributed electronically. Further, the statements made by the faculty during this program do not constitute legal advice.

Accessing the Online Electronic Course Materials

Program materials will be distributed exclusively online in PDF format. It is strongly recommended that you save the course materials in advance, in the event that you will be bringing a computer or tablet with you to the program.

Printing the complete materials is not required for attending the program.

The course materials may be accessed online at:
<< www.nysba.org/TRIAFA17Materials >>

A hard copy NotePad will be provided to attendees at the live program site, which contains lined pages for taking notes on each topic, speaker biographies, and presentation slides or outlines if available.

Please note:

- You must have Adobe Acrobat on your computer in order to view, save, and/or print the files. If you do not already have this software, you can download a free copy of Adobe Acrobat Reader at https://get.adobe.com/reader/
- If you are bringing a laptop, tablet or other mobile device with you to the program, please be sure that your batteries are fully charged in advance, as electrical outlets may not be available.
- NYSBA cannot guarantee that free or paid Wi-Fi access will be available for your use at the program location.

MCLE INFORMATION

Program Title: **Trial Lawyers Section Meeting 2018**
Date: March 9, 2018 Location: Albany, NY

Evaluation: <https://nysba.co1.qualtrics.com/jfe/form/SV_4Nka4c4IoKZ6KVL>

This evaluation survey link will be emailed to registrants following the program.

Total Credits: **4.0 New York CLE credit hours**

Credit Category:
4.0 Skills

This course is approved for credit for **both** experienced attorneys and newly admitted attorneys (admitted to the New York Bar for less than two years). Newly admitted attorneys attending via webcast should refer to Additional Information and Policies regarding permitted formats.

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff

2) Complete and return a **Verification of Presence form** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Verification of Presence form certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also listed above.

Additional Information and Policies

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

In accordance with New York CLE Board Regulations and Guidelines (section 2, part C), newly admitted attorneys (admitted to the New York Bar for less than two years) must complete **Skills** credit in the traditional live classroom setting or by fully interactive videoconference. **Ethics and Professionalism** credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as a live-streamed webcast that allows questions during the program. **Law Practice Management** and **Areas of Professional Practice** credit may be completed in any approved format.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or (800) 582-2452 (or (518) 463-3724 in the Albany area).

Lawyer Assistance Program 800.255.0569

NYSBA

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

Join Our Section

☐ As a NYSBA member, **PLEASE BILL ME $40 for Trial Lawyers Section dues.** (law student rate is $15)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Trial Lawyers Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ /_____ /_____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Please return this application to:
MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

Join a Trial Lawyers Section Committee(s)

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space availability permits.

___ Appellate Practice (TRIA1100)
___ Arbitration and Alternatives to Dispute Resolution (TRIA1200)
___ Commercial Collections (TRIA4200)
___ Construction Law (TRIA3000)
___ Continuing Legal Education (TRIA1020)
___ Criminal Law (TRIA3300)
___ Diversity (TRIA4100)
___ Employment Law (TRIA3700)
___ Family Law (TRIA4000)
___ Lawyers Professional Liability and Ethics (TRIA3800)
___ Legal Affairs (TRIA2900)
___ Legislation (TRIA1030)
___ Medical Malpractice (TRIA2200)
___ Membership (TRIA3200)
___ Motor Vehicle Law (TRIA3400)
___ No Fault Law (TRIA3500)
___ Real Property Law (TRIA3900)
___ Trial Advocacy Competition (TRIA2700)
___ Trial Practice (TRIA2800)
___ Website (TRIA4400)
___ Workers Compensation (TRIA3600)

2017 MEMBERSHIP DUES

Class based on first year of admission to bar of any state. Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2009 and prior	$275
Attorneys admitted 2010-2011	185
Attorneys admitted 2012-2013	125
Attorneys admitted 2014 - 3.31.2016	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2009 and prior	$180
Attorneys admitted 2010-2011	150
Attorneys admitted 2012-2013	120
Attorneys admitted 2014 - 3.31.2016	60

OTHER

Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2016

NYSBA

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Introduction to Jury Selection

Betty Lugo, Esq.
Pacheco & Lugo, PLLC, Brooklyn

William Pagan, Esq.
The Pagan Law Firm, PC, NYC

Jesus Zeno, Esq.
Jesus M Zeno, PC, Brooklyn

A JUROR'S ASSURANCES OF IMPARTIALITY ARE INADEQUATE TO CURE AN IMPLIED BIAS

As a matter of well-established law, a juror's assurances of impartiality are inadequate to cure an implied bias. Further, rather than testing the bounds of their discretion by allowing a potentially impartial juror to remain on the jury, it is well established that trial courts should lean toward disqualifying jurors of dubious impartiality because, at worst, the court merely replaces one impartial juror with another. *People v Powell*, 2017 NY Slip Op 06104 (3d Dep't. 2017)

PARTY MUST EXHAUST PEREMPTORY CHALLENGES TO APPEAL TRIAL RULING DENYING CHALLENGE

Generally, a ruling that erroneously denies a defendant's challenge for cause merits reversal of a subsequent conviction only when the defendant has exhausted his or her peremptory challenges (*see* CPL 270.20 [2]). *People v Powell*, 2017 NY Slip Op 06104 (3d Dep't. 2017)

Inasmuch as defendant exercised a peremptory challenge with respect to the prospective juror and exhausted all of her peremptory challenges before the completion of jury selection, the denial of her challenge for cause constitutes reversible error (*see*, CPL 270.20 [2]). *People v Hargis*, 151 A.D.3d 1946, 57 N.Y.S.3d 850 (4th Dep't. 2017)

Significantly, the prospective juror never unequivocally asserted that she could be fair and impartial following these remarks. The appellant's subsequent challenge to the prospective juror for cause was denied, and the appellant utilized a peremptory challenge to remove her from the panel. The appellant contends that the denial of his for-cause challenge constituted error. We agree. Contrary to the State's contention, this issue is preserved for appellate review, since the appellant exhausted his peremptory challenges before jury selection was completed. *Matter of State of New York v Keith G.*, 152 A.D.3d 527, 58 N.Y.S.3d 504, (2d Dep't. 2017)

IMPROPER REMARKS BY JUDGE AT JURY SELECTION

Defendant contends that he was deprived of a fair trial based on three improper remarks by County Court during jury selection. Defendant failed to preserve for our review his contention with respect to any of the alleged improper remarks. In any event, the remarks do not warrant reversal. Although some of the court's remarks, when isolated and taken out of context, were arguably improper, we conclude that, when they are viewed in their proper context, they did not prevent the jury "from arriving at an impartial judgment on the merits" or deprive defendant of a fair trial. *People v Oquendo*, 152 A.D.3d 1220, 57 N.Y.S.3d 872 (4th Dep't. 2017)

ATTORNEY MISCONDUCT DURING JURY SELECTION

Allegedly improper comment made by the prosecutor during **jury selection**. That contention is not preserved for our review inasmuch as defense counsel "fail[ed] to request any further relief after the court sustained his objection." *People v Meacham*, 151 A.D.3d 1666, 57 N.Y.S.3d 279, (4th Dep't. 2017)

We agree with defendant, however, that she was denied a fair trial based upon the cumulative effect of the prosecutor's misconduct during jury selection**…."** *People v Hayward-Crawford*, 151 A.D.3d 1584, 55 N.Y.S.3d 562, (4th Dep't. 2017)

FAILURE TO TIMELY EXERCISE CHALLENGE: COURT HAS DISCRETION TO ALLOW

Where a defendant seeks to exercise a peremptory challenge after the time in which to do so has passed, the court has discretion whether to allow the challenge.

Here, defense counsel momentarily lost count of the number of jurors who had been selected. As a result, defense counsel declined to exercise a peremptory challenge to prospective juror 21. When informed that prospective juror 21 was the 12th juror seated, defense counsel immediately asked the court to allow defendant to exercise his last peremptory challenge to that juror. The jury had not yet been sworn, the panel from which the alternates would be selected had not yet been called, and prospective juror 21 had not yet been informed that he had been selected. Furthermore, the People expressly declined to object to the request. Under the circumstances of this case, we conclude that the court abused its discretion in denying defendant's request. *People v Scerbo*, 147 A.D.3d 1497, 47 N.Y.S.3d 607 (4th Dep't. 2017)

FAILURE TO OBJECT WAIVES APPEAL

Although we agree with defendant that the procedure in CPL 270.15 (2) with respect to the sequence for exercising challenges for cause to prospective jurors was violated during jury selection, we conclude that defendant waived any challenge thereto by failing to object. *People v. Newton*, 147 A.D.3d 1463, 47 N.Y.S.3d 582 (4th Dep't. 2017)

The defendant argues that certain jurors should have been dismissed for cause based upon comments they made during jury selection. However, the defendant waived this contention by failing to challenge the jurors for cause before they were sworn. *People v Wiggins*, 146 A.D.3d 995, 48 N.Y.S.3d 676 (2d Dep't. 2017)

TIME LIMITS OF JURY SELECTION PROCESS

60 Minutes "Reasonable"

Jury selection process whereby plaintiff's counsel was permitted 30 minutes (subsequently enlarged to 60 minutes) to question first round of 12 prospective jurors and was required to exercise peremptory challenges prior to similar questioning and peremptory challenges by defendants' counsel, not prejudicial. *Horton v Associates in Obstetrics & Gynecology, P.C.*, 229 A.D.2d 734, 645 N.Y.S.2d 354 (3d Dep't. 1996).

15 Minutes "Unreasonable"

New trial in automobile accident action required where the 15 minutes allowed for each round under the circumstances of the case was unreasonably short; the case involved close factual and medical issues, and evidence from several experts, and the issues implicated involved, among others, proof regarding four distinct injuries and four surgeries, challenges to causation regarding each injury, the relevance and impact of preexisting conditions, the weight to be given evidence from several experts with markedly varying opinions, and consideration of appropriate compensation for a variety of asserted injuries. The record did not indicate that the husband and the wife were not prejudiced by the extremely short time permitted for voir dire. *Zgrodek v McInerney*, 61 A.D.3d 1106, 876 N.Y.S.2d 227 (3d Dep't. 2009).

BATSON

Under the circumstances, we conclude that the nonracial bases advanced by the prosecutor for challenging prospective jurors Nos. 2 and 8 were pretextual. Accordingly, the defendant is entitled to a new trial. *People v Brown*, 2017 NY Slip Op 06289 (2d Dep't. 2017)

We have adopted *Batson* under the State Constitution and prohibit discrimination against prospective jurors by either the People or the defense "on the basis of race, gender or any other status that implicates equal protection concerns." *People v Bridgeforth*, 28 N.Y.3d 567, 46 N.Y.S.3d 824 (2016).

Our State Constitution and Civil Rights Law plainly acknowledge that color is a "status that implicates equal protection concerns."... "Today, we acknowledge color as a classification separate from race for *Batson* purposes, as it has already been acknowledged by our State Constitution and Civil Rights Law. *People v Bridgeforth*, 28 N.Y.3d 567, 46 N.Y.S.3d 824 (2016).

But see,

We reject appellant's argument that, regardless of race, "minorities" in general constitute a cognizable racial group. *People v. Smith*, 81 N.Y.2d 875, 597 N.Y.S.2d 633 (1993)

VARIOUS STATUTES

New York State Constitution

Art. 1 Bill of Rights

§ 2. [Trial by jury; how waived]

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

"The *heretofore been guaranteed* phrase now means that the right to jury applies to all causes of action to which the right attached at the time of the adoption of the 1894 Constitution. The effect of this provision is to continue under the constitution all common law rights to a jury trial prior to 1777 and all statutory rights to such trial by jury enacted prior to 1894. These first two classes exist as constitutionally guaranteed rights."

Judiciary Law

Article 16

§ 506. Source of names

The commissioner of jurors shall cause the names of prospective jurors to be selected at random from the voter registration lists, and from such other available lists of the residents of the county as the chief administrator of the courts shall specify, such as lists of utility subscribers, licensed operators of motor vehicles, registered owners of motor vehicles, state and local taxpayers, persons applying for or receiving family assistance, medical assistance or safety net assistance, persons receiving state unemployment benefits and persons who have volunteered to serve as jurors by filing with the commissioner their names and places of residence.

§ 507. Random selection

The commissioner of jurors shall select the names of prospective jurors, or cause them to be selected, at random from the sources provided in section five hundred six. The selection may be accomplished by mechanical means or by any other method designed to implement the purposes of this article.

CPLR

§ 4104. Number of jurors

- A jury shall be composed of six persons.

§ 4105. Persons who constitute the jury

- The first six persons who appear as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, must be sworn and constitute the jury to try the issue.

§ 4106. Alternate jurors

- One or more additional jurors, to be known as "alternate jurors", may be drawn upon the request of a party and consent of the court. Such alternate juror or jurors shall be drawn at the same time, from the same source, in the same manner, and have the same qualifications as regular jurors, and be subject to the same examinations and challenges. They shall be seated with, take the oath with, and be treated in the same manner as the regular jurors. After final submission of the case, the courtmay, in its discretion, retain such alternate juror or jurorsto ensure availability if needed. At any time, before or after the final submission of the case, if a regular juror dies, or becomes ill, or is unable to perform the duties of a juror, the court may order that juror discharged and draw the name of an alternate, or retained alternate, if any, who shall replace the discharged juror, and be treated as if that juror had been selected as one of the regular jurors. Once deliberations have begun, the court may allow an alternate juror to participate in such deliberations only if a regular juror becomes unable to perform the duties of a juror.

R 4107. Judge present at examination of jurors

- On application of any party, a judge shall be present at the examination of the jurors.

§ 4108. Challenges generally

- An objection to the qualifications of a juror must be made by a challenge unless the parties stipulate to excuse him. A challenge of a juror, or a challenge to the panel or array of jurors, shall be tried and determined by the court.

§ 4109. Peremptory challenges

- The plaintiff or plaintiffs shall have a combined total of three peremptory challenges plus one peremptory challenge for every two alternate jurors. The defendant or defendants (other than any third-party defendant or defendants) shall have a combined total of three peremptory challenges, plus one peremptory challenge for every two alternate jurors. The court, in its discretion before the examination of jurors begins, may grant an equal number of additional challenges to both sides as may be appropriate. In any case where a side has two or more parties, the court, in its discretion, may allocate that side's combined total of peremptory challenges among those parties in such manner as may be appropriate.

§ 4110. Challenges for cause

- **(a) Challenge to the Favor.** The fact that a juror is in the employ of a party to the action; or if a party to the action is a corporation, that he is a shareholder or a stockholder therein; or, in an action for damages for injuries to person or property, that he is a shareholder, stockholder, director, officer or employee, or in any manner interested, in any insurance company issuing policies for protection against liability for damages for injury to persons or property; shall constitute a ground for a challenge to the favor as to such juror. The fact that a juror is a resident of, or liable to pay taxes in, a city, village, town or county which is a party to the action shall not constitute a ground for challenge to the favor as to such juror.

- **(b) Disqualification of Juror for Relationship.** Persons shall be disqualified from sitting as jurors if related within the sixth degree by consanguinity or affinity to a party. The party related to the juror must raise the objection before the case is opened; any other party must raise the objection no later than six months after the verdict.

Uniform Rules For Trial Courts

§ 202.33. Conduct of the Voir Dire

a. Trial judge. All references to the trial judge in this section shall include any judge designated by the administrative judge in those instances where the case processing system or other logistical considerations do not permit the trial judge to perform the acts set forth in this section.

b. Pre-voir dire settlement conference. Where the court has directed that jury selection begin, the trial judge shall meet prior to the actual commencement of jury selection with counsel who will be conducting the voir dire and shall attempt to bring about a disposition of the action.

c. Method of jury selection. The trial judge shall direct the method of jury selection that shall be used for the voir dire from among the methods specified in subdivision (f) below.

d. Time limitations. The trial judge shall establish time limitations for the questioning of prospective jurors during the voir dire. At the discretion of the judge, the limits established may consist of a general period for the completion of the questioning, a period after which attorneys shall report back to the judge on the progress of the voir dire, and/or specific time periods for the questioning of panels of jurors or individual jurors.

e. Presence of judge at the voir dire. In order to ensure an efficient and dignified selection process, the trial judge shall preside at the commencement of the voir dire and open the voir dire proceeding. The trial judge shall determine whether supervision of the voir dire should continue after the voir dire has commenced and, in his or her discretion, preside over part of or all of the remainder of the voir dire.

f. and using the method designated by the judge pursuant to subdivision (c). The methods that may be selected are:

(1) "White's method," as set forth in Appendix "E"* of this Part;
(2) "Struck method," as set forth in Appendix "E"* of this Part;
(3) "Strike and replace method," in districts where the specifics of that method have been submitted to the Chief Administrator by the Administrative Judge and approved by the Chief Administrator for that district. The strike and replace method shall be approved only in those districts where the Chief Administrator, in his or her discretion, has determined that experience with the method in the district has resulted in an efficient and orderly selection process; or
(4) Other methods that may be submitted to the Chief Administrator for use on an experimental basis by the appropriate Administrative Judge and approved by the Chief Administrator.

Pt 202 APPENDIX E

Appendix E. Procedures for Questioning, Challenging and Selecting Jurors Authorized by Section 202.33 of the Rules of the Chief Administrator of the Courts.

- **A. General principles applicable to jury selection.** Selection of jurors pursuant to any of the methods authorized by section 202.33(e) of the Rules of the Chief Administrator shall be governed by the following:
  - **(1)** If for any reason jury selection cannot proceed immediately, counsel shall return promptly to the courtroom of the assigned trial judge or the Trial Assignment Part or any other designated location for further instructions.
  - **(2)** Generally, a total of eight jurors, including two alternates, shall be selected. The court may permit a greater number of alternates if a lengthy trial is expected or for any appropriate reason. Counsel may consent to the use of "nondesignated" alternate jurors, in which even no distinction shall be made during jury selection between jurors and alternates, but the number of peremptory challenges, in such cases shall consist of the sum of the peremptory challenges that would have been available to challenge both jurors and designated alternates.
  - **(3)** All prospective jurors shall complete a background questionnaire supplied by the court in a form approved by the Chief Administrator. Prior to the commencement of jury selection, completed questionnaires shall be made available to counsel. Upon completion of jury selection, or upon removal of a prospective juror, the questionnaires shall be either returned to the respective jurors or collected and discarded by court staff in a manner that ensures juror privacy. With Court approval, which shall take into consideration concern for juror privacy, the parties may supplement the questionnaire to address concerns unique to a specific case.
  - **(4)** During the voir dire each attorney may state generally the contentions of his or her client, and identify the parties, attorneys and the witnesses likely to be called. However, counsel may not read from any of the pleadings in the action or inform potential jurors of the amount of money at issue.
  - **(5)** Counsel shall exercise peremptory challenges outside of the presence of the panel of prospective jurors.
  - **(6)** Counsel shall avoid discussing legal concepts such as burden of proof, which are the province of the court.
  - **(7)** If an unusual delay or a lengthy trial is anticipated, counsel may so advise prospective jurors.
  - **(8)** If counsel objects to anything said or done by any other counsel during the selection process, the objecting counsel shall unobtrusively request that all counsel step outside the juror's presence, and counsel shall make a determined effort to resolve the problem. Should that effort fail, counsel shall immediately bring the problem to the attention of the assigned trial judge, the Trial Assignment Part judge or any other designated judge.
  - **(9)** After jury selection is completed, counsel shall advise the clerk of the assigned Trial Part or of the Trial Assignment Part or other designated part. If counsel anticipates the need during trial of special equipment (if available) or special assistance, such as an interpreter, counsel shall so inform the clerk at that time.
- **B. "White's Method"**
  - **(1)** Prior to the identification of the prospective jurors to be seated in the jury box, counsel shall ask questions generally to all of the jurors in the room to determine whether any prospective juror in the room has knowledge of the subject matter, the parties, their attorneys or the prospective witnesses. A response from a juror that requires elaboration may be the subject of further questioning of that juror by counsel on an individual basis. Counsel may exercise challenges for cause at this time.
  - **(2)** After general questions have been asked to the group of prospective jurors, jury selection shall continue in rounds, with each round to consist of the following: (1) seating prospective jurors in the jury box; (2) questioning of seated prospective jurors; and (3) removal of seated prospective jurors upon exercise of challenges. Jurors removed for cause shall immediately be replaced during each round. The first round shall begin initially with the seating of six prospective jurors (where undesignated alternates are used, additional prospective jurors equal to the number of alternate jurors shall be seated as well).
  - **(3)** In each round, the questioning of the seated prospective jurors shall be conducted first by counsel for the plaintiff, followed by counsel for the remaining parties in the order in which their names appear in the caption. Counsel may be permitted to ask follow-up questions. Within each round, challenges for cause shall be exercised by any party prior to the exercise of peremptory challenges and as soon as the reason therefor becomes apparent. Upon replacement of a prospective juror removed for cause, questioning shall revert to the plaintiff.

- **(4)** Following questioning and the exercise of challenges for cause, peremptory challenges shall be exercised one at a time and alternately as follows: In the first round, in caption order, each attorney shall exercise one peremptory challenge by removing a prospective juror's name from a "board" passed back and forth between or among counsel. An attorney alternatively may waive the making of a peremptory challenge. An attorney may exercise a second, single peremptory challenge within the round only after all other attorneys have either exercised or waived their first peremptory challenges. The board shall continue to circulate among the attorneys until no other peremptory challenges are exercised. An attorney who waives a challenge may not thereafter exercise a peremptory challenge within the round, but may exercise remaining peremptory challenges in subsequent rounds. The counsel last able to exercise a peremptory challenge in the round is not confined to the exercise of a single challenge but may then exercise one or more peremptory challenges.
- **(5)** In subsequent rounds, the first exercise of peremptory challenges shall alternate from side to side. Where a side consists of multiple parties, commencement of the exercise of peremptory challenges in subsequent rounds shall rotate among the parties within the side. In each such round, before the board is to be passed to the other side, the board must be passed to all remaining parties within the side, in caption order, starting from the first party in the rotation for that round.
- **(6)** At the end of each round, those seated jurors who remain unchallenged shall be sworn and removed from the room. The challenged jurors shall be replaced, and a new round shall commenced.
- **(7)** The selection of designated alternate jurors shall take place after the selection of the six jurors. Designated alternate jurors shall be selected in the same manner as described above, with the order of exercise of peremptory challenges continuing as the next round following the last completed round of challenges to regular jurors. The total number of peremptory challenges to alternates may be exercised against any alternate, regardless of seat.
-

- **C. "Struck Method"**
  - **(1)** Unless otherwise ordered by the Court, selection of jurors shall be made from an initial panel of 25 prospective jurors, who shall be seated randomly and who shall maintain the order of seating throughout the voir dire. If fewer prospective jurors are needed due to the use of designated alternate jurors or for any other reason, the size of the panel may be decreased.
  - **(2)** Counsel first shall ask questions generally to the prospective jurors as a group to determine whether any prospective juror has knowledge of the subject matter, the parties, their attorneys or the prospective witnesses. A response from a juror that requires further elaboration may be the subject of further questioning of that juror by counsel on an individual basis. Counsel may exercise challenges for cause at this time.
  - **(3)** After the general questioning has been completed, in an action with one plaintiff and one defendant, counsel for the plaintiff initially shall question the prospective jurors, followed by questioning by defendant's counsel. Counsel may be permitted to ask follow-up questions. In cases with multiple parties, questioning shall be undertaken by counsel in the order in which the parties' names appear in the caption. A challenge for cause may be made by counsel to any party as soon as the reason therefor becomes apparent. At the end of the period, all challenges for cause to any prospective juror on the panel must have been exercised by respective counsel.
  - **(4)** After challenges for cause are exercised, the number of prospective jurors remaining shall be counted. If that number is less than the total number of jurors to be selected (including alternates where non-designated alternates are being used) plus the maximum number of peremptory challenges allowed by the court or by statute that may be exercised by the parties (such sum shall be referred to as the "jury panel number"), additional prospective jurors shall be added until the number of prospective jurors not subject to challenge for cause equals or exceeds the jury panel number. Counsel for each party then shall question each replacement juror pursuant to the procedure set forth in paragraph 3.
  - **(5)** After all prospective jurors in the panel have been questioned, and all challenges for cause have been made, counsel for each party, one at a time beginning with counsel for the plaintiff, shall then exercise allowable peremptory challenges by alternately striking a single juror's name from a list or ballot passed back and forth between or among counsel until all challenges are exhausted or waived. In cases with multiple plaintiffs and/or defendants, peremptory challenges shall be exercised by counsel in the order in which the parties' names appear in the caption, unless following that order would, in the opinion of the court, unduly favor a side. In that event, the court, after consulting with the parties, shall specify the order in which the peremptory challenges shall be exercised in a manner that shall balance the interests of the parties.
  - An attorney who waives a challenge may not thereafter exercise a peremptory challenge. Any Batson or other objections shall be resolved by the court before any of the struck jurors are dismissed.

- **(6)** After all peremptory challenges have been made, the trial jurors (including alternates when non-designated alternates are used) then shall be selected in the order in which they have been seated from those prospective jurors remaining on the panel.
- **(7)** The selection of designated alternate jurors shall take place after the selection of the six jurors. Counsel shall select designated alternates in the same manner as set forth in these rules, but with an initial panel of not more than 10 prospective alternates unless otherwise directed by the court. The jury panel number for designated alternate jurors shall be equal to the number of alternates plus the maximum number of peremptory challenges allowed by the court or by statute that may be executed by the parties. The total number of peremptory challenges to alternates may be exercised against any alternate, regardless of seat.

Part 220. Uniform Rules for Jury Selection and Deliberation

Subpart A. Uniform Rules for Jury Selection

Subpart B. Uniform Rules for Juror Deliberation

Juror Questions and Answers (FAQ's)

Where do you get the names of potential jurors?

Potential jurors are randomly selected from

- lists of registered voters,
- holders of drivers' licenses or ID's issued by the Division of Motor Vehicles,
- New York State income tax filers,
- recipients of unemployment insurance or
- recipients of family assistance, and from
- volunteers.

Who must report?

There are no automatic exemptions or excuses from jury service in New York State. Everyone who is eligible must serve. You are eligible to serve as a juror in New York State if you are:
1) a United States citizen,
2) at least 18 years old, and
3) a resident of the county to which you are summoned to serve.

In addition, jurors must

4) be able to understand and communicate in the English language, and
5) not have been convicted of a felony

What happens if a juror does not report for jury service?

Jury duty, like paying taxes, is mandatory. Skipping jury duty can result in civil or criminal penalties. In addition, anyone who skips jury service will be assigned a new date for future jury service.

What accommodations are available for jurors with disabilities?

The court provides services or aids to reasonably accommodate jurors with disabilities. Aids that are generally available for hearing impaired people include assistive listening devices, sign language interpreters, and “real-time” captioning of court proceedings. Courts may also be able to provide a reader for visually impaired jurors. A juror who has a mobility impairment and is sent to a courtroom with access problems may be reassigned to a different location that has better access. TDD users can call the relay service at 1-800-662-1220 to place the call. Some courts may have a TDD or TTY in the Clerk’s office. Access questions or requests for assistance should be addressed to a jury commissioner, court clerk or judge.

Can jurors postpone jury service for a later date?

You can postpone your service once online or by calling 800-449-2819 at least one week before your date of service. Have your juror index number (from your summons) with you when you call. Pick a date between 2 and 6 months from the date on your summons and you will be assigned the available date closest to your choice. Any future request for postponement or excusal must be made by contacting your local commissioner of jurors office.

If you cannot serve even if granted a postponement, you may contact your local commissioner of jurors office and ask to be excused from service. The commissioner may ask you to provide documentary proof of the reasons why you need to be excused.

How long is jury service?

Jurors who do not sit on a jury trial may serve for as little as 1–2 days. However, even if not needed for a trial, a juror may be asked to be available or on call for up to five days. Those who are selected to serve on a jury are required to serve on only one trial. The judge informs the jurors how long the trial is expected to last. Length of service on a grand jury may vary from two weeks to a month or more. For more information about service as a grand juror see the Unified Court System’s “Grand Juror’s Handbook.”

Are jurors paid?

The jury fee is $40 per day. If service extends beyond 30 days the court may authorize an additional $6 per day per juror. The fee is paid by the State or the employer depending on (1) the day of service and (2) the size of employer. Employers’ jury fee obligations are explained below. For help figuring out how the rules apply to your individual circumstances, you can use the chart “Who Pays Your Jury Fee?” The Commissioner of Jurors will collect the Social Security number from any juror who is likely to be paid $600 or more in jury fees.

How long does it take for jurors to get paid?

Four to six weeks.

What if my summons or questionnaire is lost?

Contact your local Commissioner of Jurors. Find contact information by scrolling down at “Select County” in the box on the left menu.

Email Your County:

Can I request an excuse from service due to a financial or medical hardship?

Yes. Jurors are normally required to provide supporting documentation. Contact your local Commissioner of Jurors.

Email Your County:

Is there an age restriction for jurors?

Jurors must be at least 18 years old. There is no upper age limit.

What happens if a juror does not report for jury service?

Jury duty, like paying taxes, is mandatory. Skipping jury duty can result in civil or criminal penalties. In addition, anyone who skips jury service will be assigned a new date for future jury service.

If I serve as a juror in federal court do I still have to serve in state court?

A person who serves in a State or Federal court in New York—either by reporting in person or by being available to serve via a telephone call-in system—normally is not eligible to serve again in the New York State courts for at least six years. A juror who serves for more than ten days normally is not eligible to serve again in the New York State courts for at least eight years. Jurors who physically report to serve in Town and Village courts are eligible to serve again in two years. Just because a person is eligible to serve does not mean they will be called.

If I served as a juror in New York State Court, do I still have to serve in federal court?

Each of the four federal district courts in New York State treats the length of time for ineligibility from service differently. The Eastern, Western, and Northern Districts excuse from service anyone who has served within two years. The Southern District excuses anyone who has served within four years. If your service in the Eastern District (Queens, Kings, Richmond, Nassau or Suffolk) was limited to telephone standby you are not excused from federal court service. In the Northern District (32 northern counties) a summoned juror who attended a jury selection in state court but was not selected to serve on a jury is not excused. For specific information about each court's practices go toNYS Federal Court Jury Rules.

How can jurors make comments regarding jury service?

- Contact the Commissioner of Jurors for your county:

History of Batson v. Kentucky and Its Progeny

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CLE- OCTOBER 14, 2017

BATSON CHALLENGES

Presenter: Marisa K. Cabrera, Esq.
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BATSON CHALLENGES

A. Background

The "Constitution forbids striking even a single prospective juror for discriminatory purpose." Snyder v. Louisiana, 552 U.S. 472, 478 (2008). In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court held that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race. Id. at 89. Batson has been extended by the Supreme Court to apply to gender, J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994), and ethnicity, Hernandez v. New York, 500 U.S. 352, 359 (1991). New York adopted Batson under the State Constitution and prohibits discrimination against prospective jurors by either the People or the defense "on the basis of race, gender, or any other status that implicates equal protection concerns." People v. Luciano, 10 N.Y.3d 499, 502-03 (2008); see People v. Kern, 75 N.Y.2d 638 (1990).

B. Making a Batson Challenge

Batson sets forth the three-step burden-shifting procedure to assess claims of discrimination during the jury selection process. Courts are supposed to strictly abide by the three-step procedure discussed in more detail below; however, they often confuse and conflate the steps.

Step One – the moving party bears the initial burden of establishing a prima facie case that the opposing party has intentionally used its peremptory challenges to discriminate against a cognizable group. The prima facie case has two components: the cognizable class and facts and circumstances giving rise to an inference of discrimination.

Step Two – the burden shifts to the opposing party to articulate a facially non-discriminatory ("neutral") reason for striking the juror(s).

Step Three – the trial court must determine, based on the arguments presented by the parties, whether the proffered reason for the peremptory strike was pretextual and whether the movant has shown purposeful discrimination.

1. Step One: A Prima Facie Case

a. Legal Standard

As noted above, a Batson challenge begins with making a step one showing of a prima facie case of intentional discrimination. This showing has two components: 1) identifying the cognizable

class and 2) setting forth "facts and other relevant circumstances" to support an inference or "pattern" of discrimination. See Batson; People v. Hecker, 15 N.Y.3d 625, 651 (2010).

The Supreme Court has noted that the step one burden is not intended to be onerous. See Johnson v. California, 545 U.S. 162 (2005); see also Truesdale v. Sabourin, 427 F. Supp. 2d 451, 460 (S.D.N.Y. 2006) (noting that Batson "does not support the differential treatment of claims based on a pattern of strikes and claims based on other forms of evidence. . . . Nor does Batson support a requirement that any argument made at the first step of the Batson inquiry be 'compelling' or 'conclusive.'"). In fact, the moving party need only demonstrate an "inference" of discrimination. People v. Smocum, 99 N.Y.2d 418, 421 (2003); People v. Childress, 81 N.Y.2d 263, 268 (1993). While identifying a cognizable class is relatively straightforward, demonstrating a "pattern" of discrimination has not proven easy for litigants.

i. Cognizable Class

A cognizable class has been defined as "a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." Castaneda v. Partida, 430 U.S. 482 (1977) (discussing equal protection violations in grand jury context). Cognizable groups, include (but are not limited to):

-**Race** - Batson v. Kentucky, 476 U.S.79 (1986) (black jurors); People v. Payton, 204 A.D.2d 661 (2d Dep't 1994) (white jurors).

-**Gender** - People v. Irizarry, 165 A.D.2d 715 (1st Dep't 1990) (female jurors); People v. Wilson, 65 A.D.3d 956 (1st Dep't 2009) (male jurors); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) (same).

-**National origin** - People v. Hernandez, 75 N.Y.2d 350 (1990) (Latino jurors); United States v. Rudas, 905 F.2d 38 (2d Cir. 1990) (same); People v. Rambersed, 170 Misc. 2d 923 (Sup. Ct., Bx. Cty. 1996) (Italian-Americans).

-**Hybrid of any of these protected classes** – People v. Bridgeforth, 28 N.Y.3d 567 (2016) ("dark-colored" women).

-**Sexual orientation** – People v. Baker, 211 A.D.2d 602 (1st Dep't 1995) (finding Batson challenge unpreserved on appeal, but denied existence of a pattern of discrimination as to "homosexual" prospective jurors); Smithkline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014).

-**Religious Affiliation** – United States v. Somerstein, 959 F. Supp. 592 (E.D.N.Y. 1997) (Jewish jurors); People v. Langston, 167 Misc. 2d 400 (Sup. Ct., Queens Cty. 1996) (Muslim jurors). But see United States v. Brown, 352 F.3d 654 (2d Cir. 2003) (distinguishing religious

affiliation – a protected class – from those engaged in religious activities – not a cognizable group).

-**Skin Color/People of color/Skin tones** - People v. Bridgeforth, 28 N.Y.3d 567 (2016) ("dark-colored" skin tone was a protected class to challenge exclusion of black and Indian women). But see People v. Ortega, __ Misc. 3d __, 2017 WL 3461034 (Sup. Ct., N.Y. Cty. Aug. 8, 2017) (declining to find that "people of color" was a cognizable class under Bridgeforth where the group was non-white, but was comprised of African-Americans, Hispanics, and Middle Easterners).

Groups that courts have held **not** to be cognizable include:

-**"Minorities"** - People v. Smith, 81 N.Y.2d 875 (1993).

-**Political Affiliation** - United States v. Prince, 647 F.3d 1257 (10th Cir. 2011); Jaquith v. South Orangetown Cent. School Dist., 349 F. App'x 653 (2d Cir. 2009).

-**Age** - People v. Assi, 63 A.D.3d 19 (1st Dep't 2009); United States v. Helmstetter, 479 F.3d 750 (10th Cir. 2007).

> **Practice Tip:** While age independently is not a cognizable group, there is an open question in NY as to whether or not age, in combination with other cognizable groups, is a protected class. See, e.g., Robinson v. United States, 890 A.2d 674 (D.C. 2006) (recognizing "young black males" as a cognizable

ii. "Facts and other relevant circumstances"

In addition to identifying a cognizable class, the movant must also show "that the facts and circumstances of the voir dire raise an inference that the other party excused one or more jurors for an impermissible reason." People v. Smocum, 99 N.Y.2d 418, 421 (2003). There are no fixed rules for determining what will establish an "inference" of discrimination, however, the following is a non-exhaustive list of things you want to consider when making out a prima facie case:

-The pattern of strikes (numerical arguments are discussed in the next section).
-Whether the prosecutor questioned the challenged jurors during voir dire.
-Whether the prosecutor struck "members of this group who, because of their background and experience, might otherwise be expected to be favorably disposed to the prosecution." Childress, 81 N.Y.2d at 267. Examples include, education levels, stable employment, ties to law enforcement, lack of criminal history, etc.
-Whether members of the cognizable group were excluded while others with the same

relevant characteristics were not. See Foster v. Chapman, 578 U.S. __, 136 S. Ct. 1737 (2016); Childress, 81 N.Y.2d at 267; People v. Bolling, 79 N.Y.2d 317, 324-25 (1992); People v. Rodriguez, 211 A.D.2d 275, 277-78 (1st Dep't 1995).

iii. Numerical Arguments

While litigants should use numerical arguments in support of meeting its prima facie burden, the Court of Appeals has cautioned that "numerical or statistical arguments are '**rarely** conclusive in the absence of other facts or circumstances' to give rise to an inference of discrimination." Hecker, 15 N.Y.3d at 651 (quoting People v. Brown, 97 NY2d 500, 507 (2002) (emphasis added)).

Nonetheless, this should not discourage litigants from raising numerical arguments. See, e.g., People v. Rosado, 45 A.D.3d 508 (1st Dep't 2007) (numerical argument sufficient to raise inference of discrimination although not accompanied by other evidence); People v. Brown, 97 N.Y.2d 500, 507 (2002) (noting that a disproportionate number of strikes against a particular group may be sufficient to create an inference that establishes a prima facie claim). Numerical arguments help paint a picture (especially on appeal!) as to who comprises the venire and whether peremptory strikes are being disproportionately utilized against a specific group.

b. Practical Matters

i. Notetaking

Before an attorney can even know if a Batson challenge is warranted, careful attention to the personal details of each prospective juror is necessary. In order to make an effective Batson challenge, the party must note the name, race, color, and gender of each prospective juror (as well as any notes pertaining to national or religious affiliation if it is evident). Additionally, the parties must take notes as to the background of each prospective juror (important facts include, whether there are ties to law enforcement, education level, profession, crime victim, family member of crime victim, etc.).

Practice Tip: There can be a lot of important information that is revealed in a short time span, so it helps to have your client, if possible, take down notes as well. This assists you as a practical matter, allows your client to contribute to the jury selection process, and gives the prospective jurors (who will eventually be sworn jurors) the opportunity to see your client taking an active and interested role in the litigation of his/her case. More, jurors will believe that you trust your client enough to play an important role in this process – a sentiment that could impact deliberations.

ii. Making a Record

Two things to keep in mind: 1) clearly state what protected group(s) are being unlawfully stricken and 2) identify (by name and number) which prospective jurors you are challenging as part of the protected class. Many records are left unintelligible on appeal because defense counsel has neglected to state which prospective jurors are being challenged. This is particularly important if you are challenging the use of peremptory strikes from a **prior** round.

-**Note:** If you have previously made a Batson challenge as to the same protected class that the court denied, make sure to join your prior Batson challenge with your current challenge. This will help further establish your pattern.

Other things to state when making a record for a Batson claim:
-How many prospecitve jurors are on the venire?
-How many of those prospective jurors were part of the protected class?
-How many jurors of that protected class remain on the panel after the prosecutor's use of peremptory strikes?
-What are the name and numbers of similarly situated jurors that the prosecutor did not strike?
-How many similarly situated jurors were not stricken by the prosecution?

To develop a clear record for appeal, it is also important to identify the juror by name during voir dire. Oftentimes, attorneys will seamlessly go from juror to juror during voir dire without identifying the juror, making it impossible to know whether those were the responses of jurors later named in a Batson challenge. Therefore, at least when you are zeroing in on a particular prospective juror as one who might be challenged for cause or involved in a Batson issue, try to address that juror by name during the voir dire. If the key questions were asked by the court or opposing counsel, restate, as best you can, during your argument of the resulting issue exactly what the juror said, so the appeals attorney can identify the relevant parts of the transcript.

2. Step Two: Neutral Reasons

Assuming the court finds a prima facie case of discrimination, step two places the burden on the opponent of the Batson challenge to provide non-discriminatory reasons for its patterned use of peremptory challenges against a cognizable class. However, if the complaining party does not question a particular strike, the party defending the strike is not required to provide a neutral reason for it. People v. James, 99 N.Y.2d 264 (2002); People v. Manigo, 165 A.D.2d 660 (1st Dep't 1990). Any "facially-neutral reason" for the challenge is enough to rebut the prima facie case, even if the reason is ill-founded, unpersuasive, or implausible. Purkett v. Elam, 514 U.S. at 768; People v. Allen, 86 N.Y.2d 101, 109-10 (1995).

"Determination whether the People's proffered reasons meet their burden is a question of law: assuming the proffered reasons for the peremptory challenges are true, do the challenges violate the Equal Protection Clause?'' Allen, 86 N.Y.2d at 109. Thus, unless a discriminatory intent is "inherent in the . . . explanation," the reason proffered will be deemed neutral. Id. at 110; Smocum, 99 N.Y.2d 418.

Nonetheless, there are limitations. One cannot meet the step two burden by claiming "good faith." Purkett v. Elam, 514 U.S. at 769; People v. Jenkins, 75 N.Y.2d 550 (1990); People v. Reid, 212 A.D.2d 642 (2d Dep't 1995) (prosecutor's statement that as a black individual she was very sensitive to racial discrimination was insufficient because it was little more than a denial of discriminatory purpose and an assertion of good faith). Nor is the failure to recall the reason for the peremptory strike sufficient to meet the burden. People v. Dove, 172 A.D.2d 768, 769 (2d Dep't 1991). Moreover, the trial court, rather than the opposing party, cannot be the person to supply the neutral reason even if it is evident on the face of the record. Williams v. Louisiana, __ U.S. __, 136 S. Ct. 2156 (2016).

> **Note:** In a reverse Batson challenge, the defense will be the party that will have to offer neutral reasons for its peremptory strikes. As a result, notetaking is critical to providing neutral reasons for the peremptory challenges. Additionally, during step two of a reverse Batson, the defense should be challenging the prosecution's prima facie case, arguing that either a cognizable group has not been identified and/or that the facts and circumstances did not establish a pattern of discrimination.

3. Step Three: Pretext

Assuming the court finds that the striking party's explanations are neutral, the burden shifts back to the moving party to "persuade the court that reasons are merely a pretext for intentional discrimination." People v. Hecker, 15 N.Y.3d 625, 656 (2010). This is a factual, not legal, determination that the court must make based on all of the facts and circumstances presented. Id.

> **Practice Tip:** Since the court must consider all of the facts and circumstances presented, you should cite to the facts listed in your step one showing to support your Batson claim. These facts that were elicited during step one are still relevant in the step three analysis as they explain why the prosecutor's purportedly neutral reason is pretextual.

The court can consider a variety of factors when assessing pretext. "Credibility can be measured by among other factors, the demeanor of the opposing party, by how reasonable or how improbable, the explanations are, and by whether the proffered rationale has some basis in

accepted strategy." Miller-El v. Cockrell, 537 U.S. 332, 339 (2003). In People v. Richie, 217 A.D.2d 84, 89 (2d Dep't 1995), the Second Department suggested five factors in assessing pretext:

> 1. Whether the reason proffered by the party exercising the peremptory challenge relates at all to the facts of the case,
>
> 2. The extent to which the party exercising the peremptory challenge actually questioned the proposed juror,
>
> 3. Whether particular questions were asked of only one group of jurors, and not of others,
>
> 4. Whether a particular reason was applied to only one group of jurors, and not to others,
>
> 5. Whether the reason proffered was based upon "hard data" or was purely intuitive.

Practice Tip: If you are the party making a Batson challenge, make sure the court explicitly decides step three. The reason for this is that once the court makes a step 3 finding, any questions as to whether there is a prima facie case (step one) is mooted out. See Bridgeforth, 28 N.Y.3d 567 (2016). On the other hand, if you are responding to a Batson challenge, there is no need to encourage the court to make a step three finding as it would moot out any step one litigation on appeal. Nor can an appellate lawyer argue that the race-neutral reasons were pretextual if you do not make arguments below saying so, and do not insist on a ruling by the court. Foster v. Chapman, 578 U.S. __, 136 S. Ct. 1737 (2016).

a. Mixed Motive:

The Supreme Court has yet to announce specific guidance on this mixed-motive or dual-motive situation, but it has phrased the requisite showing for the third prong as proof that a strike was "motivated in substantial part by discriminatory intent." Snyder v. Louisiana, 552 U.S. 472 (2008). If during a step three analysis you believe the court is not going to find pretext, it may be worth reminding the court that it need not find that the strikes were used solely for discriminatory purposes and only in "substantial part."

C. Scenarios

1. Prosecution makes a reverse Batson challenge in the second round of voir dire claiming that the defense is discriminating against minority prospective jurors. What is your response?

2. You make a Batson challenge due to what you claim is a pattern of discriminatory strikes against young, Asian, male jurors. The prosecution responds that you have not identified a cognizable class under Batson. How do you reply?

3. You make a Batson challenge due to the prosecutor striking four out of the five female, Latina prospective jurors on the panel. Without making a step one finding, the court immediately asks the prosecutor for race and gender neutral reasons. The prosecutor provides neutral reasons for three out of the four women. For the fourth woman, the prosecutor simply states that he did not believe she was part of the protected class (Latina) and never provides any other explanation. The court then finds that the defense did not meet its step 1 burden and, in any event, accepts the prosecutor's neutral reasons. How do you respond?

4. You are in the second round of voir dire and the prosecution has used all three peremptory challenges against black jurors. In the first round, the prosecution struck the only black juror on the venire. How do you craft your Batson challenge?

5. The prosecution makes a reverse Batson challenge and argues that the defense is striking a disproportionate number of people of color. At this point, the defense has struck an African male, a Korean woman, and an Indian male. How do you respond?

BATSON CHALLENGES IN CRIMINAL CASES: AFTER *SNYDER V. LOUISIANA*, IS SUBSTANTIAL DEFERENCE TO THE TRIAL JUDGE STILL REQUIRED?

BOBBY MARZINE HARGES*

INTRODUCTION: APPLYING *BATSON* IN THE TWENTY-FIRST CENTURY

During jury selection, attorneys are asked to meet, evaluate, and make decisions about a number of individuals who will eventually decide the fate of their case. This "voir dire" process is complicated, time-consuming, and difficult because attorneys must make quick decisions with relatively little information. A lawyer may challenge jurors either for "cause" or through the use of a "peremptory" strike.[1] Attorneys exercise cause challenges when a prospective juror "lacks the qualifications required by law, cannot be impartial, is related to one of the parties or lawyers or is unable to accept the law given to him by the court."[2] In contrast, attorneys exercise peremptory challenges for almost any reason.[3] Because of this complicated and fast-paced process, lawyers usually base their decisions on gut reactions or hunches.[4] While some potential jurors exhibit clear biases and should be struck for good cause, peremptory challenges have always allowed attorneys to strike jurors with more subtle bias which may not rise to the level of a "for cause strike."[5]

Peremptory challenges, which have a long history in American jurisprudence, give attorneys a vehicle to act arbitrarily upon instinct or intuition. The use of peremptory challenges helps to ensure fairness in jury selection and to bolster respect for jury verdicts. However, the nature of peremptory challenges creates a conflict with modern constitutional jurisprudence. Peremptory challenges are by definition arbitrary and create a cloak for possible discrimina-

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[1] *See* Bobby Marzine Harges & Russell Jones, LOUISIANA EVIDENCE: PROBLEMS AND MATERIALS 5 (Harrison Co. ed., 4th ed. 2002).

[2] *Id.* (citing La. C.C.P. art. 1765 and La. C.Cr. P. art. 797).

[3] *See id.*

[4] *See id.*

[5] *See id.* ("Such challenges are designed to allow lawyers to exclude potential jurors that they believe may be harmful to their case.").

tion.[6] The interplay between peremptory challenges and the Fourteenth Amendment to the Constitution has created a riddle: the courts must attempt to maintain a challenge that lawyers can exercise arbitrarily while simultaneously requesting a reason for the challenge.

The test announced by the United States Supreme Court in *Batson v. Kentucky* is currently the methodology the Court uses to balance these conflicting forces.[7] However, over twenty years later, the Court is still explaining *Batson*'s three-part test.[8] Over time, the Court has both expanded and refined the principles set forth in *Batson*.[9] It has become clear that eliminating discrimination in jury selection presents many unique obstacles.[10]

This article discusses how the recent Supreme Court decision, *Snyder v. Louisiana*, fits in with modern *Batson* jurisprudence. First, this article examines the landmark case of *Batson v. Kentucky* and its foundations. Second, this article considers how *Batson* has changed and expanded over the years. Specifically, this article canvasses the three-part *Batson* test to explain how it should be properly applied in jury selection for criminal cases. Finally, this article places *Snyder v. Louisiana* within the current *Batson* landscape.

I. *Batson:* Foundations and Expansions

The *Batson* decision did not emerge fully formed in American jurisprudence; the original roots of *Batson* began with the passage of the Fourteenth Amendment, which provided all citizens with equal protection under the law.[11] This, in turn, began a judicial progression to remove all racial discrimination in jury selection. Understanding *Batson* requires an analysis of two types of cases. The first type of cases consists of those that laid the foundation for the *Batson* holding. The second type of cases includes those decided after *Batson*. This second group of cases expanded the ideals of *Batson* to other situations and described how to apply the *Batson* test properly.

A. *Foundations*

With the passage of the Fourteenth Amendment to the Constitution in

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[6] *See* Black's Law Dictionary (8th ed. 2004) (defining peremptory challenges as "challenges that do not need to be supported by a reason").

[7] *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986).

[8] *E.g.*, Snyder v. Louisiana, 552 U.S. 472 (2008).

[9] *E.g.*, J.E.B. v. Alabama, 511 U.S. 127 (1994) (expanding the *Batson* holding to challenges based on gender); Johnson v. California, 545 U.S. 162, 166–67 (2005) (defining how courts should apply step one of *Batson*).

[10] *See generally* Sheri Lynn Johnson, *Race and Recalcitrance: The* Miller-El *Remands*, 5 Ohio St. J. Crim. L. 131 (2007); Brian W. Wais, Note, *Actions Speak Louder Than Words: Revisions to the* Batson *Doctrine and Peremptory Challenges in the Wake Of* Johnson v. California *and* Miller-El v. Dretke, 45 Brandeis L.J. 437 (2007).

[11] *See* U.S. Const. amend. XIV.

1868,[12] the Supreme Court began the task of guaranteeing the rights granted by this new amendment.[13] In *Strauder v. West Virginia*, the Supreme Court began looking at the Fourteenth Amendment in the context of jury selection.[14] The Court dealt with the question of whether defendants have a right to a jury chosen free of racial discrimination.[15] Using the recently passed Fourteenth Amendment, the Court found that the West Virginia law prohibiting jury service based on race was unconstitutional.[16] The Court found that the specific purpose of the amendment was to protect the rights of the recently emancipated slaves by prohibiting state action violating those rights.[17] The Court held that the state violated a defendant's rights when attorneys excluded members of his race from jury service.[18] However, the Court was careful to point out that a defendant did not have the right to a jury that included members of his own race.[19]

Over fifty years later, the Court again examined the role of race in jury selection.[20] *Straughter* abolished laws prohibiting jury service based on race,[21] but in *Swain v. Alabama*, the defendant argued that prosecutors were using peremptory strikes to effectively bar African-Americans from serving on juries.[22] The *Swain* Court established a test allowing defendants to show that the state used peremptory strikes to *systematically* eliminate all African-American members of the venire.[23] The Court held that the defendant had the burden of showing that the prosecutor used peremptory strikes to exclude members of a particular race from jury service.[24] To demonstrate a violation, the defendant was required to show a systematic use of discrimination, not just in his case, but in multiple cases, in which the prosecution used peremptory challenges.[25] The defendant in *Swain* failed to meet this high burden of proof, and as time

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[12] *Id.*

[13] *See* Batson v. Kentucky, 476 U.S. 79, 82 (1986); *see also* Lawrence Elmen, Jr., *Preemptory Challenges After* Batson v. Kentucky*: Equal Protection Under the Law or an Unequal Application of the Law*, 20 NEW ENG. J . ON CRIM. & CIV. CONFINEMENT 481, 486 (1994).

[14] Strauder v. West Virginia, 100 U.S. 303 (1880).

[15] *Id.* at 305.

[16] *Id.* at 310–12; *see also* Heather Davenport, *Blinking Reality: Race and Criminal Jury Selection in Light of* Ovalle*,* Miller-El, *and* Johnson, 58 BAYLOR L. REV. 949, 950–53 (2006) (giving a history of jury composition).

[17] *Strauder*, 100 U.S. at 310–12.

[18] *Id.* at 310.

[19] *Id.* at 309.

[20] *See* Swain v. Alabama, 380 U.S. 202 (1965).

[21] *Strauder*, 100 U.S. at 311.

[22] *Swain*, 380 U.S. at 203.

[23] *Id*. at 223–24.

[24] *Id.* at 222–23.

[25] *Id.*

progressed, most defendants fell short of this high standard.[26]

The *Swain* test proved onerous to the point of being unjust.[27] To correct this injustice, the Court reworked the test in *Batson v. Kentucky*.[28] This landmark case affirmed the ideals of *Strauder* but changed the test so a defendant had only to prove discrimination in his case.[29] In *Batson*, the prosecution struck all four of the African-American venire members on the jury panel.[30] The trial court overruled the objections to the peremptory strikes and empanelled an all white jury, which subsequently convicted the defendant.[31] After the Kentucky Supreme Court denied Batson's appeal alleging his denial of equal protection under the Sixth and Fourteenth Amendments, the Supreme Court granted certiorari and fashioned a new test to govern peremptory challenges.[32] While the test created in *Batson* was similar to the one in *Swain*, the Court greatly reduced the burden of proof on the defendant in *Batson*.[33]

The *Batson* test has three parts. First, the defendant must make a prima facie showing that the prosecution's peremptory challenges are discriminatory.[34] To make this prima facie case, the defendant must show he is part of a "cognizable racial group" and that the prosecutor has used the peremptory strike against members of that racial group.[35] When making his argument, the defendant may reiterate that peremptory strikes essentially allow "those to discriminate who are of a mind to discriminate" while using the court as a medium for said discrimination.[36] Finally, the defendant must use these and any other "relevant circumstances" to create an inference that the prosecutor struck the venire member because of his race.[37]

Second, the state must tender a nonracial reason for the strike.[38] This nonracial reason must be clearly articulated and be more than an assertion that the

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[26] *See id.* at 224; *see* Batson v. Kentucky, 476 U.S. 79, 92–93 (1986).

[27] *See Batson*, 476 U.S. at 92–93.

[28] *See id.*; *see also* Bobby Marzine Harges, *Peremptory Challenges in Jury Selection in Louisiana—When a "Gut Feeling" Is Not Enough*, 54 LOY. L. REV. 95, 96–99 (2008).

[29] *Batson*, 476 U.S. at 93–94.

[30] *Id.* at 82–83.

[31] *Id.* at 92–93.

[32] *Id.* at 84.

[33] *See id.* at 96.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* Often the movement to step two is referred to as a "burden shift" because once the prima facie case is made the burden shifts to the State to show a nonracial reason for the strike. It is, however, important to remember that the ultimate burden of proof lies with the defendant who made the *Batson* challenge. *See* Johnson v. California, 545 U.S. 162, 167 (2005) (citing Purkett v. Elem, 514 U.S. 765, 768 (1995)).

strike was not motivated by discrimination.[39] The nonracial reason need not rise to the level of a "for cause strike," but must include a specific race-neutral reason for the strike.[40] Third, the judge must decide whether the "defendant has established purposeful discrimination."[41]

The majority in *Batson* attempted to reconcile two opposing legal principles. On one hand, the peremptory challenge is designed to allow parties to strike potential jurors for any reason in order to ensure that each defendant receives a fair trial.[42] On the other hand, notwithstanding the importance of the peremptory challenge to our criminal justice system, the Court recognized the fact that peremptory strikes can be vehicles for discrimination.[43] The *Batson* decision attempted to place a limit on this unlimited power to strike.[44] The Court conceded that peremptory challenges lend to the fairness of jury trials, but found that the limitation placed on the strikes does not render the strikes useless.[45]

The concurrence by Justice Marshall dismissed the majority's centrist approach and recommended abolishing peremptory strikes.[46] Justice Marshall remarked that peremptory strikes provide the potential for discriminatory practices in opposition to the Constitution and must be abolished.[47] He did not believe that a Supreme Court decision would stop prosecutors from discriminating during jury selection.[48]

B. *Expansion of* Batson *to Other Factual Situations*

1. *Powers v. Ohio*: The Court Expands *Batson* to Allow Cross-Racial Objections

In subsequent decisions, the Supreme Court expanded the *Batson* holding to factual scenarios different from those in the *Batson* case. In *Powers v. Ohio*, decided in 1991, the Court considered whether the *Batson* holding extended to cases where the defendant and the challenged juror are not of the same race.[49] The white defendant in *Powers* was charged with aggravated murder.[50] At trial, the prosecution used seven of the ten peremptory strikes on African-Ameri-

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[39] *Batson*, 476 U.S. at 97.

[40] *Id.*

[41] *Id.* at 98.

[42] *See id.* at 89.

[43] *Id.* at 89. ("[T]he State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause.").

[44] *See id.* at 98–99.

[45] *Id.*

[46] *Id.* at 102–09 (Marshall, J., concurring).

[47] *Id.* at 102–03 (Marshall, J., concurring).

[48] *Id.* at 105 (Marshall, J., concurring).

[49] Powers v. Ohio, 499 U.S. 400 (1991); *see also* Harges, *supra* note 28 at 100–02.

[50] *Powers*, 499 U.S. at 402.

can jurors.[51] Although the defendant objected to the strikes, the objections were overruled and he was subsequently convicted.[52] The conviction was affirmed on appeal to the Court of Appeals and the Ohio Supreme Court dismissed the appeal.[53] The United States Supreme Court granted certiorari to decide whether a lawyer could raise a *Batson* challenge when the defendant and challenged venire member are not of the same race.[54]

The State of Ohio argued that *Batson* should be limited to its facts and that objections to peremptory challenges should be allowed only where the defendant and venire person are of the *same* race.[55] The Court dismissed this argument, noting that *Batson* was meant to "serve multiple ends" by protecting defendants, jurors, and the community at large.[56] Specifically, the Court held that venire persons have a right not to be struck from the jury because of their race.[57] While venire persons do not have the specific right to serve on a jury, they are, nevertheless, not to be excluded based on race.[58] Ohio also advanced the argument that the "raw fact" of race is a legitimate way to decide a venire member's fitness because it lacks any "particular stigma or dishonor."[59] Ohio claimed that because all races are potentially subject to race-based strikes, no equal protection challenge existed.[60] The Court dismissed this argument by pointing out that "racial classification" *is* the flaw and anything that includes a racial label has no place in a modern court.[61]

While the struck venire members had an equal protection claim, the problem is that Powers, the defendant, was the party advancing the interest.[62] The Court granted third-party standing based on three criteria.[63] First, the defendant must show an actual injury to himself due to the issue in dispute.[64] Second, the defendant must show a "close relationship to the third party," so that he is a sufficient advocate.[65] Finally, the defendant must show that there is "some hindrance to the third party's ability to protect his or her own interests.".[66]

In applying these criteria, the Court found that a criminal defendant satisfies

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[51] *Id.* at 403.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 403–04.
[55] *Id.* at 406.
[56] *Id.*
[57] *Id.* at 406–07.
[58] *Id.* at 407.
[59] *Id.* at 410.
[60] *Id.*
[61] *Id.*
[62] *See id.*
[63] *Id.* at 410–11 (citing to Singleton v. Wulff, 428 U.S 106 (1976)).
[64] *Id.* at 411.
[65] *Id.*
[66] *Id.*

the criteria for third-party standing when a venire member is struck based on race.[67] First, the Court found that a defendant is harmed when a venire member is struck based on race.[68] The harm to the defendant arises from the doubt the discriminatory strike places on all of the subsequent proceedings.[69] The defendant is harmed by the race-based strike that may lead to a tainted trial.[70] Second, the Court found that criminal defendants and venire members have a common interest in eliminating racial discrimination from the courtroom.[71] Finally, the Court enumerated the barriers to venire members when trying to assert their own rights during voir dire.[72] Venire members have no access to relief at the time of the trial and have a limited financial incentive to pursue litigation.[73] Moreover, it is difficult for an excluded venire member to show a likelihood that discrimination against him during jury selection will occur.[74] Given these barriers, the Court found that a struck venire member is unable to advance his own interests.[75]

2. *Edmonson v. Leesville Concrete Co.*: The Court Expands *Batson* to Civil Proceedings

The next expansion of *Batson* also came in 1991 when the Supreme Court applied the *Batson* holding to civil cases. In *Edmonson v. Leesville Concrete Co.*,[76] the Court found that parties in civil litigation also have a right to be free from discrimination during jury selection.[77] Edmonson sued Leesville Concrete for negligence.[78] During the trial, Leesville used two of its peremptory strikes against three potential African-American jurors.[79] When Edmonson objected to the strikes under *Batson*, the court overruled the challenge.[80] The trial judge agreed with Leesville's arguments that *Batson* applied only to criminal cases.[81] On appeal, the Fifth Circuit ultimately affirmed the decision,[82] which

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[67] *Id.*

[68] *Id.*

[69] *Id.* at 412 (finding that a race-based peremptory challenge "casts doubt over the obligation of the parties, the jury and indeed the court to adhere to the law throughout the trial of the case").

[70] *Id.* at 411.

[71] *Id.* at 413–14.

[72] *Id.* at 414–15.

[73] *Id.*

[74] *Id.* at 415.

[75] *Id.* ("[D]efendant[s] in a criminal case can raise the third-party equal protection claims of jurors excluded . . . .").

[76] 500 U.S. 614 (1991); *see also* Harges, *supra* note 28, at 102–03.

[77] *Edmonson*, 500 U.S. at 628.

[78] *Id.* at 616.

[79] *Id.*

[80] *Id.* at 616–17.

[81] *Id.* at 617.

the Supreme Court agreed to review.[83]

The Court disagreed with Leesville's argument that only the state was bound by the Equal Protection Clause and that *Batson* should not be applied because the state was not a party in this civil litigation. The Court found that the litigation was so dominated by governmental authority that the litigants were bound by the constitutional principle of equal protection.[84] The Court also applied the *Powers* holding, finding that civil litigants have standing to bring an Equal Protection claim on behalf of the improperly struck juror.[85] The Court highlighted that in both criminal and civil matters, it is in the interest of the litigants and the judicial process to rid the courtroom of racial discrimination.[86] Ultimately, the Court extended the *Batson* holdings and procedures to encompass both civil and criminal proceedings.[87]

3. *Georgia v. McCollum*: The Court Expands *Batson* to Prohibit Discrimination by a Criminal Defendant

A year after the decision in *Edmonson v. Leesville Concrete Co.*, the Court held in *Georgia v. McCollum* that *Batson* also prohibited discriminatory peremptory strikes by a criminal defendant.[88] In this case, several white defendants were on trial for assaulting two African-American victims.[89] Before jury selection began, because of the defendant's intention to use peremptory strikes in a racially discriminatory manner, the prosecution sought an order allowing a *Batson* challenge if the defendants used peremptory strikes to dismiss potential African-American jurors.[90] The trial court denied the motion but certified it for immediate appeal to the Supreme Court of Georgia.[91] The Supreme Court of Georgia also denied the motion, and the United States Supreme Court granted certiorari to decide whether a criminal defendant can make racially motivated peremptory challenges.[92]

The Court began by discussing the harm to jurors, the court, and the community when racially motivated peremptory challenges are allowed.[93] The Court next considered whether the harm is caused by a state actor.[94] The Court ex-

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[82] *Id.* The Court of Appeals initially reversed and remanded, but then ordered a rehearing en banc and affirmed the district court. *Id.*

[83] *Id.* at 618.

[84] *Id.* at 619–20 (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972)).

[85] *Id.* at 629–30 (citing Powers v. Ohio, 499 U.S. 400, 629–30 (1991)).

[86] *Id.* at 630.

[87] *See id.*

[88] Georgia v. McCollum, 505 U.S. 42 (1992).

[89] *Id.* at 44.

[90] *Id.* at 44–45.

[91] *Id.* at 45.

[92] *Id.* at 45–46.

[93] *Id.* at 48–50.

[94] *Id.* at 50–51.

amined the logic in *Edmonson* and found that because the state grants a criminal defendant the right to use peremptory challenges, he becomes a state actor.[95] As the defendant exercises his peremptory challenges, the state further facilitates the process by dismissing the venire member.[96] The Court concluded that a criminal defendant is a state actor for purposes of applying equal protection.[97]

The Court next considered whether the state had standing to question the peremptory challenge.[98] Here, the Court followed the logic in *Powers* and *Edmonson* to find that the state had standing to represent the excluded venire member.[99] The Court cited the injury to the state when the judicial process is tainted by discrimination, the state's relationship to the potential jurors, and the barriers that the dismissed venire members would face in bringing suit on their own.[100] The Court found that the relationship between the state and the potential juror is closer than the relationships it approved in *Powers* and *Edmonson*.[101] Moreover, as the representatives of all its citizens, the state is the most appropriate party to assert the violation of the constitutional rights of the excluded jurors in a criminal trial.[102]

Finally, the Court considered the rights of criminal defendants compared to the rights provided in *Batson*.[103] The Court began by reaffirming that peremptory challenges are not a required element of due process, but have long been maintained as an additional element of fairness in our jury system.[104] The Court found that given the Fourteenth Amendment's constitutional mandate to eliminate discrimination from the courtroom, peremptory challenges based on racial discrimination cannot stand.[105] Additionally, the Court found that the *Batson* requirements do not violate the defendant's Sixth Amendment right to effective counsel or trial by jury.[106] Ultimately, the Court held that any peremptory challenge based on race cannot stand, regardless of the party who

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[95] *Id.* (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991)).

[96] *See id.* at 52.

[97] *Id.* at 53 ("Regardless of who precipitated the jurors' removal, the perception and the reality in a criminal trial will be that the court has excused jurors based on race . . . .").

[98] *Id*. at 55–56.

[99] *Id.*; Powers v. Ohio, 499 U.S. 400 (1991); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

[100] *McCollum*, 505 U.S. at 56.

[101] *Id.*

[102] *Id.*

[103] *Id.* at 57; Batson v. Kentucky, 476 U.S. 79 (1986).

[104] *McCollum*, 505 U.S. at 57 ("[I]t is important to recall that peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial.").

[105] *Id.*

[106] *Id.* at 58.

brought the challenge.[107]

4. *J.E.B. v. Alabama*: The Court Expands *Batson* to Prohibit Discrimination Based on Gender

In *J.E.B v. Alabama*, decided in 1994, the Court considered whether peremptory strikes based on gender can be challenged under *Batson*.[108] During a paternity suit, Alabama used nine peremptory strikes to strike males from the potential jury, resulting in an entirely female jury.[109] The defendant objected, claiming that *Batson* prohibits strikes of a discriminatory nature whether based on gender or race.[110] The trial court denied the defendant's claim and found that the defendant was the child's father.[111] The state appeals court affirmed the decision and the Alabama Supreme Court declined to hear the case.[112] The United States Supreme Court granted certiorari and found that the Equal Protection Clause prohibits peremptory strikes based on gender.[113]

The Court dismissed the State's arguments that men are more inclined to agree with the male defendant, refusing to accept a justification based on stereotypes that the Court sought to avoid.[114] The Court traced the exclusion of women from juries back to eighteenth-century England and found that women have historically been excluded from jury service.[115] The Court cited the harm to both the litigants and the legal system when discrimination of any type is allowed to prevail[116] and found that strikes based on gender, like strikes based on race, have no place in the courtroom.[117]

5. *United States v. Martinez-Salazar*: The Court Expands *Batson* to Prohibit Discrimination Based on Ethnic Origin

In 2000, the Court decided *United States v. Martinez-Salazar*, in which a venire person who should have been struck for cause was seated on the jury despite the defendant's objections, forcing the defense to use a peremptory challenge.[118] The defendant, Martinez-Salazar, was tried for a number of nar-

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[107] *Id.* at 59.

[108] J.E.B. v. Alabama, 511 U.S. 127 (1994); *see also* Harges, *supra* note 28, at 103.

[109] *J.E.B.*, 511 U.S. at 129.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 129–30.

[113] *Id.* at 130–31.

[114] *Id.* at 140 ("Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.").

[115] *Id.* at 132.

[116] *Id.* at 140.

[117] *Id.* at 146.

[118] United States v. Martinez-Salazar, 528 U.S. 304 (2000); *see also* Harges, *supra* note 28, at 104–05.

cotics and weapons offenses.[119] A potential juror indicated in a preliminary questionnaire that he would favor the prosecution.[120] However, the court refused to reject the juror for cause, forcing the defense to use a peremptory challenge to excuse the juror.[121] The defendant was subsequently convicted, and Martinez-Salazar appealed based on the failure of the trial court to excuse the juror for cause.[122] On appeal, the Ninth Circuit found a due process violation because the defendant was required to use a peremptory challenge to strike the prospective juror.[123] The Supreme Court granted certiorari and reversed, finding that because the prospective juror did not actually serve on the jury, there was no due process violation.[124]

The defendant claimed that having to use a peremptory challenge on a potential juror who should have been struck for cause was a violation of due process.[125] The Court concluded that the peremptory challenge worked as designed; the defendant was able to strike the biased juror and receive a fair trial.[126] While discussing peremptory strikes, the Court found that challenges to a peremptory strike are only viable when the strike discriminates based on "the juror's gender, ethnic origin, or race."[127]

It is the Court's mention of ethnic origin in its dicta that is significant in this case. This was the first time the Court specifically stated that *Batson* also applied to strikes motivated by ethnic origin.[128] The Court cited *Hernandez* for this proposition, but in *Hernandez* the Court never specifically stated whether *Batson* applies to peremptory challenges motivated by ethnic origin.[129] It appears from this dicta and references to *Hernandez* that the Court is considering extending a party's ability to challenge peremptory strikes to those motivated by ethnic origin. However, as ethnic origin is merely referenced in Hernandez and appears in the dicta of *Martinez-Salazar*, the controlling nature of a challenge based on ethnic origin is unclear.

II. *Batson v. Kentucky:* The Test Applied

While one set of cases expands the *Batson* test to encompass more factual

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[119] *Martinez-Salazar*, 528 U.S. at 308.

[120] *Id.*

[121] *Id.* at 309.

[122] *Id.*

[123] *Id.* at 310.

[124] *Id.* at 310–11.

[125] *Id.* at 309–10.

[126] *Id.* at 313–14.

[127] *Id.* at 315.

[128] *Id.* at 315 ("Under the Equal Protection Clause, a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, *ethnic origin*, or race . . . ." (citing to Hernandez v. New York, 500 U.S. 352 (1991) (emphasis added))).

[129] *Id.*; *see Hernandez*, 500 U.S.

situations, a second set of cases explains how to administer the test. The mandate of *Batson* (eliminating discriminatory peremptory strikes) is clear, but it is often difficult to execute. Attempting to decide when a peremptory challenge is motivated by discrimination is a difficult process, and the Supreme Court has given surprisingly little guidance. Prior to *Snyder v. Louisiana*,[130] there were four major cases that examined how the *Batson* test should be applied: *Hernandez v. New York*,[131] *Purkett v. Elem*,[132] *Johnson v. California*,[133] and *Miller-El v. Dretke*.[134] Understanding how these cases work together can be difficult, particularly when taking into account the timeline. After the Court decided *Hernandez* and *Purkett*, in 1991 and 1995, respectively, scholars viewed the cases together as a movement away from the ideals of *Batson*.[135] A more complete picture did not emerge until 2005, when the Court decided *Johnson* and *Miller-El*.[136] *Hernandez* and *Purkett* can be read as a step away from *Batson*, which the Court corrected in the *Miller-El* and *Johnson* decisions. On the other hand, all four can be read to fit together and describe the three steps of the *Batson* test. The descriptions here examine each case as it applies to a particular step in the *Batson* test.

A. Johnson v. California*: Analyzing Step One of the* Batson *Test*

In *Johnson v. California*, the Court held that step one of the *Batson* inquiry requires only an inference of discrimination.[137] In *Johnson*, an African-American defendant was accused of assaulting and murdering a white child.[138] During the trial, the prosecutor struck all three of the African-American venire persons eligible to serve on the jury.[139] The defense objected to the prosecu-

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[130] 552 U.S. 472 (2008).

[131] 500 U.S. 352 (1991) (plurality opinion).

[132] 514 U.S. 765, 766 (1995).

[133] 545 U.S. 162 (2005).

[134] 545 U.S. 231 (2005).

[135] *See, e.g.*, Michelle Mahony, Note, *The Future Viability of* Batson v. Kentucky *and the Practical Implications of* Purkett v. Elem, 16 REV. LITIG. 137, 169 (1997) (stating that the *Purkett* holding reduces *Batson* to a "mere formality"); D. John Neese, Jr., Note, Purkett v. Elem: *Resuscitating the Nondiscriminatory Hunch*, 33 HOUS. L. REV. 1267 (1996) (describing *Purkett* as restoring integrity to peremptory challenges); *see also* Jason Hendren, Note, *Criminal Procedure—Peremptory Challenges After* Purkett v. Elem*, 115 S. Ct. 1796 (1995): How to Judge a Book by its Cover Without Violating Equal Protection,* 19 U. ARK. LITTLE ROCK L.J. 249 (1997); Jason Laeser, Case Note, *Jurors and Litigants Beware—Savvy Attorneys are Prepared to Strike: Has* Purkett v. Elem *Signaled the Demise of the Peremptory Challenge at the Federal and State Levels?*, 52 U. MIAMI L. REV. 635 (1998).

[136] *Johnson*, 545 U.S. at 162; *Miller-El*, 545 U.S. at 231.

[137] *Johnson*, 545 U.S. at 172–73.

[138] *Id.* at 164.

[139] *Id.*

tion's strikes, but the trial judge overruled each objection.[140] The judge found that the strikes bordered on a *Batson* violation but did not warrant the objection because the defendant had not shown a "strong likelihood" of discrimination.[141] Upon review, the California Supreme Court pointed out that *Batson* allows state courts to determine how to evaluate the prima facie case in step one.[142] The court agreed that the "strong likelihood" standard applied by the trial court is the correct standard according to California case law.[143] The court concluded that while the "strong likelihood" standard was a "substantial" burden, it was not an "onerous" burden, and so it fit within *Batson*.[144] After finding that the trial court had used the correct standard, the California Supreme Court deferred to the trial judge's decision and upheld the conviction.[145] The United States Supreme Court granted certiorari and held that to fulfill step one in *Batson*, a defendant need only present enough evidence to create an *inference* of discrimination.[146]

The Court found that raising the standard of step one (i.e., to a "strong likelihood" standard) would place a higher burden on the defendant than *Batson* intended.[147] The Court designed the *Batson* framework to bring out as much information as possible in order to minimize uncertainty and speculation.[148] The *Johnson* Court highlighted the difficulty of knowing with certainty whether the strike is discriminatory.[149] Instead of speculating about why the strike might have been made, the party who made the strike is required to explain it.[150] Raising the standard in step one would require the court to evaluate step one without all the information.[151] The Court argued that *Batson* was designed to provide as much information as possible for the judge to decide whether the strike was discriminatory.[152] While the ultimate burden of persuasion is on the

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[140] *Id.* at 165.

[141] *Id.* (citing People v. Johnson, 30 Cal. 4th 1302, 1307 (2003)) (emphasis removed). Under the California case of *People v. Wheeler*, a judge is required to find a *strong likelihood* that the peremptory challenge was discriminatory before proceeding to step two of the *Batson* analyst. People v. Wheeler, 583 P.2d 748 (1978).

[142] *Johnson*, 545 U.S. at 166. Specifically, the California Supreme Court found that the states are tasked with evaluating the standards for a *Batson* challenge and that the *Wheeler* "strong likelihood" standard fit within the *Batson* holding. *Wheeler*, 583 P.2d.

[143] *Johnson*, 545 U.S. at 166–67.

[144] *Id.* at 167.

[145] *Id.*

[146] *Id.* at169 (emphasis added).

[147] *Id.* at 170.

[148] *Id.* at 172.

[149] *Id.*

[150] *Id.* ("The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.").

[151] *Id.* at 170.

[152] *Id.* at 171.

party making the *Batson* challenge, steps one and two are designed to maximize the amount of information the judge has to consider in step three.[153] If the requirement of proof in step one is too high, *Batson* cannot bring "actual answers to suspicions and inferences that discrimination may have infected the jury selection."[154] In order to expose this possible infection, the Court found that step one of the *Batson* inquiry required only an inference of discrimination.[155]

B. Purkett v. Elem *and* Hernandez v. New York*: Analyzing Step Two of the* Batson *Test*

In the per curiam decision in *Purkett v. Elem*, the Court focused on step two of the *Batson* test.[156] The criminal defendant in *Purkett* made a *Batson* challenge when the prosecution struck two African-American men from the jury panel.[157] The prosecutor responded that the two strikes were made because the men had long unkempt hair and facial hair.[158] The trial judge denied the challenge and the defendant was convicted.[159] After conviction, the defendant sought a writ of habeas corpus in federal court.[160] While the Court of Appeals for the Eighth Circuit found a *Batson* violation, the Supreme Court reversed the circuit court and confirmed the state court conviction.[161]

In the opinion, the Supreme Court faulted the circuit court for focusing on the reasonableness of the nonracial reason in step two, rather than in step three.[162] The Court stated that step two's only requirement is an offering of a race neutral justification for the strike.[163] As long as the strike was not discriminatory, it did not matter whether it was sensible or plausible.[164] The court does not consider whether the inference of discrimination holds up against the nonracial reason until step three.[165] The *Purkett* Court found that facial hair is not race-specific, so the analysis should have continued to step three.[166] After deferring to the lower court's finding in step three, the Court upheld the convic-

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153 *Id.* at 170–71.

154 *Id.*

155 *Id.* at 172–73. The holding in this case speaks only to step one; the party who makes the *Batson* challenge is still required to carry the ultimate burden beyond a preponderance of the evidence.

156 Purkett v. Elem, 514 U.S. 765, 768 (1995).

157 *Id.* at 766.

158 *Id.*

159 *Id.*

160 *Id.* at 767.

161 *Id.* at 767, 769–70.

162 *Id.* at 768.

163 *Id.*

164 *Id.* at 768–69.

165 *Id.* at 767.

166 *Id.* at 769.

tion, finding that the trial court was correct in concluding that "the prosecutor was not motivated by discriminatory intent."[167]

The Court's decision in *Purkett* restated the rule it announced earlier in *Hernandez v. New York*, where the Court, in a plurality decision, first suggested its retreat from the rigorous burden required of the prosecution in step two of the *Batson* test.[168] With reference to step two, the Court in *Hernandez* stated:

> A neutral explanation in [step two] means an explanation based on something other than the race of the juror. At this 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.[169]

This low threshold allowed parties free rein to exercise peremptory challenges based on race, gender, or any other kind of discrimination without fear that their peremptory challenges would be found discriminatory. This standard allowed virtually any facially neutral explanation to survive a *Batson* challenge regardless of how tenuous the explanation might be. Consequently, the standard articulated in *Hernandez* arguably allowed an improbable explanation to suffice even if it had no connection to the case.

The *Purkett* dissent viewed the majority decision as a reversal of the *Batson* ideals, stating that if any reason will satisfy step two, it will be difficult for the defendant to win the challenge.[170] The dissent argued that there was no way to evaluate the nonracial reason tendered in step two and, as a result, the prosecution is given a blank slate to manufacture any nonracial reason, no matter how unrelated or absurd.[171] According to the dissent, the requirement is so minimal that it is really no different from saying, "I [have] a hunch."[172] The dissent argued that the nonracial reason should require some relation to the case.[173] The dissent pointed to the logic in *Hernandez*, showing how the nonracial reason should relate to the case.[174] Depending on the facts of the case, a dubious nonracial reason in one case might, under different circumstances, be completely proper and survive a *Batson* challenge.[175] By requiring a stronger connec-

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[167] *Id.* at 769–70.

[168] Hernandez v. New York, 500 U.S. 352 (1991).

[169] *Id.* at 360.

[170] *Purkett*, 514 U.S. at 775 (Stevens, J., dissenting).

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 773–74 (citing *Hernandez*, 500 U.S. at 352). In *Hernandez*, the prosecution struck all Spanish speaking jurors. The prosecution stated the strikes were made out of a concern that Spanish speaking jurors might not trust the prosecution's translators. While such strikes would normally be considered discriminatory, the court found that because of the substantial amount of translated testimony the strikes were valid. The court also warned that similar strikes under different circumstances may not be valid.

[175] *Id.* at 775.

tion, there is less chance for a manufactured nonracial reason. Without a requirement of a minimal relation to the case at hand, a prosecutor could use any reason that is not openly discriminatory to rebut a *Batson* challenge.[176] The dissent argued that the majority's ruling was not in the spirit of *Batson* and significantly weakened the defendant's chances under a *Batson* challenge.[177]

The *Purkett* dissent made a persuasive argument. If a prosecutor is allowed to satisfy step two of the *Batson* test by articulating *any* race-neutral reason, even one that is not related to the facts of the case, the trial court will not be able to eliminate discrimination in jury selection. A skilled prosecutor with a desire to discriminate during jury selection may easily create race-neutral reasons to satisfy step two of the *Batson* analysis by articulating any of the plethora of available reasons unrelated to race.[178]

Before the Court's decisions in *Purkett* and *Hernandez*, it was already difficult for the trial court to eliminate discrimination in jury selection. The lower standard articulated by the Court in *Hernandez* and *Purkett* for step two of the *Batson* test actually made it easier for a prosecutor to discriminate against prospective jurors during voir dire than it had been prior to the decisions. Courts have not found it easy to establish "a legal test that will objectively measure the inherently subjective reasons that underlie use of a peremptory challenge."[179] Because a prosecutor usually bases a peremptory challenge on a gut reaction, experience, or intuition, it is often difficult for prosecutors exercising peremptory challenges to articulate their precise reasons for doing so when allegations are made that they have discriminated against prospective jurors during jury selection. When that fact is coupled with the reality that any race-neutral reason articulated by the prosecutor will satisfy step two of the *Batson* test, the trial court's ability to eradicate discrimination in jury selection becomes even more difficult. The Court's decision in *Miller-El v. Dretke* may have given trial courts more guidance in their efforts to eradicate discrimination in jury selection.[180]

C. Miller-El v. Dretke*: Analyzing Step Three of the* Batson *Test*

While *Hernandez v. New York* and *Purkett v. Elem*[181] can be viewed as a retreat from the ideals of the *Batson* decision, *Miller-El v. Dretke* can be seen as a step toward a reaffirmation of the *Batso*n principles.[182] *Miller-El* came to trial before *Batson* was decided, but the Supreme Court did not reach a deci-

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[176] *Id.*

[177] *Id.*

[178] See *id.* at 769, where the Court found that the prosecutor's argument that "facial hair . . . mustaches and . . . beards look suspicious" satisfied step two of the *Batson* test.

[179] Miller-El v. Dretke, 545 U.S. 231, 267 (2005) (Breyer, J., concurring).

[180] *See id.* at 241.

[181] Hernandez v. New York, 500 U.S. 352 (1991); Purkett v. Elem, 514 U.S. 765 (1991).

[182] *Miller-El*, 545 U.S. at 241.

sion until 2005.[183] The case involved a defendant charged with murder in Texas.[184] During voir dire, the prosecution struck ten of the African-American venire persons.[185] After the conviction, the defense appealed under *Swain*,[186] but the Court sent the case back to the trial court after *Batson* was decided.[187] The trial court affirmed the original decision despite *Batson*, and the appeals process began again.[188] After a Texas state court affirmed the conviction, the defendant sought a writ of habeas corpus in federal court.[189] After a series of appeals and remands, the Supreme Court granted certiorari and ruled in favor of the defendant.[190] In the *Miller-El* opinion, the Court spent little time debating the jurisprudence, but instead reviewed the entire trial record to conclude that the peremptory strikes violated the precedent in *Batson*.[191]

Miller-El instructed trial courts to look at "all relevant circumstances."[192] The Court skipped over any abstract discussion and instead presented a primer on how to analyze a *Batson* challenge using the facts of *Miller-El*.[193] Justice Souter began by conducting a statistical analysis of the prosecutor's peremptory challenges.[194] The prosecution used peremptory strikes to eliminate ninety-one percent of the African-American venire persons.[195] The Court looked extensively at side-by-side comparisons of various similarly situated venire persons.[196] Statistically, many of the individuals with similar characteristics re-

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[183] *Id*. at 236–37. The case first entered the state system in 1985, but did not make a federal appeal until 2000. Miller-El v. Johnson, No. Civ. 3:96-CV-1992-H, 2000 WL 724534 (N.D. Tex. June 5, 2000).

[184] *Miller-El*, 545 U.S. at 236.

[185] *Id.* at 236, 240. The other nine in the pool were struck for cause or by agreement and one served. *Id.* at 240.

[186] *See id.* at 236 (citing *Swain v. Alabama*, 380 U.S. 202 (1965)).

[187] *Id* at 236. *Batson* was decided in 1986. Batson v. Kentucky, 476 U.S. 79 (1986).

[188] *Miller El*, 545 U.S. at 236–37.

[189] *Id.* at 274 (Thomas, J., dissenting).

[190] *Id.* at 266. This decision is actually the second time the Supreme Court has dealt with Miller-El. The Court also granted certiorari after the Fifth Circuit denied review of the *Batson* claim. Miller-El v. Cockrell, 534 U.S. 1122, 1122 (2002) (granting certiorari so Fifth Circuit could review the *Batson* claim). After the Fifth Circuit reviewed and denied the *Batson* claim, the Supreme Court again granted certiorari, giving rise to the case analyzed here. *Miller-El*, 545 U.S. at 237.

[191] *See Miller-El*, 545 U.S. at 279–80 (Thomas, J., dissenting). The Texas Supreme Court did not look at the entire record as it was presented to the United States Supreme Court. Instead, the Texas Supreme Court was only presented with the cards of the jurors who were struck and were not able to consider an argument based on comparative analysis. *Id.* at 279.

[192] *Id.* at 240 (citing *Batson*, 476 U.S. at 96–97).

[193] *Id.* at 241.

[194] *See id.* at 240–41.

[195] *Id.*

[196] *Id.* at 241–53.

ceived different treatment because of their race.[197] The Court examined how the prosecutor spoke to and questioned members of different races.[198] Often the Court found that the prosecutor gave more provocative descriptions or harder questions to African-American members of the venire in an attempt to make them sound more undesirable.[199] Also, since the defendant originally appealed the decision under *Swain*, the Court reviewed evidence of past discriminatory peremptory challenges by the prosecution's office.[200] The Court concluded that the race-neutral reasons presented by the prosecution were not consistent in light of the facts, and that the strikes were in fact discriminatory.[201] After considering all the facts, the majority opinion found that "it blinks reality" to say the strikes were not discriminatory.[202] Commenting on the prosecutor's reasons for exercising a peremptory challenge, the Court noted that "if the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a [legitimate unarticulated] reason" for exercising the challenge.[203] As a result, the reasons stated by the prosecutor are very important at step three of the *Batson* analysis and should be scrutinized carefully by the trial or reviewing court.

From the *Miller-El* decision, a simple rule emerges. The Court takes the straightforward instruction from *Batson* to eliminate discrimination. The *Johnson* and *Purkett* holdings give the trial court the tools to bring out as much information as possible into the record. The trial court is then left with the task of deciding whether discrimination is the motive for the peremptory challenge. *Miller-El* gives courts permission to look at the entire record and to consider "all relevant circumstances" to determine whether the strikes have been discriminatory.[204] Unfortunately, even after close scrutiny of all the facts, this decision can still be a difficult one.

In addition to giving an example of how to evaluate a *Batson* challenge, the *Miller-El* decision also acted to tie together the *Batson* progeny. As the Supreme Court handed down decisions concerning the application of *Batson*, lower courts initially interpreted these opinions as stand-alone cases. *Hernandez v. New York* and *Purkett v. Elem* were the two major cases interpreting *Batson* until 2005, when the Supreme Court handed down both *Johnson* and *Miller-El*.[205] Considering *Hernandez* and *Purkett* alone, both decisions denied the

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197 *Id.*

198 *Id.* at 253–63.

199 *Id.*

200 *Id.* at 263–64.

201 *Id.* at 265.

202 *Id.* at 266.

203 *Id.* at 252.

204 *Id.* at 240 (citing Batson v. Kentucky, 476 U.S. 79, 96–97 (1986)).

205 Hernandez v. New York, 500 U.S 352, 360 (1991) (stating that in step two of the *Batson* inquiry, the issue is simply the "facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered

defendants' *Batson* challenges.[206] At that time, commentators, as well as the dissent in *Purkett*, believed that decisions like *Hernandez* and *Purkett* were a shift away from the *Batson* ideals and a shift toward allowing liberal exercise of peremptory challenges.[207] Whatever the Court's actual reasoning was in *Hernandez* and *Purkett*, the more recent decisions of *Johnson* and *Miller-El* indicate a shift back to a more constrained exercise of peremptory challenges.

In reading *Hernandez*, *Purkett*, *Johnson*, and *Miller-El* together, one could draw two different conclusions. First, the Court could have changed its position over the years. The *Hernandez* and *Purkett* decisions seem to contradict the original *Batson* holding and allow any nonracial reason to rebut the prima facie case.[208] This view has led to the belief that the *Miller-El* decision reshaped the holdings of *Hernandez* and *Purkett*.[209] Second, one could read the *Miller-El* decision to fit within the holding of *Purkett*. The only holding the Court made in *Purkett* was that any nonracial reason will satisfy the second step.[210] However, although many have read into *Purkett* that step three is necessarily satisfied by any non-racial reason, the Court makes little comment on this interpretation in the *Miller-El* decision.[211] This is because *Miller-El* extrapolates on the importance of step three in assessing the validity of the race-neutral reason for the strike, therefore shifting the weight of the *Batson* test to step three, rather than step two. The majority opinion in *Miller-El* cited *Purkett* once in a small section discussing the amount of deference given to the trial court's determination that the "state race-neutral explanations were true."[212] Meanwhile, the majority opinion in *Miller-El* made no reference to *Hernandez*.[213]

The *Hernandez*, *Purkett*, *Johnson*, and *Miller-El* decisions in concert give a

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will be deemed race neutral"); *see generally* Purkett v. Elem, 514 U.S. 765 (1995) (stating that it is error for a reviewing court to combine *Batson*'s second and third steps because it is at the third step that the trial court determines the persuasiveness of the justification given for the strike); *supra* notes 156–80 and accompanying text. The *Hernandez* decision, along with *Purkett*, weakened the *Batson* inquiry by allowing the trial court to accept almost any reason offered by the prosecution for exercising a peremptory challenge. *Hernandez*, 500 U.S. at 360.

[206] *E.g.*, Mahony, *supra* note 135, at 169 (stating that the *Purkett* holding "reduces *Batson* to a mere formality").

[207] *See generally* Wais, *supra* note 10, at 445 (discussing what the writer calls the "retreat from *Batson*").

[208] *See generally* Johnson, *supra* note 10.

[209] *See generally* Wais, *supra* note 10.

[210] *See* Purkett v. Elem, 514 U.S. 765, 769 (1991).

[211] In my opinion, it is likely the Court meant to have some effect on *Purkett* with statements such as "if any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more then *Swain*." Miller-El v. Dretke, 545 U.S. 231, 240 (2004).

[212] *Id.* at 240 (citing Purkett v. Elem, 514 U.S. 765, 769 (1995) (per curiam)).

[213] Only Justice Thomas, in a dissenting opinion, mentioned *Hernandez* for the proposi-

comprehensive look at how to apply *Batson*. The *Johnson* holding did not establish what it takes to make a successful *Batson* challenge, but what it takes to satisfy the first step.[214] Similarly, *Hernandez* and *Purkett* speak only to what is acceptable in step two of the *Batson* test and not how to evaluate the evidence in step three.[215] Finally, *Miller-El* instructs courts to "consider all relevant circumstances" in step three to make a final decision in evaluating the *Batson* challenge.[216] Together these cases work in conjunction to explain each step of a *Batson* challenge.

III. *Snyder v. Louisiana*: The Court Elaborates on Step Three of the *Batson* Analysis

In *Snyder v. Louisiana*, the Court conducted a fact-intensive analysis of the prosecutor's proffered reasons for excluding an African-American prospective juror during jury selection and found that the prosecution's exercise of a peremptory strike was simply a pretext for racial discrimination.[217] The state charged Allen Snyder, an African-American defendant, with first-degree murder, a capital crime in Louisiana, for attacking his estranged wife, Mary Snyder and her companion, Howard Wilson.[218] During the attack, Snyder allegedly killed Howard by inflicting nine knife wounds and seriously injured Mary by stabbing her a total of nineteen times.[219] The prosecutor sought the death penalty.[220] During jury selection, the lawyers questioned eighty-five jurors, with thirty-six of those surviving challenges for cause.[221] Five of the thirty-six prospective jurors were African-American; the prosecutor eliminated those five prospective jurors through the use of peremptory challenges.[222] The court found Snyder guilty and sentenced him to death.[223]

On appeal, the Louisiana Supreme Court affirmed Snyder's conviction, denying his *Batson* claim.[224] Snyder petitioned the United States Supreme Court

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tion that "a strong presumption of validity attaches to a trial court's factual finding at *Batson's* third step." *Id.* at 284.

[214] *See* Johnson v. California, 545 U.S. 162, 170 (2005).

[215] *See Purkett*, 514 U.S at 767–68; Hernandez v. New York, 500 U.S. 352, 360 (1991).

[216] *Miller-El*, 545 U.S. at 240 (citing Batson v. Kentucky, 476 US 79, 96–97 (1986)).

[217] Snyder v. Louisiana, 552 U.S. 472, 485 (2008).

[218] *Id.* at 474.

[219] State v. Snyder, 750 So. 2d 832, 836 (La. 1999).

[220] *Snyder*, 552 U.S. at 475.

[221] *Id.*

[222] *Id.* at 475–76.

[223] *Id.*

[224] State v. Snyder, 750 So. 2d at 836. "On direct appeal, the Louisiana Supreme Court [initially] conditionally affirmed the conviction," rejecting Snyder's *Batson* claim, but remanded the case for a *nunc pro tunc* determination of his competency to stand trial. State v. Snyder, 942 So. 2d 484, 486 (La. 2006). On remand, the lower court found Snyder competent to stand trial, and the Louisiana Supreme Court affirmed that determination. *Id.*

for a writ of certiorari.[225] While his petition was pending, the Court decided *Miller-El*.[226] The Court granted Snyder's petition, "vacated the judgment, and remanded the case to the Louisiana Supreme Court for further consideration in light of *Miller-El*."[227] The Louisiana Supreme Court, on remand, again rejected Snyder's *Batson* claim.[228] The U.S. Supreme Court again granted certiorari, reversed the judgment of the Louisiana Supreme Court, and remanded the case for further proceedings.[229]

In holding that the lower court erred in not finding a *Batson* violation, the U.S. Supreme Court conducted a detailed analysis of the voir dire proceedings and found that the trial court committed clear error in overruling Snyder's *Batson* objection with respect to one of the African-American jurors, Jeffrey Brooks.[230] Brooks was a college senior attempting to fulfill his student teaching obligation.[231] When defense counsel made a *Batson* objection concerning the striking of Brooks, the prosecution offered two race-neutral reasons for the strike: Brooks' nervousness and his concern that the trial would interfere with his student-teaching obligation.[232] With respect to the first reason, Brooks' nervousness, the Court acknowledged that race-neutral reasons for peremptory challenges often involve a juror's demeanor such as nervousness and inattention.[233] However, because the trial judge made no actual statement on the record concerning Brooks' demeanor or nervousness, the Court could not presume that the trial judge actually accepted the prosecutor's assertion that Brooks was nervous.[234]

Regarding the second reason proffered by the prosecution, Brooks' concern about his student-teaching obligation, the Court noted, "Brooks was one of more than fifty members of the venire who expressed concern that jury service would interfere with work, school, family, or other obligations."[235] In responding to the *Batson* challenge, the prosecutor stated that he was apprehensive that Brooks might attempt to find the defendant guilty of a lesser-included offense instead of first degree murder in order to minimize his time away from student-

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225 *Snyder*, 552 U.S. at 476.

226 *Id.*

227 *Id.*

228 *Id.*

229 *Id.*

230 *Id.* at 477–486.

231 *Id.* at 477.

232 *Id* at 478.

233 *Id.*; *see also* Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 534 (1999) (stating that the demeanor excuse is another useful and successful reason for exercising peremptory challenges).

234 *Id.* at 479.

235 *Id.* at 479–80.

teaching.[236] A finding of guilt for a crime other than first-degree murder would eliminate the need for the penalty phase proceeding.[237] The Court found this reasoning to be largely conjecture because even if Brooks favored a prompt resolution of the trial, that would not inevitably have led him to spurn a finding of first-degree murder.[238]

In rejecting the prosecution's proffered reasons for eliminating Brooks, the Court focused primarily on the prosecution's alleged concern that missing classes worried Brooks.[239] The court dismissed this concern because, after the university dean informed Brooks that his jury service would not interfere with Brooks' student teaching obligations,[240] Brooks no longer had concerns about any hardship brought about by his jury service.[241]

According to the Court, the prosecution's second proffered justification was simply not credible because the prosecutor accepted white jurors who disclosed conflicting obligations that appeared to have been as serious, if not more serious, than Brooks'.[242] The Court singled out one white juror in particular, Ronald Laws, as having greater hardships than Brooks.[243] During voir dire, Laws, a self-employed general contractor, approached the trial judge and offered strong reasons why serving on a jury would cause him hardship.[244] Specifically, he stated that he had two houses that were nearing completion (one with the occupants moving in that very weekend) and that he had demanding family obligations brought about by his wife just having undergone a hysterectomy, causing him to have complete child care responsibilities during the time of trial.[245] Laws' childcare hardship was intensified by the fact that he and his wife were not from the area, and ostensibly did not have relatives to assist with the childcare.[246] Although the hardships to Laws were substantially greater than those to Brooks, the prosecutor did not use a peremptory challenge on Laws.[247]

During its *Batson* analysis, the Court stated that the question presented at the

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[236] *Id.* at 482.

[237] *Id.*

[238] *Id.*

[239] *Id.* at 482–83.

[240] *Id.* at 481–82. During the trial, the judge's law clerk telephoned Brook's Dean, Doctor Tillman, and was informed by the dean that the trial would not interfere with Brooks' student-teaching obligations. *Id.*

[241] *Id* at 482.

[242] *Id.* at 483.

[243] *Id.* at 483–84.

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *Id.* at 484. The Court also noted that the prosecution did not use a peremptory challenge to strike another white juror, John Donnes, who raised the concern that the trial would cause him substantial hardship.

third stage of the *Batson* inquiry is "whether the defendant has shown purposeful discrimination."[248] In answering this question, the Court found that the prosecution's proffer of this "pretextual explanation naturally gives rise to an inference of discriminatory intent."[249] The prosecution's explanation simply was not credible.[250] As a result, the Court reversed the judgment of the Louisiana Supreme Court and remanded the case.[251]

IV. Lessons Learned from *Snyder v. Louisiana*

Noticeably absent from the Court's decision in *Snyder v. Louisiana* was the prosecutor's deliberate attempt to bring sensitive racial issues into the case.[252] First, the Court made no reference to statements made by the prosecutor during rebuttal argument in the penalty phase regarding the acquittal of O.J. Simpson, a high-profile African-American defendant, for the murders of his ex-wife and a friend, both of whom were white.[253] A jury acquitted Simpson a year before Synder's trial.[254] Because of Simpson's acquittal, many white Americans believed that Simpson "was guilty of murdering his wife and that he 'got away with it.'"[255] During his rebuttal argument of the penalty phase of the Snyder trial, the prosecutor urged the all-white jury not to let this O.J. prototype "get away with" murder.[256] Because of *Miller-El*'s declaration that the trial court should examine "all relevant circumstances,"[257] the Court could have easily commented on the prosecutor's attempt to appeal to the jurors' prejudice during his closing argument. That is, the Court could have stated that the prosecutor's statements during closing arguments could have been evidence of his intent to discriminate during jury selection.

The Court's decision also omits any reference to the prosecutor's pretrial comments to the media referring to the Snyder trial as "his O.J. Simpson case."[258] Snyder's attorney was so concerned that the prosecutor would refer to the Simpson case during the trial that prior to trial he moved to exclude any reference to the Simpson case.[259] However, the trial judge denied the motion because the prosecutor gave his word that he would make no such refer-

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[248] *Id.* at 484–85.

[249] *Id.* at 485.

[250] *See id.*

[251] *Id.* at 486.

[252] State v. Snyder, 750 So. 2d 832 (La. 1999) (discussing prosecution's repeated allusions to the O.J. Simpson trial).

[253] *See id.*

[254] *Id.* at 864.

[255] *Id.* at 507 (Johnson, J., dissenting).

[256] *Id.* at 506 (Johnson, J., dissenting).

[257] Miller-El v. Dretke, 545 U.S. 231, 240 (2005) (citing Batson v. Kentucky, 476 U.S. 79, 96–97 (1986).

[258] State v. Snyder, 750 So. 2d 832, 864 (La. 1999) (Lemmon, J., dissenting).

[259] *Id.*

ences.[260]

Finally, the Court did not mention the fact that the prosecutor used the Louisiana voir dire procedure known as "backstriking" to eliminate venireman Brooks from the jury.[261] "Back striking refers to a party's exercise of a peremptory challenge to strike or excuse a prospective juror after initially accepting him, but prior to the final swearing of the jury panel."[262] The prosecutor's backstrike of Brooks eliminated the only African-American juror the State had originally accepted for service.[263] The timing of the backstrike of Brooks made the initial acceptance of Brooks suspicious.[264]

It appears that the Snyder trial commenced with the issues of race and prejudice prevalent in the case as evidenced by the prosecutor's references to the O.J. Simpson trial, both to the media and in his closing argument.[265] The prosecutor's statements before and during the trial, when viewed with the prosecutor's peremptory challenges striking all five African-American jurors who survived challenges for cause, made it quite easy for the Court to find that the prosecutor's peremptory challenges were motivated in large part by race.[266] Perhaps the Court felt that a discussion of the Simpson case was unnecessary and sought to avoid adding to the media frenzy surrounding the Simpson trial and verdict. Apparently, the Supreme Court believed that the prosecutor's motives were evident from his striking of Jeffery Brooks alone.[267] It is also possible that the Court wanted to demonstrate that discrimination in jury selection does not have to be blatant or that the prosecutor does not have to admit to discrimination for a *Batson* violation to exist.[268]

It is also noteworthy that the Court felt it unnecessary to discuss the defendant's claim that another African-American prospective juror, Elaine Scott, was struck by the prosecutor for a discriminatory purpose.[269] The Court seemingly

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[260] *Id.*

[261] *See* Snyder v. Louisiana, 552 U.S. 472, 475 (2008).

[262] State v. Snyder, 942 So. 2d 484, 508 n.1 (La. 2006) (Johnson, J., dissenting).

[263] *Id.* at 501 (Kimball, J., dissenting).

[264] *See Snyder*, 750 So. 2d at 863 (Johnson, J., dissenting).

[265] *Id.* at 864 (Johnson, J., dissenting).

[266] *See id.* at 864 (Lemmon, J., dissenting). The prosecutor's conduct before the Snyder trial also provides some indication of the prosecutor's intentions. *Id*. Prior to the trial, the defendant moved to exclude any reference to O.J. Simpson's acquittal by arguing that the prosecutor had been "all over two [counties] talking about 'this is his O.J. Simpson case.'" *Id*. Because the prosecutor stated he would not mention the Simpson case during trial, the trial judge denied the motion. *Id.*

[267] *See* Snyder v. Louisiana, 552 U.S. 472, 478 (2008).

[268] Another explanation for the Court's failure to discuss these issues is Chief Justice John Roberts's goal of narrow decisions for greater consensus. This goal allowed the Court to avoid the most difficult questions implicated by the case. *See* Case Comment, *Jury Selection*—Batson *Challenges*, 122 HARV. L. REV. 346, 346–47 (2008).

[269] *Snyder*, 522 U.S. at 478.

chose to discuss the prosecutor's striking of one potential African-American juror, Jeffrey Brooks, to emphasize that a *Batson* violation can be shown by the prosecution's use of a single peremptory challenge against a potential juror when that challenge is based on race.[270] As stated by the Court, "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose."[271]

In *Snyder v. Louisiana*, the Court sent a message to trial judges that they must be more active during voir dire to ensure that race does not play a role in jury selection.[272] *Snyder* focuses on step three of the *Batso*n analysis, in which the Court carefully scrutinized the actions of the trial judge during jury selection.[273] While the decision will not end racial discrimination during jury selection, it enhances the nondiscrimination principles enunciated in *Batson*, thus giving the *Batson* decision more context. When *Snyder* is read in conjunction with *Miller-El v. Dretke* and *Johnson v. California*,[274] trial court judges, prosecutors, and defense attorneys can learn lessons to assist in handling *Batson* issues.

As a result of the *Snyder* decision, it is now clear that trial courts considering *Batson* issues can conduct side-by-side comparisons of venire persons who were struck with those jurors who were not struck by the prosecutor. When the prosecutor's alleged race-neutral reasons for striking a potential juror do not withstand scrutiny and are found to be a pretext for racial discrimination, the trial judge should find a *Batson* violation. As often occurs during *voir dire*, the race-neutral reasons for peremptory challenges invoke a juror's demeanor, such as nervousness.[275] In this instance, the trial court should evaluate not only the prosecutor's credibility to determine whether the prosecutor's demeanor conceals 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.

Additionally, *Snyder* emphasized that a *Batson* violation can result from striking a single prospective juror.[276] Consequently, a side-by-side comparison of jurors struck by the prosecutor and those allowed to serve becomes even more important to find individual violations without an evident pattern of discrimination. Of course, if a pattern of discrimination by the prosecutor develops, the defendant should object to race based exclusion of potential jurors.[277] On the other hand, if there is no pattern of discrimination, and the defendant

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[270] *See id.*

[271] *Id.* (quoting United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994)).

[272] *See id.* at 477.

[273] *Id.*

[274] Miller-El v. Dretke, 545 U.S. 231 (2005); Johnson v. California, 545 U.S. 162 (2005).

[275] *See Snyder*, 552 U.S. at 478–79.

[276] *Id.* at 478.

[277] For instance, in *Miller-El v. Dretke*, after the prosecutor used peremptory challenges to strike ten of the eleven qualified black venire members during jury selection, the defense

believes that the prosecutor struck a juror because of race, the defendant is better able to meet his burden of showing a *Batson* violation. The defendant can convince the trial judge that the race-neutral reason was pretext because the prosecutor did not strike similarly situated jurors.

Furthermore, because of the trial judge's ability to observe the prosecutor's and prospective juror's demeanors, the reviewing court will grant the trial judge substantial deference in handling *Batson* issues.[278] Consequently, the reviewing court will sustain the trial court's ruling on the *Batson* issue unless it is clearly erroneous.[279]

For this reason, it is important that lawyers create a record of everything occurring in the courtroom. This record will provide sufficient information from which the trial judge or the appellate court can make a proper determination on the *Batson* issues. It is often beneficial for attorneys to have a second-chair attorney or legal assistant to record the race of the jurors, types of questions opposing counsel asks, types of challenges made against jurors of a particular race, and any disparate treatment by opposing counsel of people of different races. Disparate treatment could be the attorney's tone of voice, language used, or general demeanor towards one racial group as compared to another. This attention to detail will help the attorney make the kind of detailed record that is necessary to successfully challenge or defend against a *Batson* challenge.

An example of disparate treatment of racial groups occurred in *Miller-El v. Dretke* when the prosecutor posed different voir dire questions to the African-American and non-African-American panel members on two different subjects.[280] First, the prosecutor used disparate lines of questions for the African-American panelists and non-African-American panelists on their views of capital punishment.[281] The African-American panelists were questioned with a "graphic script" that detailed Texas's capital punishment methodologies, which was meant to induce qualms about applying the death penalty.[282] These doubts about the death penalty were designed to produce an appearance of hesitancy to consider the death penalty and thus to obtain credible neutral reasons for a peremptory challenge of a prospective juror who expressed the uncertainty.[283] Meanwhile, white panelists were given a bland description of the death penalty before being questioned about their individual feelings on the matter.[284] Additionally, all African-American panelists were subjected to a trick question

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attorney objected after seeing a pattern of strikes against black venire members. *Miller-El*, 545 U.S. at 236.

[278] *Snyder*, 552 U.S. at 477.

[279] *Id*.

[280] *Miller-El*, 545 U.S. at 255.

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] *Id.* (citing Miller-El v. Cockrell*,* 537 U. S. 322, 332 (2003)).

about the minimum acceptable penalty for murder with the purpose of inducing a disqualifying answer, while only a small percentage of non-African-Americans were subject to the trick question.[285] As a result of the disparate questions and other tactics used by the prosecutor, the Supreme Court in *Miller-El* found that the prosecutor's peremptory challenges of African-American panelists violated the *Batson* principles.[286]

When a defendant makes a *Batson* challenge based on race, she should state the particular race of the person (or persons) improperly struck by the prosecution and be able to rebut the alleged neutral reasons given by the prosecution. In challenging the prosecution's exercise of peremptory challenges, the defendant should state as many details as possible to support the challenge. The details could be used for statistical analysis of the number of peremptory challenges used by the prosecution on members of a particular race. For example, in *Miller-El v. Dretke*, the prosecutors used peremptory challenges to strike ninety-one percent of the eligible African-American venire members.[287] Alternatively, the details could provide side-by-side comparisons of similarly situated venire panelists of a particular race who were allowed to serve on the jury with those who were struck by the prosecution. For instance, the Court in *Snyder* conducted side-by-side comparisons of some African-American prospective jurors who were struck and white jurors who were allowed to serve.[288] When the *Snyder* Court performed a comparative analysis of jurors Jeffrey Brooks and Ronald Laws, it found that the prosecutor's reason for striking Jeffrey Brooks, an African-American prospective juror, should also have applied to Ronald Laws, a white juror who the prosecutor did not strike.[289]

If the race-neutral reason given for striking a member of a particular race applies with equal force to a member of a different race, and the prosecutor did not exercise a peremptory challenge against that person, there may be sufficient evidence to prove purposeful discrimination under *Batson*'s third step.[290] To satisfy step one of the *Batson* test, that is, to make a prima facie showing that the prosecution discriminated in its use of peremptory challenges, *Johnson v. California* states that the defendant must show that the prosecution exercised its peremptory challenges based wholly or in part on race.[291] The prima facie inquiry mandated by *Batson* is minimal and is met when the defendant produces evidence sufficient to permit the trial court to draw an inference that discrimination has occurred.[292] The Court's decision in *Johnson* clarified the burden for the defendant in step one of the *Batson* analysis. This slight burden draws

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[285] *Id.* at 265–66.
[286] *Id.* at 266.
[287] *Id.* at 241 (citing Miller-El v. Cockrell, 537 U. S. 322, 342 (2003)).
[288] Snyder v. Louisiana, 553 U.S. 472, 483–84 (2008).
[289] *Id.* at 484.
[290] *Miller-El*, 545 U.S. at 241.
[291] Johnson v. California, 545 U.S. 162, 170–71 (2005).
[292] *Id.* at 169 (quoting Batson v. Kentucky, 476 U.S. 79, 94 (1986)).

attention to the actions and words of the prosecutor in exercising peremptory challenges.

Before responding with a race-neutral explanation, the prosecution should allow the trial judge to determine if the defendant has made the prima facie showing required by *Batson*. Otherwise, if the trial judge fails to rule specifically on whether a defendant asserting a *Batson* challenge met the burden to establish a prima facie case of discrimination based on race, yet does rule on the ultimate question of intentional discrimination in step three, the question of whether the defendant has made a prima facie showing becomes moot.[293] The prosecutor should allow the defendant to respond, because it is possible that the defendant could fail to make a prima facie showing of race discrimination. If the prima facie showing is not made, the *Batson* challenge fails and the voir dire process continues.

If the defendant does make a prima facie showing of racial discrimination in step two of the *Batson* analysis, the trial judge should require the prosecution to offer a race-neutral reason for exercising the peremptory challenge, because the burden of production shifts to the proponent of the strike to provide a race-neutral explanation.[294] It is not sufficient for the prosecutor to simply deny having a discriminatory motive or to affirm good faith.[295] The race-neutral reason does not have to be persuasive or even plausible, though, because at this stage the issue is the facial validity of the prosecutor's explanation.[296] However, the race-neutral reason does have to be persuasive in order to survive the court's discretion in stage three.[297] "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[298] Notwithstanding this low threshold at step two, the prosecution should provide enough details on the record so that the trial judge will have sufficient information to make an appropriate determination at step three of the *Batson* analysis. For example, in *Snyder v. Louisiana*, the first reason given by the prosecutor for striking Jeffrey Brooks, the African-American venire person, was that "he looked very nervous to [the prosecutor] throughout the questioning."[299] The Court did not presume that the trial judge credited the prosecutor's assertion that Brooks was nervous because the prosecutor did not provide any details of Brooks' nervousness, the fact that "nervousness cannot be shown from a cold transcript," and the fact that the trial judge did not make an actual determination concerning Brooks' nervousness.[300] In other words, because the

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[293] Hernandez v. New York, 500 U.S. 352, 352 (1991).

[294] Purkett v. Elem, 514 U.S. 765, 767 (1995).

[295] *Id.* at 768.

[296] *Id.*

[297] *Id.*

[298] *Id.* (citing *Hernandez*, 500 U.S. at 360).

[299] Snyder v. Louisiana, 552 U.S. 472, 478 (2008) (citing Snyder v. State, 942 So. 2d 484, 496 (La. 2006)).

[300] *Id.* at 479 (citing *Snyder*, 942 So. 2d at 496).

trial judge did not make any comment regarding Brooks' demeanor, it was not clear from the record whether the trial judge considered the alleged nervousness at all.[301] Consequently, the Court did not evaluate this reason for the prosecutor's peremptory challenge.

Step three of the *Batson* analysis requires the trial judge to consider "all relevant circumstances" and determine if the explanation given for the strike is convincingly race-neutral.[302] If the record does not support the prosecutor's proffered reason for the *Batson* challenge or indicates that the prosecutor's reason is "fantastic or improbable," this could be found as a pretext for the purpose of discrimination.[303] For an appellate court to consider a trial court's determination on a *Batson* issue properly, the appellate court must have sufficient information from the record in order to makes its evaluation. Consequently, when the defense questions the prosecution's peremptory challenges, the prosecutor should request that the trial judge make a finding on the record regarding all of the reasons given for exercising a peremptory challenge. This ensures that the court considers each race-neutral reason, thus producing a more detailed record for appellate review.

Another effect of the *Snyder* decision is that it may have expanded the authority of the reviewing court to consider alleged *Batson* violations. Simultaneously, the *Snyder* decision may have also taken away some of the trial court's discretion in deciding *Batson* issues. While the *Snyder* Court emphasized that it would defer to the trial court's rulings on *Batson* issues except in "exceptional circumstances,"[304] the Court also reiterated that the trial and reviewing courts must examine "all of the circumstances that bear on the issue of racial animosity."[305] By giving the reviewing court the power to consider all relevant circumstances bearing on racial animosity, the Court effectively granted the appellate court an opportunity to eradicate racism in jury selection that was unavailable to the trial court. The appellate court is clearly in a better position than the trial court to observe all relevant circumstances, because a reviewing court considers everything in the record as a whole. During jury selection, the trial judge is busy handling objections, observing the demeanor and credibility of the lawyers and potential jurors, listening to the type and tone of questions posed by lawyers, and generally making first hand observations of occurrences in the courtroom. Because the trial judge has a myriad of responsibilities during jury selection, she could easily miss many forms of discrimination, subtle or not, that may occur during voir dire. Because the appellate judge reviews the record *in toto*, she may find discrimination where the trial judge did not.

Simply stated, many occurrences may not be apparent to the trial judge but

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[301] *Id.*

[302] *Id.* at 484–85.

[303] *Id.* at 485 (citing *Hernandez*, 500 U.S. at 365).

[304] *Id.* at 477 (quoting *Hernandez*, 500 U.S. at 366).

[305] *Id.* at 478 (citing Miller-El v. Dretke, 545 U.S. 231, 239 (2005)).

may be apparent to the reviewing court as it considers the entire record of the trial. For example, disparate types of questions posed to prospective jurors of different races may be much more apparent when an appellate court reviews them as part of the record, as the appellate court has as much time as it needs to consider *Batson* issues, than when a trial court observes them during the hurried and often fast-paced voir dire process. Moreover, the reviewing court is able to compare the prosecutor's questions during voir dire to those statements and questions made at different points during the trial, such as those made during opening statement, closing argument, and during the prosecution's case in chief, to ascertain the prosecutor's real intent during jury selection. Consequently, the *Snyde*r Court may have indirectly granted appellate courts the power to consider evidence in the record that the trial court did not consider. In this instance, it is possible that the trial court, while being vigilant during the trial, may have inadvertently missed or not fully understood the effect of an action of the prosecution bearing on racial animosity.

Although the Court in *Snyder* stressed how important it is for the trial court to make its findings on the record, the Court missed an opportunity to provide guidance to judges, lawyers, and litigants on how to handle mixed-motive reasons given by the prosecutor for exercising a peremptory challenge. Mixed-motive issues arise when the prosecutor executing the peremptory challenge states multiple reasons for exercising the peremptory challenge, one reason being discriminatory and the other being nondiscriminatory.[306] The Court has not yet ruled on whether a mixed-motive analysis is consistent with the intent of *Batson* and its progeny.[307] Because the prosecution in *Snyder* gave two reasons for exercising a peremptory challenge against Brooks, the arguably proper "nervousness" reason, and the other, pretextual concern about Brooks' student-teaching obligations,[308] the Court could have opined on whether the peremptory challenge of Brooks would have resulted in a *Batson* violation.

Would the result in *Snyder* have been different if the Court had applied a mixed-motive analysis? The outcome should have been the same. Based on the Court's rationale in *Snyder*, the prosecutor's strike of Brooks was motivated in substantial part by discriminatory intent.[309] Consequently, even if the trial court had accepted the prosecutor's statement about Brooks' nervousness as legitimate, the Court should still have found a *Bats*on violation. After all, in recent cases discussing the *Batso*n three-step process,[310] the Court has continually sent the message that racial discrimination in jury selection will not be

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[306] *See* Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 281 (2007).

[307] *Id.* at 282.

[308] *Snyder*, 552 U.S. at 479–80.

[309] *Id.* at 485.

[310] *See* Johnson v. California, 545 U.S. 162 (2005); Miller-El v. Dretke, 545 U.S. 231 (2005).

tolerated. Because the prosecutor's discriminatory intent in *Snyder* was clear, it would have been inconsistent with the *Batson* principles for the peremptory challenge to stand in light of that intent.

V. Conclusion

Twenty years later, the Supreme Court is still construing the *Batson* decision.[311] While the Court may have vacillated in expounding on how step two of the *Batson* test should be applied, the Court has continued to stress that it will not tolerate racial discrimination during jury selection in criminal cases. In *Snyder v. Louisiana*, the Court continued its attempt to eradicate racial discrimination during voir dire by underscoring that a *Batson* violation can result from the striking of a single potential juror. By allowing a side-by-side comparison of a prospective juror struck by the prosecutor with a peremptory challenge with jurors who were not struck by the prosecutor, trial and appellate courts should now be more able to assess the real motive of parties during jury selection, thus enforcing the Court's mandate that racial discrimination should have no place in jury selection.

While appellate courts must still grant substantial deference to trial courts in their rulings during jury selection in criminal cases, trial courts must apply each of the *Batson* steps according to principles articulated by the Supreme Court. They must also simultaneously announce their rulings on the record so that the reviewing courts can clearly understand the bases of the rulings relative to the exercise of peremptory challenges. Failure by the trial courts to do so can lead to reversals. Further, by emphasizing to reviewing courts that they have the power to consider all relevant circumstances bearing on racial animosity, the Supreme Court may have given appellate courts additional power to eradicate racism during jury selection.

Although there are many uncertainties left in determining the validity of peremptory challenges, *Snyder v. Louisiana* offers a major step toward reconciling conflicting Supreme Court precedents while more clearly explicating the requirements for each step of a *Batson* analysis. Although *Snyder* will most definitely not deter all instances of peremptory challenges used for discriminatory purposes, it should at least serve to make such practice more recognizable and therefore more likely to result in reversal.

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[311] Batson v. Kentucky, 476 U.S. 79 (1986).

Judicial Trial Court and Appellate View

Judge Paul G. Feinman
NYS Court of Appeals, Albany

Judge Wilma Guzman
State of New York Unified Court System, Bronx

The Constitution of the State of New York

ARTICLE I
BILL OF RIGHTS

[Rights, privileges and franchise secured; power of legislature to dispense with primary elections in certain cases]
Section 1. No member of this state shall be disfranchised(1), or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers, except that the legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general law. (Amended by vote of the people November 3, 1959; November 6, 2001.) (2)

[Trial by jury; how waived]
§2. Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

The United States Constitution

The Constitution is presented in several ways on this site. This page presents the Constitution on one large HTML-enhanced page. Other pages present the Constitution as a series of individual pages, in plain text, in standard Palm DOC format, and in enhanced TealDoc format. A quick reference is also available, as are photos of the Constitution. The Constitution of China is available for comparison.

In these pages, superseded text is presented like this: *(This is superseded text.)* Added text that is not a part of the Constitution is presented like this: **(This is added text.)**

US Constitution Table of Contents

The Constitution of the United States

Preamble *Note*

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Amendment 6 - Right to Speedy Trial, Confrontation of Witnesses

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In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 14 - Citizenship Rights

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1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

OCTOBER 14, 2017 **NYSBA TRIAL LAWYERS SECTION**
ALBANY LAW SCHOOL **CONTINUED LEGAL EDUCATION PROGRAM**

JURY SELECTION, PEREMPTORY CHALLENGES, CHALLENGES FOR CAUSES, BATSON & BEYOND

JUDICIAL TRIAL COURT: A VIEW FROM THE BENCH

HON. WILMA GUZMAN

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4. ***United States v. Biaggi, 673 F. Supp 96 (E.D.,NY 1987, aff'd, 853 F2d 89 (2nd Cir.1988) (Italian-Americans)***
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22. ***People v. Langston, 167 Misc.2d 400, 641 N.Y.S.2d 513 (1996)***
23. ***Siriano v. Beth Israel Hosp. Ctr., 161 Misc.2d 512, 614 N.Y.S.2d 700 (1994)***
24. ***O'Neill v. New York, 160 Misc.2d 1086, 612 N.Y.S.2d 303 (1994)***
25. ***People v. Thomas, 141 Misc.2d 182, 533 N.Y.S.2d 192 (1988)***

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104 A.D.2d 263, 482 N.Y.S.2d 939

The People of the State of New York, Respondent,

People v Shedrick
Supreme Court, Appellate Division, Fourth Department, New York December 14, 1984 104 A.D.2d 263 482 N.Y.S.2d 939 *(Approx. 8 pages)*

Robert Shedrick, Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
992/84
December 14, 1984

CITE TITLE AS: People v Shedrick

SUMMARY

Appeal from a judgment of the Steuben County Court (Purple, J.), rendered upon a verdict convicting defendant of two counts each of murder in the second degree, felony murder, robbery in the first degree and petit larceny, and burglary in the first degree and conspiracy in the fourth degree.

HEADNOTES

Crimes
Selection of Jury

(1) Section 500 of article 16 of the Judiciary Law requires only that Grand and petit juries be selected at random from a fair cross section "of the community in the county or other governmental subdivision wherein the court convenes" and does not require that the jury be drawn from a cross section of the community of the county wherein the court convenes; thus, the Steuben County jury districting system does not violate article 16 of the Judiciary Law by requiring that when County Court convenes in the Village of Bath, grand and petit jurors are to be selected from the Bath jury district which holds approximately 30% of the population of the county.

Crimes
Selection of Jury

(2) In order to show that a jury selection system violates the Sixth and Fourteenth Amendments of the Federal Constitution thus depriving defendant of due process of law, defendant bears the burden of showing, prima facie, that a substantial and identifiable segment of the community was not included in the jury pool because the process used to select jurors systematically excluded that group from service; and defendant has not met that burden where a Grand or petit jury convenes in the Village of Bath; although some 71% of the Steuben County population in districts other than Bath is excluded from jury service pursuant to the county jury selection system, defendant does not allege that the jurors from Bath were ethnically, economically, politically or otherwise significantly different from those in the other Steuben County districts and that this disparity was represented in his panel.

Crimes
Venue

(3) A motion for a change of venue is granted where a defendant is able to demonstrate reasonable cause to believe that a fair and impartial trial cannot be had due to extensive media coverage; however, where defendant moves for change of venue, is advised to bring another such application if it develops during the *voir dire* that a fair and impartial jury cannot be drawn, but allows jury selection to be completed without further application and fails even to exhaust his peremptory challenges, defendant failed to preserve for appellate review the contention that he was deprived of a fair trial.

Crimes
Evidence
Testimony Incredible as Matter of Law

(4) The incriminating testimony of an alleged accomplice is not incredible as a matter of law where the jury chose to believe that testimony rather than defendant's alibi, although there were many inconsistencies in the witness' testimony and he had been intoxicated with drugs and alcohol on the day in question. **264*

Crimes
Evidence
Polygraph Test Results

(5) The results of a polygraph test are clearly inadmissible in New York; therefore, the trial court did not err in refusing to conduct a *Daniels* hearing (102 Misc 2d 540) to determine the reliability of a polygraph examination.

Crimes
Indictment
Motion to Dismiss in Interests of Justice--Hearing Not Required

(6) The fact that a motion under CPL 210.40 to dismiss an indictment in the interests of justice because of police misconduct has been made does not require the trial court to conduct a *Clayton* hearing (41 AD2d 204); a detailed enumeration of the various statutory factors involved in the denial of the motion is unnecessary.

APPEARANCES OF COUNSEL

David A. Shults for appellant.
Larry D. Bates, District Attorney, for respondent.

OPINION OF THE COURT

Moule, J.

At 9:30 A.M. on January 22, 1980, the bludgeoned bodies of Frank and Virginia Kiff were found by their daughter in their home on West Washington Boulevard in the Village of Bath. The body of Mrs. Kiff, age 74, was in a sitting room near the bathroom; that of Mr. Kiff, age 79, was in the pantry near the kitchen. Both bodies were fully clothed and lay in pools of blood. The kitchen door leading to the rear porch was slightly ajar and the window glass in it had been broken; shards of glass were on the kitchen floor. Mrs. Kiff still had on a large diamond ring on her right hand and her wedding band, but her purse and a desk in the sitting room near her body appeared to have been ransacked. Mr. Kiff was not wearing any jewelry when found; his wallet, located near his body, contained no currency.

The victims were pronounced dead by the Steuben County Coroner shortly after 10:00 A.M. that day; the Coroner believed they had died between 9 and 11 hours earlier. An autopsy revealed that the deaths resulted from multiple blows to the head with a heavy instrument.

Police learned that the Kiffs had been playing bridge on the night of January 21, 1980 at the nearby Wightman Primary School. Witnesses told police that the Kiffs had left the school at approximately 11:20 P.M. Police estimated that it took but 45 seconds to drive from the school to the Kiff residence. A friend of the victims observed that, at the school, Mr. Kiff was wearing a large diamond ring and that Mrs. Kiff, in addition to wearing the diamond ring on her right hand and wedding band, was wearing her engagement ring. **265*

Defendant and two others, Edward Ames and Harry Barnes, were arrested for an unrelated matter, possession of stolen coins, on the afternoon of January 22, 1980. All three, along with defendant's sister, Wanda Shedrick, were later accused of committing the Kiff homicides. Defendant was subsequently charged in a 10-count indictment with two counts each of intentional murder (Penal Law, §125.25, subd 1), felony murder (Penal Law, §125.25, subd 3), first degree robbery (Penal Law, §160.15, subd 1), petit larceny (Penal Law, § 155.25), and one count each of first degree burglary (Penal Law, §140.30, subd 2) and fourth degree conspiracy (Penal Law, §105.10, subd 2).[1]

Defendant moved for a change of venue in October, 1980. Defendant's application was subsequently denied by our court on the ground that defendant had failed to show he could not receive a fair trial in Steuben County. It was ordered, however, that the trial be "held in a courthouse other than the one at Bath". Defendant was further informed by the court in its

order that he could make another application in the event that jury selection showed that an impartial jury could not be selected. Defendant subsequently made a second application for a change of venue on the eve of jury selection, which we rejected as premature. Jury selection was completed without further application; significantly, defendant failed to exhaust his peremptory challenges.

At trial, the People's case was based entirely on the testimony of one of defendant's alleged accomplices, Edward Ames, and two admissions defendant was alleged to have made while awaiting trial. No physical evidence connecting defendant to the crime was presented.

Ames testified that he met defendant, who was then his roommate, at a Bath pool hall on the afternoon of January 21, 1980. They left to go to the home of Harry Barnes, a mutual friend, "To split up some coins" that Ames had stolen earlier in the day. The three went to the Bath bowling alley to get something to eat, and then took a taxicab to a laundromat on Washington Street where they used a coin change machine to convert 50-cent pieces into quarters. They left the laundromat and walked across the street to a parking lot where they met Wanda, defendant's sister and Ames' girlfriend; she was driving a green Maverick. The group decided to drive to defendant's parents' home in Hammondsport where they met defendant's parents and two brothers, Bill, Jr., and Sherlock. ***266***

Ames stated that Bill, Jr., drove him, defendant and Barnes to a nearby store to buy beer and gas. After they returned to the Shedricks' home, the group drank beer in the driveway and, later, defendant, Wanda, Barnes and Ames went into the house where defendant explained "a burglary that he wanted to do". Defendant stated that Barnes and Ames were to keep watch outside while Wanda waited in the car and he entered the house. Defendant identified the proposed victims as the owners of the Pontiac dealership in Bath. The four left the Shedrick home at around 10:30 P.M., drove to the primary school in Bath, and drove back to the West Washington Street laundromat. Barnes and Ames walked inside to change more coins as the others waited in the car. Defendant then came in and asked Ames to get the tire iron out of the trunk. Ames was familiar with the iron because he has used it earlier in the day; he obtained the trunk key from Wanda, opened the trunk and laid the iron on the ground behind the car. Ames returned the keys to Wanda and walked back into the laundromat. Ames stated that defendant had been standing next to the car and that he did not see the iron again that evening.

Ames further testified that, shortly thereafter, defendant walked into the laundromat to summon him and Barnes. The four drove to Pine Street, a street intersecting West Washington Boulevard near the Kiffs' home, exited the car and walked to the Kiff residence; no car was in the driveway and no lights were on in the house. Barnes walked to the far side of the house while Ames hid in the back yard. Defendant walked up the back porch to the door. Ames next heard "sounds like glass breaking and a door being pushed in". Ames saw an individual walk by the driveway, apparently taking a shortcut, while defendant was in the house. A few moments later, Ames heard a dog bark and saw a car pull into the Kiff driveway while defendant was still inside the house. Ames saw some lights turned on in the front of the house and then heard the screams of a man and a woman. Through a window visible from his hiding spot, Ames saw a silhouette of a male striking downward onto something laying on the floor.

After he saw defendant run from the house about 15 minutes later, Ames went over to the window and saw a body laying on the floor in a pool of blood. Ames recalled that a table light and an overhead light in the room had been turned on. Ames then ran toward Pine Street and jumped into the waiting car. Wanda drove the group to defendant's and Ames' apartment at 30 Buell Street. Defendant indicated that "it didn't go as planned", walked inside alone and returned wearing different clothing. ***267*** Wanda then dropped Barnes off near his apartment and drove the others to the Eatons' house on Morris Street. Defendant walked inside alone; Ames followed 15 minutes later.

Defendant and Ames left after watching some television and walked to Ames' nephew's home. During this walk, defendant displayed two rings and some paper currency to Ames. After smoking marijuana with Ames' nephew, defendant and Ames returned to the Eaton's where they spent the night.

Ames testified that upon returning to the apartment he shared with defendant on the following afternoon he opened defendant's closet and saw the tire iron he had taken out of the car the night before. The tire iron had blood and hair on it and there was a lot of blood on the floor; additionally, two rings were on the floor of the closet. Ames testified that defendant

later told him that Wanda "had cleaned out the apartment" prior to a police search of the premises.

Ames' credibility was attacked at length during cross-examination. He admitted to convictions of attempted third degree burglary and petit larceny and to a probation violation. On the morning of January 21, he drank a pint of wine and had two hits of phenobarbital before going to the bowling alley, where he had four double seven and sevens and a pitcher of beer. He remembered having four hits of speed during the day but could not recall how many marihuana cigarettes he had smoked. Ames once described his condition as "being super super screwed up". Ames also admitted that he had received the opportunity to plead guilty to third degree burglary in exchange for his testimony. Ames' credibility was further impeached by his admissions that he had changed his account of what happened several times prior to trial and that he had threatened Wanda, after their relationship had soured, with implicating her and defendant in the Kiff homicides. On redirect, Ames explained that he had initially lied to investigators in an attempt to arrange a deal between Wanda and the authorities.

Joseph Eaton, Jr., testified that defendant and Ames arrived at his house around midnight on January 21, 1980, that they left for awhile and then returned before 1:00 A.M. Eaton observed nothing unusual about the pair, although he believed that Ames was intoxicated.

Deputy Sheriff James Woolridge took speedometer readings and mileage timings in an attempt to determine the veracity of Ames' story. It took Woolridge 8 minutes to drive from the Shedrick home to the Weston Country Store; 19 minutes to drive *268 from the Shedrick home to a downtown Bath intersection; and 2 minutes from that intersection to the West Washington Street laundromat.

Bath Police Sergeant Wenban jogged from the Kiff residence to Pine Street; the run lasted 1 minute and 5 seconds. He drove from Pine Street to defendant's apartment at 30 Buell Street; that took 1 minute and 5 seconds. It took 2 minutes and 10 seconds to drive from Buell Street to the Eaton residence on Morris Street. Wenban added five minutes to his total (assuming a five-minute visit at Buell Street) and determined that the total was in excess of nine minutes. Wenban estimated that it would take 45 seconds to drive from the Bath primary school to the Kiff residence.

James Jackson, an inmate at the Elmira Correctional Facility, testified that he and defendant became acquainted in February, 1980 while both were incarcerated at the Steuben County Jail. On February 6, Jackson asked defendant in the presence of Robert Laughlin if he had been involved in the Kiff matter and defendant answered "definitely yes to the burglary charge case of the Kiffs and on the murder charge it's hard to explain how he said *** I asked him if he was the one that killed the Kiffs *** and when I asked him and he just pointed to his eyes and asked me if those looked like the eyes of a killer". Defendant also mentioned that Wanda, Barnes and Ames were involved. Jackson stated that he had never conversed with authorities regarding a *quid pro quo* for his testimony.

Michael Campbell testified that he had a conversation with defendant while the two were in the Elmira Correctional Facility in May, 1980. On May 12 or 13, Campbell asked about the murders. Defendant replied, "I had to. They seen my face." On the following Friday, defendant "told me it was so well-planned that they would never catch him for it and that he passed a lie detector but failed some kind of stress test". Defendant had cased the place for at least two and a half weeks and knew that the Kiffs were playing cards at the school. Wanda had dropped off Ames, defendant and Barnes and hid the car. Wanda returned and defendant broke the glass on the door with his gloved fist. Defendant told Campbell that he jumped Mr. Kiff and that Barnes then jumped Mrs. Kiff. Barnes then removed the ring from Mrs. Kiff's finger and Wanda ransacked Mrs. Kiff's pocketbook. Barnes unsuccessfully tried to cut off one of Mrs. Kiff's fingers so that another ring could be removed. Campbell stated that defendant told him Mr. Kiff was killed in the pantry and Mrs. Kiff was killed near a foyer bathroom. Defendant mentioned that a tire iron was used in the killings and stated that *269 jewelry was taken and later hidden. Campbell also stated that defendant told him that he went to the Eatons' house and his parents' house to establish an alibi.

Campbell's credibility was impeached by a showing of extensive prior bad acts including a lengthy criminal record. Campbell admitted receiving a letter of recommendation to the parole department from the District Attorney in exchange for his testimony.

For the defense, Robert Laughlin testified that he shared a cell at the Steuben County Jail with defendant and Jackson in February, 1980. When Jackson inquired as to whether

Defendant's first contention is that he was indicted and convicted by unlawfully constituted Grand and petit juries. They were unlawfully constituted, he claims, because the Steuben County jury districting system violates both article 16 of the Judiciary Law and the due process guarantees of the Sixth and Fourteenth Amendments of the Federal Constitution.

Under the Steuben County system, the county is divided into three jury districts: Bath, Corning and Hornell. When County Court convenes in the Village of Bath, grand and petit jurors are selected from the first jury district, which includes Bath and certain surrounding municipalities and, when it convenes in either Corning or Hornell, prospective jurors are selected solely from the district in which the court is sitting. The Bath district holds approximately 29,511 potential jurors or 30% of the population; Hornell holds 26,665 or 27% and Corning holds 42,802 or 43%. Defendant was indicted in Bath and tried in Corning.

The Steuben County Board of Supervisors created the three district jury selection system in 1904 pursuant to State enabling legislation that permitted counties to adopt jury districting plans (see L 1892, ch 686, § 12, subd 14; L 1902, ch 119). This system, which was apparently adopted for the convenience of veniremen, has remained unchanged despite two important changes in State law.

The first change was made in 1942 when the county's power to create jury districts was repealed (L 1942, ch 799, § 20). That amendment neither expressly nor impliedly abolished existing districts that were lawfully created (*People v. Wood*, Steuben County Ct, Sept. 18, 1979 [Purple, J.]; see, also, General Construction Law, §93; McKinney's Cons Laws of NY, Book 1, Statutes, § 391; *Matter of Urban League of Rochester v. County of Monroe*, 71 AD2d 787, revd on other grounds 49 NY2d 551; cf. *People v. Johnson*, 110 NY 134). The second change, the one relied on by defendant, was made in 1977 when article 16 of the Judiciary Law was adopted. Section 500 provides: "It is the policy of this state that all litigants *** entitled to trial by jury *272 shall have the right to grand and petit juries selected at random from a fair cross-section *of the community in the county or other governmental subdivision wherein the court convenes*" (emphasis added).[2]

(1)Defendant argues that the italicized language specifically requires that prospective jurors be drawn from the entire county and, thus, that the Steuben County three district system conflicts with section 500 and is impermissible. We disagree.

Section 500 requires only that Grand and petit juries be selected at random from a fair cross section "of the community *in* the county *or* other governmental subdivision *wherein* the court convenes" (emphasis added). It does not require that the jury be drawn from a cross section of the community *of the county* wherein the court convenes. Further, the language of the statute and the memorandum accompanying it (Memorandum of Office of Court Admin, McKinney's Session Laws of NY, 1977, p 2617) show that article 16 seeks only to promote a fair, efficient and economical jury selection system. Since we view the Steuben County jury selection system as being in harmony with these goals and, since article 16 neither contains language expressly nor impliedly abolishing lawfully created districting systems, we decline to interpret article 16 as prohibiting the Steuben County jury districting system (*People v. Wood*, Sept. 18, 1979 [Purple, J.], supra.; see, also, General Construction Law, §93; McKinney's Cons Laws of NY, Book 1, Statutes, § 391; *Matter of Urban League of Rochester v. County of Monroe*, supra.; cf. *People v. Johnson*, supra.).

Defendant also argues that the Steuben County jury selection system violates the Sixth and Fourteenth Amendments of the Federal Constitution; specifically, that Grand and petit juries were not selected from a group that is reasonably representative of a fair cross section of the community (*Duren v. Missouri*, 439 US 357; *People v. Guzman*, 60 NY2d 403, cert den __ US __, 104 S Ct 2155; *People v. Parks*, 41 NY2d 36).

The Sixth and Fourteenth Amendments require that a jury be selected in an impartial manner from a group that is reasonably representative of the community. "[T]he deliberate exclusion of a particular community group or class of persons from jury service violates the constitutional right to a jury trial" (*People v. Parks*, supra., at p 42). In order to show that he has been deprived of due process of law, a defendant bears the burden of showing, *273 prima facie, that a substantial and identifiable segment of the community was not included in the jury pool because the process used to select jurors systematically excluded that group from service (*People v. Guzman*, supra.).

(2)Here, defendant failed to establish a prima facie case. While it is true that, when a Grand or petit jury convenes in Bath, some 71% of the Steuben County population is excluded from jury service, defendant has failed to show that doing so systematically excludes a

"distinctive" group or class of persons (*Duren v. Missouri*, supra., at p 364). Defendant does not allege that the jurors from Bath were ethnically, economically, politically, or otherwise significantly different from those in the other Steuben County districts and that this disparity was represented in his panel (see *People v. Waters*, 123 Misc 2d 1057). Absent such a showing, the jury selection system in Steuben County is not constitutionally infirm. [3]

(3)Defendant's second contention is that extensive media coverage deprived him of a fair trial. The gravamen of defendant's contention is his claim that local publicity in this small, rural community was so widespread that it was impossible for him to draw a fair and impartial jury. In response to this same concern, our court has previously granted motions for change of venue where a defendant is able to demonstrate "reasonable cause to believe that a fair and impartial trial cannot be had" (*People v. Acomb*, 94 AD2d 978; see, also, *People v. Sawyer*, 94 AD2d 978). In our previous order denying defendant's motion for change of venue, we advised him to bring another such application "[i]f it develops during the voir dire that a fair and impartial jury cannot be drawn". Jury selection was thereafter completed without further application; indeed, defendant failed to even exhaust his peremptory challenges. Given these circumstances, defendant has failed to preserve this contention for our review (see *People v. Pepper*, 59 NY2d 353, 358). [4]

Defendant next contends that the testimony of Edward Ames was "incredible as a matter of law". This contention is based ***274** principally upon Ames' inconsistent testimony and upon his drug and alcohol intoxication.

Testimony will be rejected as being incredible as a matter of law when it is "incredible and unbelievable, that is, impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v. Stroman*, 83 AD2d 370, 373). Credibility is best determined by the trier of fact who has the advantage of observing the witnesses and, necessarily, is in a superior position to judge veracity than an appellate court, which reviews but the printed record (*People v. Cohen*, 223 NY 406; *People v. Majeer*, 100 AD2d 830; *People v. Wright*, 71 AD2d 585).

In the final analysis, this case came down to a question of defendant's alibi against Ames' incriminating testimony. There is no inherent incredibility or improbability in Ames' testimony. While there are many inconsistencies, each was revealed to the jury which, nevertheless, chose to believe Ames rather than defendant. As the Court of Appeals has aptly stated, "If diverse inferences may properly be drawn from the testimony; if witnesses contradict each other, or if their character is criticized; if the probability of the stories told by them is questioned; if their interest in the result may influence them, it is for the jury to decide where the truth lies. We may not reverse its finding because some of us or all of us would have hesitated to reach the same conclusion" (*People v. Cohen*, supra., at p 411).

(4)Likewise, the jury could properly reject defendant's argument that Ames was too drunk or stoned to clearly recall what happened. Defendant did not dispute that Ames properly recanted what transpired from noon to 10:30 P.M. but only that he was mistaken or lying as to what occurred between 10:30 and 11:30 P.M. This selective dissection of Ames' testimony based on Ames' intoxication was clearly unwarranted since the bulk of his drinking and drug-taking had occurred earlier in the day. Ames' testimony was, thus, not incredible as a matter of law.

Defendant's fourth contention is that the trial court erred in refusing to conduct a *Daniels* hearing. In *People v. Daniels* (102 Misc 2d 540), the court ordered a hearing pursuant to defendant's request to determine the reliability of a polygraph examination. Following the hearing, the court, after having satisfied itself as to the competence of the examiner, found that the results were scientifically reliable and ruled that the proffered evidence was admissible. Defendant argues that such a hearing should have been held here to determine the admissibility of a polygraph test he took and, apparently, "passed". ***275**

(5)The trial court properly rejected defendant's request for a hearing. The law in New York is well settled on the question of admissibility of polygraph results; such results are clearly inadmissible (see, e.g., *People v. Tarsia*, 50 NY2d 1; *People v. Stuewe*, 103 AD2d 1042, application for lv to app den 63 NY2d 680).

Defendant's fifth contention is that the court erred in not conducting a *Clayton* hearing. In *People v. Clayton* (41 AD2d 204, 207), the Second Department stated that a CPL 210.40 motion to dismiss an indictment in the interests of justice requires that a hearing be held. The *Clayton* court went on to list a number of factors that the court should consider in reaching its decision; these factors are now set forth in CPL 210.40 (subd 1). Defendant's

contention here is premised upon the court's refusal to either dismiss the indictment or hold a hearing in response to his motion for dismissal in the interests of justice because of police misconduct.[5]

(6)This court has never held that a hearing need be conducted whenever a defendant moves for dismissal in the interests of justice (see *People v. Johnson*, 64 AD2d 821; *People v. Anthony*, 60 AD2d 994). This position is supported by the Second Department's recent decision in *People v. Macy* (100 AD2d 557): "In any event, a trial court may deny a motion to dismiss the indictment in the interest of justice without a detailed enumeration of the various statutory factors and *without a hearing* (see *People v. Rickert*, 58 NY2d 122; Bellacosa, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 210.40, pp 155-156), and, on this record, we perceive no compelling factor which would have warranted the granting of the motion" (emphasis added). Similarly, while the conduct complained of by defendant was clearly reprehensible, it was not sufficient, especially considering the serious nature of the crimes charged, to warrant dismissal of the indictment and, hence, the court did not abuse its discretion in denying defendant's application on its merits.

We have considered defendant's other contentions and find them to be without merit.[6]

The judgment should be affirmed. ***276**

Hancock, Jr., J. P., Callahan, Green and O'Donnell, JJ., concur.
Judgment unanimously affirmed. ***277**

Footnotes

1 Six months prior to defendant's trial, Wanda Shedrick was convicted of two counts of felony murder, two counts of petit larceny, first degree burglary and fourth degree conspiracy.

2 The policy reflected in section 500 is, in part, restated under section 514 of the Judiciary Law which provides: "[G]rand jurors shall be drawn at random from the list *** of persons qualified as jurors in the county."

3 Section 1861 of title 28 of the United States Code, the Federal equivalent of section 500 of the Judiciary Law, does not require that all municipal subdivisions within a given locale form the basis for a jury pool (see *United States v. Foxworth*, 599 F2d 1; *United States v. Lane*, 574 F2d 1019, cert den 439 U.S. 867; *United States v. Mase*, 556 F2d 671, cert den 435 U.S. 916; *United States v. Test*, 550 F2d 577).

4 Additionally, even if we were to choose to review this contention in the interests of justice (CPL 470.15, subd 6), defendant's failure to include in the record any of the allegedly inflammatory newspaper articles he relies upon would preclude intelligent review of this contention.

5 The conduct complained of by defendant consisted of police attempts to secure admissions from him by "planting" David Johnson in his cell; Johnson was apparently given some marihuana to take with him to the cell to help facilitate gaining the admissions from defendant.

6 We note that defendant's contentions relating to the District Attorney's cross-examination of him, the District Attorney's summation, and the court's charge were not preserved for review (CPL 470.05, subd 2) and we decline to review them in the interests of justice (CPL 470.15, subd 6).

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defendant killed the Kiffs, defendant jokingly replied, "Do these look like the eyes of a killer?" Defendant said nothing else regarding the murder or the burglary. Laughlin stated that Jackson asked defendant about the Kiff matter "at least once a day", and that defendant consistently denied having killed the Kiffs. Laughlin testified that Jackson has a poor reputation for veracity in the Steuben County Jail community.

Defendant's brother, Bill, Jr., testified, as did Ames, that defendant, Wanda, Barnes and Ames arrived at his parents' home on the evening of January 21, 1980, and then left a short time later to buy gas and beer at a nearby store. He disagreed, however, with Ames' testimony regarding the time the four left the Shedrick home; Bill testified that the group left at 11:00 P.M., a half hour later than Ames recalled. Bill claimed he remembered that the group left during the 11:00 P.M. news. On cross-examination, Bill admitted that he had once told authorities that he did not know when the four had left.

Defendant's mother, Mary Shedrick, also testified that the four left for Bath at 11:00 P.M.

In an attempt to establish that someone else had committed the crimes, defendant called Russell Mullahey who admitted previously claiming that he was responsible for the Kiff homicides. He stated that he made the admission to William Frazier as a joke. Mullahey denied making a similar admission to David Johnson. Johnson testified that Mullahey had called him on January 23, 1980 and stated that he had "flipped out and beat a couple people's brains in". Johnson's credibility was impaired by prior convictions for petit larceny, grand larceny and passing bad checks, as well as his admission that he had recently been treated for psychiatric problems. Bath Police Chief James Urey testified that, during the course of the investigation, he learned of Mullahey's admission to Frazier. Urey stated that Mullahey *270 was brought in and interrogated in his presence and that Mullahey had an alibi for the evening of the Kiff killings; police later checked out and were satisfied with Mullahey's alibi.

Defendant then testified concerning what transpired on January 21, 1980. His story was essentially the same as Ames' except for his claims that the group left his parents' home at 11:00 P.M. instead of 10:30 P.M., that he never discussed burglarizing the Kiff residence, and that the group did not go to the Kiffs' home later that evening. Defendant testified that Wanda drove the group back to Bath and dropped Barnes off at a convenience store near his home. The three then went to the West Washington Street laundromat. They arrived at 11:30 and exchanged more half dollars. After a few minutes, they drove to the Eaton home. No one opened the trunk of Wanda's car. Defendant stated that he walked inside alone at 11:50 while Ames and Wanda argued in the car. He talked with Mrs. Eaton and left a note for her husband. Ames walked inside a few minutes later and the two watched basketball for awhile before leaving for Ames' nephew's apartment.

Defendant admitted saying to Jackson, in response to his continuous questioning concerning the Kiff homicides, "Do I look like a killer to you? Do these look like the eyes of a killer to you?" Defendant denied ever claiming responsibility for the Kiff killings or burglary.

On cross-examination, the District Attorney improperly touched upon two prior bad acts committed by defendant which the trial court had ruled inadmissible in its *Sandoval* decision. Defense counsel failed, however, to object to either line of questioning.

On rebuttal, Carol Decker, defendant's former girlfriend, stated that defendant had told her during a visit to Elmira that "it was the way Eddie [Ames] said but he would prove him to be a liar". Decker stated that she received no consideration in exchange for her testimony and admitted being an alcoholic and a reformed narcotics abuser. Decker has a history of bad check convictions and has been treated for psychological problems.

Defendant voiced no objection to either the District Attorney's summation or the court's charge. After the jury had deliberated for 6 12 hours, it found defendant guilty of two counts of each of the following crimes: second degree murder; second degree felony murder; first degree burglary; first degree robbery; petit larceny; and fourth degree conspiracy. Postverdict motions to set aside the verdict were denied. However, the court dismissed one *271 burglary and one conspiracy conviction because those counts were erroneously submitted.

Defendant raises five principal contentions on appeal: (1) that the Grand and petit juries were unlawfully constituted; (2) that extensive media coverage of defendant's trial and Wanda's earlier trial deprived him of a fair trial; (3) that Ames' testimony should have been disregarded as a matter of law; (4) that the court erred in refusing to conduct a *Daniels* hearing; and (5) that the court erred in refusing to conduct a *Clayton* hearing.

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31 Misc.3d 799, 923 N.Y.S.2d 822, 2011 N.Y. Slip Op. 21118

**1 The People of the State of New York, Plaintiff

People v Duffy
District Court of Nassau County, First District March 30, 2011 31 Misc.3d 799 923 N.Y.S.2d 822 2011 N.Y. Slip Op. 21118 *(Approx. 4 pages)*

Joanne Duffy, Defendant.

District Court of Nassau County, First District
March 30, 2011

CITE TITLE AS: People v Duffy

HEADNOTE

Crimes
Jurors
Misconduct of Juror—Failure to Disclose Prior Felony Criminal Record

Defendant was not entitled to an order setting aside the jury verdict in her criminal prosecution based on the failure of one of the jurors to disclose his prior felony convictions, as there was no evidence that defendant was subjected to actual bias as a result of the juror's misconduct. The juror, by virtue of his felony convictions, was not qualified to serve (Judiciary Law § 510 [3]), and his willful concealment of his criminal history from the parties and the court constituted misconduct. There is, however, no per se rule requiring the setting aside of a jury verdict upon the postverdict discovery that a juror had previously been convicted of a felony. Rather, defendant was entitled to an evidentiary hearing at which she bore the burden of proving by a preponderance of the evidence that the juror's failure to disclose his prior felony convictions resulted in actual bias against defendant. Defendant failed to present any such evidence at her hearing.

RESEARCH REFERENCES

Am Jur 2d, Criminal Law § 858; Am Jur 2d, Jury §§ 142, 143, 152; Am Jur 2d, Trial §§ 1302–1304, 1659.

Carmody-Wait 2d, Jury Selection and Supervision § 191:6; Carmody-Wait 2d, Jury Conduct and Deliberation § 201:24; Carmody-Wait 2d, Verdict and Postverdict Proceedings §§ 202:29, 202:30, 202:33.

LaFave, et al., Criminal Procedure (3d ed) §§ 22.2, 24.11.

McKinney's, Judiciary Law § 510 (3).

NY Jur 2d, Criminal Law: Procedure §§ 2528, 2827, 2853, 2859.

ANNOTATION REFERENCE

Disqualification or exemption of juror for conviction of, or prosecution for, criminal offense. 75 ALR5th 295.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: juror /2 misconduct & set /2 aside /4 verdict & prior /s felony

APPEARANCES OF COUNSEL

Scott Lockwood, North Babylon, for defendant. *Kathleen M. Rice, District Attorney*, Hempstead (*Elizabeth Schlissel* of counsel), for plaintiff.

*800 OPINION OF THE COURT

Angelo A. Delligatti, J.

Trial Decision

The defendant, by motion dated April 19, 2010, and filed April 21, 2010, moves pursuant to CPL 330.30 and 370.10 to set aside a jury verdict convicting the defendant of driving while intoxicated in violation of section 1192 (2) of the Vehicle and Traffic Law. The defendant argues that the jury verdict was tainted by juror misconduct on the ground that one of the jurors who rendered the verdict was not qualified to serve pursuant to section 510 of the Judiciary Law. Section 510 of the Judiciary Law reads as follows:

"§ 510. Qualifications

"In order to qualify as a juror a person must:

"1. Be a citizen of the United States, and a resident of the county.

"2. Be not less than eighteen years of age.

"3. Not have been convicted of a felony.

"4. Be able to understand and communicate in the English language."

Procedural History **2

The defendant was arrested and charged with violating section 1192 (2) and section 1163 (d) of the Vehicle and Traffic Law. Both offenses were alleged to have been committed on the 29th day of January 2005. After extensive pretrial proceedings, a trial was commenced before the Honorable Norman St. George, J.D.C. on February 7, 2007. On February 9, 2007, the court declared a mistrial. Thereafter, there was additional motion practice, including a motion to dismiss the charges on the ground that the defendant had been denied a speedy trial under CPL 30.30, as well as the ground that jeopardy had attached at the time of the mistrial. By decision dated August 2, 2007, Justice St. George denied the defendant's motion. Thereafter, upon Justice St. George's elevation to the Nassau County Court bench, the case was transferred to the Honorable Robert Spergel, J.D.C. Additional motion practice ensued and ultimately the matter was transferred to the undersigned for trial. The trial commenced on January 27, 2010 and concluded on February 2, 2010, on which date the jury returned a verdict of guilty on the charge of violating section 1192 (2) of the Vehicle and Traffic Law, and not guilty on the charge of violating *801 section 1163 (d) of the Vehicle and Traffic Law. Upon the rendering of the jury's verdict the defendant was continued released on bail and the court ordered a presentence report. The matter was therefore adjourned to April 6, 2010 for sentencing and thereafter to May 11, 2010 for defendant to submit the instant motion.

In the interim period between the verdict and the sentence date, the assistant district attorney, Adam C. Raffo, Esq., who prosecuted the charges, learned that juror No. 3, Mr. Gregory Rogers, had, previous to his service as a juror on this case, been convicted of a felony. (In fact a search disclosed that the juror had two prior felony convictions.)

The assistant district attorney conveyed the information about the juror to the defendant's attorney, Mr. Scott Lockwood, Esq., who thereafter submitted the instant motion to set aside the verdict.

Upon reviewing the defendant's notice of motion, the assistant district attorney's affirmation in opposition, and the defendant's reply affirmation, this court granted the defendant's motion to the extent that an evidentiary hearing was ordered (*People v Mercado*, 290 AD2d 237 [2002]). The hearing was scheduled for July 7, 2010. At that hearing, the People and the defendant stipulated that the juror, Mr. Gregory Rogers, had, prior to his jury service, been convicted of two felonies. The parties also agreed that it would be of importance to review the minutes of the voir dire of Mr. Rogers, and the matter was continued for the parties to obtain the transcript. (It should be noted that all prospective jurors in Nassau County are asked to complete a standard jury questionnaire prior to the commencement of jury selection.) Question No. 14 on said questionnaire reads in part as follows: "Have you or anyone close to you ever: Been accused of a crime. Been convicted of a crime."

Unfortunately the actual questionnaires used in this matter were destroyed. Although we do not have the actual questionnaire which was signed by Mr. Rogers, neither counsel nor the court believes that juror No. 3 answered that question truthfully. Above the line for the signature of the prospective juror is printed the following: "I affirm that the statements made

on this questionnaire are true and I understand that any false statements made on this questionnaire are punishable under Article 210 of the Penal Law."

On or about the 6th day of November 2010, the court received a transcript of the jury selection, including the examination of Mr. Rogers, who was ultimately seated as juror No. 3. The **802* transcript revealed that the juror never disclosed his prior criminal record, even when he asked to speak to the court and counsel outside the presence of the other jurors. This court has no doubt that the juror in question concealed his prior criminal record from the court and the parties. After reviewing the transcript, the parties were directed to appear before the undersigned to continue the hearing previously ordered and for the attorneys to present oral argument. On January 14, 2011, the parties appeared and upon inquiry by the court, both parties stated they did not intend to call any witnesses to testify. The attorneys presented their oral argument and, upon conclusion, the court reserved decision.

It is the position of the defendant that section 510 (3) of the Judiciary Law, by its clear language, rendered Mr. Rogers (juror No. 3) unqualified to serve as a juror and that his failure to disclose his prior felony criminal record constituted juror misconduct which required the court to set aside the verdict. The defendant relied heavily on the United States Supreme Court decision in *Clark v United States* (289 US 1 [1933]), regarding the willful giving of false or evasive answers by a juror during voir dire.

The People on the other hand argue that even if the prospective juror is not qualified under section 510 (3) of the Judiciary Law, the verdict should not be set aside unless the defendant can show that the juror's misconduct resulted in bias which tainted the jury's verdict. The People rely primarily on *People v Mercado* (*supra*).

Conclusion

As stated above, the juror in question failed to disclose his prior criminal history. Based upon the stipulation of the parties and this court's review of the juror's New York State fingerprint record it is clear that juror No. 3, Mr. Gregory Rogers, was not qualified to sit as a juror. Based upon a reading of the statute (Judiciary Law § 510 [3]) one would likely be inclined to determine that the jury's verdict should be set aside and a new trial ordered for the defendant. However, it appears that the case law regarding juror nonqualification and misconduct indicates otherwise. There is little doubt in this court's mind that the juror in question willfully concealed from the parties and the court his prior criminal history. If the juror had disclosed his criminal record as required on the juror questionnaire, the juror most assuredly would have been excused.

803* There is no doubt that the juror's action constituted misconduct. However, in order to set aside a jury verdict the law requires that the juror's conduct resulted in actual bias against the defendant.3*

The defendant relies on Justice Cardozo's decision in *People v Clark* (289 US at 11) and quotes from that decision:

> "The judge who examines on the voir dire is engaged in the process of organizing the court. If the answers to the questions are willfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted on its origin; it is a mere pretense and sham."

However, the Supreme Court decision in *Clark* dealt with the issue of whether the evasive/untruthful juror could be prosecuted for contempt and not with the setting aside of the underlying verdict.

In fact, there is no per se rule requiring the setting aside of a jury verdict upon the postverdict discovery that a juror had previously been convicted of a felony. (*See United States v Boney*, 977 F2d 624, 633 [DC Cir 1992] ["Sixth Amendment guarantee of an impartial trial does not mandate a *per se* invalidation of every conviction reached by a jury that included a felon"].)

This fact does entitle the defendant to an evidentiary hearing, and the defendant was afforded this hearing on July 7, 2010 and January 14, 2011. At such hearing, the defendant bore the burden of proving by a preponderance of the evidence that Mr. Rogers' failure to disclose his prior felony conviction(s) resulted in actual bias against the defendant (*see People v Mercado*, *supra*; *People v Broughton*, 3 Misc 3d 1104[A], 2004 NY Slip Op 50397 [U] [Sup Ct, Westchester County 2004]; CPL 330.40 [2] [g]). However, the defendant failed to present any evidence or testimony at the hearing indicating that she was subjected to

actual bias as a result of Mr. Rogers' failure to disclose his prior felony convictions. Accordingly, the defendant's motion is denied.

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WESTLAW

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29 N.Y.2d 135, 272 N.E.2d 538, 324 N.Y.S.2d 30

The People of the State of New York, Respondent.

People v Boulware
Court of Appeals of New York July 07, 1971 29 N.Y.2d 135 272 N.E.2d 538 324 N.Y.S.2d 30 *(Approx. 6 pages)*

James Boulware, Appellant.

Court of Appeals of New York
Argued June 7, 1971;
decided July 7, 1971.

CITE TITLE AS: People v Boulware

HEADNOTES

Jury
conduct of voir dire--report of Referee ordered by Appellate Division as to what transpired at voir dire accepted as substitute for actual transcript which was not available--no error in refusing to permit counsel on voir dire to question prospective jurors as to their attitudes or knowledge of matters of law--finding that counsel was not precluded from asking proper questions supported by evidence--no evidence that court continually hastened voir dire--question asked by prosecutor of one prospective juror not prejudicial.

(1) Since no transcription of the *voir dire* of the veniremen appears in the record, a hearing was held by order of the Appellate Division before a Special Referee who took evidence as to what transpired at the *voir dire*. The Referee's report provides a sufficient factual account for purposes of review and, consequently, his findings confirmed by the Appellate Division are accepted as a substitute for an actual transcript.

(2) The Referee found that defense counsel had attempted to question prospective jurors on various matters of law, including the presumption of innocence, the burden of proof, the doctrine of reasonable doubt, the meaning and purpose of an indictment, and the absence of an obligation by a defendant to produce evidence in his own behalf. The trial court's refusal to permit inquiry into any of these areas of the law was not an abuse of discretion. It is not the province ***136** of counsel to question prospective jurors as to their attitudes or knowledge of matters of law.

(3) Defendant also argues that the court barred questioning as to other matters which directly related to the juror's qualifications. There is no finding by the Special Referee that counsel was ever precluded from asking questions of this nature and his findings are supported by the evidence.

(4) The Referee found that there was no evidence to warrant the conclusion that the court was continually hastening the *voir dire*.

(5) The fact that one prospective juror was asked by the prosecutor whether he had encountered the defendant during the course of his work as a welfare worker did not unduly prejudice defendant.

People v. Boulware, 35 A D 2d 925, affirmed.

SUMMARY

Appeal, by permission of the Chief Judge of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered December 8, 1970, affirming a judgment of the Supreme Court (John M. Murtagh, J.), rendered in New York County upon a verdict convicting defendant of manslaughter in the first degree and assault in the second degree.

SELECTED TOPICS

Competency of Jurors, Challenges, and Objections

Limit Jury Voir Dire Examination

Criminal Law

Review
Denial of Prosecution Peremptory Challenge of Alternate Juror

Secondary Sources

s 44:28. Examination of individual jurors-Challenges for cause

3 Criminal Procedure in New York § 44:28 (2d)

...A challenge for cause is an objection to a prospective juror, the grounds for which are specified by statute. The challenge for cause may be made only on the ground that: The prospective juror does not...

s 44:27. Examination of individual jurors-Voir dire

3 Criminal Procedure in New York § 44:27 (2d)

...The authority of trial judges in examining prospective jurors and eliminating improper questioning by attorneys has been expanded. The trial judge is now required to do the following: The judge must qu...

s 22.3(a). Nature of voir dire

6 Crim. Proc. § 22.3(a) (4th ed.)

...If the defendant has not waived jury trial, then it is necessary to select from the panel of prospective jurors those individuals who will actually serve as jurors in his case. The examination of prosp...

See More Secondary Sources

Briefs

BRIEF FOR THE RESPONDENT

1999 WL 1051260
U.S. v. Abel Martinez-Salazar
Supreme Court of the United States
Oct. 14, 1999

...At the Respondent's voir dire proceeding, the district court submitted a form to all prospective jurors. J.A. 90-91. On the questionnaire, prospective Juror Gilbert wrote that "I would favor the prosec...

BRIEF FOR PETITIONER

1990 WL 513115
Mu'Min (Dawud Majid) v. Virginia
Supreme Court of the United States
Dec. 07, 1990

...FN*Counsel of Record The opinion of the Supreme Court of Virginia affirming petitioner's conviction and sentence of death is reported as Mu'Min v. Commonwealth, 239 Va. 433, 389 S.E.2d 886 (1990), and ...

BRIEF FOR THE UNITED STATES

1999 WL 618377
U.S. v. Abel Martinez-Salazar
Supreme Court of the United States
Aug. 13, 1999

...The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 146 F.3d 653. The judgment of the court of appeals was

POINTS OF COUNSEL

Eleanor Jackson Piel for appellant.

I. The constitutional guarantee to jury trial in a criminal case under the Sixth Amendment is a guarantee of an impartial jury; that impartial jury is achieved in large part by questioning on *voir dire* to permit defense counsel to make peremptory as well as challenges for cause. (*Pointer v. United States*, 151 U. S. 396; *St. Clair v. United States*, 154 U. S. 134; *Betts v. United States*, 132 F. 228; *Duncan v. Louisiana*, 391 U. S. 145; *Bruton v. United States*, 391 U. S. 123; *Witherspoon v. Louisiana*, 391 U. S. 510; *United States v. Jackson*, 390 U. S. 570; *DeStefano v. Woods*, 392 U. S. 631; *Swain v. Alabama*, 380 U. S. 202; *Lewis v. United States*, 146 U. S. 370.) II. The blanket and arbitrary denial of the trial court of inquiry by defense counsel on *voir dire* into the state of mind of the prospective jurors on the presumption of innocence, the burden of proof, the purpose of an indictment and the absence of any obligation on the part of defendant to produce evidence in his own behalf deprived defendant of due process of law in that he was unable to obtain an impartial jury as guaranteed him under the Sixth Amendment. (*People v. Garrett*, 285 App. Div. 1088; *People v. Hosier*, 132 App. Div. 146, 196 N. Y. 506.) III. The drastic curtailment of inquiry by the ***137** trial court of defense counsel on *voir dire*, including questions on as important and relevant issues as the occupation of the prospective juror, mandates reversal of the conviction of defendant. (*Devine v. Keller*, 32 A D 2d 34; *People v. Fearon*, 13 N Y 2d 59; *People v. Lomoso*, 284 App. Div. 670; *People v. Columbo*, 24 A D 2d 505; *Chessman v. Teets*, 354 U. S. 156; *Sellers v. United States*, 271 F. 2d 475; *People v. Presley* , 22 A D 2d 151; *Smith v. United States*, 262 F. 2d 50; *King v. United States*, 362 F. 2d 968; *Glessner v. Lafayette Post No. 37 of Amer. Legion*, 50 Misc 2d 1059, 28 A D 2d 648.) IV. Against the background of the drastic curtailment of defense counsel inquiry on *voir dire*, the trial court committed reversible error when it repeatedly pressed defense counsel to hurry, and further permitted the District Attorney to suggest prejudicially to the panel that defendant was a "welfare" recipient at time of the crime.

Frank S. Hogan, District Attorney (*Herman Kaufman* and *Michael R. Juviler* of counsel), for respondent.

I. Defendant's guilt was established beyond a reasonable doubt by the testimony of eyewitnesses. II. On the record before this court, the limitations imposed upon defense counsel's inquiry of the prospective jurors did not deprive defendant of his right to select an impartial jury. III. The trial court did not err in declining to permit defense counsel to question the prospective jurors about their attitudes concerning the criminal law. (*United States v. Owens*, 415 F. 2d 1308; *Silverthorne v. United States*, 400 F. 2d 627; *Kreuter v. United States*, 376 F. 2d 654; *People v. Conklin*, 175 N. Y. 333; *People v. Rolchigo*, 28 N Y 2d 644; *People v. Yore*, 36 A D 2d 818; *People v. Travato*, 309 N. Y. 382; *People v. Leavitt*, 301 N. Y. 113.) IV. Since the Referee made no finding that defense counsel was precluded by the court from questioning the prospective jurors about their personal backgrounds, defendant's appellate claim that his attorney was so limited may be disregarded. (*People v. Robles*, 27 N Y 2d 155; *People v. Zabrocky*, 26 N Y 2d 530; *People v. Paulin*, 25 N Y 2d 445; *People v. Baker*, 23 N Y 2d 307; *People v. Leonti*, 18 N Y 2d 384.) V. The conduct of the court and prosecutor during the selection of the jury did not deprive defendant of a fair trial. No error was committed when the court instructed defense counsel to hasten his examination of the prospective jurors. (*People v. Gates*, 24 N Y 2d 666; ***138** *People v. Schwartzman*, 24 N Y 2d 241; *People v. Simons*, 22 N Y 2d 533; *People v. Howard*, 12 N Y 2d 65; *People v. Friola*, 11 N Y 2d 157; *Illinois v. Allen*, 397 U. S. 337; *People v. Marcelin*, 23 A D 2d 368; *Cooper v. United States*, 403 F. 2d 71; *Carter v. United States*, 373 F. 2d 911; *United States v. Ross*, 321 F. 2d 61.) VI. No reversible error was committed when the prosecutor asked one of the panelists, a welfare worker, whether, in the course of his work, he had previously encountered defendant. (*People v. Rutherford*, 21 N Y 2d 889; *People v. Schweininger*, 19 N Y 2d 872.) VII. Since the findings of the Referee supply an adequate record to review defendant's appellate claims, the absence of the stenographic minutes of the *voir dire* proceedings does not warrant reversal. (*Casella v. Manikas*, 8 A D 2d 587; *People v. Fearon*, 13 N Y 2d 59; *People v. Battle*, 30 A D 2d 842; *People v. Genova*, 15 A D 2d 44; *People v. Himmel*, 10 A D 2d 622; *People v. Lomoso*, 284 App. Div. 670.)

OPINION OF THE COURT

Scileppi, J.

One summer afternoon in August, 1967 defendant, his wife and child gathered with David Richardson and his girl friend in front of a Manhattan stoop. Defendant, who had been "dabbing at some beer can" with a knife, accidentally cut Richardson when the latter's hand got in the way. Richardson, seeking retribution for this wrong, challenged the defendant to a

fight and afterwards emerged victorious. During the course of this embroilment, Richardson scattered the contents of defendant's pockets on the ground. Defendant accused Richardson of taking $160, but this was denied.

Richardson's initial success in this quixotic encounter proved, however, to be a Pyrrhic one. Later that evening, he joined the defendant and some associates in a local tavern. After all had imbibed, defendant renewed his charge that Richardson had taken his money. At the bartender's request, defendant left. Richardson followed and shortly thereafter, a fight broke out. Five eyewitnesses testified that defendant drew a knife and that Richardson attempted to defend himself with a garbage can cover. It was during the course of this final encounter that Richardson suffered a knife wound which proved to be fatal.

Defendant, who had been injured, ran away, but friends of his victim gave chase. He was on his way to a hospital, but was stopped by one Richard Carroll, who attacked the defendant with a broom handle. Carroll was slashed by the defendant who then **139* proceeded to the hospital where he was later apprehended by the police. As a result of these altercations, defendant was indicted for murder in the second degree and assault in the first degree. After a jury trial, he was found guilty of manslaughter in the first degree and assault, second. He appeals to our court from a judgment of the Appellate Division, unanimously affirming this judgment of conviction.

Preliminarily, we observe that no argument is advanced that the proof offered by the People was deficient in any respect. Nor does the defendant question any rulings of the court during the course of the trial. This appeal addresses itself to pretrial matters. Specifically, defendant focuses his quest for a reversal on certain claimed errors occurring during the *voir dire* of the veniremen.

This *voir dire* was conducted by the parties under the procedure which existed prior to the recent change in the General Rules of the Administrative Board of the Judicial Conference which imposed that function on the Trial Judge.[1] Consequently, we do not have before us the question whether the Constitution's guarantee of a jury trial precludes *voir dire* examinations conducted by the court alone. It is, however, evident that since the right to a jury means a jury which, as far as possible, is unbiased and unprejudiced, some form of *voir dire* is necessary so that the concomitant right to challenge prospective jurors may be intelligently and effectively exercised by the parties (see *Swain v. Alabama*, 380 U. S. 202). Initially, we recognize that we are dealing with an area of the law which does not lend itself to the formulation of precise standards or to the fashioning of rigid guidelines. To be sure, it would be a relatively simple matter to circumscribe *voir dire* inquiry by reference to the particular challenges for cause (see Code Crim. Pro., §§ 375, 376). However, the very existence of the peremptory challenge (see Code Crim. Pro., § 372) would require an application of Delphic powers for only then would we be able to anticipate every line of **140* inquiry which counsel might deem relevant to the exercise of such a challenge. These considerations compel the observation that it is the function of the trial court, involved and concerned with the quest for the truth, to strike the balance, true, no less in the conduct of the *voir dire* than in the conduct of the trial proper. The Judge presiding necessarily has broad discretion to control and restrict the scope of the *voir dire* examination. To that end, he may, in order to prevent inordinate interruptions and undue delay in the proceedings, question prospective jurors at the opening of the *voir dire*, during the course thereof or after counsel have concluded their examinations.[2] The only condition imposed is that fair opportunity be accorded counsel to question about matters, not previously explored, which are relevant and material to the inquiry at hand. Thus, in this appeal, we address ourselves to whether the trial court improperly restricted counsel's *voir dire* examination.

Resolution of this question is in some measure impeded by the fact that no transcription of the *voir dire* appears in the record. By order of the Appellate Division, a hearing was held before a Special Referee who took evidence as to what transpired at the *voir dire*. The Referee found that defense counsel had advised the court that he felt that his examination was being unduly restricted. He unsuccessfully moved for a mistrial and requested that the *voir dire* be stenographically recorded. Although this request was granted, for reasons which do not appear, no transcription was made. This failure does not, however, mean that a reversal is mandated particularly in view of the overwhelming evidence of guilt against the defendant and counsel's failure to object to the jury as finally selected. We agree with the Appellate Division that the Referee's report "provides a sufficient factual account for purposes of review" (*People v. Boulware*, 35 A D 2d 925) and consequently, take his findings, confirmed by that court, as a substitute for an actual transcript.

It was the finding of the Referee that defense counsel had: "attempted to question prospective jurors on various matters of law, including (a) the presumption of innocence, (b) the burden of proof, (c) the doctrine of 'reasonable doubt,' (d) the ***141** meaning and purpose of an indictment, and (e) the absence of an obligation by a defendant to produce evidence in his own behalf. Upon the objection by the prosecuting attorney, or on its own motion, the trial court refused to permit Harap to inquire into any of these areas of the law."

We are not persuaded that the court's ruling as to these matters was an abuse of discretion. Although counsel has a right to inquire as to the qualifications of the veniremen and their prejudices so as to provide a foundation for a challenge for cause or a peremptory challenge (see *Kreuter v. United States*, 376 F. 2d 654, 656-657), it is well settled that it is simply not the province of counsel to question prospective jurors as to their attitudes or knowledge of matters of law (see, e.g., *State v. Molina*, 5 Ariz. App. 492; *People v. Love*, 53 Cal. 2d 843; *Pinion v. State*, 225 Ga. 36; *People v. Lobb*, 17 Ill. 2d 287; *State v. Morris*, 222 La. 480; *Twining v. State*, 234 Md. 97; *People v. Lambo*, 8 Mich. App. 320; *State v. Bauer*, 189 Minn. 280; *State v. Smith*, 422 S. W. 2d 50 [Sup. Ct., Mo.], cert. den., 393 U.S. 895; *Oliver v. State*, 85 Nev. 418; *State v. Douthitt*, 26 N. M. 532; *Kephart v. State*, 229 P. 2d 224 [Crim. Ct. App., Okla.]; *Commonwealth v. Lopinson*, 427 Pa. 284, vacated on other grounds 392 U. S. 647).

As the court observed in *State v. Smith* (422 S. W. 2d 50, 67-68, supra.;), "Asking whether prospective jurors have any personal feelings for or against a rule of law is like asking whether they think the law is good or bad." Indeed, nearly 70 years ago, our court held that it was beyond the scope of proper *voir dire* examination for counsel to propound questions as to the presumption of innocence and burden of proof in a criminal case (*People v. Conklin*, 175 N. Y. 333). As Judge O'Brien wrote for the court: "The qualifications of a juror do not depend in any degree upon his knowledge or want of knowledge of the law of evidence as applicable to criminal trials. These were all matters of law which the juror was bound to take from the court. A juror cannot be a law to himself, but is bound to follow the instructions of the court in that respect, and hence his knowledge or ignorance concerning questions of law is not a proper subject of inquiry upon the trial of the challenge for cause." (175 N. Y. 333, 339-340.) The reason for this rule is clear. The role of the jury is limited to the resolution of factual issues. Inasmuch as it ***142** must be presumed that the court's instructions will adequately inform the jury as to the applicable law (*People v. Love*, 53 Cal. 2d 843, supra.;), questions as to their knowledge or attitudes relating to a particular rule of law are irrelevant to their functions as jurors and hence, have no bearing on their qualifications (*People v. Lobb*, 17 Ill. 2d 287, supra.;). It would, of course, have been an entirely different matter had counsel attempted to ask whether a prospective juror would have any difficulty in following the instructions of the court. Thus, although counsel is not privileged to elicit viewpoints relating to matters of law, he is entitled to ask whether a prospective juror would obey the court's instructions (*State v. Smith*, 422 S. W. 2d 50, 68, supra.;). The record before us reveals no such attempt by defense counsel.[3] Consequently, though counsel should be given a wide degree of latitude in determining the qualification or fairness of a prospective juror, "[t]he trial court not only may, but should, preclude counsel from interrogating on issues of law" (*Oliver v. State*, 85 Nev. 418, 423, supra.;). Inasmuch as defendant advances no argument that the court's instructions as to the five questions of law were in any way erroneous, we conclude that the court's rulings on *voir dire* were entirely proper.

Defendant has also proffered the argument that, in addition to questions of law heretofore discussed, the court barred questioning as to other matters which directly related to the juror's qualifications. At the hearing before the Referee, defendant's trial counsel testified that he had attempted 15 lines of inquiry. These areas included questions dealing with the prospective jurors' occupations, education, experience with crime, and knowledge of or familiarity with the defendant, his victims, counsel or the police. Additionally, other questions related to whether they would give the defendant a fair trial, and how they would react to certain witnesses. There is little doubt that these are all the precise kind of questions which should be permitted during a *voir dire*. Moreover, the parties may always inquire as to those matters which would constitute a sufficient ground for a challenge for cause (see Code Crim. Pro., §§ 375, 376). There is, however, no finding by the Special Referee that counsel was ***143** ever precluded from asking questions of this nature. Instead his findings were limited to the questions relating to applicable law. Inasmuch as the Referee was free to discount the testimony offered by the defendant, his findings are supported by the evidence and we must assume that counsel was not inhibited as to these other matters.

Furthermore, we see no merit in defendant's argument that it was reversible error for the court to urge counsel on more than one occasion, to "get on with it" and admonish him that a

lot of time was being wasted. The Referee found that, although these statements were made, there was no evidence to warrant the conclusion that the court was continually hastening the *voir dire*. We see no reason why the court -- in the exercise of its discretion and in the interests of preventing unduly long *voir dire* examinations -- may not expedite matters especially where, as here, the record shows that counsel insisted on questioning as to matters not relevant to the *voir dire*.

Lastly, defendant argues that the mere fact that one prospective juror was asked by the prosecutor whether he had encountered the defendant during the course of his work as a welfare worker requires a reversal. This is untenable for, at best, the question was innocuous and we do not agree that defendant was unduly prejudiced by this minor incident.

Accordingly, the judgment appealed from should be affirmed.

Chief Judge Fuld and Judges Burke, Bergan, Breitel, Jasen and Gibson concur. Judgment affirmed.

Footnotes

1 Under the new practice, which went into effect on January 4, 1971, *voir dire* examinations in the first instance are conducted by the Judge. The court may, in its discretion, permit additional examinations by the respective parties (22 NYCRR 20.13). Although several attempts were made during the recent session of the Legislature to codify this new procedure (see, e.g., Bills S6275 and A6985), they proved unsuccessful.

2 We note that this was the rule both under the former procedure in effect at the time of defendant's trial and under the procedure prescribed by section 270.15 of the Criminal Procedure Law which becomes operative on September 1, 1971.

3 On the contrary, it appears from the findings of the Referee, which refer to a list of questions propounded by the prosecutor, that this question was asked by the Assistant District Attorney.

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29 N.Y.2d 135, 272 N.E.2d 538, 324 N.Y.S.2d 30

People v Boulware
Court of Appeals of New York July 07, 1971 29 N.Y.2d 135 272 N.E.2d 538 324 N.Y.S.2d 30 *(Approx. 6 pages)*

The People of the State of New York, Respondent.

James Boulware, Appellant.

Court of Appeals of New York
Argued June 7, 1971;
decided July 7, 1971.

CITE TITLE AS: People v Boulware

HEADNOTES

Jury
conduct of voir dire--report of Referee ordered by Appellate Division as to what transpired at voir dire accepted as substitute for actual transcript which was not available--no error in refusing to permit counsel on voir dire to question prospective jurors as to their attitudes or knowledge of matters of law--finding that counsel was not precluded from asking proper questions supported by evidence--no evidence that court continually hastened voir dire--question asked by prosecutor of one prospective juror not prejudicial.

(1) Since no transcription of the *voir dire* of the veniremen appears in the record, a hearing was held by order of the Appellate Division before a Special Referee who took evidence as to what transpired at the *voir dire*. The Referee's report provides a sufficient factual account for purposes of review and, consequently, his findings confirmed by the Appellate Division are accepted as a substitute for an actual transcript.

(2) The Referee found that defense counsel had attempted to question prospective jurors on various matters of law, including the presumption of innocence, the burden of proof, the doctrine of reasonable doubt, the meaning and purpose of an indictment, and the absence of an obligation by a defendant to produce evidence in his own behalf. The trial court's refusal to permit inquiry into any of these areas of the law was not an abuse of discretion. It is not the province ***136** of counsel to question prospective jurors as to their attitudes or knowledge of matters of law.

(3) Defendant also argues that the court barred questioning as to other matters which directly related to the juror's qualifications. There is no finding by the Special Referee that counsel was ever precluded from asking questions of this nature and his findings are supported by the evidence.

(4) The Referee found that there was no evidence to warrant the conclusion that the court was continually hastening the *voir dire*.

(5) The fact that one prospective juror was asked by the prosecutor whether he had encountered the defendant during the course of his work as a welfare worker did not unduly prejudice defendant.

People v. Boulware, 35 A D 2d 925, affirmed.

SUMMARY

Appeal, by permission of the Chief Judge of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered December 8, 1970, affirming a judgment of the Supreme Court (John M. Murtagh, J.), rendered in New York County upon a verdict convicting defendant of manslaughter in the first degree and assault in the second degree.

POINTS OF COUNSEL

Eleanor Jackson Piel for appellant.

I. The constitutional guarantee to jury trial in a criminal case under the Sixth Amendment is a guarantee of an impartial jury; that impartial jury is achieved in large part by questioning on *voir dire* to permit defense counsel to make peremptory as well as challenges for cause. (*Pointer v. United States*, 151 U. S. 396; *St. Clair v. United States*, 154 U. S. 134; *Betts v. United States*, 132 F. 228; *Duncan v. Louisiana*, 391 U. S. 145; *Bruton v. United States*, 391 U. S. 123; *Witherspoon v. Louisiana*, 391 U. S. 510; *United States v. Jackson*, 390 U. S. 570; *DeStefano v. Woods*, 392 U. S. 631; *Swain v. Alabama*, 380 U. S. 202; *Lewis v. United States*, 146 U. S. 370.) II. The blanket and arbitrary denial of the trial court of inquiry by defense counsel on *voir dire* into the state of mind of the prospective jurors on the presumption of innocence, the burden of proof, the purpose of an indictment and the absence of any obligation on the part of defendant to produce evidence in his own behalf deprived defendant of due process of law in that he was unable to obtain an impartial jury as guaranteed him under the Sixth Amendment. (*People v. Garrett*, 285 App. Div. 1088; ***People v. Hosier***, 132 App. Div. 146, 196 N. Y. 506.) III. The drastic curtailment of inquiry by the ***137** trial court of defense counsel on *voir dire*, including questions on as important and relevant issues as the occupation of the prospective juror, mandates reversal of the conviction of defendant. (*Devine v. Keller*, 32 A D 2d 34; *People v. Fearon*, 13 N Y 2d 59; *People v. Lomoso*, 284 App. Div. 670; *People v. Columbo*, 24 A D 2d 505; *Chessman v. Teets*, 354 U. S. 156; *Sellers v. United States*, 271 F. 2d 475; *People v. Presley* , 22 A D 2d 151; *Smith v. United States*, 262 F. 2d 50; *King v. United States*, 362 F. 2d 968; ***Glessner v. Lafayette Post No. 37 of Amer. Legion***, 50 Misc 2d 1059, 28 A D 2d 648.) IV. Against the background of the drastic curtailment of defense counsel inquiry on *voir dire*, the trial court committed reversible error when it repeatedly pressed defense counsel to hurry, and further permitted the District Attorney to suggest prejudicially to the panel that defendant was a "welfare" recipient at time of the crime.

Frank S. Hogan, District Attorney (*Herman Kaufman* and *Michael R. Juviler* of counsel), for respondent.

I. Defendant's guilt was established beyond a reasonable doubt by the testimony of eyewitnesses. II. On the record before this court, the limitations imposed upon defense counsel's inquiry of the prospective jurors did not deprive defendant of his right to select an impartial jury. III. The trial court did not err in declining to permit defense counsel to question the prospective jurors about their attitudes concerning the criminal law. (*United States v. Owens*, 415 F. 2d 1308; *Silverthorne v. United States*, 400 F. 2d 627; *Kreuter v. United States*, 376 F. 2d 654; *People v. Conklin*, 175 N. Y. 333; *People v. Rolchigo*, 28 N Y 2d 644; *People v. Yore*, 36 A D 2d 818; *People v. Travato*, 309 N. Y. 382; *People v. Leavitt*, 301 N. Y. 113.) IV. Since the Referee made no finding that defense counsel was precluded by the court from questioning the prospective jurors about their personal backgrounds, defendant's appellate claim that his attorney was so limited may be disregarded. (*People v. Robles*, 27 N Y 2d 155; *People v. Zabrocky*, 26 N Y 2d 530; *People v. Paulin*, 25 N Y 2d 445; *People v. Baker*, 23 N Y 2d 307; *People v. Leonti*, 18 N Y 2d 384.) V. The conduct of the court and prosecutor during the selection of the jury did not deprive defendant of a fair trial. No error was committed when the court instructed defense counsel to hasten his examination of the prospective jurors. (*People v. Gates*, 24 N Y 2d 666; ***138** *People v. Schwartzman*, 24 N Y 2d 241; *People v. Simons*, 22 N Y 2d 533; *People v. Howard*, 12 N Y 2d 65; *People v. Friola*, 11 N Y 2d 157; *Illinois v. Allen*, 397 U. S. 337; *People v. Marcelin*, 23 A D 2d 368; *Cooper v. United States*, 403 F. 2d 71; *Carter v. United States*, 373 F. 2d 911; *United States v. Ross*, 321 F. 2d 61.) VI. No reversible error was committed when the prosecutor asked one of the panelists, a welfare worker, whether, in the course of his work, he had previously encountered defendant. (*People v. Rutherford*, 21 N Y 2d 889; *People v. Schweininger*, 19 N Y 2d 872.) VII. Since the findings of the Referee supply an adequate record to review defendant's appellate claims, the absence of the stenographic minutes of the *voir dire* proceedings does not warrant reversal. (*Casella v. Manikas*, 8 A D 2d 587; *People v. Fearon*, 13 N Y 2d 59; *People v. Battle*, 30 A D 2d 842; *People v. Genova*, 15 A D 2d 44; *People v. Himmel*, 10 A D 2d 622; *People v. Lomoso*, 284 App. Div. 670.)

OPINION OF THE COURT

Scileppi, J.

One summer afternoon in August, 1967 defendant, his wife and child gathered with David Richardson and his girl friend in front of a Manhattan stoop. Defendant, who had been "dabbing at some beer can" with a knife, accidentally cut Richardson when the latter's hand got in the way. Richardson, seeking retribution for this wrong, challenged the defendant to a

fight and afterwards emerged victorious. During the course of this embroilment, Richardson scattered the contents of defendant's pockets on the ground. Defendant accused Richardson of taking $160, but this was denied.

Richardson's initial success in this quixotic encounter proved, however, to be a Pyrrhic one. Later that evening, he joined the defendant and some associates in a local tavern. After all had imbibed, defendant renewed his charge that Richardson had taken his money. At the bartender's request, defendant left. Richardson followed and shortly thereafter, a fight broke out. Five eyewitnesses testified that defendant drew a knife and that Richardson attempted to defend himself with a garbage can cover. It was during the course of this final encounter that Richardson suffered a knife wound which proved to be fatal.

Defendant, who had been injured, ran away, but friends of his victim gave chase. He was on his way to a hospital, but was stopped by one Richard Carroll, who attacked the defendant with a broom handle. Carroll was slashed by the defendant who then *139 proceeded to the hospital where he was later apprehended by the police. As a result of these altercations, defendant was indicted for murder in the second degree and assault in the first degree. After a jury trial, he was found guilty of manslaughter in the first degree and assault, second. He appeals to our court from a judgment of the Appellate Division, unanimously affirming this judgment of conviction.

Preliminarily, we observe that no argument is advanced that the proof offered by the People was deficient in any respect. Nor does the defendant question any rulings of the court during the course of the trial. This appeal addresses itself to pretrial matters. Specifically, defendant focuses his quest for a reversal on certain claimed errors occurring during the *voir dire* of the veniremen.

This *voir dire* was conducted by the parties under the procedure which existed prior to the recent change in the General Rules of the Administrative Board of the Judicial Conference which imposed that function on the Trial Judge.[1] Consequently, we do not have before us the question whether the Constitution's guarantee of a jury trial precludes *voir dire* examinations conducted by the court alone. It is, however, evident that since the right to a jury means a jury which, as far as possible, is unbiased and unprejudiced, some form of *voir dire* is necessary so that the concomitant right to challenge prospective jurors may be intelligently and effectively exercised by the parties (see *Swain v. Alabama*, 380 U. S. 202). Initially, we recognize that we are dealing with an area of the law which does not lend itself to the formulation of precise standards or to the fashioning of rigid guidelines. To be sure, it would be a relatively simple matter to circumscribe *voir dire* inquiry by reference to the particular challenges for cause (see Code Crim. Pro., §§ 375, 376). However, the very existence of the peremptory challenge (see Code Crim. Pro., § 372) would require an application of Delphic powers for only then would we be able to anticipate every line of *140 inquiry which counsel might deem relevant to the exercise of such a challenge. These considerations compel the observation that it is the function of the trial court, involved and concerned with the quest for the truth, to strike the balance, true, no less in the conduct of the *voir dire* than in the conduct of the trial proper. The Judge presiding necessarily has broad discretion to control and restrict the scope of the *voir dire* examination. To that end, he may, in order to prevent inordinate interruptions and undue delay in the proceedings, question prospective jurors at the opening of the *voir dire*, during the course thereof or after counsel have concluded their examinations.[2] The only condition imposed is that fair opportunity be accorded counsel to question about matters, not previously explored, which are relevant and material to the inquiry at hand. Thus, in this appeal, we address ourselves to whether the trial court improperly restricted counsel's *voir dire* examination.

Resolution of this question is in some measure impeded by the fact that no transcription of the *voir dire* appears in the record. By order of the Appellate Division, a hearing was held before a Special Referee who took evidence as to what transpired at the *voir dire*. The Referee found that defense counsel had advised the court that he felt that his examination was being unduly restricted. He unsuccessfully moved for a mistrial and requested that the *voir dire* be stenographically recorded. Although this request was granted, for reasons which do not appear, no transcription was made. This failure does not, however, mean that a reversal is mandated particularly in view of the overwhelming evidence of guilt against the defendant and counsel's failure to object to the jury as finally selected. We agree with the Appellate Division that the Referee's report "provides a sufficient factual account for purposes of review" (*People v. Boulware*, 35 A D 2d 925) and consequently, take his findings, confirmed by that court, as a substitute for an actual transcript.

It was the finding of the Referee that defense counsel had: "attempted to question prospective jurors on various matters of law, including (a) the presumption of innocence, (b) the burden of proof, (c) the doctrine of 'reasonable doubt,' (d) the ***141** meaning and purpose of an indictment, and (e) the absence of an obligation by a defendant to produce evidence in his own behalf. Upon the objection by the prosecuting attorney, or on its own motion, the trial court refused to permit Harap to inquire into any of these areas of the law."

We are not persuaded that the court's ruling as to these matters was an abuse of discretion. Although counsel has a right to inquire as to the qualifications of the veniremen and their prejudices so as to provide a foundation for a challenge for cause or a peremptory challenge (see *Kreuter v. United States*, 376 F. 2d 654, 656-657), it is well settled that it is simply not the province of counsel to question prospective jurors as to their attitudes or knowledge of matters of law (see, e.g., *State v. Molina*, 5 Ariz. App. 492; *People v. Love*, 53 Cal. 2d 843; *Pinion v. State*, 225 Ga. 36; *People v. Lobb*, 17 Ill. 2d 287; *State v. Morris*, 222 La. 480; *Twining v. State*, 234 Md. 97; *People v. Lambo*, 8 Mich. App. 320; *State v. Bauer*, 189 Minn. 280; *State v. Smith*, 422 S. W. 2d 50 [Sup. Ct., Mo.], cert. den., 393 U.S. 895; *Oliver v. State*, 85 Nev. 418; *State v. Douthitt*, 26 N. M. 532; *Kephart v. State*, 229 P. 2d 224 [Crim. Ct. App., Okla.]; *Commonwealth v. Lopinson*, 427 Pa. 284, vacated on other grounds 392 U. S. 647).

As the court observed in *State v. Smith* (422 S. W. 2d 50, 67-68, supra.;), "Asking whether prospective jurors have any personal feelings for or against a rule of law is like asking whether they think the law is good or bad." Indeed, nearly 70 years ago, our court held that it was beyond the scope of proper *voir dire* examination for counsel to propound questions as to the presumption of innocence and burden of proof in a criminal case (*People v. Conklin*, 175 N. Y. 333). As Judge O'Brien wrote for the court: "The qualifications of a juror do not depend in any degree upon his knowledge or want of knowledge of the law of evidence as applicable to criminal trials. These were all matters of law which the juror was bound to take from the court. A juror cannot be a law to himself, but is bound to follow the instructions of the court in that respect, and hence his knowledge or ignorance concerning questions of law is not a proper subject of inquiry upon the trial of the challenge for cause." (175 N. Y. 333, 339-340.) The reason for this rule is clear. The role of the jury is limited to the resolution of factual issues. Inasmuch as it ***142** must be presumed that the court's instructions will adequately inform the jury as to the applicable law (*People v. Love*, 53 Cal. 2d 843, supra.;), questions as to their knowledge or attitudes relating to a particular rule of law are irrelevant to their functions as jurors and hence, have no bearing on their qualifications (*People v. Lobb*, 17 Ill. 2d 287, supra.;). It would, of course, have been an entirely different matter had counsel attempted to ask whether a prospective juror would have any difficulty in following the instructions of the court. Thus, although counsel is not privileged to elicit viewpoints relating to matters of law, he is entitled to ask whether a prospective juror would obey the court's instructions (*State v. Smith*, 422 S. W. 2d 50, 68, supra.;). The record before us reveals no such attempt by defense counsel.[3] Consequently, though counsel should be given a wide degree of latitude in determining the qualification or fairness of a prospective juror, "[t]he trial court not only may, but should, preclude counsel from interrogating on issues of law" (*Oliver v. State*, 85 Nev. 418, 423, supra.;). Inasmuch as defendant advances no argument that the court's instructions as to the five questions of law were in any way erroneous, we conclude that the court's rulings on *voir dire* were entirely proper.

Defendant has also proffered the argument that, in addition to questions of law heretofore discussed, the court barred questioning as to other matters which directly related to the juror's qualifications. At the hearing before the Referee, defendant's trial counsel testified that he had attempted 15 lines of inquiry. These areas included questions dealing with the prospective jurors' occupations, education, experience with crime, and knowledge of or familiarity with the defendant, his victims, counsel or the police. Additionally, other questions related to whether they would give the defendant a fair trial, and how they would react to certain witnesses. There is little doubt that these are all the precise kind of questions which should be permitted during a *voir dire*. Moreover, the parties may always inquire as to those matters which would constitute a sufficient ground for a challenge for cause (see Code Crim. Pro., §§ 375, 376). There is, however, no finding by the Special Referee that counsel was ***143** ever precluded from asking questions of this nature. Instead his findings were limited to the questions relating to applicable law. Inasmuch as the Referee was free to discount the testimony offered by the defendant, his findings are supported by the evidence and we must assume that counsel was not inhibited as to these other matters.

Furthermore, we see no merit in defendant's argument that it was reversible error for the court to urge counsel on more than one occasion, to "get on with it" and admonish him that a

lot of time was being wasted. The Referee found that, although these statements were made, there was no evidence to warrant the conclusion that the court was continually hastening the *voir dire*. We see no reason why the court -- in the exercise of its discretion and in the interests of preventing unduly long *voir dire* examinations -- may not expedite matters especially where, as here, the record shows that counsel insisted on questioning as to matters not relevant to the *voir dire*.

Lastly, defendant argues that the mere fact that one prospective juror was asked by the prosecutor whether he had encountered the defendant during the course of his work as a welfare worker requires a reversal. This is untenable for, at best, the question was innocuous and we do not agree that defendant was unduly prejudiced by this minor incident.

Accordingly, the judgment appealed from should be affirmed.

Chief Judge Fuld and Judges Burke, Bergan, Breitel, Jasen and Gibson concur. Judgment affirmed.

Footnotes

1 Under the new practice, which went into effect on January 4, 1971, *voir dire* examinations in the first instance are conducted by the Judge. The court may, in its discretion, permit additional examinations by the respective parties (22 NYCRR 20.13). Although several attempts were made during the recent session of the Legislature to codify this new procedure (see, e.g., Bills S6275 and A6985), they proved unsuccessful.

2 We note that this was the rule both under the former procedure in effect at the time of defendant's trial and under the procedure prescribed by section 270.15 of the Criminal Procedure Law which becomes operative on September 1, 1971.

3 On the contrary, it appears from the findings of the Referee, which refer to a list of questions propounded by the prosecutor, that this question was asked by the Assistant District Attorney.

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22 NYCRR 202.33

Section 202.33. Conduct of the voir dire

(a) *Trial judge.* All references to the trial judge in this section shall include any judge designated by the administrative judge in those instances where the case processing system or other logistical considerations do not permit the trial judge to perform the acts set forth in this section.

(b) *Pre-voir dire settlement conference.* Where the court has directed that jury selection begin, the trial judge shall meet prior to the actual commencement of jury selection with counsel who will be conducting the voir dire and shall attempt to bring about a disposition of the action.

(c) *Method of jury selection.* The trial judge shall direct the method of jury selection that shall be used for the voir dire from among the methods specified in subdivision (f) of this section.

(d) *Time limitations.* The trial judge shall establish time limitations for the questioning of prospective jurors during the voir dire. At the discretion of the judge, the limits established may consist of a general period for the completion of the questioning, a period after which attorneys shall report back to the judge on the progress of the voir dire, and/or specific time periods for the questioning of panels of jurors or individual jurors.

(e) *Presence of judge at the voir dire.* In order to ensure an efficient and dignified selection process, the trial judge shall preside at the commencement of the voir dire and open the voir dire proceeding. The trial judge shall determine whether supervision of the voir dire should continue after the voir dire has commenced and, in his or her discretion, preside over part of or all of the remainder of the voir dire.

(f) *Methods of jury selection.* Counsel shall select prospective jurors in accordance with the general principles applicable to jury selection set forth in subdivision (g) of this section and using the method designated by the judge pursuant to subdivision (c) of this section. The methods that may be selected are:

(1) "White's method," as set forth in subdivision (g) of this section;

(2) "struck method," as set forth in subdivision (g) of this section;

(3) "strike and replace method," in districts where the specifics of that method have been submitted to the Chief Administrator by the Administrative Judge and approved by the Chief Administrator for that district. The strike and replace method shall be approved only in those districts where the Chief Administrator, in his or her discretion, has determined that experience with the method in the district has resulted in an efficient and orderly selection process; or

(4) other methods that may be submitted to the Chief Administrator for use on an experimental basis by the appropriate Administrative Judge and approved by the Chief Administrator.

(g) *Procedures for questioning, challenging and selecting jurors authorized by section 202.33 of the Rules of the Chief Administrator of the Courts.*

1 of 1 DOCUMENT

[1] THE PEOPLE OF THE STATE OF NEW YORK v. DENNIS SALVADOR ALVAREZ-HERNANDEZ, Defendant.**

Indictment # 1352/00

COUNTY COURT OF NEW YORK, WESTCHESTER COUNTY

2002 N.Y. Misc. LEXIS 1195; 2002 NY Slip Op 50375U

September 5, 2002, Decided

NOTICE: [*1] THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE OFFICIAL REPORTS.

PRIOR HISTORY: (Motions # J1-J14).

CORE TERMS: juror, prospective jurors, peremptory challenges, jury selection, voir dire, notice, questionnaire, qualification, directing, box, peremptory, photographs, pool, illiterate, sworn, statutorily, disclosure, mandated, summons, Memorandum of Law, death penalty, jury box, potential jurors, murder, media, capital case, defense counsel, postponement, accommodate, cognizable

COUNSEL: HON. JEANINE PIRRO, District Attorney, Westchester County, White Plains, New York, BY: A.D.A. Patricia Murphy and A.D.A. George Bolen.

AIELLO and CANNICK, Attorney for Defendant, Maspeth, New York, BY: Robert J. Aiello, Esq.

MICHAEL L. SPIEGEL, Esq., Attorney for Defendant, New York, New York.

JUDGES: KENNETH H. LANGE, County Court Judge.

OPINION BY: KENNETH H. LANGE

OPINION

DECISION & ORDER

LANGE, J.

The defendant stands accused under Indictment # 1352/2000 of Murder in the first degree (six counts), Murder in the second degree (three counts), Attempted Murder in the first degree (three counts), Attempted Murder in the second degree and **[**2]** Attempted Assault in the first degree.

It is alleged that on September 3, 2000, the defendant intentionally caused the deaths of three individuals and attempted to cause the death of a fourth individual. It is also alleged that, prior thereto, on July 2, 2000, the defendant attempted to cause serious physical injury to one of **[*2]** the murder victims, by attempting to drive an automobile into her.

By fourteen separate Notices of Motion designated as "J1" through "J14", with Affirmations in Support, the defendant makes application with respect to jury selection. In response, the People have submitted an Affirmation in Opposition sworn to on August 19, 2002, with accompanying Memorandum of Law. Defendant's motions, individually numbered "J1" through "J14" are consolidated for purposes of disposition and are disposed of as follows:

MOTION # J1

MOTION TO UTILIZE THE "STRUCK SYSTEM" AND

"FULL BOX METHOD" OF JURY SELECTION

Defendant moves to utilize the "Struck System" and "Full Box Method" of jury selection for exercising peremptory challenges, after the Court has qualified a sufficient number of jurors to permit empaneling a jury. Defendant argues that the fairest way to pick a jury in this capital case, is that the Court should employ a combination of these two methods of jury selection. Under this proposed **[**3]** procedure, the pool of prospective jurors would first be questioned and challenges for cause would be exercised. Once an adequate number of potential jurors are qualified, the parties **[*3]** would then exercise peremptory challenges. Defendant argues that this process best balances defendant's compelling interest in a fair and impartial jury, with the Court's interest in effective and efficient voir dire. The "Struck System" of jury selection has a distinguishing feature in that no peremptory challenges are exercised until the total number of prospective jurors potentially needed--twelve, plus the aggregate number of peremptories allowed to both sides --have been questioned and survived challenges for cause. By first qualifying this venire pool, the "Struck System" ensures that twelve petit jurors will remain, even if both sides exercise all their peremptory challenges. Defendant argues that the primary advantage of the "Struck System" is that counsel can make a comparative assessment of the entire pool of qualified potential jurors when exercising peremptory challenges. Counsel for both sides can therefore exercise a peremptory challenge against any particular juror, with a better understanding of the overall complexion of the remaining panel. As a result, defendant argues the "Struck System" allows the parties to make the most effective use of their peremptory challenges.

[*4] Under the "Full Box Method" each prospective juror is individually examined by the prosecution and then the defense. Unless excused for cause, the prospective juror is seated in the box, but without being sworn as a juror -- as with **[**4]** the "Struck System", no peremptory challenges are exercised at this time. Once the jury box is full, the People exercise their peremptory challenges until they are satisfied with the jurors in the box. Defendant then exercises his challenges. The process continues until a petit jury is selected. Under this system, the Court ceases qualifying prospective jurors once the jury box is full. The only difference between the two methods is the size of the qualified panel against which peremptory strikes are executed. Consequently, to incorporate the "Struck System", the "Full Box Method" need only expand the size of the jury box to twelve plus the number of peremptory challenges granted each side. Defendant requests the combination of these two methods, or in the alternative, he requests that the Court simply employ the "Full Box Method" of jury selection.

In opposition, the People argue that the "Full Box" method of jury selection or a combination of that method **[*5]** and the "Struck Jury" method of jury selection are not constitutionally or statutorily mandated and should not be adopted as a matter of judicial policy. The "Jury Box" method pursuant to CPL § 270.15 is the traditional method of jury selection in New York State criminal courts. The People vigorously oppose defendant's motion as an effort to gain an unfair tactical advantage over the prosecution. Pursuant to *People v. Alston*, 88 N.Y.2d 519, 647 N.Y.S.2d 142, 670 N.E.2d 426, the New York Court of Appeals has held there is no requirement that New York Courts use a "Struck Jury" method or any other alternate form of jury selection. The People argue there is no basis to grant the defendant's request. The Court of Appeals in *People v.* **[**5]** *Alston*, supra, has authorized the "Jury Box" method. The People argue that in requesting the "Struck Jury" or "Full Box" method, or a hybrid of the two, the defendant seeks an advantage in that he would be afforded the opportunity to assess the entire jury as a group prior to exercising any challenges. There is no compelling reason for him to do so, say the People, (CPL § 270.15 **[*6]** (3).)

This Court has considered the history of the statutes on examination and challenges to jurors, (CPL § 270.15, CPL § 270.16), *People v. Alston*, supra, the experience of other trial courts in selecting juries in capital cases, (*People v. Webb*, 187 Misc.2d 451, 722 N.Y.S.2d 349, *People v. McIntosh*, 173 Misc.2d 724, 662 N.Y.S.2d 212) and the resources and facilities available in this County. This Court, in an effort to balance fairness and judicial economy, will adopt the following hybrid system: the Court and attorneys will conduct individual voir dire of prospective jurors with challenges for cause exercised at the conclusion of each individual voir dire. The jurors who are not excused for cause pursuant to CPL § 270.20, will be notified to return at a future date. The process of individual voir dires will continue until there is a sufficient pool to permit the selection of a panel of twelve (12) jurors and twelve (12) alternates even if all peremptory challenges are ex-

ercised by both sides. Peremptory challenges will be exercised on subsequent dates **[*7]** from groups placed in an enlarged jury box, holding twenty-six. The prosecution will exercise its peremptory challenges first as to the twenty-six (26) jurors seated in the box, followed by the defense.

[6] *MOTION # J2***

MOTION TO PROHIBIT EXCLUSION OF OTHERWISE

QUALIFIED ILLITERATE JURORS AND FOR USE

OF A SPANISH LANGUAGE JURY QUESTIONNAIRE AND

JURY SUMMONS

Defendant moves for: A) an Order prohibiting the Westchester County Commissioner of Jurors from excusing, disqualifying, or otherwise failing to include in the pool from which defendant's jury will be drawn, any prospective juror on the basis of illiteracy; B) an Order directing the Commissioner of Jurors to promptly inform the Court and the parties, in writing and in detail, of her current policies and practices with regard to excusing or disqualifying illiterate jurors and taking steps to inform persons receiving jury qualification questionnaires, who may be illiterate, that illiteracy does not disqualify them from jury selection, and that they must appear in person and will be provided with the assistance of the Court and the Commissioner of Jurors regarding any matter related to their ability to serve **[*8]** as jurors; (C) an Order requiring the use of both a Spanish language jury summons and jury qualification questionnaire; and (D) an Order granting affirmative action by the Commissioner of Jurors to recompose the jury pool to allow illiterate jurors to be fairly qualified and represented.

In opposition, the People argue that it is constitutionally and statutorily **[**7]** permissible to disqualify illiterate persons from serving on a jury. The People argue that the Court is without jurisdiction to grant this relief sought by defendant. They urge that only a State Supreme Court, through a CPLR Article 78 proceeding, may issue a mandamus or a prohibition directing the procedures of the office of the Commissioner of Jurors, CPLR § 7804[b]; *Matter of Herald Co. v. Roy*, 107 A.D.2d 515, 487 N.Y.S.2d 435. Under Judiciary Law § 510[4], a juror must be proficient in the English language in that they must be able to "understand and communicate in the English language." Because the English requirement is reasonable and is equally administered among all those who are not proficient in English, whatever their race or ethnicity, the provision **[*9]** does not violate any constitutional rights, say the People. While Judiciary Law § 510[5] was amended in 1996 to remove the specific proficiency requirement that a prospective juror be able to "fill out satisfactorily the juror questionnaire", it did not obliterate entirely the requirement that a prospective juror be able to read and write. The defendant is incorrect, argue the People, that exclusion of illiterate jurors violates the constitutional fair cross-section and equal protection requirements. The People argue that persons who do not read or write English are neither a "distinctive group" nor a "suspect class". The language requirement, they argue, is clearly "equally administered", applying to anyone, regardless of gender, race or ethnicity, who cannot read and write English, *State v. Paz*, 118 Idaho 542, 552, 798 P.2d 1 [1990]. The defendant is not prejudiced by the exclusion of illiterate jurors. It far better serves defendant's due process rights, argue the People, if his jury were composed of people **[**8]** who read, write, speak and understand English, in that a juror must have sufficient proficiency in English to meaningfully participate **[*10]** in a trial replete with exhibits and charts that could not be understood by a juror who cannot read and write in English.

It is important to note that there will be no special call of jurors just to sit on this case. The Commissioner of Jurors will furnish jurors to this trial part from the same pool being used for other trials, civil and criminal, being commenced at the same time. All the jurors in the pool have already completed the Juror Qualification Questionnaire (Exhibit in Court File # 231), a standard form used throughout the State of New York, before they are summoned to appear on a particular day.

Help in completing the questionnaires has already been given to those who cannot read or who have difficulty with English. The Commissioner of Jurors does not disqualify any prospective jurors for illiteracy. Persons who report to the Commissioner that they cannot understand or communicate in English will not be excused by the Commissioner even though this could be a disqualification under Judiciary Law § 510(4). The

determination whether these jurors qualify will be made by this Court on the record in the presence of all the parties.

With regard to **[*11]** the lengthy special questionnaires approved by this Court for this trial, there will be a person from the Commissioner of Juror's Office to read the questions to those who are illiterate, and an official court interpreter present to translate for Spanish speaking individuals.

[9]** In light of the foregoing, and in the absence of any authority requiring a bilingual juror qualification questionnaire or summons, the relief requested by defendant under this motion (J2) is, in all respects, denied.

MOTION # J3

MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES

Defendant moves for an Order granting him an additional twenty peremptory challenges of individual jurors, twice the number authorized by statute for jury selection in a trial for First Degree Murder. In the alternative, he asks for some substantial number of additional peremptory challenges sufficient to ensure his right to a fair trial, and if necessary, sentencing by an impartial jury. Pursuant to CPL § 270.25(2)(a), a defendant charged with any Class A felony "must be allowed" twenty peremptory challenges, plus two for each alternate juror selected.

In opposition, the People argue **[*12]** that defendant has no right to additional peremptory challenges, other than those set by statute (CPL § 270.25). The right to peremptory challenges is statutory and is not a constitutional right. In other death penalty prosecutions in New York, they argue, defendants have moved pre-trial for additional peremptories and their requests were either denied outright or held in abeyance until jury selection. New York Courts have consistently held that a defendant is not deprived of a fair trial when the court denies a request for additional peremptories beyond the statutory limit. (*People v. Doran*, 246 N.Y. 409, 426, 159 N.E. 379; *People* **[**10]** *v. Ramos*, 16 N.Y.2d 700, 261 N.Y.S.2d 894, 209 N.E.2d 552; *People v. McKinney*, 158 A.D.2d 957, 958, 551 N.Y.S.2d 433, lv. den. 76 N.Y.2d 739; *People v. Gantz*, 104 A.D.2d 692, 480 N.Y.S.2d 583; *Matter of State of New York v. King*, 47 A.D.2d 594, 595, rev'd on other grounds, 36 N.Y.2d 59, 364 N.Y.S.2d 879, 324 N.E.2d 351; *People v. Fox*, 99 Misc.2d 1061, 418 N.Y.S.2d 510. Furthermore, the People argue that **[*13]** the Legislature never intended capital defendants to receive any more peremptories than statutorily authorized as evidenced by prior and current peremptory challenge statutes. The People also argue that, if at a later date, the Court finds that circumstances warrant additional peremptory challenges, the People should be granted an equal number. Accordingly, the People argue that defendant's request should be denied with leave to renew upon a proper showing of necessity and appropriateness during voir dire.

Defendant's motion for additional peremptory challenges is denied as premature, with leave to renew upon a proper showing of necessity and appropriateness during voir dire.

MOTION # J4

MOTION TO MAINTAIN JURORS' PRIVACY FROM MEDIA INTRUSION

Defendant moves for an Order prohibiting the Westchester County Jury Commissioner, the Westchester County Clerk, the Westchester County District Attorney, and all other courthouse employees and participants in Defendant's trial **[**11]** from disclosing to the media or public the names or addresses of prospective or seated jurors and providing that the Court will instruct prospective jurors, at the start of voir dire, of **[*14]** the above described requirement it has imposed; that only Court employees, the District Attorney, and the defense will have access to their names and addresses and that the reason for these requirements is to attempt to prevent the media from identifying jurors by name and address and intruding on their privacy during or after the trial.

In response, the People do not object to an order of this Court prohibiting disclosure of the names and addresses of prospective sworn jurors to the media or the public. CPL § 270.15 (1)(a) authorizes a Court, for good cause shown, to issue a protective order regulating the disclosure of the business or residential address of any prospective or sworn juror. The People argue that the sealing order should apply to the defense as well as the prosecution, and the media should be instructed not to disclose such information until after the

jury is discharged. The People do argue that to inform the jurors of the Court's decision is not necessary as any prospective juror may with the consent of the parties, discuss any sensitive issue on the record outside the presence of everyone, but the defendant and the prosecution.

Defendant's **[*15]** motion for a protective order pursuant to CPL § 270.15, is not opposed by the People. Criminal Procedure Law § 270.15(1-a) provides that a court for good cause shown may

...issue a protective order for a stated period regulating **[**12]** disclosure of the business or residential address of any prospective or sworn juror to any person or persons, other than to counsel for either party. Such good cause shall exist where the court determines that there is a likelihood of bribery, jury tampering or of physical injury or harassment of the juror.

As this is the first capital case in Westchester County since the death penalty was reinstated in New York State, the Court finds that good cause exists for such a protective order. Therefore, other than disclosure to the parties, the record of the names and addresses of all jurors shall be sealed in order to protect the anonymity of the all prospective and sworn jurors. The media will be instructed not to disclose or use such identifying information concerning any prospective or sworn jurors until after the jury is discharged, upon the rendering of a verdict. (*People v. Owens*, 187 Misc.2d 272, 2001, 721 N.Y.S.2d 489 **[*16]** N.Y. Slip Op. 21095 (N.Y. Sup. Jan. 26, 2001) No. 36, 547/99, 414/99.)

Defendant's request that the Court inform the jurors of its decision to seal the record of names and address, is granted.

MOTION # J5

MOTION TO AMELIORATE BURDENS OF LENGTHY JURY SERVICE

Defendant moves for an Order increasing the daily compensation rate **[**13]** for jurors, providing adequate childcare facilities for jurors with young children and adjourning at 2:30 or 3:00 p.m. prior to deliberations, when necessary, to accommodate jurors with school-aged children.

In opposition, the People argue that defendant's motion must be denied as the Court is without jurisdiction to grant the relief requested. Juror compensation rates are legislatively mandated (Judiciary Law § 521). The Legislature has determined that $ 40.00 per day for the first thirty days and $ 46.00 per day thereafter is fair and reasonable and trial courts may not disturb this determination. Defendant's application to provide child care facilities in or around the courthouse must similarly be denied. This Court is without authority to unilaterally authorize expenditure funds of the Office of Court Administration **[*17]** and/or the County Legislature, which would ultimately bear the cost of such childcare. Defendant's claim that low-income minorities with children will be under- represented on his jury by reason of financial hardships, which he asserts they will uniquely suffer as a result of inadequate juror compensation and child care considerations and expenses is not supported with socioeconomic data. The People argue that low income minorities with young children are not a distinct and cognizable class.

Defendant's application to adjourn court at 2:30 p.m. or 3:00 p.m. daily to accommodate jurors with small children should be denied as premature. Once jury selection is underway the court will be in a better position to assess the **[**14]** needs of the prospective jurors and fashion the trial schedule as the Court in its discretion may deem necessary to accommodate the needs of actual sitting jurors. Adjourning the trial early each day to accommodate jurors with school-aged children may not be helpful, in that it could increase the length of the trial and exacerbate the very economic hardships cited by defendant.

As noted by the People, juror compensation rates are mandated by statute. (Judiciary Law § 521 **[*18]**). It is not within the province of this Court to assume legislative responsibilities and duties totally outside of its authority. Nor is it within the power or authority of this Court to mandate that adequate child care facilities be established. Finally, defendant's request that prior to deliberations, court be adjourned when necessary to accommodate any jurors with school-aged children would not only result in inconvenience to the parties, the Court, and the attorneys, Court personnel and other jurors, but would also result in a longer trial which as stated by the Court in *People v. Page*, would "exacerbate the very economic hardships cited by defendant." (*People v. Page*, Ind. No. 9833/96, slip op. (Sup. Ct. Kings County 9/8/98); *People v. Arroyo*, Ind. No. 97-13, mot. A39, slip op. (Schoharie Co. Ct., 10/1/98); *People v. Parker*, Ind. No. 97-0762-001, slip op. (Erie Co. Ct., 7/2/98); *People v. Francois*, Ind. No. 122/98, (Dutchess Co. Ct.) Motion # 23, slip op. 6/14/99.)

MOTION # J6

[15]** ***MOTION TO ALTERNATE VOIR DIRE***

Defendant moves for an Order that the initial voir dire of each prospective juror, pursuant to CPL §§ 270.15 **[*19]** and 270.26 alternate between the prosecution and defense counsel. Particularly, defense counsel seeks an Order allowing him to initially voir dire half of the prospective jurors which he argues is more equitable than allowing the prosecutor the first opportunity to question every prospective juror. In support of this, defendant argues that under the new Capital statute, the burden has shifted with regard to the sentencing phase of the trial as now the defendant carries the burden of presenting mitigating evidence. (See, CPL § 400.27). Defendant argues in light of this burden shift, defense counsel should have the same opportunity to be the first to explore and present themes to the potential jury pool that the prosecutor does.

In opposition, the People argue there is no authority to permit deviation from the statutorily prescribed order of voir dire. In enacting CPL § 270.16(1), dealing with voir dire in capital cases, the Legislature did not change the order of voir dire as mandated in CPL § 270.15. The order of voir dire is statutorily mandated. CPL § 270.15(3) requires that "the **[*20]** process of jury selection ... shall continue until twelve persons are selected and sworn as trial jurors." Each round of voir dire must follow the statutorily dictated order that voir dire commences with the People. The correlative provisions governing the order in which challenges are made also require that the People go first (CPL § 270.15(2)). Finally, the People argue that **[**16]** the fact that the defendant faces the death penalty does not in and of itself alter the Legislative scheme for jury selection. CPL § 270.16(1) and CPL § 270.15(1)(c) both direct that voir dire of prospective jurors commence with the People. The defendant has not submitted any persuasive authority which would justify departure from these statutory mandates. *(People v. Arroyo*, 178 Misc.2d 362, 365, 679 N.Y.S.2d 885 (Schoharie Co. Ct., 1998); *People v. Francois*, Ind. No. 122/98, (Dutchess Co. Ct.) motion # 28, slip op. 6/14/99.) This motion is, accordingly, denied.

MOTION # J7

MOTION FOR ALL DISQUALIFICATIONS, DEFERMENTS AND

EXCUSALS FROM THE POTENTIAL VENIRE TO BE MADE

BY THE COURT IN THE **[*21]** ***PRESENCE OF THE ACCUSED***

AND DEFENSE COUNSEL

[17]** Defendant moves for an Order that the Court personally hear and determine any applications by summonsed jurors to be excused, disqualified or transferred, or to have jury service deferred and that the Court do so, only after providing defendant and his counsel notice and an opportunity to be heard and only in the presence of defendant and his counsel. Alternatively, defendant requests that all determinations made by the Jury Commissioner be placed on the record, subject to challenge by the defense and review by the Court.

In opposition, the People argue this motion should be denied as there is no authority to permit the Court to engage in such a practice; and indeed, to do so, would be wholly outside the Court's jurisdiction (Judiciary Law § 502; § 509; § 517). By statute, the drawing, summoning, selection and impaneling of jurors is a task solely within the purview of the Commissioner of Jurors (Judiciary Law § 502). It is the Commissioner who "shall determine the qualifications of a prospective juror on the basis of information provided on the juror qualification questionnaire. **[*22]** " (Judiciary Law § 509[a]). The People argue that there is no statutory authority that permits the Court to consider health or hardship issues raised by the applicant (Judiciary Law § 517(c)). Nor is there any authority, by which the Court may order juror qualification questionnaires to be kept under seal for possible appeal. The People argue that defendant, as a capital defendant, is provided with a broader voir dire under CPL § 270.16 and § 270.20(f). He may conduct meaningful inquiry at that time as to any bias or prejudice the defendant believes is injected by the **[**18]** Commissioner's discretionary function under the Judiciary Law.

In this case, the Commissioner of Jurors has agreed that the only jurors she will excuse are those who have immediate medical emergencies and leave to this Court all determinations as to hardship and other medical

conditions. Students who are returning to school at this time of year would ordinarily be granted a postponement. In this case, the Commissioner will also leave the determination for the Court.

Of course, prospective jurors who are not citizens of the United States, **[*23]** or residents of this County or who have been convicted of a felony must be excused by the Commissioner of Jurors as unqualified under Judiciary Law § 510.

In light of the foregoing, this motion is denied.

MOTION # J8

MOTION TO PRECLUDE JURY COMMISSIONER FROM

DISSEMINATING ORIENTATION VIDEO, HANDBOOK

NEWSLETTER, OR OTHER INFORMATION TO PROSPECTIVE

JURORS WITHOUT PERMISSION OF THE COURT

Defendant moves for an Order directing the Westchester County Jury Commissioner not to disseminate, show, or provide to any prospective jurors in this **[**19]** case any juror orientation video, handbook, newsletter or other jury orientation information absent express permission by the Court, after defense counsel has been provided notice of the exact material or information that is to be disseminated and an opportunity to advocate to the Court against its dissemination.

In opposition, the People argue that the materials the defendant objects to, a handbook and a video presentation, were prepared for use throughout New York State by the Office of Court Administration, at the direction of the Chief Judge of the State of New York. However, the Office of Court **[*24]** Administration is not a party to this action, nor have they been served with notice of this motion and given an opportunity to be heard. Only a State Supreme Court through a CPLR Article 78 proceeding, they argue may issue a mandamus or a prohibition directing the procedures of the Commissioner of Jurors. Jurors are presumed to follow their oaths and the instructions given to them by the trial court. Moreover, the defendant will be free to voir dire the potential jurors with respect to any preconceptions they might have with respect to this case or this criminal prosecution in general.

Defendant's motion is denied. The Court has reviewed the Juror's Handbook (Exhibit in Court File # 234) and the Juror Orientation Video (Exhibit in Court File # 233) and did not find any inaccuracies or any matter that could prejudice defendant's rights to a fair trial. The Court also finds that the information contained therein to be helpful. The Juror's Handbook has been recently revised and reissued by the Unified Court System, and provides specifically that it is not to replace the **[**20]** instructions given by the Judge presiding over a particular case. The video, entitled, *Your Turn, Jury Service in* **[*25]** *New York State*, was produced in 2001 under the auspices of the Unified Court System and the Committee on Courts and the Community of the New York State Bar Association.

MOTION # J9

MOTION FOR DISCLOSURE OF LIST OF POTENTIAL JURORS

Defendant moves for an Order directing the Westchester County Jury Commissioner to provide to defendant's counsel a list of the names and addresses of potential jurors, as soon as such a list is available to, or compiled by, the Commissioner of Jurors, for the purpose of mailing summonses to such persons to appear as potential jurors at defendant's trial.

In opposition, the People argue that any disclosure of the requested records would be an unwarranted invasion of the prospective jurors' personal privacy. The defendant, they argue, has not made a factual showing to justify such disclosure. Juror qualification questionnaires and juror records are confidential and are not to be disclosed except to the county jury board or as permitted by the Appellate Divisions. The material sought by defendant should not be disclosed as it would compromise the personal privacy of prospective jurors and could result in the harassment of prospective **[*26]** jurors and have a chilling effect on the jury selection process in future cases. Generalized assertions, say the People, that defendant needs **[**21]** this infor-

mation for trial preparation do not constitute the necessary factual predicate which would make it likely that the records would provide relevant evidence. (*People v. Guzman*, 60 N.Y.2d 403, 415, 469 N.Y.S.2d 916, 457 N.E.2d 1143).

Judiciary Law § 509(a) clearly states that: "such questionnaires and records shall be considered confidential and shall not be disclosed except to the county jury board or as permitted by the appellate division." The proper venue for this application is not this Court, but in the Appellate Division, Second Department. Defendant's motion is therefore denied in all respects. (*People v. Francois*, Dutchess Co. Ct., Ind. No. 122/98, Motion # 24, slip op., 6/14/99).

MOTION # J10

MOTION TO PROHIBIT SUMMONED JURORS FROM POSTPONING

JURY SERVICE WITHOUT ADEQUATE JUSTIFICATION

Defendant moves for an Order directing the Jury Commissioner not to grant any requests for postponements by jurors, summoned to a jury term immediately prior to or during **[*27]** the voir dire in this capital case, including requests for so called "automatic" six month deferrals, and directing the Westchester County Jury Commissioner in empaneling the venire for defendant's trial not to do the following: (1) assign any prospective juror drawn to this case to another panel because of the nature of this case, or because of any express preference or reluctance **[**22]** to serve by the prospective juror; (2) assign any prospective juror drawn for another case to this panel because of the nature of this case or because of any expressed preference or reluctance to serve by the prospective juror; (3) inquire of any prospective juror whether he or she would like to serve on the jury panel for this case; or (4) engage in any discussion with the prospective juror regarding the nature, facts and circumstances of this case.

The People argue that the Court is without jurisdiction to grant the relief sought by defendant. The defendant has not made a showing of a clear legal right to the relief sought. Only a State Supreme Court through a CPLR Article 78 proceeding may issue a mandamus or a prohibition directing the procedure of the Office of the Commissioner of Jurors.

The defendant's **[*28]** request for an order prohibiting the Commissioner of Jurors from granting postponements mandated by statute is untenable and must be denied. Defendant has made no showing that the Commissioner of Jurors will not comply with section 517 of the Judiciary Law with respect to juror applications for postponements or excusals or that by granting the statutorily mandated postponements, a fair and impartial jury representing a fair cross-section of the community cannot be empaneled.

The dictates of Judiciary Law § 517(a) and 22 NYCRR 128.6-a(a)(a) control. The Court cannot set up separate standards which are tailored by the defense. (*People v. Francois*, Ind. No. 122/98, (Dutchess Co. Ct.) mot. # 25, slip op. **[**23]** 6/14/99; *People v. Arroyo*, Ind. 97-13, Mot. A-32, slip op. (Schoharie Co. Ct., 10/2/98); and *People v. Page*, Ind. No. 9833/96, slip op. (Sup. Ct., Kings Co., 9/8/98).) Therefore, defendant's motion is denied.

MOTION # J11

MOTION FOR PERSONAL SERVICE OF SUMMONSES ON

PROSPECTIVE JURORS WHO DO NOT RESPOND TO

MAILED SUMMONS

Defendant moves for an Order directing the Westchester **[*29]** County Jury Commissioner to personally serve a jury summons on any prospective juror who does not respond to a mailed summons.

In opposition, the People argue there is no authority in the law for the Court to issue an order countermanding the discretion given the Commissioner of Jurors by Judiciary Law § 516, which gives discretion as to how jury summonses are delivered. While the Commissioner has authority to direct the Sheriff to personally serve a jury summons, it is the Commissioner herself who decides what methods to employ. Only a State Supreme Court through a CPLR Article 78 proceeding may issue a mandamus or a prohibition directing the proce-

dures of the Commissioner of Jurors and then, only when the defendant has demonstrated a clear right to the relief **[**24]** sought, which defendant has not demonstrated here.

These matters are governed by Judiciary Law § 502(d), § 516 and § 517, as well as 22 NYCRR 128.6 and 128.12. (*People v. Arroyo*, Ind. No. 97-13, Motion A-71, slip op. (Schoharie Co. Ct., 10/2/98); *People v. Page*, Ind. No. 9833/96, slip op. (Sup. Ct. Kings Co, 9/8/98; *People v. Francois* **[*30]** , Ind. No. 122/98, Motion # 44 (Dutchess Co. Ct., 6/14/99).) Therefore, defendant's motion is denied.

MOTION # J12

MOTION FOR AN ORDER PROHIBITING COURT AND

PROSECUTOR FROM ALERTING PROSPECTIVE JURORS

OF QUALIFICATION STANDARDS FOR THEIR SERVICE

Defendant moves for an Order prohibiting the Court and prosecutor from alerting prospective jurors of qualification standards for their service, arguing that if prospective jurors have knowledge of these standards, some panel members may be influenced to shade their answers so as to minimize their chances of serving.

In opposition, the People argue that the Court of Appeals in *People v. Harris*, (N.Y.2d), July 9, 2002, at p. 7; 2002 N.Y. Slip Op. 05750), has found no prejudice to defendant in employing this procedure.

This Court is mindful of the admonition for caution in this area from the Court of Appeals in *Harris*, supra. Jurors are presumed to follow their oaths and to answer **[**25]** questions put to them truthfully. This Court plans to conduct life/death qualification in a manner that encourages frankness and honesty in the potential jurors' responses, without seeming to place a value or reward **[*31]** on "correct or appropriate" answers. Defendant's application if granted, could curtail the People's and the Court's opportunity to identify jurors whose opposition to the death penalty is so strong that it would prevent them from determining defendant's guilt or innocence in an impartial manner. This motion is accordingly denied.

MOTION # J13

MOTION TO PROHIBIT THE PROSECUTION FROM USING

PEREMPTORY CHALLENGES TO EXCLUDE DEATH-SCRUPLED

JURORS AND FOR PRETRIAL DECLARATION THAT SUCH

JURORS CONSTITUTE COGNIZABLE GROUP

Defendant moves for an Order recognizing and declaring that jurors who have religious or conscientious qualms about or opposition to capital punishment--but not of such nature or degree that they are excusable for cause as they can still follow the law and their oaths at trial and at a capital sentencing hearing--are a cognizable and distinct group for purposes of addressing a claim that the prosecution is using peremptory challenges to discriminate against such venire **[**26]** members.

In opposition, the People argue it is constitutionally permissible for the People to use peremptory challenges to excuse persons with scruples against the death penalty **[*32]** from the jury, as such persons do not constitute a cognizable class. The classification of persons with moral scruples against the death penalty is too broad to support any finding of a distinct, readily identifiable class. The People argue that the defendant is essentially arguing he is constitutionally entitled to a jury composed of persons who will not impose a death sentence and this is not the law. The People argue that they are entitled to exercise their peremptory challenges if they suspect that a juror will be unfavorable to their case, a right which is also shared by the defendant. Defendant is entitled to be judged by a jury representative of a fair cross-section of the community, and such an exercise of peremptory strikes does not in any way impair his right to a fair jury.

As succinctly stated in Judge Dolan's decision in *People v. Francois*, Ind. No. 122/98, (Dutchess Co. Ct.) motion # 29, "(d)efendant's application is contrary to the prevailing law and must be denied. Death-scrupled jurors are not members of a cognizable class within the meaning of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed.

2d 69, 106 S. Ct. 1712 (1986). See *Gray v. Mississippi*, 481 U.S. 648, 95 L. Ed. 2d 622, 107 S. Ct. 2045 (1987) **[*33]** and *Lockhart v. McCree*, 476 U.S. 162, 90 L. Ed. 2d 137, 106 S. Ct. 1758 (1986). Therefore, *Batson* type prohibitions do not apply." Defendant's motion is denied.

MOTION # J14

[27]** ***MOTION TO PARTIALLY RECONSIDER THIS COURT'S***

DECISION ON DEFENDANT'S MOTION # 16 REQUESTING

AN IN LIMINE RULING CONCERNING PHOTOGRAPHS OF

THE DECEASED PRIOR TO JURY SELECTION

Defendant moves the Court to reconsider its decision and order dated February 14, 2002 and to make an in limine ruling on the admissibility of the photographs of the murdered victims at trial prior to jury selection.

In opposition, the People argue that the admissibility of photographs is a trial evidentiary issue. These evidentiary decisions are more properly made during the trial. In response to defendant's motion numbered 16, this Court in a decision and order dated February 14, 2002, stated that prior to the People displaying or introducing any such evidence, defendant would be given an opportunity to object and/or to offer an alternative exhibit. The determination of whether specific photographs are admissible will be made either after jury selection has concluded or during the course **[*34]** of the trial, outside of the presence of the jury, when the photographs can be considered in the context of the other evidence. Admissibility will be governed by the standards set forth in *People v. Pobliner*, 32 N.Y.2d 356, 345 N.Y.S.2d 482, 298 N.E.2d 637, cert. denied 416 U.S. 905; *People v. Wood*, 79 N.Y.2d 958, 582 N.Y.S.2d 992, 591 N.E.2d 1178; *People v. Randolph*, 250 A.D.2d 713, 673 N.Y.S.2d 174; and *People v. DeBerry*, 234 A.D.2d 470, 651 N.Y.S.2d 559. The Court will consider in ruling on the number and type of photographs admitted into **[**28]** evidence, the probative value of the proffered photographs on trial issues versus their prejudicial effect. With respect to defendant's motion to admit only black and white photos, large color photographic evidence has been deemed admissible, (see *People v. Pobliner*, 32 N.Y.2d 356, 345 N.Y.S.2d 482, 298 N.E.2d 637; *People v. Wood*,79 N.Y.2d 958, 582 N.Y.S.2d 992, 591 N.E.2d 1178; *People v. Gordon*, 131 A.D.2d 588, 516 N.Y.S.2d 297.) In light of the foregoing, the Court adheres to its prior ruling and will determine admissibility **[*35]** of photographs after jury selection and out of the presence of the jury. The defendant's motion for an earlier ruling, in limine, is denied.

The following papers were read on this application: (1) Notice of Motion # J1, dated August 5, 2002 with Affirmation in Support and Memorandum of Law; (2) Notice of Motion # J2, dated August 5, 2002 with Affirmation in Support and Memorandum of Law; (3) Notice of Motion # J3 dated August 5, 2002 with Affirmation in Support; (4) Notice of Motion # J4, dated August 5, 2002 with Affirmation in Support; (5) Notice of Motion # J5, dated August 5, 2002 with Affirmation in Support and Memorandum of Law; (6) Notice of Motion # J6, dated August 5, 2002 with Affirmation in Support; (7) Notice of Motion # J7, dated August 5, 2002 with Affirmation in Support; (8) Notice of Motion # J8, dated August 5, 2002, with Affirmation in Support; (9) Notice of Motion # J9 with Affirmation in Support; (10) Notice of Motion # J10 dated August 5, 2002 with Affirmation in Support; (11) Notice of Motion # J11 dated August 5, 2002 with Affirmation in Support; (12) Notice of Motion # J12 with Affirmation in Support and Memorandum **[**29]** of Law; (13) Notice of Motion # J13 with Affirmation **[*36]** in Support and Memorandum of Law; (14) Notice of Motion # J14 with Affirmation in Support; (15) People's Affirmation in Opposition dated August 19, 2002 with Accompanying Memorandum of Law; (16) Notice of Motion # 16 dated August 2, 2001 for an Order to exclude from trial and any capital sentencing hearing, gruesome, inflammatory and unnecessary autopsy and crime-scene photographs that were taken following the offense for which defendant is charge with Affirmation in Support and Memorandum of Law; (17) People's Supplemental Memorandum of Law in Support of their Affirmation in Opposition to Defendant's motions numbered 6a, 10a, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23, dated September 6, 2001, with Exhibit; (18) People's Memorandum of Law to Omnibus Motion dated April 5, 2001; and (19) this Court's decision and order dated February 14, 2002.

White Plains, New York

KENNETH H. LANGE

County Court Judge

[30]** Decision Date: September 05, 2002

106

McKinney's CPLR Rule 4107

Rule 4107. Judge present at examination of jurors

Currentness

On application of any party, a judge shall be present at the examination of the jurors.

Credits

(L.1962, c. 308. Amended Jud.Conf.1964 Proposal No. 7, eff. Sept. 1, 1964.)

View National Reporter System version

145 A.D.2d 341, 535 N.Y.S.2d 705

Guarnier v American Dredging Co.
Supreme Court, Appellate Division, First Department, New York December 15, 1988 145 A.D.2d 341 535 N.Y.S.2d 705 *(Approx. 2 pages)*

Charles T. Guarnier, Respondent,

American Dredging Co., Appellant.

Supreme Court, Appellate Division, First Department, New York
34825
December 15, 1988

CITE TITLE AS: Guarnier v American Dredging Co.

HEADNOTE

JURY
SELECTION OF JURY
Right to Presence of Judge

(1) Judgment in favor of plaintiff reversed, and matter remanded for new trial ---Two separate jury trials were held in this action; at first trial, jury decided issue of liability and damages; although there was series of objections by defendant to conduct of plaintiff's counsel during jury selection, trial court denied defendant's application to continue jury selection in presence of court; court later assigned law assistant to supervise voir dire and still later presided itself at selection; nevertheless, defendant's right to have 'judge' present at examination of jurors (CPLR 4107) was violated; language of CPLR 4107 is mandatory --- Court's failure to implement provisions of CPLR 4107 is reversible error --- Further, during second trial, which raised issue of jurisdiction, court advised jury that plaintiff already had obtained favorable verdict from another jury with respect to liability and damages; such disclosure by court of prior verdict was irrelevant to issue of jurisdiction and improperly prejudiced defendant at this second trial.

Judgment of the Supreme Court, New York County (Ira Gammerman, J.), entered May 22, 1987, awarding damages in favor of plaintiff, upon a jury's verdict, is unanimously reversed, on the law, without costs or disbursements, and the matter remanded for a new trial.

Two separate jury trials were held in this action. At the first trial, the jury decided the issue of liability and damages. Although there was a series of objections by defendant to the conduct of plaintiff's counsel during the jury selection, the trial court denied defendant's application to continue jury selection in the presence of the court. The court later assigned a law assistant to supervise the voir dire and still later presided itself at the selection. Nevertheless, defendant's right to have a "judge" present at the examination of the jurors*342 (CPLR 4107) was violated. As we noted in *Baginski v New York Tel. Co.* (130 AD2d 362, 366): "The language of CPLR 4107 is mandatory: on application of a party 'a judge shall be present at the examination of the jurors.' If the Judge to whom the application is made cannot attend, it is incumbent upon her to insure that the moving party's statutory right is not frustrated by arranging for another Judge to be present. We reject respondent's assertion that appellant should be required to show prejudice arising from the court's rejection of its application. Such a requirement would be onerous given that no record of the voir dire proceedings was made. The statute confers an unconditional right on the moving party to have a Judge present to insure that a fair and impartial jury is chosen. We find that the court's failure to implement the provisions of CPLR 4107 is reversible error and a new trial is therefore warranted."

Further, during the second trial, which raised the issue of jurisdiction, the court advised the jury that the plaintiff already had obtained a favorable verdict from another jury with respect to liability and damages. Such disclosure by the court of the prior verdict, timely objected to

by defendant, was irrelevant to the issue of jurisdiction and improperly prejudiced defendant at this second trial. Accordingly, we remand for retrial of both liability and jurisdiction.

Concur--Sullivan, Ross, Asch and Wallach, JJ.

Kupferman, J. P., concurs in a memorandum as follows: I concur for a new trial on the basis that disclosure of the prior verdict was prejudicial. While CPLR 4107 may mandate a Judge's presence, it does not in its language require such presence forthwith and at every stage of jury selection. Here the Judge was present sufficiently. To mandate otherwise is to limit a Judge's ability to function with a heavy calendar while serving no real purpose in the matter at hand.

End of Document

Brief for Defendant-Respondent-Appellant/Second Third-Party Plaintiff/Third Third-Party Plaintiff-Respondent-Appellant Classic Construction

2007 WL 5613924
Luis COQUE, Plaintiff-Appellant-Respondent, v. WILDFLOWER ESTATES DEVELOPERS, INC. and Classic Construction, Defendants-Respondents-Appellants; Wildflower Estates Developers, Inc., Third-Party Plaintiff-Respondent-Appellant, v. City Wide Building Corp., Third-Party Defendant-Respondent; Classic Construction, Second Third-Party Plaintiff, v. Brothers Home Renovation, Inc, Second Third-Party Defendant; Classic Construction, Second Third-Party
Supreme Court, Appellate Division, Second Department
Oct. 09, 2007

...FN1. City-Wide moved for a stay of the trial pending the appeal, however this Honorable Court denied the application. Past Pain and Suffering: $500,000 Past Stipulated Medical Expenses: $585,354 Past L...

See More Briefs

Trial Court Documents

Nelson v. The New York City Health and Hospitals Corp.

1995 WL 17958541
Annie NELSON, as Administratrix of the Goods, Chattels & Credits of Jessie Sledge, Deceased, Plaintiff, v. THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, Defendant.
Supreme Court, New York.
Sep. 01, 1995

...IAS PART 48 MARYLIN G. DIAMOND, J.: Defendant, New York City Health and Hospitals Corporation ("HHC"), moves after trial for an order, pursuant to CPLR 4404(a), setting aside the jury verdict, as a mat...

McKinney's CPLR § 4109

§ 4109. Peremptory challenges

Currentness

The plaintiff or plaintiffs shall have a combined total of three peremptory challenges plus one peremptory challenge for every two alternate jurors. The defendant or defendants (other than any third-party defendant or defendants) shall have a combined total of three peremptory challenges, plus one peremptory challenge for every two alternate jurors. The court, in its discretion before the examination of jurors begins, may grant an equal number of additional challenges to both sides as may be appropriate. In any case where a side has two or more parties, the court, in its discretion, may allocate that side's combined total of peremptory challenges among those parties in such manner as may be appropriate.

Credits

(L.1962, c. 308. Amended L.1972, c. 185, § 3; L.1996, c. 655, § 1.)

110

WESTLAW

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160 Misc.2d 1086, 612 N.Y.S.2d 303

Patrick O'Neill, Plaintiff,

O'Neill v City of New York
Civil Court of the City of New York, New York County April 25, 1994 160 Misc.2d 1086 612 N.Y.S.2d 303 *(Approx. 4 pages)*

City of New York et al., Defendants.

Civil Court of the City of New York, New York County,
108622/89, 94-259
April 25, 1994

CITE TITLE AS: O'Neill v City of New York

HEADNOTES

Jury
Selection of Jury
Racially Discriminatory Use of Peremptory Challenge

(1) Defendant's motion to disband the jury in an action for false arrest and false imprisonment, and malicious prosecution on the grounds that plaintiff's counsel had allegedly used his peremptory challenges (CPLR 4109) in a racially discriminatory fashion is granted. Peremptory challenges may be exercised against a regular juror for any or no reason, with the significant exception that they may not be used to exclude a prospective juror because of his or her race. The moving party has the burden of proving that the attorney for the other party has purposely discriminated in jury voir dire; then the burden shifts to the other party to give sufficient reasons for the exclusion of the prospective jurors. Here, since defendant met its burden by demonstrating that plaintiff's counsel used all of his peremptory challenges to remove the only African-Americans on the jury panel at the time, the burden shifted to plaintiff. Plaintiff did not meet his burden. While plaintiff's attorney stated that the reason that he removed the three African-American prospective jurors was that the Caucasian jurors were better qualified to act as jurors on this particular case, due to, *inter alia,* their educational background, he in no way supported that conclusion with any specifics as to the educational backgrounds of either the African-American or Caucasian prospective jurors.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Jury, § 173.

Carmody-Wait 2d, Selection and Impanelment of Jury §§ 55:31, 55:32.

CPLR 4109.

NY Jur 2d, Jury, §§87,97-99.

ANNOTATION REFERENCES

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

APPEARANCES OF COUNSEL

Wallace Gossett, Brooklyn *(Sharon Buckle* of counsel), for New York City Transit Authority, defendant. *Laurence E. Jacobson,* New York City *(Melvin Dubinsky* of counsel), for plaintiff.**1087*

OPINION OF THE COURT

Richard F. Braun, J.

SELECTED TOPICS

Criminal Law

Review
Prima Facie Showing of Any Pattern of Racial Discrimination Regarding State Peremptory Strike of Minority Prospective Jurors

Jury

Competency of Jurors, Challenges, and Objections
Defendant Showing of Prima Facie Case of Prosecutor Discriminatory Use of Peremptory Challenge

Secondary Sources

s 191:60. Discriminatory use of peremptory challenges, generally

35 Carmody-Wait 2d § 191:60

...As a matter of federal and state constitutional law, neither the prosecution nor the defense may exercise peremptory challenges in a discriminatory manner. The discriminatory use of peremptory challeng...

s 191:72. Judicial assessment of race-neutral explanation for use of peremptory challenges, generally

35 Carmody-Wait 2d § 191:72

...The third step of the process where one party initiates a Batson challenge arises when the challenger asserts that the proffered neutral explanations are a pretext masking discriminatory intent; this l...

s 191:70. Racially neutral explanation for use of peremptory challenges, generally

35 Carmody-Wait 2d § 191:70

...Once a party makes a prima facie showing of discrimination, in support of a Batson challenge, the burden shifts to the nonmoving party to come forward with a facially race-neutral explanation for the u...

See More Secondary Sources

Briefs

BRIEF FOR RESPONDENT

1991 WL 538725
Hernandez (Dionisio) v. New York
Supreme Court of the United States
Jan. 07, 1991

...FN* Counsel of Record for Respondent The opinion of the New York Court of Appeals (Joint App. at 26-45) is reported at 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85 (1990). The opinion of the New Yor...

Brief for Defendant-Appellant

2010 WL 4894904
THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. Jamel BLACK, Defendant-Appellant.
Court of Appeals of New York.
Mar. 24, 2010

...FN1. Numbers in parentheses preceded by "A." refer to pages of Appellant's Appendix. FN2. The third prospective juror, Tyrone Thomas, was challenged because of his demeanor in court and manner of dress...

Brief of Respondent

This is an action for false arrest and false imprisonment, and malicious prosecution. The action was removed to this court, pursuant to CPLR 325 (d). Plaintiff claims that on April 28, 1986 he was unlawfully arrested and imprisoned by Carl Dyer (Dyer), a police officer of defendant the New York City Transit Authority (TA), and that then he was maliciously prosecuted for disorderly conduct (Penal Law § 240.20) and resisting arrest (Penal Law § 205.30).

Over the course of parts of two days, the attorneys for plaintiff and defendant TA[1] selected a jury, under the supervision of a Judicial Hearing Officer (JHO). The attorneys said that all of the inquiry of the jurors was done by the attorneys. As is customary practice in a civil action to be tried before a jury, the jury voir dire was not conducted on the record. During the jury selection process, the attorney for defendant TA made an oral motion before the JHO to disband the jury to the extent that it had been selected. The basis for the motion was that plaintiff's counsel had allegedly used his peremptory challenges in a racially discriminatory fashion. The JHO gave the attorney for defendant TA leave to make her motion subsequently to a Civil Court Judge. After jury selection was completed, the trial was assigned to this Judge, and the counsel for defendant TA renewed her motion.

Pursuant to CPLR 4109, each party to a civil action generally has three peremptory challenges to use regarding regular jurors and one for each alternate juror. Different from challenges for cause (CPLR 4110), peremptory challenges may be exercised against a regular juror for any or no reason, with a significant exception. A peremptory challenge may not be used in an impermissibly discriminatory fashion to exclude a prospective juror, including because of his or her race *(Edmonson v Leesville Concrete Co.*, 500 US 614 [1991]; *Batson v Kentucky*, 476 US 79 [1986]; *People v Scott*, 70 NY2d 420 [1987]; Fox, *Bias Found in Picking Jury for Civil Suit*, NYLJ, Nov. 10, 1988, at 1, col 5, and *Today's News*, NYLJ, Dec. 8, 1988, at 1, col 2, both discussing *Taylor v Fisher Liberty Co.*, NYLJ, Dec. 8, 1988, at 24, col 5 [Sup Ct, NY County]; *see also, J.E.B. v Alabama ex rel. T.B.*, 511 US ___, 128 L Ed 2d 89 [1994] [same as to female jurors]; ***1088** *People v Hernandez*, 75 NY2d 350, 356 [1990], *affd Hernandez v New York*, 500 US 352 [1991] [same as to Latino jurors]; *People v Irizarry*, 165 AD2d 715 [1st Dept 1990] [same as to female jurors]; *cf., People v Kaplan*, 176 AD2d 821 [2d Dept 1991] [holding that the prosecution provided sufficient reasons for excluding two prospective jurors with "Jewish-sounding names" and two potential African-American alternate jurors]).

This court held a hearing on the motion of defendant TA *(see, Batson v Kentucky, supra,* 476 US, at 100; *People v Scott, supra,* 70 NY2d, at 426). At the hearing, both the attorneys for defendant TA and plaintiff argued their client's positions, explained their behavior during the jury selection process, and introduced their jury voir dire notes into evidence. Furthermore, the JHO stated on the record at the hearing his impressions regarding the use of peremptory challenges by plaintiff's attorney.[2] The court made efforts to determine whether the challenged jurors could be brought to the courtroom for further inquiry, but was informed that they were not available because they had been dispersed to various other jury panels *(see, People v Irizarry, supra,* 165 AD2d, at 718).

Plaintiff and plaintiff's trial counsel are both Caucasian men. Police Officer Dyer is an African-American man, and the trial attorney for defendant TA is an African-American woman.

There were three African-American women on the initial jury panel and no African-American men. Plaintiff's attorney used his three peremptory challenges to remove those three women from the jury. Thereafter, an African-American man and an African-American woman were seated on the jury panel. Plaintiff's attorney had no more peremptory challenges to exercise against them, as he had already used up all of his allotted peremptory challenges.

The moving party has the burden of proving that the attorney for the other party has purposely discriminated in jury voir dire *(Batson v Kentucky, supra,* 476 US, at 93). Once the burden has been met by the moving party, the burden shifts to the other party to give sufficient reasons for the ***1089** exclusion of the prospective jurors *(Batson v Kentucky, supra,* at 94).

Defendant TA met its burden by demonstrating that plaintiff's counsel used all of his peremptory challenges to remove the only African-Americans on the jury panel at the time *(Edmonson v Leesville Concrete Co., supra,* 500 US, at 630; *Batson v Kentucky, supra,* 476 US, at 96-97; *People v Scott, supra,* 70 NY2d, at 425). Furthermore, the attorney for defendant TA stated that, after a dispute arose subsequently over how many peremptory challenges each attorney had left, the JHO offered to give each attorney one more

peremptory challenge, until plaintiff's counsel asserted that he would use it to strike a subsequently seated fourth African-American juror.

Once the burden shifted to plaintiff, plaintiff did not meet his burden. His attorney stated that the reason that he removed the three African- American prospective jurors was that the Caucasian jurors were better qualified to act as jurors on this particular case, including due to their educational backgrounds. He in no way supported that conclusion with any specifics as to the educational backgrounds of either the African-American or Caucasian prospective jurors, or with any other specifics as to the relative qualifications of the former versus the latter. Nor did he explain why any special level of education was needed to serve as a juror on this particular case. The attorney for defendant TA, on the other hand, stated that one of the removed African-American prospective jurors was a school teacher of special education and another was a production manager at a textile company.

When plaintiff's attorney was asked by this court as to each of the three challenged jurors to specify any further reasons for challenging each juror, he said that he could not remember why he challenged each one. His assertion at that point that he could not remember any other specifics of his challenges from one day earlier is not credited by this court.

Plaintiff's attorney later indicated that he challenged one of the African-American women because she was a grandmother on the verge of retirement who wanted to spend more time with her grandchildren, and thus might be distracted from jury service. Defendant TA's attorney stated that plaintiff's attorney was not even identifying that juror correctly. That explanation by plaintiff's counsel is discredited by this court as a vain attempt by him to stretch to come up with some ***1090*** justification for his actions. Even if the court credited his explanation, his striking of the other two African-American jurors for racial reasons was constitutionally impermissible *(People v Jenkins,* 75 NY2d 550, 559 [1990]).

Plaintiff's attorney further argued that the counsel for defendant TA subsequently employed her three peremptory challenges to remove three prospective Caucasian jurors from the panel and thus that the attorney for defendant TA did not have clean hands. First, as the attorney for defendant TA stated, after plaintiff's attorney exercised his three peremptory challenges, there were only Caucasians among the three prospective jurors left on the jury panel until new jury prospects were added to the panel. Second, she gave a satisfactory explanation at least as to why she struck one juror. More important, the concept barring the impermissible use of peremptory challenges is not based on equity, but rather on the constitutional provision of equal protection of law *(Swain v Alabama,* 380 US 202, 203-204 [1965]). The discriminatory use of peremptory challenges by a party to civil litigation is not only violative of the rights of the opposing party but also of the prospective jurors improperly removed, who have the right to be selected to serve on a jury, and furthermore such discrimination is an affront to American society and our system of justice *(Edmonson v Leesville Concrete Co., supra,* 500 US, at 618-619; *see, Batson v Kentucky, supra,* 476 US, at 87; *People v Irizarry, supra,* 165 AD2d, at 717). Thus, even if the attorney for defendant TA had also improperly exercised her peremptory challenges, that would in no way excuse the unconstitutional use thereof by plaintiff's attorney.

Finally, only after counsel for defendant TA said that she had in part employed her peremptory challenges against one or two Caucasian jurors because of her perceived lack of eye contact with that juror or jurors did plaintiff's counsel state that he was not getting the same degree of "concentration and attention", including satisfactory eye contact, from the African-American jurors. The court does not credit his explanation, as he seemed to be borrowing it from the attorney for defendant TA.

Although it may have been good trial strategy for plaintiff and his attorney to attempt to keep prospective African-American jurors off the jury which would sit in this action, such a ***1091*** motive is constitutionally barred. This court found that such was the motive of plaintiff. Therefore, the jury was disbanded, and the parties were ordered to pick a new jury, under the supervision of the JHO and this court.***1093***

Footnotes

1 Defendant The City of New York had earlier settled with plaintiff for $1,000.

2 The JHO was asked to take the stand by this court. Although the court gave significant weight to the JHO's conclusion that plaintiff's attorney had not

exercised his peremptory challenges with biased motivation, because the JHO was at jury selection, the court placed the greatest weight on the explanations of the attorneys for the parties, which the JHO did not have the benefit of hearing.

End of Document

McKinney's CPLR § 4110

§ 4110. Challenges for cause

Currentness

(a) Challenge to the favor. The fact that a juror is in the employ of a party to the action; or if a party to the action is a corporation, that he is a shareholder or a stockholder therein; or, in an action for damages for injuries to person or property, that he is a shareholder, stockholder, director, officer or employee, or in any manner interested, in any insurance company issuing policies for protection against liability for damages for injury to persons or property; shall constitute a ground for a challenge to the favor as to such juror. The fact that a juror is a resident of, or liable to pay taxes in, a city, village, town or county which is a party to the action shall not constitute a ground for challenge to the favor as to such juror.

(b) Disqualification of juror for relationship. Persons shall be disqualified from sitting as jurors if related within the sixth degree by consanguinity or affinity to a party. The party related to the juror must raise the objection before the case is opened; any other party must raise the objection no later than six months after the verdict.

Credits

(L.1962, c. 308.)

22 NYCRR 220.1

Section 220.1. Nondesignated alternate jurors

(a) *Application.* Upon consent of the parties, a court trying a civil case heard by a jury may adopt the procedure provided for in this section concerning the formation of the trial jury.

(b) *Number of jurors.* The number of jurors selected shall be as permitted by law.

(c) *Designation of jurors.* If more than six jurors are selected, they shall not at that time be designated as trial jurors and alternate jurors. Instead, if at the conclusion of the evidence more than six jurors remain on the jury, at that time the clerk of the court, in the presence of the court and the parties, shall randomly draw the names of six of the remaining jurors, who shall be the jurors who retire to deliberate upon a verdict. Unless otherwise determined by the court, the juror whose name was first drawn shall be designated as the foreperson. After the deliberating jurors have retired to deliberate, the remaining non-deliberating jurors shall be discharged. The court may, in appropriate circumstances, direct the discharged jurors not to discuss the case while the jury deliberates.

(d) *Peremptory challenges.* If the court adopts the procedure set forth in this section, the number of peremptory challenges specified in section 4109 of the Civil Practice Law and Rules shall be increased by one for every two jurors selected beyond the first six selected.

Credits

Sec. filed Oct. 14, 1999; amd. filed July 26, 2000 eff. July 24, 2000. Amended (c).

Current with amendments included in the New York State Register, Volume XXXIX, Issue 38, dated September 20, 2017.

22 NYCRR 220.1, 22 NY ADC 220.1

View National Reporter System version

94 N.Y.2d 600, 730 N.E.2d 932, 709 N.Y.S.2d 134, 2000 N.Y. Slip Op. 03646

The People of the State of New York, Appellant,

Karim Johnson, Respondent.

The People of the State of New York, Appellant,

v.

Chance Sharper, Respondent.

The People of the State of New York, Respondent,

v.

Rogelio Reyes, Appellant.

Court of Appeals of New York

30, 31, 32

Argued February 23, 2000;

Decided April 13, 2000

CITE TITLE AS: People v Johnson

SUMMARY

Appeal, in the first above-entitled action, by permission of a Justice of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that court, entered November 10, 1998, which (1) reversed, on the law, a judgment of the Supreme Court (Joan Sudolnik, J.), rendered in New York County upon a verdict convicting defendant of robbery in the first degree (six counts) and attempted robbery in the first degree (two counts), and (2) remanded the matter for a new trial.

Appeal, in the second above-entitled action, by permission of a Justice of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that court, entered November 10, 1998, which (1) reversed, on the law, a judgment of the Supreme Court (Joan Sudolnik, J.), rendered in New York County upon a verdict convicting defendant of robbery in the first degree (six counts) and attempted robbery in the first degree (two counts), and (2) remanded the matter for a new trial.

Appeal, in the third above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 19, 1998, which affirmed a judgment of the Supreme Court (Michael Gross, J.), rendered in New York County upon a verdict convicting defendant of criminal sale of a controlled substance in the third degree.

People v Johnson, 255 AD2d 136, affirmed.

People v Sharper, 255 AD2d 139, affirmed.

People v Reyes, 255 AD2d 228, reversed. *601

HEADNOTE

Crimes

Jurors

Challenge to Jury--Challenge for Cause Where Juror Expresses Doubt as to Impartiality

A challenge for cause should be granted when a prospective juror expresses doubt as to impartiality in a case, and there is no unequivocal indication of that person's ability to set aside any predisposition and fairly appraise the evidence. When potential jurors themselves

openly state that they doubt their own ability to be impartial in the case at hand, there is far more than a likelihood of bias, and an unequivocal assurance of impartiality must be elicited if they are to serve. Accordingly, where defendants were challenging the competence of the police, and a prospective juror expressed his own predisposition toward police officers, then "guessed" that he could fairly evaluate their testimony, but when later asked if he would "tend to favor the police testimony more than say a civilian's testimony," responded "I would," that juror should have been discharged for cause. Similarly, in a prosecution for sale of heroin, where a prospective juror acknowledged that, as a parent, she was particularly upset by drug abuse and could "only try" to be fair and impartial, and that, although defendant's criminal record did not automatically make him guilty, it "might be difficult" for her to be open-minded, that juror was subject to discharge for cause. The record does not support the Trial Judge's recollection that, having openly expressed doubts, the potential juror unequivocally represented that she could be fair and impartial.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Jury, §§ 228, 229.

Carmody-Wait 2d, Criminal Procedure §§ 172:2257-172:2259.

NY Jur 2d, Criminal Law, §§ 2278, 2282.

ANNOTATION REFERENCES

See ALR Index under Challenges to Jury.

POINTS OF COUNSEL

Robert M. Morgenthau, District Attorney of New York County, New York City (*Mark Dwyer* of counsel), for appellant in the first and second above-entitled actions.
The Trial Judge was not obliged to make a potential juror pronounce an expurgatory oath before determining that such juror could be a fair juror. (*People v Williams*, 63 NY2d 882; *People v Torpey*, 63 NY2d 361; *Greenfield v People*, 74 NY 277; *People v Genovese*, 10 NY2d 478; *Cancemi v People*, 16 NY 501; *People v McGonegal*, 136 NY 62; *People v Culhane*, 33 NY2d 90; *People v Hampartjoomian*, 196 NY 77; *People v Flaherty*, 162 NY 532; *People v Wilmarth*, 156 NY 566.)
Center for Appellate Litigation, New York City (*Barbara* ***602** *Zolot* and *Robert S. Dean* of counsel), for respondent in the first above-entitled action.
As the court below properly found, the trial court erroneously denied respondent's for-cause challenge of a prospective juror who professed a heavy pro-police bias and who never then stated in any fashion that he could be impartial and would base his verdict only on the evidence. (*People v Culhane*, 33 NY2d 90; *People v Blyden*, 55 NY2d 73; *People v Torpey*, 63 NY2d 361; *People v McQuade*, 110 NY 284; *People v Wilmarth*, 156 NY 566; *People v Walton*, 220 AD2d 286; *People v Taylor*, 120 AD2d 325; *People v Biondo*, 41 NY2d 483, 434 US 928; *People v Sumpter*, 237 AD2d 389; *People v Punch*, 215 AD2d 410.)
Joseph Lee Matalon, New York City, for respondent in the second above-entitled action.
I. The Court of Appeals does not have jurisdiction to hear this appeal. (*Morrison v Budget Rent A Car Sys.*, 230 AD2d 253; *Editorial Photocolor Archives v Granger Collection*, 61 NY2d 517; *Lacks v Lacks*, 41 NY2d 71; *People v Schepis*, 85 NY2d 890, 86 NY2d 856; *People v Hinton*, 81 NY2d 867; *People v Johnson*, 47 NY2d 124; *People v Ramos*, 73 NY2d 866; *People v Knight*, 73 NY2d 992; *People v Dercole*, 52 NY2d 956; *People v Gonzalez*, 68 NY2d 995.) II. The court below correctly concluded that the trial court should have discharged a prospective juror who professed a heavy bias in favor of police testimony. (*People v Blyden*, 55 NY2d 73; *People v Torpey*, 63 NY2d 361; *People v Culhane*, 33 NY2d 90; *People v Branch*, 46 NY2d 645; *People v Williams*, 63 NY2d 882.)
Center for Appellate Litigation, New York City (*Bruce D. Austern* and *Robert S. Dean* of counsel), for appellant in the third above-entitled action.
The trial court erred in denying appellant's for-cause challenges to two prospective jurors who explained it would be "difficult" to be fair. (*People v Torpey*, 63 NY2d 361; *People v Blyden*, 55 NY2d 73; *People v Culhane*, 33 NY2d 90; *People v Branch*, 46 NY2d 645; *People v Williams*, 63 NY2d 882; *People v McQuade*, 110 NY 284; *People v Colon*, 71 NY2d 410, 487 US 1239; *People v Guzman*, 76 NY2d 1; *People v Biondo*, 41 NY2d 483, 434 US 928; *People v Brzezicki*, 249 AD2d 917.)
Robert M. Morgenthau, District Attorney of New York County, New York City (*Susan Axelrod* and *Mark Dwyer* of counsel), for respondent in the third above-entitled action.
The trial court properly exercised its discretion when it rejected two of defendant's challenges for cause. (***603** *People v Sprowal*, 84 NY2d 113; *People v James*, 75 NY2d 874;

People v Jacquin, 71 NY2d 825; *People v Biondo*, 41 NY2d 483, 434 US 928; *People v Guzman*, 76 NY2d 1; *People v Torpey*, 63 NY2d 361; *People v Blyden*, 55 NY2d 73; ***People v Moon***, 256 AD2d 24, 93 NY2d 901; *People v Alexander*, 249 AD2d 107, 92 NY2d 837; *Greenfield v People*, 74 NY 277.)

OPINION OF THE COURT

Chief Judge Kaye.

Common to these cases is the question whether a challenge for cause may properly be denied when a prospective juror expresses doubt as to impartiality in the case, and there is no unequivocal indication of that person's ability to set aside any predisposition and fairly appraise the evidence. We conclude that, in these circumstances, a challenge for cause should be granted.

I.

People v Johnson and People v Sharper

Defendants Karim Johnson and Chance Sharper were indicted in connection with a robbery at a Manhattan recording studio. Their defense was based on police incompetence. The relevant record regarding a challenged prospective juror follows in full.

Trial Judge:

"[A] number of witnesses who will be testifying are police officers, they are to be treated the same as any other witness, they are entitled to no greater weight or lesser weight just because they are police officers. Can you treat their testimony the same as any other witness and hold them to the same standard as you would any witness?"

...

"And [Prospective Juror 7?]"

Prospective Juror 7:

"I have a friend in the Manhattan DA's office, and I deal with both prisoners and police officers."

Trial Judge:

"Speak up a little bit."*604

Prospective Juror 7:

"I deal with both prisoners and police officers."

Trial Judge:

"[Where] do you work?"

Prospective Juror 7:

"Bellevue Hospital."

Trial Judge:

"You've had dealings with the District Attorney's office I guess?"

Prospective Juror 7:

"I am sorry."

Trial Judge:

"Have you had any dealings with the District Attorney's office?"

Prospective Juror 7:

"No, just--I have a friend in the District Attorney's office."

Trial Judge:

"Okay.

"Is your friend a prosecutor or--."

Prospective Juror 7:

"Prosecutor."

Trial Judge:

"In view of any of the contacts you had with anyone related to or working for the criminal justice system, are there any opinions that you have formed or any ideas that you hold that would affect your ability to be fair in a criminal case?"

Prospective Juror 7:

"I don't know. I have a lot of trust and respect for police officers."

Trial Judge:

"I don't think anyone quarrels with that attitude, but do you also recognize that police officers are subject to the same problems and failings that we *605 all have? In other words, there are some good police officers, bad ones, honest ones, dishonest ones?"

Prospective Juror 7:

"I guess."

Trial Judge:

"Could you evaluate the testimony of police officers fairly?"

Prospective Juror 7:

"I don't know, but I would guess so, but I am not positive."

...

Defense Counsel:

"[Prospective Juror 4], you said and of course we will get into what you would like to say in private, but as you know of course police officers will be testifying, if the Judge states that you are to give the same credence to police officers one way or the other as any other witness, they are not considered more or less credible, do you think you can abide by that instruction?"

Prospective Juror 4:

"Sure."

Defense Counsel:

"[Prospective Juror 2], do you think you can abide by that instruction if the Judge told you that police officers were no more or no less credible than anybody else?"

Prospective Juror 2:

"I would try. Once again, I will probably give them the benefit of the doubt."

Defense Counsel:

"Does--anybody else in the jury who would tend to favor the police testimony more than say a civilian's testimony? Anybody else?"

Prospective Juror 7:

"I would."

Defense Counsel:*606

"You would?"

Prospective Juror 7:

"Yes."

Defendants challenged Prospective Juror 7 for cause, arguing that he--like Venireperson 2, who had already been excused--favored police testimony. After the court denied the challenge for cause, defendants exercised a peremptory challenge against him. They

exhausted all of their peremptory challenges before the jury was sworn, and were ultimately convicted of six counts of robbery in the first degree and two counts of attempted robbery in the first degree.

The Appellate Division reversed defendants' convictions and ordered a new trial, holding that the trial court abused its discretion when it denied defendants' challenge for cause where the prospective juror expressed "a heavy bias in favor of police testimony over layperson testimony" (*People v Johnson*, 255 AD2d 136). The court explained that the case "law is clear that a prospective juror who expresses partiality towards the prosecution and cannot unequivocally promise to set aside this bias should be removed for cause. ... The juror's responses fell short of this standard" (*People v Sharper*, 255 AD2d 139, 140-141). We affirm.

People v Reyes

Defendant Rogelio Reyes was indicted for selling heroin. During voir dire, the prosecutor questioned the venirepersons about drug sales in their neighborhoods. Again, the relevant record regarding two challenged prospective jurors follows in full.

Prospective Juror 13:

"I have a ten year old son. He plays in various parks, Washington Square Park.

"He [is] always accompanied by an adult in Washington and Tompkins Square Park there is a lot of drugs, it's there, activity there. Those are the neighborhood parks, we have to let him go there. It's very upsetting and with the resurgence of heroin, I see more and more people just collapsing on the street.

"How do you explain that to your ten year old? What's wrong with the person? It's obvious to me what it is. I know what it looks like."***607**

Prosecutor:

"[T]his person's experience as a parent in New York State with this activity going on would affect your ability to be fair and impartial in this case where the defendant is charged with selling?"

Prospective Juror 13:

"Possibly. I have different opinions about drugs, but heroin I think is one of the most dangerous drugs."

...

Defense Counsel:

"As you've heard, my client was arrested for selling drugs, and as we have discussed, drugs are sold in every neighborhood now and affects our lives detrimentally. It's difficult living in a neighborhood where you walk outside and people sell drugs.

"We have children and it's disturbing they are sold so openly. People can be aggressive and abrasive who sell drugs.

"Ma'am, I believe you talked with the assistant about the fact you have a child. It's very disturbing?"

Prospective Juror 13:

"It is."

Defense Counsel:

"The fact my client has been arrested for selling drugs, as you mentioned, it's for selling heroin. Can you honestly be fair and impartial in this case and base your decision only on the evidence you hear in this case?"

Prospective Juror 13:

"I can only try to do that. I've listened to the evidence. There are a lot of emotional things involved. That may color my views about someone selling heroin or drugs for that matter."

Defense Counsel:

"You think it's possible--understandably your *608 emotional feelings would affect your ability to be impartial?"

Prospective Juror 13:

"It's difficult. I wonder with a ten year old son how many years do I have left before I have to let him out on his own. I don't care how many envelopes they have selling drugs, ten or three thousand dollars worth. They are selling illegal drugs."

Defense Counsel:

"This is really the time to express your opinion. It's important. My client is on trial for drugs and he has said, 'I didn't sell them.'

"Any preconceived notions, or if you feel--now is the time to say it. If you don't feel comfortable here we can approach.

"[Prospective Juror 13], you said it would be difficult. I appreciate that."

Later, the questioning turned to defendant's prior convictions.

Defense Counsel:

"[Prospective Juror 2], do you think because my client has been convicted in the past of the crimes I discussed that he automatically is guilty of selling drugs?"

Prospective Juror 2:

"No."

Defense Counsel:

"[Prospective Juror 13], how do you feel about it?"

Prospective Juror 13:

"Definitely makes me wonder about his character."

Defense Counsel:

"Do you think he's automatically guilty?"

Prospective Juror 13:

"Not automatically."

Defense Counsel:

"Would it be difficult to be open-minded?" *609

Prospective Juror 13:

"Again, I would have to say [it] might be difficult."

Defense Counsel:

"I appreciate your honesty."

"[Prospective Juror 14?]"

Prospective Juror 14:

"I don't think automatically it makes him guilty."

Defense Counsel:

"Would it be fair, do you think it's difficult to be fair and objective?"

Prospective Juror 14:

"Maybe slightly, to be honest."

There were no further questions of Prospective Jurors 13 or 14. Defense counsel challenged Prospective Juror 13, urging:

"I have number 13 for cause .... She had very strong opinions about, first of all, the fact my client was charged with drugs and whether or not she could be fair, and I believe she said she would find it very difficult in light of the fact she has I believe an eight year old child who plays in the park, and they sell drugs there.

"Also, she had [a] strong opinion about the fact that my client has a criminal conviction. She said I believe it would be very difficult for her to be fair and objective and consider this evidence, without forming an opinion based on the fact my client has prior convictions.

"That would make it very difficult for her to be fair and objective."

The Trial Judge ruled:

"Challenge for cause as to [Prospective Juror 13] will be denied. In fact, I do believe while she was clearly candid talking about the difficulty she would face, she on balance indicated she could be fair in this case, that she would be open-minded.

"She acknowledged the information, the fact the past conviction would have in evaluating the testimony, but she indicated she could be fair."*610

Defense counsel next challenged Prospective Juror 14 for cause, explaining that:

"Number 14 ... [a]lso indicated that because my client has a criminal conviction in his past, it would be difficult for her to be fair and not strongly consider it in deciding whether or not he was innocent or guilty."

The Trial Judge ruled:

"Cause is denied as to [Prospective Juror 14]. She clearly indicated two times, I believe, she could be fair. Was candid in indicating it would be somewhat difficult, but she said she could be fair in this case."

Defendant exercised peremptory challenges against both prospective jurors. He exhausted all his peremptories before completion of jury selection and was ultimately convicted. On appeal, the Appellate Division affirmed, concluding that the Trial Judge "properly exercised ... discretion in denying defendant's challenges for cause" and that the over-all responses of each venireperson "negated any substantial risk of bias" (255 AD2d 228, 228-229). We now reverse and order a new trial.

II.

Fundamental to our constitutional heritage is an accused's right to trial by an impartial jury (NY Const, art I, § 2; US Const 6th, 14th Amends; *see also, Duncan v Louisiana*, 391 US 145, 151-154). Indeed, nothing

"is more basic to the criminal process than the right of an accused to a trial by an impartial jury. The presumption of innocence, the prosecutor's heavy burden of proving guilt beyond a reasonable doubt, and the other protections afforded the accused at trial, are of little value unless those who are called to decide the defendant's guilt or innocence are free of bias" (*People v Branch*, 46 NY2d 645, 652).

To safeguard the cherished right to an impartial jury, the former Code of Criminal Procedure authorized a challenge for cause where a prospective juror had a state of mind "in reference to the case, or to either party," which satisfied the court "in the exercise of a sound discretion that such juror [could not] try the issue impartially and without prejudice to thesubstantial*611 rights of the party challenging" (former Code of Criminal Procedure § 376 [2]). Such predisposition or bias, however, was not automatically a ground for exclusion where prospective jurors swore that they did not believe their opinion or impression would influence their verdict, and that they could render an impartial verdict according to the evidence. As this Court explained in *People v Culhane* (33 NY2d 90, 107), even rote recitation of an "expurgatory oath" did not end the Trial Judge's responsibility to assure an impartial jury:

" 'It is not enough to be able to point to detached language which, alone considered, would seem to meet the statute requirement, if, on construing the whole declaration together, it is apparent that the juror is not able to express an absolute belief that his opinion will not influence his verdict ... The defendant [is] at least entitled to a certain and unequivocal declaration of their belief that they could decide the case uninfluenced by their previous opinions.' "

In 1970, as part of the new Criminal Procedure Law, the Legislature adopted CPL 270.20, which consolidated, "without substantial change," a number of provisions from the Criminal Code relating to challenges for cause, including section 376 (Commn Staff Notes, reprinted in NY Cons Law Serv, Book 7D, CPL 270.20, at 176; *see also, People v Culhane, supra,* 33 NY2d, at 104, n 2, citing Denzer, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 270.20 ["For the most part (section 270.20) restates the prior law"]). In simpler language than its predecessor, CPL 270.20 authorizes parties to seek dismissal of a prospective juror based on "actual bias" whenever "He has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence" (CPL 270.20 [1] [b]; Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 270.20, at 425). Most significantly for present purposes, the Legislature eliminated the "talismanic expurgatory oath" requirement, giving Trial Judges both "greater flexibility and a greater responsibility" in determining which venirepersons should be excused for cause (*People v Culhane, supra,* 33 NY2d, at 104, n 2).

Three Court of Appeals decisions define the contours of the statute. In our first major application of CPL 270.20 (1) (b)--*People v Blyden* (55 NY2d 73)--involving an African-American ***612** defendant, a prospective juror who was a construction worker told the Trial Judge that because of Federal affirmative action programs he was "against minorities," and did not know whether his feelings would affect his deliberations. In response to the court's thrice repeated question whether he could put aside his feelings, he said, "Yes, I think I could," and "I think I could." Asked if he had already made up his mind about the case, he answered "absolutely not."

This Court nonetheless reversed defendant's conviction and ordered a new trial, explaining that:

"When a question is raised regarding a prospective juror's ability to render an impartial verdict, it is still necessary that the prospective juror in unequivocal terms 'must expressly state that his prior state of mind concerning either the case or either of the parties will not influence his verdict, and he must also state that he will render an impartial verdict based solely on the evidence.'

...

"[I]t is essential that all elements of the required statements be voiced, and that they be voiced with conviction. The mere words themselves, however, have no talismanic power to convert a biased juror into an impartial one, although they do nonetheless provide a minimum level of protection." (*Id.,* at 77-78, quoting *People v Biondo,* 41 NY2d 483, 485 [applying former Code Crim Pro § 376], *cert denied* 434 US 928.)

Because question was raised as to the prospective juror's ability to be impartial, and he gave no unequivocal assurance that he could render an impartial verdict, we concluded that it was error not to excuse him.

Some two years later, in *People v Williams* (63 NY2d 882, 883-884), a burglary prosecution, two prospective jurors stated that "although they did not associate with blacks they *could* render a fair and impartial verdict," (emphasis added) and although "they did not approve of interracial marriages ... they did not feel that the circumstance that defendant [an African-American] had had a white girlfriend ... would interfere with their verdict" or affect their ability to sit on the jury. Unlike in *Blyden,* the prospective jurors in *Williams* themselves never expressed doubt that they could serve ***613** impartially. Both because the Trial Judge concluded that their statements did not constitute "actual bias" and because the prospective jurors asserted unequivocally that they could listen "fairly and impartially and that their feelings would not affect their ability to sit on the jury," we concluded that it was not an abuse of discretion to deny defendant's challenge for cause. We explained that:

"most if not all jurors bring some predispositions, of varying intensity, when they enter the jury box. It is only when it is shown that there is a substantial risk that such predispositions will affect the ability of the particular juror to discharge his responsibilities (a determination committed largely to judgment of the Trial Judge with his peculiar opportunities to make a fair evaluation) that his excuse is warranted. Were the rule otherwise, it would be difficult not to require the discharge ... of every potential juror who disclosed anything but total absence of prejudice ..., *notwithstanding his stated readiness to lay his feelings aside in the discharge of his duties as a juror*" (*id.,* at 885 [emphasis added]).

Finally, in *People v Torpey* (63 NY2d 361, *rearg denied* 64 NY2d 885), decided one month after *Williams,* we once again concluded that in cases of "actual bias"--that is, where a

prospective juror has a "state of mind that is likely to preclude him from rendering an impartial verdict"--an unambiguous assurance of impartiality is required before a challenge for cause may be denied. We noted that:

"where there is a prima facie showing of actual bias, the Trial Judge should require the prospective juror to 'expressly state that his prior state of mind ... will ... not influence his verdict, and ... that he will render an impartial verdict based solely on the evidence' " (*id.*, at 367, quoting *People v Biondo, supra*, 41 NY2d, at 485).

In *Torpey*, a prospective juror who had read that the defendant was a Mafia "hit man," indicated she "probably" had a negative impression of him and that it "probably" would not be fair to have someone with her frame of mind seated on the jury. Asked whether she was willing to put aside her impression and "give both sides a fair trial based on the evidence in this courtroom and nothing else," she responded, "I think I can" (*id.*, at 365). ***614** Concluding that this statement fell short of the required *unequivocal* statement of impartiality, we reversed defendant's conviction and ordered a new trial.

Torpey made clear that the principles underlying *Blyden* and *Culhane* apply "regardless of the cause of the prospective juror's actual bias" (*id.*, at 366). Indeed, where a juror's predisposition related not to the particular facts of the case but to a party--as in *Torpey*--"the evidence at trial might not address the basis of the juror's impression and thus may not alter this impression" (*id.*, at 368). Mindful of that risk, we concluded:

"the test for whether such bias has been overcome by declarations is even stricter than where the juror has expressed an opinion as to the defendant's guilt. ... [T]he prospective juror should be dismissed if there appears to be *any possibility* that his impressions ... might influence his verdict" (*id.* [emphasis added]).

Thus, from the statute and case law, the guiding principles are perfectly plain: when potential jurors reveal knowledge or opinions reflecting a state of mind likely to preclude impartial service, they must in some form give unequivocal assurance that they can set aside any bias and render an impartial verdict based on the evidence. Obviously, when potential jurors themselves openly state that they doubt their own ability to be impartial in the case at hand, there is far more than a *likelihood* of bias, and an unequivocal assurance of impartiality must be elicited if they are to serve. As the First Department put it in *Johnson* and *Sharper*: the law "is clear that a prospective juror who expresses partiality towards [one side] and cannot unequivocally promise to set aside this bias should be removed for cause" (255 AD2d, at 140-141, *supra*). That bright-line standard is followed throughout the State (*see, e.g., People v Butler*, 258 AD2d 368, 369 [1st Dept 1999]; *People v Taylor*, 120 AD2d 325, 326 [1st Dept 1986]; *People v Zachary*, 260 AD2d 514 [2d Dept 1999]; *People v Maddox*, 175 AD2d 183 [2d Dept 1991]; *People v Burdo*, 256 AD2d 737, 740-742 [3d Dept 1998]; *People v Butler*, 221 AD2d 918 [4th Dept 1995], ***lv denied*** 87 NY2d 971; *People v Williams*, 210 AD2d 914, 915 [4th Dept 1994]).

III.

Applying the law to the facts before us, we conclude that the Trial Judges erred in failing to obtain unequivocal assurances, ***615** or excusing potential jurors for cause, when they openly acknowledged doubt that they could be fair in the case.

In *People v Johnson* and *People v Sharper*, where defendants were challenging the competence of the police, Prospective Juror 7 first noted he had a friend in law enforcement and then expressed his own predisposition toward police officers. While at one point he "guessed" that he could fairly evaluate their testimony, when later asked if he would "tend to favor the police testimony more than say a civilian's testimony," he responded "I would." Asked again whether he would, he confirmed, "Yes." Surely, the cherished right to an impartial jury requires more than this.

Similarly, in *People v Reyes*--a prosecution for sale of heroin--Prospective Juror 13 acknowledged that, as a parent, she was particularly upset by drug abuse and could "only try" to be fair and impartial, but that "a lot of emotional things" could "color [her] views" about someone selling heroin. Asked a second time whether her emotional feelings would affect her ability to be impartial, she responded "it's difficult" and that, although defendant's criminal record did not *automatically* make him guilty, it "might be difficult" for her to be open-minded. So too with respect to Prospective Juror 14, who said she "[m]aybe slightly" might have difficulty being fair and objective.

Significantly, in both instances the Trial Judge stated the applicable law correctly. As to Prospective Juror 13, in denying the challenge, he said that "she on balance indicated she

could be fair in this case, that she would be open-minded. She acknowledged the information, the fact the past conviction would have in evaluating the testimony, but she indicated she could be fair." As to Prospective Juror 14, the court noted: "She clearly indicated two times, I believe, she could be fair. Was candid in indicating it would be somewhat difficult, but she said she could be fair in this case." Regrettably, in neither instance does the record support the Trial Judge's recollection that, having openly expressed their doubts, these potential jurors unequivocally represented that they could be fair and impartial.

Finally, addressing the dissent, we are unanimous on the point that, in considering whether a challenge for cause should have been granted, we must look not to characterizations or snippets of the voir dire but to the full record of what the challenged jurors--sworn to speak truthfully--actually said (*see, *616* dissenting opn, at 618, 620, 621). It is one thing, for example, to say that Prospective Juror 7 in *Johnson* and *Sharper* "stated that he would listen to the testimony of people who lived different lifestyles than he did, and give it the same credibility as he would give to testimony by those who lived the same lifestyle as he did" (dissenting opn, at 617-618). It is quite another thing to see his actual words regarding police testimony: "[W]ould [you] tend to favor the police testimony more than say a civilian's testimony?" "I would." "You would?" "Yes." It is precisely because of the importance of the actual colloquy that we have set out the relevant record as to each of the challenged jurors.

Ultimately, the principle is a simple one, drawn from the statute, well articulated in our cases, and overwhelmingly understood and applied by courts across the State. When potential jurors themselves say they question or doubt they can be fair in the case, Trial Judges should either elicit some unequivocal assurance of their ability to be impartial when that is appropriate, or excuse the juror when that is appropriate. The "worst the court will have done in most cases is to have replaced one impartial juror with another impartial juror" (*People v Culhane, supra,* 33 NY2d, at 108, n 3).

Accordingly, in *People v Johnson* and *People v Sharper,* the Appellate Division orders should be affirmed, and in *People v Reyes,* the Appellate Division order should be reversed and a new trial ordered.

Bellacosa, J.

(Dissenting). We respectfully dissent. Our votes are to affirm in *People v Reyes* and to reverse and remit the cases to the Appellate Division (*see,* CPL 470.25 [2] [d]; 470.40 [2] [b]) in *People v Johnson* and *People v Sharper.*

It is our view that the rulings by the respective trial courts during and concerning jury selection in these cases should be upheld. A remarkable fact drives our essential point home: several Judges and Justices at both appellate stages of review reasonably draw different interpretations from slices of these *617 transcripts. Thus, these cases are not, or at least should not be, susceptible to "matter-of-law" resolution on these respective, idiomatic voir dire conversations.

This Court has prudently invested trial courts with expansive discretion governing the voir dire jury selection process. The operating rubrics derived from today's decision as applied to these cases, on the other hand, result in unwarranted nullification of otherwise properly tried cases that ended with jury verdicts of conviction. The practical "kicker" also unsettles the authority of Trial Judges to conduct and manage a fair, yet prompt, voir dire selection process.

CPL 270.20 (1) (b) allows a challenge for cause when a prospective juror "has a state of mind that is likely to preclude him [or her] from rendering an impartial verdict based upon the evidence adduced at the trial." Generally, challenges under CPL 270.20 (1) (b) center on "allegations of actual bias" where a juror expresses an unwillingness to judge a case impartially and on the evidence (Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 270.20, at 425). While this section no longer expressly contains an "expurgatory oath" requirement--unlike its Code of Criminal Procedure predecessor--the majority rationale effectively reinstates that formality on a fairly generalized basis. The new regimen is not progressive for jury selection practices. The elliptical and contextual explorations, delved among the participants concerning whether a prospective juror's response is sufficient to dispel possible bias, are transformed into "matter-of-law" determinations that trump the judgment-calls of the trial courts at the "give and take" voir dire setting. A stricter and necessarily heightened review is superimposed long after trial, at a distanced appellate tribunal.

It is also useful to look briefly but more particularly at what the challenged jurors--who were peremptorily excused and never served in the respective cases--did say in these cases. In *Johnson* and *Sharper,* the trial court's colloquy regarding the for-cause challenge to Prospective Juror 7, a doctor, focused on his possible desire to be excused because of his upcoming hospital rotation. Toward the end of the venire panel questioning, however, Prospective Juror 7 responded to defense counsel hypothesis concerning his possible verdict in the case. The doctor asserted he would vote not guilty and also stated that he would listen to the testimony of people who lived different lifestyles than he did, and give it the same credibility as he would give to testimony by those who lived the same lifestyle as he ***618** did. He uttered other isolated and disquieting concerns, too, but our dissenting point of view is that the whole context and set of utterances ought to control, not potentially troublesome snippets.

Similarly, in *Reyes,* the prospective jurors simply attempted to answer counsel's probings in a forthright manner. Prospective Juror 13 was honest about how drugs had affected her everyday sensibilities as a parent, but subsequently indicated that she "could only try to be fair." In addition, when Prospective Juror 13 was asked whether defendant's prior convictions would make him automatically guilty of selling drugs, she answered that it would *not.* She added the acknowledgment that it might, however, be difficult to be open-minded. Prospective Juror 14 was asked the same question immediately thereafter and also responded that it would *not* make him automatically guilty. When pressed further by defense counsel if it would be difficult to be fair and objective, she replied "[m]aybe slightly, to be honest." This response was the only basis for defense counsel's challenge for cause as to that juror.

For the majority to overrule the trial court's balanced rulings on these exchanges and to conclude that the trial courts abused their discretion as a "matter of law," in concluding that these humanly forthright answers did not preclude fair and impartial jury service, diminishes this Court's "substantial risk" standard of appellate review. The trial courts exercised the power this Court entrusted to them to conclude in these cases that all the contested jurors manifested enough assurances of ultimate impartiality--or at least that they did not pose a "substantial risk" and threat of a biased assessment of the evidence against the defendants. Even if those courts acted "improvidently," there is no legal basis for this Court to displace their judgment-calls by way of the higher matter-of-law standard.

Voir dire jury selection is more akin to an art than a scientific process. A potential juror may be examined numerous times, by multiple questioners, over a period of several hours or even, as in the *Johnson* and *Sharper* cases, over days. Inquiries about particular subjects often occur in a piecemeal fashion, based on intuitive probings by counsel and the court, as well as queries raised by prospective jurors themselves. Prospective jurors frequently give elliptical answers or impressions in street vernacular, not by legal formulae and phrasings. They may also provide nuanced hedgings for a variety of human and psychological reasons. Today's decisions reinstate ***619** formalistic prerequisites and superimpose a rigid review standard-- otherwise widely eschewed as to many trial practices. The rubrics emanating from these cases switch the gears on this State's flexibly and empirically well-founded voir dire practices.

In *People v Williams* (63 NY2d 882), this Court instructed that, where a potential juror expresses racial biases, the trial court in its discretion must determine whether the potential juror would be able to discharge fairly the duties, if allowed to serve (*id.,* at 884-885). The Court noted that "the only feelings of the jurors were expressed in the abstract, with no disclosure of particular personal conduct ever taken in consequence of such feelings ... or any other indication of inability to lay personal predilections aside; and the jurors expressed their confidence that, notwithstanding their feelings, they could listen fairly and impartially" (*id.*). The Court noted that most jurors bring some predispositions when entering the jury box. "It is only when it is shown that there is a *substantial risk* that such predispositions will affect the ability of the particular juror to discharge his responsibilities (*a determination committed largely to judgment of the Trial Judge with his peculiar opportunities to make a fair evaluation*) that his excuse is warranted" (*id.,* at 885 [emphasis added]).

The Court then found no error. Anticipating future practices, it added that were it to rule otherwise in cases involving racial bias, every potential juror who disclosed anything but the total absence of prejudice, notwithstanding the juror's stated readiness to lay personal feelings aside, would result in and require automatic excusal from jury service (*id.*). The results in the instant cases move the process down that previously eschewed slope.

Even in the general voir dire universe, this Court has consistently emphasized the broad discretion given to trial courts to manage this key preliminary stage of a jury trial. Indeed, we "recognize[d] that we are dealing with an area of the law which does not lend itself to the formulation of precise standards or to the fashioning of rigid guidelines" (*People v Boulware*, 29 NY2d 135, 139, *cert denied* 405 US 995). The Court further noted that "it is the function of the trial court, involved and concerned with the quest for truth, to strike the balance, true, no less in the conduct of the *voir dire* than in the conduct of the trial proper" (*id.*, at 140; *see also, People v Jean*, 75 NY2d 744, 745; *People v Pepper*, 59 NY2d 353, 358-359; *People v Stanard*, 42 NY2d 74, 81-82, *cert denied* 434 US 986).*620

Thus, the determination of whether actual bias has been displayed and whether a prospective juror's uncertainties are unequivocal is responsibly and reliably allocated to trial court weighing. After all, Trial Judges have the advantage of seeing each potential juror's demeanor and body language in context of the whole of the questions and answers exchanged with the entire venire panel, as well as those uttered by the for-cause challenged individuals.

Even assuming that a prima facie showing of actual bias was made with respect to each of the challenged jurors in these cases--a conclusion which we strongly dispute on these transcripts, read as a whole and carefully scrutinized from this final forum perspective--the trial courts remain vested with the discretion. They must weigh whether a "substantial risk" of possible bias was offset by the full give-and-take exchanges.

In *People v Culhane* (33 NY2d 90), four prospective jurors were challenged for cause, primarily based on their impressions after having read newspaper articles and hearing radio reports regarding the crimes charged (*id.*, at 96-97). The Court noted that Code of Criminal Procedure § 376, the statute in effect at the time, "severely limited the grounds for automatic disqualification" and provided that " 'actual bias' could be purged by the recitation of a statutory oath provided the court *in its sound discretion* was satisfied that the oath had dispelled the taint" (*id.*, at 102 [emphasis added]). In *Culhane*, a prima facie showing of actual bias was made as to the four prospective jurors, thus the Court turned to the oath requirements (*id.*, at 106). The Court noted that the statutory oath requires the juror to declare a belief on whether a previously held impression or opinion will influence the verdict and whether the juror can render an impartial verdict according to the evidence (*id.*, at 106-107). Thus, "to this extent the testimony must be taken as a whole," and if the oath has met these standards, the *trial court* must "determine whether the prior opinion or impression has lost its sway over the mind of the juror" (*id.*, at 107).

Addressing the still-current CPL provision which had been enacted in the interim, the Court noted that "the new law gives the Trial Judge greater flexibility and a greater responsibility" in determining which prospective jurors should be excused for cause, due to the abandonment of the expurgatory oath requirement (*id.*, at 104, n 2). *Culhane* reinforced the broad discretionary powers vested in the trial court by statute and calibrated precedents, based in part on the better vantage *621 point of trial courts to evaluate voir dire exchanges as a whole and in the context of that front-line environment.

While the majority today relies heavily on *People v Blyden* (55 NY2d 73), that case does not restrict the discretion entrusted to trial courts to provide balancing judgments in resolving these matters. Nor does *Blyden* come close to compelling the matter-of-law results, extrapolated out of these voir dire transcripts.

In *Blyden*, this Court referenced the important footnote in *Culhane*, quoted earlier, while agreeing that an expurgatory oath might still be useful as an extra reassurance to resolve doubt about a prospective juror's impartiality (*see, id.*, at 77). *Blyden* establishes that when questions involving a juror's ability to render an impartial verdict are raised, the juror's statements as a whole and in context must indicate that he or she will be able to serve impartially and render a verdict based solely on the evidence (*id.*, at 77-78). In the present cases, taking the exchanges as a whole and in context, there is no justification to go so far as to conclude that the trial courts violated their discretionary authority, as a matter of law, in their determinations that the responses by prospective jurors were overall satisfactory to withstand a for-cause challenge. Thus, *Blyden* is manifestly distinguishable.

Very importantly, *People v Williams* (63 NY2d 882, *supra*) also distinguished *Blyden*. This Court unanimously underscored, with the benefit of common-law empirical perspective and applications in specific cases decided after *Culhane* and *Blyden*, that the determination whether a potential juror's responses are unequivocal should be left virtually exclusively to the trial court. *Williams* placed *Blyden* in context by noting that in *Blyden* the juror could do

no more than state in response to the court's thrice-repeated question that he thought he could put aside his feelings about minorities (*id.*, at 884). This Court pushes the *Blyden* envelope well beyond *Williams'* carefully circumscribed analysis. In realistic terms, today's matter-of-law modality conflates the intermediate appellate court mode of superintendence (*see,* CPL 470.15-470.25).

We offer another apt analogy from *People v Mackey* (49 NY2d 274). This Court used the common-law, experience-taught method to conclude that the exclusion of prior convictions was properly a matter of discretionary weighing--not a "matter-of-law" modality--vested "virtually exclusively" in the trial courts, fortified and supervised by the plenary review power of intermediate ***622** appellate courts. We noted that we could not "say that the ruling of the pretrial Judge or that of the Trial Judge ... constituted the clear abuse of discretion that would make it reversible error" (*id.*, at 281-282). *Mackey* concludes that "[u]nder these circumstances, adherence to the ruling of the pretrial Judge is not such an exercise of discretion as, after affirmance by the Appellate Division, warrants reversal" (*id.*, at 282). That prudent and respectful allocation of judicial power not only has worked very well, it also applies, a fortiori, to the grey, arguable shadings presented by these voir dire transcripts (*see also, People v Gray,* 84 NY2d 709).

The finely balanced set of rubrics that we propose based on this Court's precedential guideposts, leaving such matters to "a discretionary determination for the trial courts and fact-reviewing intermediate appellate courts," makes a lot of good sense (*see, People v Mattiace,* 77 NY2d 269, 274). Plenary review by intermediate appellate courts, with discretion and interest of justice powers should play a role in this Court's decisional choices about such cases. It is very important to point out the existence of that safeguard because it proportionately protects against unfettered, arbitrary and even improvident exercises of trial court discretion. As dissenters, we also agree that more prophylactic practices like exceptional expurgatory oaths or even more probing explorations should be undertaken at the trial level, when appropriate. On the other hand, formalisms that unnecessarily pinch trial court discretion should not be mandated as a matter of law.

The voir dire exchanges in these cases presented dynamic variables and, to be frank, some degree of uncertainty or unevenness. Could the trial courts have gone an extra mile to dispel any doubts and nail down a firmer commitment to impartiality? The answer is "Yes." Did they have to do so in order to avoid an appellate ruling labeling them abusers of trial court discretion, determined as a matter-of-law? The answer should be "No." The very fact that so many judicial officers have assayed these transcripts so differently (the Trial Judges, the Appellate Division Justices, the Court of Appeals Judges) logically demonstrates that these calibrations were matters of degree, not matter-of-law certainty. The rub of these cases can be appreciated by examining the fuzzy difference between a weighing exercise (discretion), contrasted to a matter-of-law template (more doctrinaire). In the end, the cases present issues that are quintessentially and rightly entrusted to a trial court's in-the-trenches balancing resolution. ***623**

After all is said and done, we dissenters, like our colleagues who comprise the majority, might have ruled differently or pressed the challenged jurors harder, were any of us serving as the trial court Judges. But that is not the test and standard for decision at this Court. Seeing with the benefit of hindsight what might have been done to provide a bit more reassurance does not render wrong the actions taken by these trial courts--at least as measured through the sharper prism of later appellate scrutiny.

Judges Smith, Levine, Ciparick and Rosenblatt concur with Chief Judge Kaye; Judge Bellacosa dissents and votes to reverse in a separate opinion in which Judge Wesley concurs.
In *People v Johnson* and *People v Sharper:* Order affirmed.

In *People v Reyes:* Order reversed and a new trial ordered. ***624**

Footnotes

* We all agree as well that, in the important matter of seeking an impartial jury, a trial court must afford counsel a fair opportunity to question prospective jurors, but the court has discretion to restrict the scope of voir dire. That is the purport of the cases cited by the dissent at page 619 (*People v Jean,* 75 NY2d 744,

745; *People v Pepper*, 59 NY2d 353, 358-359; *People v Stanard*, 42 NY2d 74, 81-82, *cert denied* 434 US 986; *People v Boulware*, 29 NY2d 135, 139, *cert denied* 405 US 995). That, however, is not the issue before us on this appeal.

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98 N.Y.2d 749, 781 N.E.2d 884, 751 N.Y.S.2d 820, 2002 N.Y. Slip Op. 07326

The People of the State of New York, Appellant,

People v Nicholas
Court of Appeals of New York October 17, 2002 98 N.Y.2d 749 781 N.E.2d 884 751 N.Y.S.2d 820 2002 N.Y. Slip Op. 07326 (Approx. 3 pages)

Pete Nicholas, Also Known as Pete Nichols, Respondent.

Court of Appeals of New York
124, 4
Argued September 11, 2002;
Decided October 17, 2002

CITE TITLE AS: People v Nicholas

SUMMARY

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from *750 an order of that Court, entered September 28, 2001, which (1) reversed, on the law, a judgment of the Supreme Court (John J. Ark, J.), rendered in Monroe County upon a verdict convicting defendant of murder in the second degree, and (2) granted a new trial.

People v Nicholas, 286 AD2d 861, affirmed.

HEADNOTE

Crimes
Jurors
Challenge to Jury--Challenge for Cause Where Juror Expressed Doubt as to Impartiality

Potential jurors who express possible bias must be excused for cause unless they provide unequivocal assurance that they can set aside any bias and render an impartial verdict based on the evidence (*see* CPL 270.20 [1] [b]). Thus, certain prospective jurors, who indicated possible bias in favor of police testimony by raising their hands and nodding affirmatively in response to a question by defense counsel, should have been excused for cause. The record indicates "No Response" to the trial court's subsequent inquiry of the panel, collectively, whether they agreed that police testimony should be accorded the same weight and be evaluated in the same way as any other testimony. While a more definitive record could have and should have been made, the demonstrative responses and affirmative nods of certain prospective jurors sufficiently indicated their possible bias. The trial court should have obtained unequivocal assurances of impartiality from each of them. It did not do so. In the absence of these assurances, denial of defendant's challenges for cause, where defendant eventually exhausted his peremptory challenges, was reversible error (*see* CPL 270.20 [2]).

APPEARANCES OF COUNSEL

Howard R. Relin, District Attorney, Rochester (*Wendy Evans Lehmann* of counsel), for appellant.
Edward J. Nowak, Public Defender, Rochester (*Timothy P. Donaher* of counsel), for respondent.

OPINION OF THE COURT

Memorandum.

The order of the Appellate Division should be affirmed.

Once again we emphasize that prospective jurors who give some indication of bias but do not provide an unequivocal assurance of impartiality must be excused for cause.

During voir dire, the trial court instructed the prospective jurors to raise their hands in response to questions when responding affirmatively. When defense counsel addressed the panel, he asked:

"Does anyone else ... feel that they would have a tendency to believe a police officer's account just because he or she is a police officer?*751

"[Prospective Jurors]: (INDICATING)

"[Defense Counsel]: I will need you to hold up your hands.

"[Prospective Jurors]: (INDICATING)."

After colloquy with prospective jurors, defense counsel then inquired:

"[t]he question that I have to ask of you is whether each of you can treat each and every witness the same way, apply the tests, the same standards at the same time or whether somebody is going to be getting a leg up just because he or she is a police officer. And if I understand those that raised their hands, you are going to be leaning towards accepting a police officer just because of the title or the uniform, which means you are treating those people different than non-police officers; correct?

"(JURORS NODDING AFFIRMATIVELY)."

Subsequently, the court inquired of the panel, collectively, whether they agreed that police testimony should be accorded the same weight as any other testimony and whether the testimony should be evaluated in the same way. The record indicates "NO RESPONSE" and the court did not pursue the matter further.

Defense counsel challenged for cause those prospective jurors who had raised their hands and nodded affirmatively on the ground of bias in favor of police testimony. The court denied the challenges and the defense used its peremptory challenges to remove the jurors, specifically naming each juror being challenged on account of bias. Neither the prosecutor nor the court disagreed with those designations. The defense ultimately exhausted its peremptory challenges.

On this appeal from the Appellate Division's reversal of defendant's conviction, the People argue that there is an insufficient record to determine which jurors had expressed bias. We agree with the Appellate Division that the record is sufficient to identify which jurors were being challenged for bias.

CPL 270.20 (1) (b) allows a prospective juror to be challenged for cause if such juror evinces "a state of mind that is likely to preclude him [or her] from rendering an impartial verdict based upon the evidence adduced at the trial." We have repeatedly stated that potential jurors who express possible bias must be excused unless they provide "unequivocal assurance that they *752 can set aside any bias and render an impartial verdict based on the evidence." (*People v Johnson*, 94 NY2d 600, 614 [2000]; *see also People v Chambers*, 97 NY2d 417, 419 [2002]; *People v Arnold*, 96 NY2d 358, 362 [2001].)

Here, while a more definitive record could have and should have been made, the demonstrative responses and affirmative nods of certain prospective jurors sufficiently indicated their possible bias in favor of police testimony. The trial court should have obtained unequivocal assurances of impartiality from each of them. It did not do so. In the absence of these assurances, denial of defendant's challenges for cause, where defendant eventually exhausted his peremptory challenges, was reversible error (*see* CPL 270.20 [2]).

Chief Judge Kaye and Judges Smith, Levine, Ciparick, Wesley, Rosenblatt and Graffeo concur.
Order affirmed in a memorandum.

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Haymarket Correctional Unit serving a 48-year sentence for a 1973 first degree murder ...

See More Briefs

Trial Court Documents

The People of the State of New York v. Degondea

2001 WL 36097913
THE PEOPLE OF THE STATE OF NEW YORK, v. David DEGONDEA, Defendant.
Supreme Court, New York.
Dec. 20, 2001

...MARCY L. KAHN, J.: Defendant was convicted on January 5, 1995, after a jury trial before a different Justice of this court, of murder in the first degree, attempted murder in the first degree, criminal...

The People of the State of New York v. Degondea

2001 WL 36103704
THE PEOPLE OF THE STATE OF NEW YORK, v. David DEGONDEA, Defendant.
Supreme Court, New York.
July 09, 2001

...[This opinion is uncorrected and not selected for official publication.] On January 5, 1995, defendant was convicted after a jury trial before a different Justice of this court' of murder in the first ...

WESTLAW

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7 A.D.3d 549, 776 N.Y.S.2d 98, 2004 N.Y. Slip Op. 03603

People v Wilson
Supreme Court, Appellate Division, Second Department, New York | May 03, 2004 | 7 A.D.3d 549 | 776 N.Y.S.2d 98 | 2004 N.Y. Slip Op. 03603 (Approx. 2 pages)

****1** The People of the State of New York, Respondent

Joseph Wilson, Appellant.

Supreme Court, Appellate Division, Second Department, New York

May 3, 2004

CITE TITLE AS: People v Wilson

HEADNOTE

Crimes
Jurors
Selection of Jury

Since it was clear that prospective juror's initial statements indicated hostility to black people which cast serious doubt on her ability to render impartial verdict and she never unequivocally stated that her bias would not influence her verdict or that she could render impartial verdict based on evidence presented, it was error to deny defendant's challenge for cause.

Appeal by the defendant from a judgment of the County Court, Nassau County (Calabrese, J.), rendered December 7, 2001, convicting him of burglary in the third degree, criminal possession of a controlled substance in the fifth degree, criminal possession of stolen property in the fifth degree, and false personation, upon a jury verdict, and imposing sentence. ***550**

Ordered that the judgment is reversed, on the law, and a new trial is ordered.

The defendant, who is black, argues that the trial court committed reversible error when it refused to discharge for cause a prospective juror who voiced a bias against black people. The juror informed the court that she would not be able to judge the defendant fairly because she and her family had been victims of crimes committed by "people of color." Although she told the court ****2** that she would be objective and try to set aside her past experiences, when asked by defense counsel if her past experiences of crime "by a person of color" would influence her ability to be objective, she replied "I don't know. I have to look at the evidence I guess and see. You see the thing is I know what happened in the past does haunt me, but I try not to think about it." When asked if she would be able to set aside her past experiences, she replied "I should be able to do it."

Defense counsel challenged the prospective juror for cause, but the trial court denied the challenge. The defendant's attorney then used a peremptory challenge to remove the juror. Since the defendant exhausted his peremptory challenges before the completion of jury selection, the erroneous denial of a challenge for cause constitutes reversible error (*see* CPL 270.20 [2]; *People v Lynch,* 95 NY2d 243, 248 [2000]; *People v White,* 260 AD2d 413 [1999]).

Once a potential juror has asserted bias, that juror should be discharged unless he or she subsequently makes an "unequivocal assurance" to set aside his or her prior state of mind and render a verdict solely on the evidence (*People v Johnson,* 94 NY2d 600, 614 [2000]; *People v Blyden,* 55 NY2d 73, 77-78 [1982]; *People v White, supra*). In determining whether such assurances are unequivocal, the juror's testimony should be taken as a whole (*see People v Blyden, supra*). In this case, it is clear that the prospective juror's initial statements indicated a hostility to black people which cast serious doubt on her ability to render an impartial verdict. She never unequivocally stated that her bias would not influence her

verdict or that she could render an impartial verdict based on the evidence presented. The juror's answer that she "should be able" to set aside her past experiences fell short of the required express and unequivocal declarations (*see People v Torpey*, 63 NY2d 361 [1984]; *People v Blyden, supra*). Accordingly, the Supreme Court erred in denying the defendant's challenge for cause, and a new trial is necessary (*see People v White, supra*).

The defendant's contentions raised in his pro se supplemental ***551** brief either are unpreserved for appellate review or without merit. H. Miller, J.P., Adams, Townes and Mastro, JJ., concur.

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...1.The indictment number in the court below was 2920/02. 2.The full names of the original parties were People of the State of New York against Calvin Ross. There has been no change of parties on appeal....

See More Briefs

Trial Court Documents

The People of the State of New York v. Degondea

2001 WL 36097913
THE PEOPLE OF THE STATE OF NEW YORK, v. David DEGONDEA, Defendant.
Supreme Court, New York.
Dec. 20, 2001

...MARCY L. KAHN, J.: Defendant was convicted on January 5, 1995, after a jury trial before a different Justice of this court, of murder in the first degree, attempted murder in the first degree, criminal...

The People of the State of New York v. Degondea

2001 WL 36103704
THE PEOPLE OF THE STATE OF NEW YORK, v. David DEGONDEA, Defendant.
Supreme Court, New York.
July 09, 2001

...[This opinion is uncorrected and not selected for official publication.] On January 5, 1995, defendant was convicted after a jury trial before a different Justice of this court' of murder in the first ...

People of the State of New York v. Mateo

1998 WL 35490127
THE PEOPLE OF THE STATE OF NEW YORK, v. Angel MATEO.
County Court of New York
Sep. 17, 1998

...Connell, J. The following constitutes the Opinion, Decision & Order of the Court. The defendant has made an application for an Order precluding the prosecution from introducing evidence concerning alle...

WESTLAW

Disagreed With by People v. Clemens, Colo., September 11, 2017

View National Reporter System version

People v Arnold, 96 N.Y.2d 358, 753 N.E.2d 846, 729 N.Y.S.2d 51, 2001 N.Y. Slip Op. 05379
Court of Appeals of New York June 12, 2001 96 N.Y.2d 358 753 N.E.2d 846 729 N.Y.S.2d 51 2001 N.Y. Slip Op. 05379 (Approx. 7 pages)

The People of the State of New York, Appellant,

v.

Marlon Arnold, Respondent.

Court of Appeals of New York
4, 80
Argued April 25, 2001;
Decided June 12, 2001

CITE TITLE AS: People v Arnold

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered May 10, 2000, which (1) reversed, on the law, a judgment of the Monroe County Court (Charles T. Maloy, J.), rendered upon a verdict convicting defendant of assault in the second degree and assault in the third degree, and (2) dismissed the indictment without prejudice to the People to re-present any appropriate charges to another Grand Jury.

People v Arnold, 272 AD2d 857, affirmed.

HEADNOTES

Crimes
Jurors
Selection of Jury--Juror Indicating Inability to be Impartial-- Determination of Impartiality

(1) A prospective juror who has revealed doubt, because of prior knowledge or opinion, about her ability to serve impartially must be excused upon a challenge for cause unless the juror states unequivocally on the record that she can be fair. Jurors must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict. If there is any doubt about a prospective juror's impartiality, trial courts should err on the side of excusing the juror, since at worst the court will have replaced one impartial juror with another. Accordingly, prospective jurors who make statements that cast serious doubt on their ability to render an impartial verdict, and who have given less-than-unequivocal assurances of impartiality, must be excused. By contrast, where prospective jurors unambiguously state that, despite preexisting opinions that might indicate bias, they will decide the case impartially and based on the evidence, the trial court has discretion to deny the challenge for cause if it determines that the juror's promise to be impartial is credible.

Crimes
Jurors
Selection of Jury--Juror Indicating Inability to be Impartial--Domestic Violence

(2) In a prosecution arising out of defendant's alleged stabbing of his former girlfriend, where a prospective juror volunteered that she did not think she should be sitting on the case because she had studied domestic violence in college and had a "problem," the trial court should not have seated the juror without obtaining her unequivocal assurance that she could be fair. The juror's statements revealed that, because of her background, the juror herself questioned whether she could be impartial in any domestic violence case. Thus, the juror's

SELECTED TOPICS

Jury

Competency of Jurors, Challenges, and Objections
Implied Bias of Prospective Juror Arises
Voir Dire Examination of Prospective Juror
Bias or Prejudice

Criminal Law

Trial
Juror Misconduct Adversely Affected Defendant

Secondary Sources

s 370. Discretion of court

50A C.J.S. Juries § 370

...The trial court has broad discretion in determining the competency or qualifications of a juror for the trial of a case, and in determining whether to exclude a juror from the jury for cause, as in the...

Challenges for Cause in Jury Selection Process

58 Am. Jur. Proof of Facts 3d 395 (Originally published in 2000)

...Jury selection, when lawyers are allowed to interact directly with the jurors, is a complex phase of trial which is botched more often than not. Too frequently, counsel waste this invaluable opportunit...

APPENDIX V COURT CASES

ADA Compliance Guide Appendix V

...Appendix V contains summaries of significant ADA decisions. See the Index for an alphabetical listing of court cases in the Guide. Readers should note that these cases were decided before the 2008 amen...

See More Secondary Sources

Briefs

Brief for Appellee

2010 WL 5853251
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. Ricardo Ruiz MONTES, Defendant-Appellant. United States of America, Plaintiff-Appellee, v. Luke Scarmazzo, Defendant-Appellant.
United States Court of Appeals, Ninth Circuit.
Apr. 19, 2010

...The defendants were charged with violating 21 U.S.C. §§ 848, 846, 841(a)(1) and 18 U.S.C. § 924(c)(1)(A). E.R. 1. The district court therefore had jurisdiction under 18 U.S.C. § 3231. Judgments of conv...

BRIEF FOR THE UNITED STATES

1999 WL 618377
U.S. v. Abel Martinez-Salazar
Supreme Court of the United States
Aug. 13, 1999

...The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 146 F.3d 653. The judgment of the court of appeals was entered on May 28, 1998. A petition for rehearing was denied on October 7, 1...

JOINT APPENDIX, VOL. II

2009 WL 4825149
Jeffrey K. Skilling, Petitioner, v. United States of America, Respondent.

own statements cast serious doubt on her ability to serve. Accordingly, the trial court should have granted defendant's challenge for *359 cause unless the juror unequivocally indicated that she could be fair despite her background.

Crimes
Jurors
Selection of Jury--Juror Indicating Inability to be Impartial-- Individualized Determination of Impartiality

(3) A prospective juror who has revealed doubt, because of prior knowledge or opinion, about her ability to serve impartially must be excused upon a challenge for cause unless the juror states unequivocally on the record that she can be fair. The collective acknowledgment by the entire jury panel that they would follow the Judge's instructions and would not use the case as a "referendum" on crime or domestic violence was insufficient to constitute an unequivocal declaration of impartiality from the juror in question. The group answer by the entire panel did not address her personal attitudes, nor did it force her to confront the crucial question whether she could be fair to the defendant in light of her expressed predisposition. Nothing less than a personal, unequivocal assurance of impartiality can cure a juror's prior indication that she is predisposed against a particular defendant or particular type of case.

Crimes
Jurors
Misconduct of Juror--Use of Personal Professional Expertise by Jurors-- Voir Dire

(4) In a prosecution for assault arising out of defendant's alleged stabbing of his former girlfriend, when a juror concurred with defense counsel's suggestion that she might, in the jury room, become another expert witness in the case, the trial court should immediately have reminded and cautioned her that she was required to decide the case solely on the evidence presented. However, at that point the Trial Judge's refusal to allow a challenge for cause based on that ground alone would not constitute reversible error. The juror had not conducted any personal specialized assessments of the evidence outside the common ken of juror experience; rather, she was excused on a peremptory challenge by the defense and did not communicate any specialized knowledge to the other jurors. Even more fundamentally, the record does not demonstrate that the prospective juror could have injected any knowledge outside the common realm of juror experience into the deliberations, or that she stood in a position of expertise. The fact that the juror had studied domestic violence in college did not demonstrate that she had specialized knowledge that would enable her to exert undue influence on her fellow jurors.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Jury, §§ 230, 266, 267, 276, 278, 289, 291, 294; Trial, §§ 1541, 1628.

Carmody-Wait 2d, Criminal Procedure §§ 172:2261, 172:2262, 172:2953, 172:2954.

NY Jur 2d, Criminal Law, §§ 2282, 2283, 2523, 2524.

ANNOTATION REFERENCES

See ALR Index under Bias or Prejudice; Harmless and Prejudicial Error; Jury and Jury Trial.

POINTS OF COUNSEL

Howard R. Relin, District Attorney of Monroe County, Rochester (*Stephen K. Lindley* of counsel), for appellant.
The *360 statements of the prospective juror in this case did not reflect an actual bias, and, thus, there was no need for the juror to state unequivocally that she could put her feeling about domestic violence aside and render a fair and impartial verdict. (*People v Johnson*, 94 NY2d 600; *People v Williams*, 63 NY2d 882; *People v Blyden*, 55 NY2d 73; *People v Torpey*, 63 NY2d 361; *People v Biondo*, 41 NY2d 483; *People v Maragh*, 94 NY2d 569; *People v Silva*, 273 AD2d 417; *People v Smyers*, 167 AD2d 773.)
Edward J. Nowak, Public Defender of Monroe County, Rochester (*Stephen J. Bird* of counsel), for respondent.
The court below correctly held that the trial court erred in refusing to inquire of, or excuse "for cause," a prospective juror who indicated her bias and stated that, based upon her research in college, she would become an unsworn expert witness during deliberations. (*People v Johnson*, 94 NY2d 600; *People v Maragh*, 94 NY2d 569; *People v Arnold*, 272 AD2d 857; *People v Blyden*, 55 NY2d 73; *People v Torpey*, 63 NY2d 361; *People v*

Williams, 63 NY2d 882; *People v Biondo,* 41 NY2d 483; *People v Branch,* 46 NY2d 645; *People v Brown,* 48 NY2d 388.)

OPINION OF THE COURT

Chief Judge Kaye.

A basic premise of our criminal justice system is that a defendant has the right to trial by an impartial jury. This appeal requires us to consider, once again, what it means for a juror to be impartial, and what is required to insure the impartiality of the jury.

Defendant was convicted of assault for stabbing his former girlfriend. His defense at trial was that he had acted in self-defense after she had attacked him with a razor blade. During voir dire, defense counsel asked a panel of prospective jurors if anyone was "thinking in the back of your mind maybe this is not the case that I ought to be sitting on because of my own personal background, my own personal experience, my own personal feelings about certain situations." Prospective Juror Number 4, who had a bachelor's degree in sociology and had minored in women's studies, answered, "Yes," stating that she had done "a lot of research" on domestic violence and battered women's syndrome. She added, "I have a problem with that." Defense counsel then asked whether if, in the jury room, "would you be saying, well, I minored in this in college, and I've done all of this research and in effect become another witness in the case, an expert if you will, on that area with the **361* other jurors. Do you think that might be a problem?" The prospective juror answered, "I think so." Counsel then asked whether she would feel more comfortable sitting on another kind of case, such as a bank robbery. She responded, "I think I would."

Later in the voir dire, defense counsel asked the entire panel whether they could follow the law as instructed by the court, and whether they agreed that they would not use this case as a "referendum" on crime, domestic abuse or violence in the streets. Without stating how, the transcript reads, "Prospective jurors indicating yes."

Defense counsel moved to excuse Prospective Juror Number 4 for cause, arguing she had indicated that she could not be fair in this case because of her background in women's studies. Counsel noted she did not give an unequivocal assurance that she could be fair, and added the juror had admitted the possibility that, because of her background, she might become an "unsworn witness in the jury room." The prosecutor opposed the challenge, arguing that although the prospective juror said that she would "feel more comfortable with another kind of case," and that she had "experience with issues concerning conjugal violence and women's studies," she did not say that she "wouldn't be able to listen to the law and would be unfair." The prosecutor contended that the juror "can be advised as to what she can or cannot do."

The trial court denied the challenge for cause, after which defense counsel used a peremptory challenge to excuse Prospective Juror Number 4. During the course of the voir dire, defendant exhausted his peremptory challenges.

A divided Appellate Division reversed. The majority reasoned that once "the prospective juror expressed doubt regarding her ability to be impartial or indicated that she might be an unsworn expert witness in the jury room, it was incumbent upon the court to ascertain that her prior state of mind would not influence her verdict and that she would render an impartial verdict based on the evidence." (272 AD2d 857, 858.) In addition, the majority noted that "the later general acknowledgment by all prospective jurors that they would follow the law" did not establish "the impartiality of the prospective juror in question." Two Justices dissented, arguing that the prospective juror indicated no "predisposition to rule a certain way," and also "indicated that she would base her decision on the evidence alone and that she would follow the law as instructed by **362* the court." (272 AD2d, at 858-859.) A Judge of this Court granted leave, and we affirm.

Analysis

One of the important rights afforded a criminal defendant under our system of justice is the right to a fair trial before an unbiased fact finder. But ours is a human process, and just as there are no "perfect" trials, there are no "perfect" juries.

While the goal is utter impartiality, each juror inevitably brings to the jury room a lifetime of experience that will necessarily inform her assessment of the witnesses and the evidence. This is a reality we simply cannot deny. Nor would we want a jury devoid of life experience, even if that were possible, because it is precisely such experience that enables a jury to evaluate the credibility of witnesses and the strength of arguments. What we can--and do--

ask, however, is that every juror enter the trial with an open mind, that every juror not be prejudiced from the outset against any particular party, and that every juror be willing to decide the case solely on the evidence presented and the law instructed by the Trial Judge.

(1) In order to achieve that goal, Criminal Procedure Law § 270.20 (1) (b) provides that a party may challenge a prospective juror for cause if the juror "has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at trial." Upon such a challenge, a juror who has revealed doubt, because of prior knowledge or opinion, about her ability to serve impartially must be excused unless the juror states unequivocally on the record that she can be fair. While the CPL, unlike the former Code of Criminal Procedure, does not require any particular expurgatory oath or "talismanic" words (*see, People v Johnson,* 94 NY2d 600, 611; *People v Culhane,* 33 NY2d 90, 106), jurors must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict. If there is any doubt about a prospective juror's impartiality, trial courts should err on the side of excusing the juror, since at worst the court will have "replaced one impartial juror with another" (*People v Culhane, supra,* at 108 n 3).

Applying that principle, this Court held in *People v Johnson* that the defendant's challenge for cause was improperly denied where a prospective juror stated that he would tend to favor police testimony and that he did not know whether he could evaluate police testimony fairly (94 NY2d, at 604-606). ***363** Similarly, in *People v Reyes,* a companion case to *Johnson,* we held that a prospective juror should have been excused who said that, as a parent, she would have difficultly being impartial in a drug case, that she could "only try" to be fair, and that there were "a lot of emotional things" that would color her view of the case (*see, id.,* at 607-608). When "potential jurors themselves openly state that they doubt their own ability to be impartial in the case at hand, there is far more than a *likelihood* of bias, and an unequivocal assurance of impartiality must be elicited if they are to serve" (*id.,* at 614 [emphasis in original]).

Prospective jurors who make statements that cast serious doubt on their ability to render an impartial verdict, and who have given less-than-unequivocal assurances of impartiality, must be excused (*see, People v Blyden,* 55 NY2d 73, 78; *see also, People v Torpey,* 63 NY2d 361, 367-369). By contrast, where prospective jurors unambiguously state that, despite preexisting opinions that might indicate bias, they will decide the case impartially and based on the evidence, the trial court has discretion to deny the challenge for cause if it determines that the juror's promise to be impartial is credible (*see, People v Williams,* 63 NY2d 882, 884-885).

(2) Here, as the Appellate Division correctly held, the trial court should not have seated Prospective Juror Number 4 without obtaining her unequivocal assurance that she could be fair. In response to defense counsel's questioning, the prospective juror volunteered that she did not think she should be sitting on this case because of her experience. Specifically, she stated that she had studied domestic violence extensively and that she had a "problem." Those statements revealed that, because of her background, the juror herself questioned whether she could be impartial in any domestic violence case. Thus, the juror's own statements cast serious doubt on her ability to serve. Accordingly, the trial court should have granted the challenge for cause unless the juror unequivocally indicated that she could be fair despite her background.

(3) Furthermore, we agree with the Appellate Division that the collective acknowledgment by the entire jury panel that they would follow the Judge's instructions and would not use this case as a "referendum" on crime or domestic violence was insufficient to constitute an unequivocal declaration of impartiality from Prospective Juror Number 4. The group answer by the entire panel did not address her personal attitudes, nor did it force her to confront the crucial question whether she could ***364** be fair to this defendant in light of her expressed predisposition. Indeed, nothing less than a personal, unequivocal assurance of impartiality can cure a juror's prior indication that she is predisposed against a particular defendant or particular type of case.

Defendant also contends that further inquiry was required of Prospective Juror Number 4 after she admitted that, because of her knowledge on domestic violence issues, she might, in the jury room, become an unsworn "expert" witness on the subject. This too is a recurring issue and a matter of serious concern. Indeed, even more so than defining "bias," courts have struggled to draw the line between permissible "life" experience and impermissible juror "expertise." Commentators also have grappled with this issue (*see,* Richard M. Fraher,

Adjudicative Facts, Non-Evidence Facts, and Permissible Jury Background Information, 62 Ind LJ 333 [1987]; John H. Mansfield, *Jury Notice*, 74 Geo LJ 395 [1985]).

The governing principle is easily stated: the jury must reach its verdict solely "on evidence received in open court, not from outside sources" (*Sheppard v Maxwell*, 384 US 333, 351; *see also, People v De Jesus*, 42 NY2d 519, 523; *People v Hommel*, 41 NY2d 427, 429). As the pattern instruction on the function of the jury states, the jury must resolve "each and every issue of fact ... solely on the evidence in the case and that evidence alone," and "may not consider or speculate on matters not in evidence or matters outside the case" (1 CJI 5.10).

Accordingly, courts have at times found it necessary to reverse convictions where jurors have been exposed to prejudicial, extra-record facts. Reversals, for instance, have resulted where the trial court permitted the prosecutor to act as an unsworn witness by arguing non-record facts in summation (*see, e.g., People v Jackson*, 7 NY2d 142, 144-145), and where the jury had been exposed to prejudicial media publicity during the trial (*see, e.g., Marshall v United States*, 360 US 310, 311-313). Trial courts must take proper measures to insure that the jury bases its verdict on the evidence.

As a corollary to that principle, this Court has reversed convictions where the jury has reached its verdict by going outside the evidence and conducting unauthorized investigation or experimentation. On several occasions, we have overturned convictions where jurors have engaged in unauthorized experiments or re-creations of the crimes, injecting non-record evidence into the deliberative process. Specifically, in ***365** *People v Stanley* (87 NY2d 1000), during a court-arranged visit to the crime scene, two jurors conducted an experiment designed to test whether the eyewitness could have seen the events as described in her testimony. In *People v Legister* (75 NY2d 832), a juror conducted an experiment in her hotel room--with another juror present--designed to simulate the lighting conditions at the time of the crime, and they shared their results with the other jurors the next morning. And in *People v Brown* (48 NY2d 388), a juror conducted a test with her van to determine if a police officer could have--as he testified--identified defendant during the incident from his seat in a police van, again sharing the results of her "test" with the other jurors. In all of these cases, we determined that the experiments conducted by the jurors denied the defendants a fair trial because the jurors injected non-record evidence on matters beyond the common understanding of the jury into their deliberations.

Most recently, in *People v Maragh* (94 NY2d 569), we reversed a conviction and ordered a new trial where two jurors--both nurses--used their professional expertise to calculate the victim's blood loss and reach conclusions about the cause of death, reaching findings that contravened the expert testimony and theories both sides presented at trial. The nurses then shared their findings with the rest of the jury, which used them in its deliberations. While noting that a verdict generally "may not be impeached by probes into the jury's deliberative process," we recognized that a narrow exception exists where there has been a showing of "improper influence" on the jury (*id.*, at 573). Specifically, the Court held that a grave potential for prejudice is present where

"a professional in everyday life shares expertise to evaluate and draw an expert conclusion about a material issue in the case that is distinct from and additional to the ... proofs adduced at trial. Other jurors are likely to defer to the gratuitous injection of expertise and evaluations by fellow professional jurors, over and above their own everyday experiences, judgment and the adduced proofs at trial. Overall, a reversible error can materialize from (1) jurors conducting personal specialized assessments not within the common ken of juror experience and knowledge (2) concerning a material issue in the case, and (3) communicating ***366** that expert opinion to the rest of the jury panel with the force of private, untested truth as though it were evidence" (*id.*, at 574).

Here, relying on *Maragh*, defendant argues that the trial court was required to conduct further inquiry of Prospective Juror Number 4 after she indicated that, because of her background in women's studies, she might become an unsworn expert witness on the issue of domestic violence.

(4) We readily agree that when the juror concurred with defense counsel's suggestion that she might, in the jury room, become another expert witness in the case, the trial court--to avoid *Maragh*-type problems--should immediately have reminded, and cautioned, her that she was required to decide the case solely on the evidence presented. Trial Judges are strongly encouraged to follow that practice *whenever* a prospective juror indicates a possible motivation to inject non-record facts into the deliberations. The more difficult question is

whether at that point the Trial Judge's refusal to allow a challenge for cause based on that ground alone would constitute reversible error. Under the facts before us, we cannot say that it would.

None of the requirements identified in *Maragh* as necessary to create reversible error were met here. The juror obviously did not conduct any "personal specialized assessments" of the evidence outside the common ken of juror experience (*see*, 94 NY2d, at 574)--she was excused on a peremptory challenge by the defense. Even more fundamentally, the record does not demonstrate that Prospective Juror Number 4 could have injected any knowledge outside the common realm of juror experience into the deliberations, or that she stood in a position of expertise comparable to the jurors in *Maragh*. The fact that the juror had studied domestic violence in college did not demonstrate that she had specialized knowledge that would enable her to exert undue influence on her fellow jurors. Indeed, all jurors bring their background, education and "predispositions, of varying intensity, when they enter the jury box" (*People v Williams, supra*, 63 NY2d, at 885). We do not require jurors to check their life experiences at the courtroom door, nor could we. In fact, one of the goals of New York's jury reform was to eliminate all automatic exemptions from service, bringing to ***367** the jury room a wide array of individuals with specialized knowledge and training. *Maragh* should not be read as requiring trial courts automatically to excuse them.

What *Maragh* and our other precedents do require, however, is that jurors not engage in experimentation, investigation and calculation that necessarily rely on facts outside the record and beyond the understanding of the average juror. This applies equally if the jury conducts unauthorized experiments at the crime scene, or if an "expert" juror performs "expert" scientific analysis--requiring knowledge of facts beyond those presented at trial--and convinces the other jurors to disregard the trial testimony and instead rely on his expertise. Of course no such thing happened here.

In addition, under *Maragh*, there is no reversible error unless a juror has specialized knowledge "concerning a material issue in the case" (94 NY2d, at 574). Here, while defendant was charged with assaulting his former girlfriend, he points to no material contested issue in the case particular to Prospective Juror Number 4's research. Finally, *Maragh* states that reversible error will occur only where the juror communicates an "expert opinion to the rest of the jury panel with the force of private, untested truth as though it were evidence" (94 NY2d, at 574). Again, since Prospective Juror Number 4 was not seated, she did not communicate any specialized knowledge to the other jurors. On this record, we decline to hold that the trial court's failure to take action, at the voir dire stage, to prevent potential jury misconduct constituted immediate reversible error.

While a finding of reversible error on that ground would be premature here, we caution trial courts to investigate and address potential jury misconduct problems as early as possible. Jurors should be instructed from the outset that they must decide the case based on the evidence presented and that evidence alone. Further, if any juror indicates a willingness to consider facts outside the record, the court should remind the juror what is and is not permissible. Indeed, in *Maragh*, we suggested that trial courts may wish to "modify their standard instructions differentiating between ordinary and professional opinions of jurors, and directing that jurors may not use their ***368** professional expertise to insert facts and evidence outside the record with respect to material issues into the deliberation process" (94 NY2d, at 576). We urge trial courts to give such a 1charge, in order to alleviate the potential for improper activity. In fact, a pattern charge has been devised for use in civil cases (*see*, PJI 1:25A). And, of course, if a juror upon inquiry in voir dire indicates an inability or unwillingness to follow the Judge's instructions, that would provide grounds for a challenge for cause.

In sum, we conclude that the Appellate Division correctly reversed defendant's conviction. After Prospective Juror Number 4 volunteered that she had a predisposition that might prevent her from being impartial in a domestic violence case, the trial court should have granted the challenge for cause unless the juror stated unequivocally that she would be able to render an unbiased decision.

Accordingly, the order of the Appellate Division should be affirmed.

Judges Smith, Levine, Ciparick, Wesley, Rosenblatt and Graffeo concur.
Order affirmed. ***369**

Footnotes

* Significantly, courts from other jurisdictions have held that reversible error is not created whenever jurors share their life experiences, including experience with particular subjects, during deliberations (*see, e.g., State v Miller*, 167 Ore App 72, 76-78, 1 P3d 1047, 1050; *State v Coburn*, 724 A2d 1239, 1241 n 2 [Me]; *Saenz v State*, 976 SW2d 314, 320-323 [Tex]; *State v Dickens*, 187 Ariz 1, 16, 926 P2d 468, 483, *cert denied* 522 US 920; *State v Graham*, 422 So 2d 123, 132 [La], *appeal dismissed* 461 US 950; *Jordon v State*, 481 P2d 383, 388 [Alaska]).

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141 Misc.2d 182, 533 N.Y.S.2d 192

The People of the State of New York, Plaintiff,

People v Thomas
Supreme Court, Kings County August 15, 1988 141 Misc.2d 182 533 N.Y.S.2d 192 *(Approx. 3 pages)*

John Thomas, Defendant

Supreme Court, Kings County
0279, 1881-87
August 15, 1988

CITE TITLE AS: People v Thomas

HEADNOTES

Crimes
Jurors
Challenge to Jury

(1) Despite the fact that a juror stated during voir dire that he could not read the jury questionnaire, no challenge was made and the juror was selected and sworn, and prior to the commencement of jury deliberations the court, upon questioning the juror, determined that he was fully competent to determine the case, following which a motion by defendant to discharge the juror for cause and for a mistrial was denied. Challenge for cause is the appropriate method for objection to a prospective juror on the ground that he does not have the qualifications required by the Judiciary Law, which include the ability to read and write English with a degree of proficiency sufficient to fill out satisfactorily the juror qualification questionnaire; the failure of both attorneys to question the juror's statement indicating his inability to read and to timely challenge for cause the juror's technical qualification constitutes a waiver. Although this juror would have been dismissed for cause at voir dire upon appropriate challenge, once a juror is sworn, he must be found "grossly unqualified" in order to be removed; a technical statutory disqualification such as the one at issue here is not a "gross disqualification".

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Jury, §§ 215, 217-219.

APPEARANCES OF COUNSEL

Plummer E. Lott for defendant. *Elizabeth Holtzman, District Attorney (Dana Pisanelli* of counsel), for plaintiff.

OPINION OF THE COURT

Herbert Kramer, J.

During voir dire, a juror stated that he could not read the jury questionnaire. The court then orally inquired. Neither counsel questioned the juror on his ability to read. No challenge was made for cause. No peremptory challenge was made and the juror was selected and sworn.

The trial consisted of oral testimony but for a revolver and a subway map issued by the Transit Authority. After charge, as the jury was entering to deliberate, the court clerk notified the court ex parte that the juror in question had asked a court officer for a number of slips with the words "Guilty" on some **183* and "Not Guilty" on others. He was able to discern the variable by the number of words on the slip. The court directed that the jury not begin deliberations and called the sworn juror to the courtroom. The court questioned the juror in the presence of the attorneys and the defendant, giving the attorneys an opportunity to inquire.

The juror testified and the court finds that the juror, in fact, did not fill in the jury questionnaire by himself but through the offices of a friend. This juror was native born and had no difficulty understanding and communicating with this court and indicated that he had no problem comprehending the trial testimony. He was able to read and comprehend the subway map, the only written evidence introduced at trial, and did in fact, utilize subway maps during the course of his own travels through the subway system.

The court found that this juror was fully competent to determine this case.

A motion was made by the defense at that point to discharge this juror for cause, and declare a mistrial, which was denied. The defendant refused the opportunity to replace the juror with an alternate and then again moved for the discharge of this juror and a mistrial; said motions were denied for the hereinafter reasons.

DISCUSSION

Judiciary Law § 510 (5) requires that a juror: be intelligent, of good character, able to read and write the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification questionnaire and be able to speak the English language in an understandable manner. [1]

Challenge for cause is the appropriate method for objection to a prospective juror on the ground that "[h]e does not have the qualifications required by the judiciary law" (CPL 270.20 [1] [a]).

In the case at bar, at the time the juror indicated an inability to read, both attorneys had an opportunity to question ***184** his statement. Their failure to do so and to timely challenge for cause this juror's technical qualification which did not affect the juror's fairness or competence to serve as a juror constitutes a waiver. *(People v Foster*, 100 AD2d 200 [2d Dept 1984], *mod on other grounds* 64 NY2d 1144 [1985], *cert denied* 474 U.S. 857 [1985]; CPL 270.15 [4]. [2])

A party has a duty to make further inquiry when put on notice of a potential disqualifying statement by a juror. In *Foster (supra)*, the court held that failure to inquire of jury service within a two-year period is a waiver of a subsequent determination after trial. Similarly, this court finds that failure to inquire and challenge this juror constitutes a waiver of defendant's right to challenge this juror for cause absent gross disqualification. The policy reason, although not expressly stated, requires a diligent inquiry by the attorneys at the earliest opportunity, akin to the Federal statute, once put on notice of a potentially disqualifying statement by a juror, or the challenge is deemed waived. *(Cf., People v Ellis*, 54 AD2d 1052 [1976].)

The United States Court of Appeals, Second Circuit, in *United States v Silverman* (449 F2d 1341 [1971]) held that there is no actual prejudice to defendant where a juror who had no difficulty understanding the oral testimony, but was unable to read English, was included in the jury panel.

The standard for disqualification of sworn jurors appears to be dealt with differently on the State and Federal level. The Federal statute looks at prejudice to the defendant while the State law speaks of the juror's gross disqualification. The actual test used, however, is similar.

CPL 270.35 sets the standard for excusing a sworn juror as "grossly unqualified". The juror must be found to be, after a factual inquiry, unable to deliberate fairly and possess ""a state of mind which would prevent the rendering of an impartial verdict"" *(People v Cargill*, 70 NY2d 687, 688 [1987]), or engaged in misconduct of a substantial nature. The burden of demonstrating that a juror is grossly unqualified is much greater than that required to challenge a prospective juror for cause. *(People v Buford*, 69 NY2d 290 [1987].)

The court in *Silverman (supra)* stated that based on the applicable Federal statute, it would reverse, where the disqualification ***185** might have adversely affected the juror's ability to decide the case intelligently. Similarly, the State appellate courts look at the sworn juror's fairness and competence to sit on the case.

The *Silverman* court notes that defendant's failure to timely object to a potential disqualification prevents a trial court from having the exhibits read to the sworn deliberating juror who was unable to read, diffusing any incompetence to sit on the case, although the juror lacked a technical qualification.

Similarly, the Fifth Circuit in *Ford v United States* (201 F2d 300 [1953]) stated that where an objection to a juror was not actual prejudice but statutory disqualification, the disqualification is waived by failure to timely assert.

In the case at bar, there is no question but that this juror would have been dismissed for cause at voir dire upon appropriate challenge. However, once a juror is sworn there is a separate standard under the law for that juror's removal. The State law requires that a juror be not merely unqualified but grossly unqualified *(People v Cosmo*, 205 NY 91; *People v Ivery*, 96 AD2d 712 [1983]; *People v Dunlap*, 132 AD2d 953 [1987]; CPL 270.35).

The courts have been scrupulous in applying the gross disqualification standard in cases of sworn jurors, and finding technical disqualifications waivable (citizenship and residence waivable, prior jury service waivable: *People v Foster, supra)*.

This court holds that the elevation from prospective to sworn juror operates as a waiver of all juror defects not constituting "gross disqualification" and which by diligent inquiry could have been discovered.

Further, this court holds that where an objection to a sworn juror relates not to prejudice or incompetence but to technical statutory disqualifications, such disqualifications are waived for failure to assert. ***186**

Footnotes

1 Judiciary Law § 511 lists the technical disqualifications of jurors, e.g., members in active service in the Armed Forces, elected officials, Judges, and persons who have served on a jury within two years.
Similarly, 28 USC § 1865 (b) (2) provides: "the chief judge *** shall deem any person qualified to serve *** unless he *** (2) is unable to read, write, and understands the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form".

2 CPL 270.15 (4) states: "A challenge for cause of a prospective juror which is not made before he is sworn as a trial juror shall be deemed to have been waived".

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1 of 1 DOCUMENT

[1] THE PEOPLE OF THE STATE OF NEW YORK v. DENNIS SALVADOR ALVAREZ-HERNANDEZ, Defendant.**

Indictment # 1352/00

COUNTY COURT OF NEW YORK, WESTCHESTER COUNTY

2002 N.Y. Misc. LEXIS 1195; 2002 NY Slip Op 50375U

September 5, 2002, Decided

NOTICE: [*1] THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE OFFICIAL REPORTS.

PRIOR HISTORY: (Motions # J1-J14).

CORE TERMS: juror, prospective jurors, peremptory challenges, jury selection, voir dire, notice, questionnaire, qualification, directing, box, peremptory, photographs, pool, illiterate, sworn, statutorily, disclosure, mandated, summons, Memorandum of Law, death penalty, jury box, potential jurors, murder, media, capital case, defense counsel, postponement, accommodate, cognizable

COUNSEL: HON. JEANINE PIRRO, District Attorney, Westchester County, White Plains, New York, BY: A.D.A. Patricia Murphy and A.D.A. George Bolen.

AIELLO and CANNICK, Attorney for Defendant, Maspeth, New York, BY: Robert J. Aiello, Esq.

MICHAEL L. SPIEGEL, Esq., Attorney for Defendant, New York, New York.

JUDGES: KENNETH H. LANGE, County Court Judge.

OPINION BY: KENNETH H. LANGE

OPINION

DECISION & ORDER

LANGE, J.

The defendant stands accused under Indictment # 1352/2000 of Murder in the first degree (six counts), Murder in the second degree (three counts), Attempted Murder in the first degree (three counts), Attempted Murder in the second degree and **[**2]** Attempted Assault in the first degree.

It is alleged that on September 3, 2000, the defendant intentionally caused the deaths of three individuals and attempted to cause the death of a fourth individual. It is also alleged that, prior thereto, on July 2, 2000, the defendant attempted to cause serious physical injury to one of **[*2]** the murder victims, by attempting to drive an automobile into her.

By fourteen separate Notices of Motion designated as "J1" through "J14", with Affirmations in Support, the defendant makes application with respect to jury selection. In response, the People have submitted an Affirmation in Opposition sworn to on August 19, 2002, with accompanying Memorandum of Law. Defendant's motions, individually numbered "J1" through "J14" are consolidated for purposes of disposition and are disposed of as follows:

MOTION # J1

MOTION TO UTILIZE THE "STRUCK SYSTEM" AND

"FULL BOX METHOD" OF JURY SELECTION

Defendant moves to utilize the "Struck System" and "Full Box Method" of jury selection for exercising peremptory challenges, after the Court has qualified a sufficient number of jurors to permit empaneling a jury. Defendant argues that the fairest way to pick a jury in this capital case, is that the Court should employ a combination of these two methods of jury selection. Under this proposed **[**3]** procedure, the pool of prospective jurors would first be questioned and challenges for cause would be exercised. Once an adequate number of potential jurors are qualified, the parties **[*3]** would then exercise peremptory challenges. Defendant argues that this process best balances defendant's compelling interest in a fair and impartial jury, with the Court's interest in effective and efficient voir dire. The "Struck System" of jury selection has a distinguishing feature in that no peremptory challenges are exercised until the total number of prospective jurors potentially needed--twelve, plus the aggregate number of peremptories allowed to both sides --have been questioned and survived challenges for cause. By first qualifying this venire pool, the "Struck System" ensures that twelve petit jurors will remain, even if both sides exercise all their peremptory challenges. Defendant argues that the primary advantage of the "Struck System" is that counsel can make a comparative assessment of the entire pool of qualified potential jurors when exercising peremptory challenges. Counsel for both sides can therefore exercise a peremptory challenge against any particular juror, with a better understanding of the overall complexion of the remaining panel. As a result, defendant argues the "Struck System" allows the parties to make the most effective use of their peremptory challenges.

[*4] Under the "Full Box Method" each prospective juror is individually examined by the prosecution and then the defense. Unless excused for cause, the prospective juror is seated in the box, but without being sworn as a juror -- as with **[**4]** the "Struck System", no peremptory challenges are exercised at this time. Once the jury box is full, the People exercise their peremptory challenges until they are satisfied with the jurors in the box. Defendant then exercises his challenges. The process continues until a petit jury is selected. Under this system, the Court ceases qualifying prospective jurors once the jury box is full. The only difference between the two methods is the size of the qualified panel against which peremptory strikes are executed. Consequently, to incorporate the "Struck System", the "Full Box Method" need only expand the size of the jury box to twelve plus the number of peremptory challenges granted each side. Defendant requests the combination of these two methods, or in the alternative, he requests that the Court simply employ the "Full Box Method" of jury selection.

In opposition, the People argue that the "Full Box" method of jury selection or a combination of that method **[*5]** and the "Struck Jury" method of jury selection are not constitutionally or statutorily mandated and should not be adopted as a matter of judicial policy. The "Jury Box" method pursuant to CPL § 270.15 is the traditional method of jury selection in New York State criminal courts. The People vigorously oppose defendant's motion as an effort to gain an unfair tactical advantage over the prosecution. Pursuant to *People v. Alston*, 88 N.Y.2d 519, 647 N.Y.S.2d 142, 670 N.E.2d 426, the New York Court of Appeals has held there is no requirement that New York Courts use a "Struck Jury" method or any other alternate form of jury selection. The People argue there is no basis to grant the defendant's request. The Court of Appeals in *People v.* **[**5]** *Alston*, supra, has authorized the "Jury Box" method. The People argue that in requesting the "Struck Jury" or "Full Box" method, or a hybrid of the two, the defendant seeks an advantage in that he would be afforded the opportunity to assess the entire jury as a group prior to exercising any challenges. There is no compelling reason for him to do so, say the People, (CPL § 270.15 **[*6]** (3).)

This Court has considered the history of the statutes on examination and challenges to jurors, (CPL § 270.15, CPL § 270.16), *People v. Alston*, supra, the experience of other trial courts in selecting juries in capital cases, (*People v. Webb*, 187 Misc.2d 451, 722 N.Y.S.2d 349, *People v. McIntosh*, 173 Misc.2d 724, 662 N.Y.S.2d 212) and the resources and facilities available in this County. This Court, in an effort to balance fairness and judicial economy, will adopt the following hybrid system: the Court and attorneys will conduct individual voir dire of prospective jurors with challenges for cause exercised at the conclusion of each individual voir dire. The jurors who are not excused for cause pursuant to CPL § 270.20, will be notified to return at a future date. The process of individual voir dires will continue until there is a sufficient pool to permit the selection of a panel of twelve (12) jurors and twelve (12) alternates even if all peremptory challenges are ex-

ercised by both sides. Peremptory challenges will be exercised on subsequent dates **[*7]** from groups placed in an enlarged jury box, holding twenty-six. The prosecution will exercise its peremptory challenges first as to the twenty-six (26) jurors seated in the box, followed by the defense.

[6] *MOTION # J2***

MOTION TO PROHIBIT EXCLUSION OF OTHERWISE

QUALIFIED ILLITERATE JURORS AND FOR USE

OF A SPANISH LANGUAGE JURY QUESTIONNAIRE AND

JURY SUMMONS

Defendant moves for: A) an Order prohibiting the Westchester County Commissioner of Jurors from excusing, disqualifying, or otherwise failing to include in the pool from which defendant's jury will be drawn, any prospective juror on the basis of illiteracy; B) an Order directing the Commissioner of Jurors to promptly inform the Court and the parties, in writing and in detail, of her current policies and practices with regard to excusing or disqualifying illiterate jurors and taking steps to inform persons receiving jury qualification questionnaires, who may be illiterate, that illiteracy does not disqualify them from jury selection, and that they must appear in person and will be provided with the assistance of the Court and the Commissioner of Jurors regarding any matter related to their ability to serve **[*8]** as jurors; (C) an Order requiring the use of both a Spanish language jury summons and jury qualification questionnaire; and (D) an Order granting affirmative action by the Commissioner of Jurors to recompose the jury pool to allow illiterate jurors to be fairly qualified and represented.

In opposition, the People argue that it is constitutionally and statutorily **[**7]** permissible to disqualify illiterate persons from serving on a jury. The People argue that the Court is without jurisdiction to grant this relief sought by defendant. They urge that only a State Supreme Court, through a CPLR Article 78 proceeding, may issue a mandamus or a prohibition directing the procedures of the office of the Commissioner of Jurors, CPLR § 7804[b]; *Matter of Herald Co. v. Roy*, 107 A.D.2d 515, 487 N.Y.S.2d 435. Under Judiciary Law § 510[4], a juror must be proficient in the English language in that they must be able to "understand and communicate in the English language." Because the English requirement is reasonable and is equally administered among all those who are not proficient in English, whatever their race or ethnicity, the provision **[*9]** does not violate any constitutional rights, say the People. While Judiciary Law § 510[5] was amended in 1996 to remove the specific proficiency requirement that a prospective juror be able to "fill out satisfactorily the juror questionnaire", it did not obliterate entirely the requirement that a prospective juror be able to read and write. The defendant is incorrect, argue the People, that exclusion of illiterate jurors violates the constitutional fair cross-section and equal protection requirements. The People argue that persons who do not read or write English are neither a "distinctive group" nor a "suspect class". The language requirement, they argue, is clearly "equally administered", applying to anyone, regardless of gender, race or ethnicity, who cannot read and write English, *State v. Paz*, 118 Idaho 542, 552, 798 P.2d 1 [1990]. The defendant is not prejudiced by the exclusion of illiterate jurors. It far better serves defendant's due process rights, argue the People, if his jury were composed of people **[**8]** who read, write, speak and understand English, in that a juror must have sufficient proficiency in English to meaningfully participate **[*10]** in a trial replete with exhibits and charts that could not be understood by a juror who cannot read and write in English.

It is important to note that there will be no special call of jurors just to sit on this case. The Commissioner of Jurors will furnish jurors to this trial part from the same pool being used for other trials, civil and criminal, being commenced at the same time. All the jurors in the pool have already completed the Juror Qualification Questionnaire (Exhibit in Court File # 231), a standard form used throughout the State of New York, before they are summoned to appear on a particular day.

Help in completing the questionnaires has already been given to those who cannot read or who have difficulty with English. The Commissioner of Jurors does not disqualify any prospective jurors for illiteracy. Persons who report to the Commissioner that they cannot understand or communicate in English will not be excused by the Commissioner even though this could be a disqualification under Judiciary Law § 510(4). The

determination whether these jurors qualify will be made by this Court on the record in the presence of all the parties.

With regard to **[*11]** the lengthy special questionnaires approved by this Court for this trial, there will be a person from the Commissioner of Juror's Office to read the questions to those who are illiterate, and an official court interpreter present to translate for Spanish speaking individuals.

[9]** In light of the foregoing, and in the absence of any authority requiring a bilingual juror qualification questionnaire or summons, the relief requested by defendant under this motion (J2) is, in all respects, denied.

MOTION # J3

MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES

Defendant moves for an Order granting him an additional twenty peremptory challenges of individual jurors, twice the number authorized by statute for jury selection in a trial for First Degree Murder. In the alternative, he asks for some substantial number of additional peremptory challenges sufficient to ensure his right to a fair trial, and if necessary, sentencing by an impartial jury. Pursuant to CPL § 270.25(2)(a), a defendant charged with any Class A felony "must be allowed" twenty peremptory challenges, plus two for each alternate juror selected.

In opposition, the People argue **[*12]** that defendant has no right to additional peremptory challenges, other than those set by statute (CPL § 270.25). The right to peremptory challenges is statutory and is not a constitutional right. In other death penalty prosecutions in New York, they argue, defendants have moved pre-trial for additional peremptories and their requests were either denied outright or held in abeyance until jury selection. New York Courts have consistently held that a defendant is not deprived of a fair trial when the court denies a request for additional peremptories beyond the statutory limit. (*People v. Doran*, 246 N.Y. 409, 426, 159 N.E. 379; *People* **[**10]** *v. Ramos*, 16 N.Y.2d 700, 261 N.Y.S.2d 894, 209 N.E.2d 552; *People v. McKinney*, 158 A.D.2d 957, 958, 551 N.Y.S.2d 433, lv. den. 76 N.Y.2d 739; *People v. Gantz*, 104 A.D.2d 692, 480 N.Y.S.2d 583; *Matter of State of New York v. King*, 47 A.D.2d 594, 595, rev'd on other grounds, 36 N.Y.2d 59, 364 N.Y.S.2d 879, 324 N.E.2d 351; *People v. Fox*, 99 Misc.2d 1061, 418 N.Y.S.2d 510. Furthermore, the People argue that **[*13]** the Legislature never intended capital defendants to receive any more peremptories than statutorily authorized as evidenced by prior and current peremptory challenge statutes. The People also argue that, if at a later date, the Court finds that circumstances warrant additional peremptory challenges, the People should be granted an equal number. Accordingly, the People argue that defendant's request should be denied with leave to renew upon a proper showing of necessity and appropriateness during voir dire.

Defendant's motion for additional peremptory challenges is denied as premature, with leave to renew upon a proper showing of necessity and appropriateness during voir dire.

MOTION # J4

MOTION TO MAINTAIN JURORS' PRIVACY FROM MEDIA INTRUSION

Defendant moves for an Order prohibiting the Westchester County Jury Commissioner, the Westchester County Clerk, the Westchester County District Attorney, and all other courthouse employees and participants in Defendant's trial **[**11]** from disclosing to the media or public the names or addresses of prospective or seated jurors and providing that the Court will instruct prospective jurors, at the start of voir dire, of **[*14]** the above described requirement it has imposed; that only Court employees, the District Attorney, and the defense will have access to their names and addresses and that the reason for these requirements is to attempt to prevent the media from identifying jurors by name and address and intruding on their privacy during or after the trial.

In response, the People do not object to an order of this Court prohibiting disclosure of the names and addresses of prospective sworn jurors to the media or the public. CPL § 270.15 (1)(a) authorizes a Court, for good cause shown, to issue a protective order regulating the disclosure of the business or residential address of any prospective or sworn juror. The People argue that the sealing order should apply to the defense as well as the prosecution, and the media should be instructed not to disclose such information until after the

jury is discharged. The People do argue that to inform the jurors of the Court's decision is not necessary as any prospective juror may with the consent of the parties, discuss any sensitive issue on the record outside the presence of everyone, but the defendant and the prosecution.

Defendant's **[*15]** motion for a protective order pursuant to CPL § 270.15, is not opposed by the People. Criminal Procedure Law § 270.15(1-a) provides that a court for good cause shown may

...issue a protective order for a stated period regulating **[**12]** disclosure of the business or residential address of any prospective or sworn juror to any person or persons, other than to counsel for either party. Such good cause shall exist where the court determines that there is a likelihood of bribery, jury tampering or of physical injury or harassment of the juror.

As this is the first capital case in Westchester County since the death penalty was reinstated in New York State, the Court finds that good cause exists for such a protective order. Therefore, other than disclosure to the parties, the record of the names and addresses of all jurors shall be sealed in order to protect the anonymity of the all prospective and sworn jurors. The media will be instructed not to disclose or use such identifying information concerning any prospective or sworn jurors until after the jury is discharged, upon the rendering of a verdict. (*People v. Owens*, 187 Misc.2d 272, 2001, 721 N.Y.S.2d 489 **[*16]** N.Y. Slip Op. 21095 (N.Y. Sup. Jan. 26, 2001) No. 36, 547/99, 414/99.)

Defendant's request that the Court inform the jurors of its decision to seal the record of names and address, is granted.

MOTION # J5

MOTION TO AMELIORATE BURDENS OF LENGTHY JURY SERVICE

Defendant moves for an Order increasing the daily compensation rate **[**13]** for jurors, providing adequate childcare facilities for jurors with young children and adjourning at 2:30 or 3:00 p.m. prior to deliberations, when necessary, to accommodate jurors with school-aged children.

In opposition, the People argue that defendant's motion must be denied as the Court is without jurisdiction to grant the relief requested. Juror compensation rates are legislatively mandated (Judiciary Law § 521). The Legislature has determined that $ 40.00 per day for the first thirty days and $ 46.00 per day thereafter is fair and reasonable and trial courts may not disturb this determination. Defendant's application to provide child care facilities in or around the courthouse must similarly be denied. This Court is without authority to unilaterally authorize expenditure funds of the Office of Court Administration **[*17]** and/or the County Legislature, which would ultimately bear the cost of such childcare. Defendant's claim that low-income minorities with children will be under- represented on his jury by reason of financial hardships, which he asserts they will uniquely suffer as a result of inadequate juror compensation and child care considerations and expenses is not supported with socioeconomic data. The People argue that low income minorities with young children are not a distinct and cognizable class.

Defendant's application to adjourn court at 2:30 p.m. or 3:00 p.m. daily to accommodate jurors with small children should be denied as premature. Once jury selection is underway the court will be in a better position to assess the **[**14]** needs of the prospective jurors and fashion the trial schedule as the Court in its discretion may deem necessary to accommodate the needs of actual sitting jurors. Adjourning the trial early each day to accommodate jurors with school-aged children may not be helpful, in that it could increase the length of the trial and exacerbate the very economic hardships cited by defendant.

As noted by the People, juror compensation rates are mandated by statute. (Judiciary Law § 521 **[*18]**). It is not within the province of this Court to assume legislative responsibilities and duties totally outside of its authority. Nor is it within the power or authority of this Court to mandate that adequate child care facilities be established. Finally, defendant's request that prior to deliberations, court be adjourned when necessary to accommodate any jurors with school-aged children would not only result in inconvenience to the parties, the Court, and the attorneys, Court personnel and other jurors, but would also result in a longer trial which as stated by the Court in *People v. Page*, would "exacerbate the very economic hardships cited by defendant." (*People v. Page*, Ind. No. 9833/96, slip op. (Sup. Ct. Kings County 9/8/98); *People v. Arroyo*, Ind. No. 97-13, mot. A39, slip op. (Schoharie Co. Ct., 10/1/98); *People v. Parker*, Ind. No. 97-0762-001, slip op. (Erie Co. Ct., 7/2/98); *People v. Francois*, Ind. No. 122/98, (Dutchess Co. Ct.) Motion # 23, slip op. 6/14/99.)

MOTION # J6

[15]** ***MOTION TO ALTERNATE VOIR DIRE***

Defendant moves for an Order that the initial voir dire of each prospective juror, pursuant to CPL §§ 270.15 **[*19]** and 270.26 alternate between the prosecution and defense counsel. Particularly, defense counsel seeks an Order allowing him to initially voir dire half of the prospective jurors which he argues is more equitable than allowing the prosecutor the first opportunity to question every prospective juror. In support of this, defendant argues that under the new Capital statute, the burden has shifted with regard to the sentencing phase of the trial as now the defendant carries the burden of presenting mitigating evidence. (See, CPL § 400.27). Defendant argues in light of this burden shift, defense counsel should have the same opportunity to be the first to explore and present themes to the potential jury pool that the prosecutor does.

In opposition, the People argue there is no authority to permit deviation from the statutorily prescribed order of voir dire. In enacting CPL § 270.16(1), dealing with voir dire in capital cases, the Legislature did not change the order of voir dire as mandated in CPL § 270.15. The order of voir dire is statutorily mandated. CPL § 270.15(3) requires that "the **[*20]** process of jury selection ... shall continue until twelve persons are selected and sworn as trial jurors." Each round of voir dire must follow the statutorily dictated order that voir dire commences with the People. The correlative provisions governing the order in which challenges are made also require that the People go first (CPL § 270.15(2)). Finally, the People argue that **[**16]** the fact that the defendant faces the death penalty does not in and of itself alter the Legislative scheme for jury selection. CPL § 270.16(1) and CPL § 270.15(1)(c) both direct that voir dire of prospective jurors commence with the People. The defendant has not submitted any persuasive authority which would justify departure from these statutory mandates. *(People v. Arroyo*, 178 Misc.2d 362, 365, 679 N.Y.S.2d 885 (Schoharie Co. Ct., 1998); *People v. Francois*, Ind. No. 122/98, (Dutchess Co. Ct.) motion # 28, slip op. 6/14/99.) This motion is, accordingly, denied.

MOTION # J7

MOTION FOR ALL DISQUALIFICATIONS, DEFERMENTS AND

EXCUSALS FROM THE POTENTIAL VENIRE TO BE MADE

BY THE COURT IN THE **[*21]** ***PRESENCE OF THE ACCUSED***

AND DEFENSE COUNSEL

[17]** Defendant moves for an Order that the Court personally hear and determine any applications by summonsed jurors to be excused, disqualified or transferred, or to have jury service deferred and that the Court do so, only after providing defendant and his counsel notice and an opportunity to be heard and only in the presence of defendant and his counsel. Alternatively, defendant requests that all determinations made by the Jury Commissioner be placed on the record, subject to challenge by the defense and review by the Court.

In opposition, the People argue this motion should be denied as there is no authority to permit the Court to engage in such a practice; and indeed, to do so, would be wholly outside the Court's jurisdiction (Judiciary Law § 502; § 509; § 517). By statute, the drawing, summoning, selection and impaneling of jurors is a task solely within the purview of the Commissioner of Jurors (Judiciary Law § 502). It is the Commissioner who "shall determine the qualifications of a prospective juror on the basis of information provided on the juror qualification questionnaire. **[*22]** " (Judiciary Law § 509[a]). The People argue that there is no statutory authority that permits the Court to consider health or hardship issues raised by the applicant (Judiciary Law § 517(c)). Nor is there any authority, by which the Court may order juror qualification questionnaires to be kept under seal for possible appeal. The People argue that defendant, as a capital defendant, is provided with a broader voir dire under CPL § 270.16 and § 270.20(f). He may conduct meaningful inquiry at that time as to any bias or prejudice the defendant believes is injected by the **[**18]** Commissioner's discretionary function under the Judiciary Law.

In this case, the Commissioner of Jurors has agreed that the only jurors she will excuse are those who have immediate medical emergencies and leave to this Court all determinations as to hardship and other medical

conditions. Students who are returning to school at this time of year would ordinarily be granted a postponement. In this case, the Commissioner will also leave the determination for the Court.

Of course, prospective jurors who are not citizens of the United States, **[*23]** or residents of this County or who have been convicted of a felony must be excused by the Commissioner of Jurors as unqualified under Judiciary Law § 510.

In light of the foregoing, this motion is denied.

MOTION # J8

MOTION TO PRECLUDE JURY COMMISSIONER FROM

DISSEMINATING ORIENTATION VIDEO, HANDBOOK

NEWSLETTER, OR OTHER INFORMATION TO PROSPECTIVE

JURORS WITHOUT PERMISSION OF THE COURT

Defendant moves for an Order directing the Westchester County Jury Commissioner not to disseminate, show, or provide to any prospective jurors in this **[**19]** case any juror orientation video, handbook, newsletter or other jury orientation information absent express permission by the Court, after defense counsel has been provided notice of the exact material or information that is to be disseminated and an opportunity to advocate to the Court against its dissemination.

In opposition, the People argue that the materials the defendant objects to, a handbook and a video presentation, were prepared for use throughout New York State by the Office of Court Administration, at the direction of the Chief Judge of the State of New York. However, the Office of Court **[*24]** Administration is not a party to this action, nor have they been served with notice of this motion and given an opportunity to be heard. Only a State Supreme Court through a CPLR Article 78 proceeding, they argue may issue a mandamus or a prohibition directing the procedures of the Commissioner of Jurors. Jurors are presumed to follow their oaths and the instructions given to them by the trial court. Moreover, the defendant will be free to voir dire the potential jurors with respect to any preconceptions they might have with respect to this case or this criminal prosecution in general.

Defendant's motion is denied. The Court has reviewed the Juror's Handbook (Exhibit in Court File # 234) and the Juror Orientation Video (Exhibit in Court File # 233) and did not find any inaccuracies or any matter that could prejudice defendant's rights to a fair trial. The Court also finds that the information contained therein to be helpful. The Juror's Handbook has been recently revised and reissued by the Unified Court System, and provides specifically that it is not to replace the **[**20]** instructions given by the Judge presiding over a particular case. The video, entitled, *Your Turn, Jury Service in* **[*25]** *New York State*, was produced in 2001 under the auspices of the Unified Court System and the Committee on Courts and the Community of the New York State Bar Association.

MOTION # J9

MOTION FOR DISCLOSURE OF LIST OF POTENTIAL JURORS

Defendant moves for an Order directing the Westchester County Jury Commissioner to provide to defendant's counsel a list of the names and addresses of potential jurors, as soon as such a list is available to, or compiled by, the Commissioner of Jurors, for the purpose of mailing summonses to such persons to appear as potential jurors at defendant's trial.

In opposition, the People argue that any disclosure of the requested records would be an unwarranted invasion of the prospective jurors' personal privacy. The defendant, they argue, has not made a factual showing to justify such disclosure. Juror qualification questionnaires and juror records are confidential and are not to be disclosed except to the county jury board or as permitted by the Appellate Divisions. The material sought by defendant should not be disclosed as it would compromise the personal privacy of prospective jurors and could result in the harassment of prospective **[*26]** jurors and have a chilling effect on the jury selection process in future cases. Generalized assertions, say the People, that defendant needs **[**21]** this infor-

mation for trial preparation do not constitute the necessary factual predicate which would make it likely that the records would provide relevant evidence. (*People v. Guzman*, 60 N.Y.2d 403, 415, 469 N.Y.S.2d 916, 457 N.E.2d 1143).

Judiciary Law § 509(a) clearly states that: "such questionnaires and records shall be considered confidential and shall not be disclosed except to the county jury board or as permitted by the appellate division." The proper venue for this application is not this Court, but in the Appellate Division, Second Department. Defendant's motion is therefore denied in all respects. (*People v. Francois*, Dutchess Co. Ct., Ind. No. 122/98, Motion # 24, slip op., 6/14/99).

MOTION # J10

MOTION TO PROHIBIT SUMMONED JURORS FROM POSTPONING

JURY SERVICE WITHOUT ADEQUATE JUSTIFICATION

Defendant moves for an Order directing the Jury Commissioner not to grant any requests for postponements by jurors, summoned to a jury term immediately prior to or during **[*27]** the voir dire in this capital case, including requests for so called "automatic" six month deferrals, and directing the Westchester County Jury Commissioner in empaneling the venire for defendant's trial not to do the following: (1) assign any prospective juror drawn to this case to another panel because of the nature of this case, or because of any express preference or reluctance **[**22]** to serve by the prospective juror; (2) assign any prospective juror drawn for another case to this panel because of the nature of this case or because of any expressed preference or reluctance to serve by the prospective juror; (3) inquire of any prospective juror whether he or she would like to serve on the jury panel for this case; or (4) engage in any discussion with the prospective juror regarding the nature, facts and circumstances of this case.

The People argue that the Court is without jurisdiction to grant the relief sought by defendant. The defendant has not made a showing of a clear legal right to the relief sought. Only a State Supreme Court through a CPLR Article 78 proceeding may issue a mandamus or a prohibition directing the procedure of the Office of the Commissioner of Jurors.

The defendant's **[*28]** request for an order prohibiting the Commissioner of Jurors from granting postponements mandated by statute is untenable and must be denied. Defendant has made no showing that the Commissioner of Jurors will not comply with section 517 of the Judiciary Law with respect to juror applications for postponements or excusals or that by granting the statutorily mandated postponements, a fair and impartial jury representing a fair cross-section of the community cannot be empaneled.

The dictates of Judiciary Law § 517(a) and 22 NYCRR 128.6-a(a)(a) control. The Court cannot set up separate standards which are tailored by the defense. (*People v. Francois*, Ind. No. 122/98, (Dutchess Co. Ct.) mot. # 25, slip op. **[**23]** 6/14/99; *People v. Arroyo*, Ind. 97-13, Mot. A-32, slip op. (Schoharie Co. Ct., 10/2/98); and *People v. Page*, Ind. No. 9833/96, slip op. (Sup. Ct., Kings Co., 9/8/98).) Therefore, defendant's motion is denied.

MOTION # J11

MOTION FOR PERSONAL SERVICE OF SUMMONSES ON

PROSPECTIVE JURORS WHO DO NOT RESPOND TO

MAILED SUMMONS

Defendant moves for an Order directing the Westchester **[*29]** County Jury Commissioner to personally serve a jury summons on any prospective juror who does not respond to a mailed summons.

In opposition, the People argue there is no authority in the law for the Court to issue an order countermanding the discretion given the Commissioner of Jurors by Judiciary Law § 516, which gives discretion as to how jury summonses are delivered. While the Commissioner has authority to direct the Sheriff to personally serve a jury summons, it is the Commissioner herself who decides what methods to employ. Only a State Supreme Court through a CPLR Article 78 proceeding may issue a mandamus or a prohibition directing the proce-

dures of the Commissioner of Jurors and then, only when the defendant has demonstrated a clear right to the relief **[**24]** sought, which defendant has not demonstrated here.

These matters are governed by Judiciary Law § 502(d), § 516 and § 517, as well as 22 NYCRR 128.6 and 128.12. (*People v. Arroyo*, Ind. No. 97-13, Motion A-71, slip op. (Schoharie Co. Ct., 10/2/98); *People v. Page*, Ind. No. 9833/96, slip op. (Sup. Ct. Kings Co, 9/8/98; *People v. Francois* **[*30]** , Ind. No. 122/98, Motion # 44 (Dutchess Co. Ct., 6/14/99).) Therefore, defendant's motion is denied.

MOTION # J12

MOTION FOR AN ORDER PROHIBITING COURT AND

PROSECUTOR FROM ALERTING PROSPECTIVE JURORS

OF QUALIFICATION STANDARDS FOR THEIR SERVICE

Defendant moves for an Order prohibiting the Court and prosecutor from alerting prospective jurors of qualification standards for their service, arguing that if prospective jurors have knowledge of these standards, some panel members may be influenced to shade their answers so as to minimize their chances of serving.

In opposition, the People argue that the Court of Appeals in *People v. Harris*, (N.Y.2d), July 9, 2002, at p. 7; 2002 N.Y. Slip Op. 05750), has found no prejudice to defendant in employing this procedure.

This Court is mindful of the admonition for caution in this area from the Court of Appeals in *Harris*, supra. Jurors are presumed to follow their oaths and to answer **[**25]** questions put to them truthfully. This Court plans to conduct life/death qualification in a manner that encourages frankness and honesty in the potential jurors' responses, without seeming to place a value or reward **[*31]** on "correct or appropriate" answers. Defendant's application if granted, could curtail the People's and the Court's opportunity to identify jurors whose opposition to the death penalty is so strong that it would prevent them from determining defendant's guilt or innocence in an impartial manner. This motion is accordingly denied.

MOTION # J13

MOTION TO PROHIBIT THE PROSECUTION FROM USING

PEREMPTORY CHALLENGES TO EXCLUDE DEATH-SCRUPLED

JURORS AND FOR PRETRIAL DECLARATION THAT SUCH

JURORS CONSTITUTE COGNIZABLE GROUP

Defendant moves for an Order recognizing and declaring that jurors who have religious or conscientious qualms about or opposition to capital punishment--but not of such nature or degree that they are excusable for cause as they can still follow the law and their oaths at trial and at a capital sentencing hearing--are a cognizable and distinct group for purposes of addressing a claim that the prosecution is using peremptory challenges to discriminate against such venire **[**26]** members.

In opposition, the People argue it is constitutionally permissible for the People to use peremptory challenges to excuse persons with scruples against the death penalty **[*32]** from the jury, as such persons do not constitute a cognizable class. The classification of persons with moral scruples against the death penalty is too broad to support any finding of a distinct, readily identifiable class. The People argue that the defendant is essentially arguing he is constitutionally entitled to a jury composed of persons who will not impose a death sentence and this is not the law. The People argue that they are entitled to exercise their peremptory challenges if they suspect that a juror will be unfavorable to their case, a right which is also shared by the defendant. Defendant is entitled to be judged by a jury representative of a fair cross-section of the community, and such an exercise of peremptory strikes does not in any way impair his right to a fair jury.

As succinctly stated in Judge Dolan's decision in *People v. Francois*, Ind. No. 122/98, (Dutchess Co. Ct.) motion # 29, "(d)efendant's application is contrary to the prevailing law and must be denied. Death-scrupled jurors are not members of a cognizable class within the meaning of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed.

2d 69, 106 S. Ct. 1712 (1986). See *Gray v. Mississippi*, 481 U.S. 648, 95 L. Ed. 2d 622, 107 S. Ct. 2045 (1987) **[*33]** and *Lockhart v. McCree*, 476 U.S. 162, 90 L. Ed. 2d 137, 106 S. Ct. 1758 (1986). Therefore, *Batson* type prohibitions do not apply." Defendant's motion is denied.

MOTION # J14

[27]** ***MOTION TO PARTIALLY RECONSIDER THIS COURT'S***

DECISION ON DEFENDANT'S MOTION # 16 REQUESTING

AN IN LIMINE RULING CONCERNING PHOTOGRAPHS OF

THE DECEASED PRIOR TO JURY SELECTION

Defendant moves the Court to reconsider its decision and order dated February 14, 2002 and to make an in limine ruling on the admissibility of the photographs of the murdered victims at trial prior to jury selection.

In opposition, the People argue that the admissibility of photographs is a trial evidentiary issue. These evidentiary decisions are more properly made during the trial. In response to defendant's motion numbered 16, this Court in a decision and order dated February 14, 2002, stated that prior to the People displaying or introducing any such evidence, defendant would be given an opportunity to object and/or to offer an alternative exhibit. The determination of whether specific photographs are admissible will be made either after jury selection has concluded or during the course **[*34]** of the trial, outside of the presence of the jury, when the photographs can be considered in the context of the other evidence. Admissibility will be governed by the standards set forth in *People v. Pobliner*, 32 N.Y.2d 356, 345 N.Y.S.2d 482, 298 N.E.2d 637, cert. denied 416 U.S. 905; *People v. Wood*, 79 N.Y.2d 958, 582 N.Y.S.2d 992, 591 N.E.2d 1178; *People v. Randolph*, 250 A.D.2d 713, 673 N.Y.S.2d 174; and *People v. DeBerry*, 234 A.D.2d 470, 651 N.Y.S.2d 559. The Court will consider in ruling on the number and type of photographs admitted into **[**28]** evidence, the probative value of the proffered photographs on trial issues versus their prejudicial effect. With respect to defendant's motion to admit only black and white photos, large color photographic evidence has been deemed admissible, (see *People v. Pobliner*, 32 N.Y.2d 356, 345 N.Y.S.2d 482, 298 N.E.2d 637; *People v. Wood*,79 N.Y.2d 958, 582 N.Y.S.2d 992, 591 N.E.2d 1178; *People v. Gordon*, 131 A.D.2d 588, 516 N.Y.S.2d 297.) In light of the foregoing, the Court adheres to its prior ruling and will determine admissibility **[*35]** of photographs after jury selection and out of the presence of the jury. The defendant's motion for an earlier ruling, in limine, is denied.

The following papers were read on this application: (1) Notice of Motion # J1, dated August 5, 2002 with Affirmation in Support and Memorandum of Law; (2) Notice of Motion # J2, dated August 5, 2002 with Affirmation in Support and Memorandum of Law; (3) Notice of Motion # J3 dated August 5, 2002 with Affirmation in Support; (4) Notice of Motion # J4, dated August 5, 2002 with Affirmation in Support; (5) Notice of Motion # J5, dated August 5, 2002 with Affirmation in Support and Memorandum of Law; (6) Notice of Motion # J6, dated August 5, 2002 with Affirmation in Support; (7) Notice of Motion # J7, dated August 5, 2002 with Affirmation in Support; (8) Notice of Motion # J8, dated August 5, 2002, with Affirmation in Support; (9) Notice of Motion # J9 with Affirmation in Support; (10) Notice of Motion # J10 dated August 5, 2002 with Affirmation in Support; (11) Notice of Motion # J11 dated August 5, 2002 with Affirmation in Support; (12) Notice of Motion # J12 with Affirmation in Support and Memorandum **[**29]** of Law; (13) Notice of Motion # J13 with Affirmation **[*36]** in Support and Memorandum of Law; (14) Notice of Motion # J14 with Affirmation in Support; (15) People's Affirmation in Opposition dated August 19, 2002 with Accompanying Memorandum of Law; (16) Notice of Motion # 16 dated August 2, 2001 for an Order to exclude from trial and any capital sentencing hearing, gruesome, inflammatory and unnecessary autopsy and crime-scene photographs that were taken following the offense for which defendant is charge with Affirmation in Support and Memorandum of Law; (17) People's Supplemental Memorandum of Law in Support of their Affirmation in Opposition to Defendant's motions numbered 6a, 10a, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23, dated September 6, 2001, with Exhibit; (18) People's Memorandum of Law to Omnibus Motion dated April 5, 2001; and (19) this Court's decision and order dated February 14, 2002.

White Plains, New York

KENNETH H. LANGE

County Court Judge

[30]** Decision Date: September 05, 2002

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WESTLAW

View National Reporter System version

18 N.Y.3d 16, 959 N.E.2d 504, 935 N.Y.S.2d 567, 2011 N.Y. Slip Op. 08178

People v Guay
Court of Appeals of New York November 15, 2011 18 N.Y.3d 16 959 N.E.2d 504 935 N.Y.S.2d 567 2011 N.Y. Slip Op. 08178 *(Approx. 7 pages)*

****1** The People of the State of New York, Respondent

Dean A. Guay, Appellant.

Court of Appeals of New York
Argued October 12, 2011
Decided November 15, 2011

CITE TITLE AS: People v Guay

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered April 8, 2010. The Appellate Division modified, on the law, a judgment of the Supreme Court, Clinton County (Timothy J. Lawliss, J.), which had convicted defendant, upon a jury verdict, of rape in the first degree, sexual abuse in the first degree, and endangering the welfare of a child, and imposing sentence. The modification consisted of vacating the sentences imposed and remitting the matter for resentencing. The Appellate Division affirmed the judgment as modified.

People v Guay, 72 AD3d 1201, affirmed.

HEADNOTES

Crimes
Jurors
Challenge to Jury—Hearing Impaired Juror

(1) In a prosecution in which defendant was accused of committing sex crimes against his then seven-year-old daughter, the trial court did not abuse its discretion when it dismissed a hearing-impaired prospective juror for cause because the record supported the determination that the prospective juror's hearing impairment would have unduly interfered with his ability to be a trial juror. It was readily apparent to the court and the parties that the panelist had trouble hearing the precise questions posed, and despite his remark that he would not have difficulty if he remained in the front of the jury box, the court observed the venire member during voir dire and apparently noticed that the prospective juror's body language demonstrated that he was not comprehending everything that was happening. In addition, the court expressed its concern that the hearing impairment was likely to be more problematic here because, in its experience, child witnesses tended to be more soft-spoken than adults. Defense counsel did not contest any of those conclusions. Moreover, it was significant that, aside from the panelist's own suggestion that he remain in the front row, the court was not asked to offer any other reasonable accommodation that may have adequately assuaged the concerns about the prospective juror's ability to understand the proceedings and fulfill the functions of a trial juror. While in the absence of some suggestion for reasonably addressing the concerns about the prospective juror the trial court could not be faulted for failing to order an accommodation sua sponte, a better course would have been for the court to take steps on its own accord to inquire about the prospective juror's auditory limitations and discuss possible accommodation.

Crimes
Fair Trial
Bolstering Victim's Testimony—Harmless Error

SELECTED TOPICS

Criminal Law

Review
Unlawful Electronic Surveillance of Defendant Place of Business
Court of Appeals Review of Mixed Question of Law and Fact

Jury

Competency of Jurors, Challenges, and Objections
Challenge to Prospective Juror

Secondary Sources

s 3.04. RESTRICTIONS ON MONITORING EMPLOYEES' ELECTRONIC ACTIVITIES AND USE OF ACQUIRED INFORMATION.

32 E. Min. L. Found § 3.04

...As discussed, there are plenty of good reasons for an employer to monitor its employees' electronic activities, including that if it does not, it could face legal liability. But there are also plenty o...

SURVEILLANCE AND SEARCHES

Workplace Privacy Chapter 6

...In undertaking workplace investigations, employers should be aware of applicable federal and state laws before conducting electronic surveillance of employees such as tape-recording employee telephone ...

COMPUTER MONITORING

Workplace Privacy Chapter 14

...It is possible that the computer and the Internet have had the most profound impact on the workplace since the introduction of electricity. With computer technology progressing by leaps and bounds, bus...

See More Secondary Sources

Briefs

Brief for the United States

1978 WL 223201
Lawrence DALIA, Petitioner, v. UNITED STATES OF AMERICA.
Supreme Court of the United States
Dec. 22, 1978

...The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 575 F. 2d 1344. The opinion of the district court (excerpted at Pet. App. 10a-18a) is reported at 426 F. Supp. 862. The judgment of ...

Brief of Bertram Zweibon, Marilyn Betman, Irving Calderon, Stuart C. Cohen, Sheldon Davis, Jerome Eisenberg, Lawrence H. Fine, Eileen Garfinkle, Ruth Hartstein, Libby Kahane, Meir Kahane, Neil S. Rothenberg, Murray Schneider, Eli Schwartz and Alex St ernberg, Amici Curiae, in Support of Respondents

1980 WL 339277
Henry KISSINGER, et al., Petitioners, v. Morton HALPERIN, et al., Respondents.
Supreme Court of the United States
Oct. 31, 1980

...The case before the Court was argued and decided below with Zweibon v. Mitchell, 606 F.2d 1172 (D.C.Cir. 1979). Petitions for writs of certiorari in Zweibon, Nos. 79-881, 79-883, are being held pending...

(2) In a prosecution in which defendant was accused of committing sex crimes against his then seven-year-old daughter, the defendant was not deprived of a *17 fair trial where a police investigator and a caseworker opined that the victim was credible. Although that type of testimony was improper, the trial court sustained an objection before the investigator answered, no curative instruction was requested, and the court subsequently directed the jury to disregard such impermissible testimony. Defense counsel opened the door to the prosecutor asking certain questions about the caseworker's ability to gauge the victim's veracity, but arguably not so wide as to allow the caseworker to state his ultimate conclusion regarding the victim's credibility. Nevertheless, the error was harmless because there was no significant probability that the jury would have acquitted defendant if the caseworker had not provided the opinion testimony.

RESEARCH REFERENCES

Am Jur 2d, Jury §§ 200–203, 228; Am Jur 2d, Trial §§ 1179, 1182; Am Jur 2d, Witnesses §§ 711, 976, 978, 979.

Carmody-Wait 2d, Jury Selection and Supervision § 191:36; Carmody-Wait 2d, Charge and Instruction to Jury §§ 200:36, 200:49; Carmody-Wait 2d, Appeals in Criminal Cases §§ 207:117, 207:169, 207:170.

LaFave, et al., Criminal Procedure (3d ed) §§ 22.3, 24.4.

NY Jur 2d, Criminal Law: Procedure §§ 2023, 2453, 2457, 2549, 3637, 3640.

ANNOTATION REFERENCE

See ALR Index under Challenges to Jury; Credibility of Witnesses; Jury Trials; Witnesses.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: challenge /4 cause /p hearing /2 impair! & voir /2 dire

POINTS OF COUNSEL

Kindlon Shanks and Associates, Albany (*Terence L. Kindlon* and *Kathy Manley* of counsel), for appellant.
I. The convictions should be reversed based on ineffective assistance of counsel. (*People v Baker*, 14 NY3d 266; *People v Benevento*, 91 NY2d 708; *People v Baldi*, 54 NY2d 137; *People v Caban*, 5 NY3d 143; *People v Dean*, 50 AD3d 1052; *People v Green*, 37 AD3d 615; *People v Fogle*, 10 AD3d 618; *People v Laraby*, 305 AD2d 1121; *People v Fleegle*, 295 AD2d 760; *People v Miller*, 11 AD3d 729.) II. The convictions should be reversed because the trial court removed a possibly hearing impaired prospective juror for cause without *18 conducting the necessary inquiry. (*People v Guzman*, 76 NY2d 1; *People v Cruz*, 46 AD3d 313; *People v Busreth*, 35 AD3d 965; *People v Santiago*, 277 AD2d 258; *People v Caldwell*, 159 Misc 2d 190; *Tennessee v Lane*, 541 US 509; *People v Cahill*, 2 NY3d 14.) III. The convictions should be reversed because two nonexpert witnesses were allowed to testify as to their expert opinion of the complainant's credibility. (*People v Crowell*, 278 AD2d 832; *People v White*, 184 AD2d 798; *People v Smith*, 127 AD2d 864; *People v Bennett*, 79 NY2d 464; *People v Ciaccio*, 47 NY2d 431; *People v Kozlowski*, 11 NY3d 223; *People v Ballerstein*, 52 AD3d 1192; *People v Eberle*, 265 AD2d 881; *People v Graham*, 251 AD2d 426; *People v Seaman*, 239 AD2d 681.) IV. The convictions should be reversed because of pervasive prosecutorial misconduct. (*People v Riback*, 13 NY3d 416; *People v Ballerstein*, 52 AD3d 1192; *People v Gordon*, 50 AD3d 821; *People v Gorghan*, 13 AD3d 908; *People v Wlasiuk*, 32 AD3d 674; *People v Harte*, 29 AD3d 475; *People v Brown*, 26 AD3d 392; *People v Liverpool*, 35 AD3d 506; *People v Anderson*, 35 AD3d 871; *People v De Vito*, 21 AD3d 696.)
Andrew Wylie, District Attorney, Plattsburgh (*Nicholas J. Evanovich* and *Miriam C. Healy* of counsel), for respondent.
I. Defendant's complaints regarding the trial court's disposition of the People's for cause challenge to the prospective juror who is hard of hearing are not reviewable by the court. (*People v Guzman*, 76 NY2d 1; *People v Harrison*, 57 NY2d 470; *People v Gonzalez*, 55 NY2d 720; *People v Waters*, 90 NY2d 826; *People v Santos*, 86 NY2d 869; *People v Burke*, 72 NY2d 833; *People v Everson*, 100 NY2d 609.) II. Defense counsel opened the door to the otherwise impermissible opinion testimony. (*People v Lamphier*, 302 AD2d 864; *People v Conway*, 297 AD2d 398; *People v Melendez*, 55 NY2d 445; *People v Regina*, 19 NY2d 65; *People v Gonzalez*, 55 NY2d 720; *People v Waters*, 90 NY2d 826; *People v Santos*, 86

NY2d 869; *People v Burke*, 72 NY2d 833; *People v Everson*, 100 NY2d 609; *People v Baker*, 14 NY3d 266.) III. The prosecutor did not engage in misconduct; as such defendant was not denied his right to a fair trial. (*People v Hurley*, 75 NY2d 887; *People v Gill*, 54 AD3d 965; *People v Calabria*, 94 NY2d 519; *People v McCombs*, 18 AD3d 888; *People v Roberts*, 12 AD3d 835; *People v Russell*, 307 AD2d 385; *People v Layton*, 16 AD3d 978; *People v Tarantola*, 178 AD2d 768; *People v Colas*, 206 AD2d 183; *People v Halm*, 81 NY2d 819.) IV. Defendant was afforded meaningful representation by trial counsel. (*People v Benevento*, 91 NY2d 708; *People v Baker*, 14 NY3d 266; *People v Ellis*, 81 NY2d 854; *People v Rivera*, 71 NY2d 705; *People v Satterfield*, 66 NY2d 796; *People v Baldi*, 54 NY2d 137.)

***19 OPINION OF THE COURT**

Graffeo, J.

The primary issue in this appeal is whether Supreme Court abused its discretion ***2** when it dismissed a hearing-impaired prospective juror for cause. We hold that it did not based on the particular facts of this case.

I

Defendant Dean Guay discovered that he was the father of a child (whom we refer to as Jane) when the girl was four years old. He subsequently visited his daughter on alternate weekends and spent time with her in the summers. Defendant also vacationed with Jane and other members of his family at a summer camp in Clinton County.

At some point in August 2005, when Jane was seven years old, defendant picked her up from her mother's house for a scheduled week-long trip to the camp. While there, Jane woke up one night to find defendant crawling into the bed that she was occupying with other children. She went back to sleep but was awoken again when defendant removed her pants. He pulled Jane toward him, touched her chest and genital area, and then inserted his finger and penis into her vagina. Defendant stopped when his one-year-old son, who was also in the bed, woke up.

The next morning, defendant brought Jane and the other children to his mother's house for breakfast and afterwards defendant drove her home. During the trip, defendant did not speak to Jane but, upon arrival, defendant announced that he was not going to see her anymore. Defendant then terminated his relationship with his daughter. [1] Jane told her mother that defendant did not want to visit with her but did not disclose her father's sexual misconduct at that time because she did not comprehend that defendant's actions were wrong.

In May 2007, after attending an educational program at her school relating to sex-related issues, Jane realized that her father had engaged in inappropriate sexual contact with her. She then told a school counselor what had happened to her. The police were notified and Jane was interviewed by State Police Investigator Karen DuFour and Child Protective Services Caseworker Thom Schultz.

20** Defendant was incarcerated when the authorities learned of Jane's accusations. On the day he was released from jail, Investigator DuFour met with him. After *Miranda* warnings were issued to defendant, Schultz engaged defendant in a discussion about his daughter's disclosures. Although defendant initially denied having any improper physical contact with his daughter, he eventually confessed that he crawled into the bed and sexually assaulted Jane, but he did not admit to penetrating her with his penis. Defendant also revealed that he terminated his relationship with Jane after the incident because he was "too embarrassed" or "too ashamed" of what he had done, so "it was easier just not to see her."3**

Defendant was indicted for first-degree rape, first-degree sexual abuse and endangering the welfare of a child. During jury selection, after groups of venire members were placed in the jury box for individual questioning, the trial court read introductory instructions to these prospective jurors and inquired if anyone had difficulty hearing. When venire member 1405 responded affirmatively, the court repeated the information. The prosecutor later asked whether any of the prospective jurors knew a person who had confessed to a crime that he or she did not commit. Venire member 1405 answered that he did and went on to explain that his son was incarcerated for drug possession. The prosecutor asked, "[d]id he admit to possessing the drugs? Did he make a confession?" Venire member 1405 replied "I don't know, I didn't go to any of the trial. I stayed away." The prosecutor responded, did "[y]ou feel that he was innocent?" and the prospective juror said "No."

Defense counsel apparently realized that venire member 1405 was having trouble comprehending the questions and asked him if he had "any problems hearing as long as we speak up?" He replied "[o]nce in a while you talk awfully low." Defense counsel remarked, "I have to be reminded to speak up. But you could sit on a jury throughout the course of the week? You don't think you would have any hearing problems as long as I speak up?" The prospective juror responded "I'm pretty good right here in the front" row of the jury box.

At the conclusion of this round of voir dire, the People moved to dismiss venire member 1405 for cause. The prosecutor noted that the panelist "had trouble hearing the [c]ourt" and that child victims frequently "have trouble speaking up" when they testify, which raised a concern that venire member 1405 could "miss critical parts of [Jane's] testimony." Defense counsel ***21*** opposed the request, arguing that the prospective juror had indicated that he would not have a problem hearing during the trial. Although Supreme Court agreed with defense counsel's characterization of venire member 1405's statements, the judge further explained

> "I think he's inaccurate in his answer because he indicated he had difficulty hearing certain things and by his nonverbal reactions to various questions you could tell that he was having difficulty hearing the three of us. I do think that and I think that the People make a valid point that children tend to be more soft spoken witnesses, and adults, all things considered, I think his hearing is a big enough problem [ ]here that it does disqualify him from serving as a juror."

The court therefore granted the People's challenge for cause.

At trial, the People's witnesses included a nurse practitioner who provided medical testimony regarding Jane's gynecological examination. She established that Jane's hymenal ring evidenced a disruption and scar tissue, that it was "not very probable" that the ***4*** injury occurred naturally and that such a condition was consistent with "some blunt force of penetration" caused by a finger or a penis. Caseworker Schultz testified about defendant's confession. Defendant later claimed that he had lied to Schultz when he acknowledged sexually abusing Jane.

The jury convicted defendant on all counts. He was sentenced to an aggregate prison term of 20 years and 10 years of postrelease supervision. The Appellate Division modified by remitting for imposition of new periods of postrelease supervision but otherwise affirmed (72 AD3d 1201 [3d Dept 2010]). A Judge of this Court granted defendant leave to appeal (15 NY3d 750 [2010]) and we now affirm.

II

Defendant contends that the trial court erred because it allegedly failed to engage in an adequate inquiry regarding venire member 1405's ability to serve on the jury and, rather than dismissing him for cause, the court should have accommodated his hearing impairment. According to defendant, the trial court's action violated the Judiciary Law and *People v Guzman* (76 NY2d 1 [1990]). The People submit that the trial court properly questioned the prospective juror and that his dismissal was not an abuse of discretion.

22 New York has long considered jury service to be a civil right that is a privilege and duty of citizenship protected by the State Constitution (*see e.g. People v Hecker*, 15 NY3d 625, 649 [2010], *cert denied* 563 US —, 131 S Ct 2117 [2011]; *People v Kern*, 75 NY2d 638, 651 [1990], *cert denied* 498 US 824 [1990]). A person's ability to serve as a juror, however, must be balanced against the accused's fundamental constitutional rights and the State's obligation to provide a fair trial. Among other requirements specified in Judiciary Law § 510, "[i]n order to qualify as a juror a person must . . . [b]e able to understand and communicate in the English language" (Judiciary Law § 510 [4]).[2]

When confronted with such a situation involving a prospective juror's hearing impairment, a court must determine whether the individual has the ability to "understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberations, and comprehend the applicable legal principles, as instructed by the court" (*People v Guzman*, 76 NY2d at 5). If a judge is made aware of a reasonable accommodation that would allow a hearing-impaired prospective juror to fulfill these ***5*** duties without interfering with the defendant's trial rights, such measures should be taken (*see id.*). In furtherance of the need to accommodate such prospective jurors, we recognized in *Guzman* that a hearing impairment does not per se preclude an individual from serving as a juror (*see id.*).

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Guzman also acknowledged that trial courts have discretion to determine whether an auditory problem will unduly interfere with an individual's ability to fulfill the important functions that trial jurors perform. This determination, "[a]s with most juror qualification questions," must "be left largely to the discretion of the trial court, which can question and observe the prospective juror . . . during the voir dire" (*id.*).[3] Although the Appellate Division possesses the power to exercise its own discretion and substitute its judgment for that of the trial court, this Court lacks that authority. And when the Appellate ***23** Division adopts a trial court's factual findings and the application of those facts to the applicable legal principles, as occurred here, that determination presents a mixed question of law and fact that we cannot overturn unless there is no record support for the trial court's conclusion.

(1) In this case, we hold that Supreme Court did not abuse its discretion by granting the cause challenge to venire member 1405 because the record supported the determination that his hearing impairment would have unduly interfered with his ability to be a trial juror. It was readily apparent to the court and the parties that this panelist had trouble hearing the precise questions posed. After he asked the court to repeat its preliminary instructions, he incorrectly responded to an inquiry asking whether he knew a person who had falsely confessed to a crime. Despite his remark that he would not have difficulty if he remained in the front of the jury box, Supreme Court observed venire member 1405 during voir dire and apparently noticed that the prospective juror's body language demonstrated that he was not comprehending everything that was happening. In addition, the court expressed its concern that the hearing impairment was likely to be more problematic in this case because, in its experience, child witnesses tended to be more soft-spoken than adults. Defense counsel did not contest any of these conclusions.

It is also significant that, aside from the panelist's own suggestion that he remain in the front row, the court was not asked to offer any other reasonable accommodation that may have adequately assuaged the concerns about the prospective juror's ability to understand the proceedings and fulfill the functions of a trial juror. The record also does not reveal whether any type of audio equipment for the hearing impaired was available in the courthouse or whether ***6** venire member 1405 would have been willing to use such a device. Therefore, this case is not akin to *Guzman*, where the prospective juror confirmed that a sign language interpreter would allow him to follow the proceedings verbatim. In the absence of some suggestion for reasonably addressing the concerns about venire member 1405, we cannot fault the trial court for failing to order an accommodation sua sponte.[4]

***24** We must emphasize, however, that a better course would have been for Supreme Court to take steps on its own accord to inquire about the prospective juror's auditory limitations and discuss possible accommodation. It is imperative that the privilege and duty of jury service be made available to all eligible individuals—regardless of disability—who are capable of performing this civic function. For this reason, a judge should endeavor to make a reasonable and tactful inquiry of any prospective juror who appears to have a hearing impairment and consider offering to provide an assistive amplification device or some other appropriate accommodation available in our court system.

III

(2) Defendant's remaining contentions do not require reversal. He argues that he was deprived of a fair trial because Investigator DuFour and Caseworker Schultz opined that the victim was credible. Although this type of testimony was improper (*see e.g. People v Kozlowski*, 11 NY3d 223, 240 [2008], *cert denied* 556 US —, 129 S Ct 2775 [2009]; *People v Ciaccio*, 47 NY2d 431, 439 [1979]), the trial court sustained an objection before DuFour answered, no curative instruction was requested and the court subsequently directed the jury to disregard such impermissible testimony—an instruction that we assume was followed (*see People v Baker*, 14 NY3d 266, 274 [2010]). As for Schultz, defense counsel opened the door to the prosecutor asking certain questions about the caseworker's ability to gauge the victim's veracity, but arguably not so wide as to allow Schultz to state his ultimate conclusion regarding Jane's credibility. Nevertheless, the error was harmless because there is no significant probability that the jury would have acquitted defendant if Schultz had not provided the opinion testimony (*see e.g. People v Diaz*, 15 NY3d 40, 49 [2010]; *People v Crimmins*, 36 NY2d 230, 240-241 [1975]). For this reason, we also reject defendant's preserved challenges to remarks by the prosecutor that strayed beyond the bounds of permissible rhetoric and advocacy. Finally, on this record, defendant failed to establish that he was denied meaningful representation (*see generally People v Hobot*, 84 NY2d 1021, 1022 [1995]).

Accordingly, the order of the Appellate Division should be affirmed.***7**

*25 Chief Judge Lippman and Judges Ciparick, Read, Smith, Pigott and Jones concur.

Order affirmed.

FOOTNOTES

Footnotes

1 Defendant wrote a letter to Jane at some point and attempted to see her on one occasion but Jane's mother rebuffed his request to visit with the child.

2 In the past, a prospective juror could be dismissed for cause on the basis of "a mental or physical condition, or combination thereof, which causes the person to be incapable of performing in a reasonable manner the duties of a juror" (Judiciary Law § 510 [former (3)]). This provision was repealed in 1995 and replaced with current subdivision (4) (*see* L 1995, ch 86).

3 We ultimately held in *Guzman* that it was not an abuse of discretion to allow a hearing-impaired juror to serve with the assistance of an interpreter who communicated using "signed English," which transmitted the speaker's words literally without any translation (*see* 76 NY2d at 7).

4 To the extent defendant claims that the Americans with Disabilities Act (*see* 42 USC § 12101 *et seq.*) required the trial court to provide a reasonable accommodation to venire member 1405, that contention is not preserved for review.

WESTLAW

Declined to Follow by Thorson v. State, Miss., August 20, 1998

View National Reporter System version

People v Langston 167 Misc.2d 400, 641 N.Y.S.2d 513
Supreme Court, Queens County March 29, 1996 167 Misc.2d 400 641 N.Y.S.2d 513 *(Approx. 3 pages)*

The People of the State of New York, Plaintiff,

v.

Jamel Langston, Defendant.

Supreme Court, Queens County,
2206-95
March 29, 1996

CITE TITLE AS: People v Langston

HEADNOTES

Crimes
Jurors
Selection of Jury--Discriminatory Use of Peremptory Challenges--Challenge Based on Religion

(1) Inasmuch as NY Constitution, article I, § 11 specifically and explicitly bans discrimination with regard to a person's civil rights based on "creed or religion" by any person, institution or by the State, a religious-based peremptory challenge violates the equal protection rights of the challenged juror under the NY Constitution by depriving the potential juror of his civil right to serve as a juror. Accordingly, in a criminal prosecution, the People's religious-based peremptory challenge during jury selection to exclude an Islamic juror is disallowed in the absence of a sufficient neutral explanation for its exercise.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Jury, §§ 234, 246, 272.

Carmody-Wait 2d, Selection and Impanelment of Jury § 55:31; Criminal Procedure §§ 172:2273, 172:2277, 172:2281.

NY Const, art I, § 11.

NY Jur 2d, Criminal Law, §§ 2292-2299; Jury, § 98.

ANNOTATION REFERENCES

See ALR Index under Jury and Jury Trial; Peremptory Challenges.

APPEARANCES OF COUNSEL

Alan Kudisch, Kew Gardens, for defendant. *Richard A. Brown, District Attorney* of Queens County, Kew Gardens (*John W. Kosinski* of counsel), for plaintiff.

OPINION OF THE COURT

Richard L. Buchter, J.

The issue presented herein is whether the *Batson* doctrine extends to peremptory challenges based on religious affiliation under the Equal Protection Clauses of the Federal and/or New York Constitutions.**401*

The facts are as follows: Using the procedure enunciated in *People v Allen* (86 NY2d 101), the court found that the People had made a religious-based peremptory challenge during

SELECTED TOPICS

Criminal Law

Review
Prima Facie Showing of Any Pattern of Racial Discrimination Regarding State Peremptory Strike of Minority Prospective Jurors
Prosecutor Exercise of Peremptory Challenge of Prospective Juror Based on Race, Ethnicity or National Origin

Secondary Sources

s 191:71. Facially race-neutral explanation for striking prospective juror as sufficient

35 Carmody-Wait 2d § 191:71

...In the second step of a Batson challenge, the nonmovant's reasons given for each challenged peremptory strike of a prospective juror need be only facially permissible. The race-neutral explanation tend...

s 191:72. Judicial assessment of race-neutral explanation for use of peremptory challenges, generally

35 Carmody-Wait 2d § 191:72

...The third step of the process where one party initiates a Batson challenge arises when the challenger asserts that the proffered neutral explanations are a pretext masking discriminatory intent; this l...

s 44:37. Examination of individual jurors-Peremptory challenges-Discriminatory exercise of peremptory challenges-Race neutral explanation

3 Criminal Procedure in New York § 44:37 (2d)

...The prosecutions' credibility in explaining its justification for peremptory strikes of racial minorities can be measured by, among other factors, the prosecution's demeanor, by how reasonable or how i...

See More Secondary Sources

Briefs

BRIEF FOR RESPONDENT

1991 WL 538725
Hernandez (Dionisio) v. New York
Supreme Court of the United States
Jan. 07, 1991

...FN* Counsel of Record for Respondent The opinion of the New York Court of Appeals (Joint App. at 26-45) is reported at 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85 (1990). The opinion of the New Yor...

BRIEF FOR PETITIONER

1990 WL 515099
Hernandez (Dionisio) v. New York
Supreme Court of the United States
Nov. 28, 1990

...FN* Counsel of Record The opinion of the New York State Court of Appeals is reported at 75 N.Y.2d 350, 553 N.Y.S.2d 85, 552 N.E.2d 621 (1990) and found in the Joint Appendix at A26. The opinion of the...

Brief for Defendant-Appellant

2010 WL 4894904
THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. Jamel BLACK, Defendant-Appellant.

jury selection to exclude an Islamic juror. In order to determine whether or not such a peremptory challenge should be sustained, this court must now decide whether or not religious affiliation is a cognizable group under the Equal Protection Clauses of the Constitution of the United States and/or of New York State, for purposes of jury selection.

Initially, the court will briefly review the expansion of the *Batson* doctrine.

In *Swain v Alabama* (380 US 202 [1965]), the United States Supreme Court placed the first constraint on the use of peremptory challenges by prohibiting prosecutors from systematically excluding members of one race from the venire.

In *Batson v Kentucky* (476 US 79 [1986]) the Court overruled the *Swain* requirement that the defendant show systematic exclusion. The Court held that prosecutors may not strike a juror who is a member of defendant's race solely on account of identity of race.

The *Batson* Court crafted a test in order to determine whether a prima facie case of purposeful discrimination had been established. The defendant must first show that he is a member of a cognizable racial group and, second, that by using peremptory challenges, the prosecutor has removed a member or members of defendant's race from the venire. (476 US, at 96, *supra.)* If these criteria have been met, that is, if the court finds that the defendant has shown a prima facie case of purposeful discrimination, the court will then require the prosecutor to proffer a race-neutral explanation for the striking of that juror or else the peremptory challenge will be overruled.

In 1991 the Supreme Court modified the first prong of the *Batson* test in *Powers v Ohio* (499 US 400), ruling that the challenged juror need not belong to the same race as the defendant.

This signaled a shift in the Court's focus, in that the *Batson* Court was primarily concerned with the defendant's rights, while the *Powers* Court was concerned with the rights of a prospective juror. Thus, the Court imposed a further limitation on the use of the peremptory challenge.

Thereafter, in *Edmonson v Leesville Concrete Co.* (500 US 614 [1991]), the Court held that the Equal Protection Clause ***402** prohibits both parties in a civil suit from exercising peremptory challenges to exclude jurors based on race, again concerned with juror's rights.

In 1992, the Court applied the *Batson* rationale in *Georgia v McCullum* (505 US 42), holding that the ban on the use of racially discriminatory peremptory challenges applies to criminal defendants as well as to prosecutors. All parties in civil and criminal cases are therefore prohibited from exercising race-based peremptory challenges.

In 1994, the Court extended *Batson* to prohibit strikes based solely on gender in *J.E.B. v Alabama ex rel. T.B.* (511 US ___, 114 S Ct 1419). The Court in that case held that the Equal Protection Clause of the Fourteenth Amendment prohibited "discrimination [which] serves to ratify and perpetuate invidious, archaic and overboard stereotypes about the relative abilities of men and women." (511 US, at ___, 114 S Ct, at 1422, *supra.)* The Court further suggested that *Batson* applies to "heightened scrutiny classifications," which, traditionally, would include religious groups. To date, however, the Supreme Court has not specifically ruled on the issue of religious-based peremptory challenges, denying certiorari when the issue arose. *(See, e.g., Davis v Minnesota,* ___ US ___, 114 S Ct 2120 [in which the Minnesota Supreme Court permitted the strike of a Jehovah's Witness]; *United States v Greer,* 939 F2d 1076 [5th Cir], *reh granted* 948 F2d 934 [5 th Cir 1991], *cert denied* 507 US 962 [1993] [in which the Court interpreted *Batson* as limiting challenges based on race, religion and national origin].)

Thus the law with respect to religious-based peremptory strikes under the Equal Protection Clause of the United States Constitution has remained unsettled.

However, the Equal Protection Clause of the New York Constitution provides its own constraints upon the discriminatory use of peremptory challenges.

Article I, § 11 of the New York Constitution provides as follows: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of this state."

Clearly, the protections afforded to New York State venirepersons are broader than those set forth under the United States Constitution, in that the New York Constitution specifically

Court of Appeals of New York.
Mar. 24, 2010

...FN1. Numbers in parentheses preceded by "A." refer to pages of Appellant's Appendix. FN2. The third prospective juror, Tyrone Thomas, was challenged because of his demeanor in court and manner of dress...

See More Briefs

Trial Court Documents

People of the State of New York v. Mateo

1997 WL 34904654
THE PEOPLE OF THE STATE OF NEW YORK, v. Angel MATEO.
County Court of New York
Aug. 25, 1997

...Connell, J. The following constitutes the Opinion, Decision & Order of the Court. The headings and numbering in this Decision correspond as nearly as possible to those of the motion papers. To the exte...

*403 and explicitly bans discrimination with regard to a person's civil rights based on "creed or religion" by any person, institution or by the State. The harm of such jury discrimination is that it wrongfully excludes people by reason of their religion from participating in jury service, a fundamental institution of American government.

Based upon the above, the court finds that the People's religious-based peremptory challenge violates the equal protection rights of the challenged juror under the New York Constitution by depriving said potential juror of his civil right to serve as a juror. Any other determination would, in essence, be a court-sanctioned tolerance of religious discrimination and would be contrary to the clear language of the State Constitution.

Where, as here, a peremptory challenge has been used to purposefully exclude a juror because of his religion, absent a sufficient neutral explanation for its exercise, the resultant impairment of the integrity of the judicial system cannot be tolerated. The strike must be overruled. The court holds that New York constitutional considerations outweigh any burden, limitation or further restriction on the use of the peremptory challenge.

Based upon the foregoing, the People's peremptory challenge was disallowed and the juror was seated. *404

End of Document

WESTLAW

Called into Doubt by Carmichael v. Chappius, S.D.N.Y., April 21, 2016

View National Reporter System version

People v Brown
97 N.Y.2d 500, 769 N.E.2d 1266, 743 N.Y.S.2d 374, 2002 N.Y. Slip Op. 02255
Court of Appeals of New York March 19, 2002 97 N.Y.2d 500 769 N.E.2d 1266 743 N.Y.S.2d 374 2002 N.Y. Slip Op. 02255 *(Approx. 13 pages)*

The People of the State of New York, Respondent,

v.

Tarkisha Brown, Appellant.

Court of Appeals of New York
1, 14
Argued January 10, 2002;
Decided March 19, 2002

CITE TITLE AS: People v Brown

SUMMARY

Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered October 26, 2000, which affirmed a judgment of the Supreme Court (Robert H. Straus, J.), rendered in Bronx County upon a verdict convicting defendant of criminal sale of a controlled substance in or near school grounds.

People v Brown, 276 AD2d 429, affirmed.

HEADNOTES

Crimes
Witnesses
Expert Witness--Police Officer--Explanation of General Operating Methods and Terminology Used in Street-Level Narcotics Transactions

(1) In the prosecution of defendant for criminal sale of a controlled substance in or near school grounds, arising out of her alleged sale of crack cocaine to an undercover officer, the trial court did not abuse its discretion, under the facts and circumstances presented, in allowing the introduction of expert testimony by a police officer regarding the general operating methods and terminology used in street-level narcotics transactions. As the basis for defendant's primary defense of misidentification, she relied on the fact that no prerecorded buy money or drugs were recovered from her person when she was arrested. By presenting the expert testimony, the prosecution offered one plausible explanation as to why a person might not possess money or drugs shortly after selling narcotics to an undercover officer. Although the average juror may be familiar with the reality that drugs are sold on neighborhood streets, it cannot be said that the average juror is aware of the specialized terminology used in the course of narcotics street sales or the intricacies of how drugs and money are shuttled about in an effort to prevent their discovery and seizure by the police. Such expert testimony must be paired with appropriate limiting instructions, which should be reemphasized in the jury charge, that the jury is free to reject it, and that it should in no way be taken as proof that the defendant was engaged in the sale of narcotics.

Crimes
Jurors
Challenge to Jury--Prima Facie Showing of Invidious Racial Discrimination--Bare Numerical Argument

(2) In a narcotics prosecution, defendant's reliance on the People's removal of seven African-Americans through the exercise of eight peremptory challenges was inadequate,

SELECTED TOPICS

Criminal Law

Opinion Evidence
Admissibility of Proffered Expert Scientific Testimony

Jury
Competency of Jurors, Challenges, and Objections
Defendant Showing of Prima Facie Case of Prosecutor Discriminatory Use of Peremptory Challenge

Secondary Sources

s 702:6. Subjects of expert testimony

5 Handbook of Fed. Evid. § 702:6 (7th ed.)

...Overview. As described in § 702:5 supra, judicial reliability gatekeeping prior to 1993 under Frye was confined as a practical matter to forensic evidence offered by the prosecution in criminal cases c...

S 5.05. RULE 704 (ABOLISHES ULTIMATE ISSUE PROHIBITION).

12 E. Min. L. Found. § 5.05

...(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of...

s 44:34. Examination of individual jurors-Peremptory challenges-Discriminatory exercise of peremptory challenges

3 Criminal Procedure in New York § 44:34 (2d)

...There is a three-step process for determining whether a party has exercised its peremptory challenges for reasons that implicate equal protection concerns. First, the party objecting to the challenges ...

See More Secondary Sources

Briefs

BRIEF FOR RESPONDENT

1991 WL 538725
Hernandez (Dionisio) v. New York
Supreme Court of the United States
Jan. 07, 1991

...FN* Counsel of Record for Respondent The opinion of the New York Court of Appeals (Joint App. at 26-45) is reported at 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85 (1990). The opinion of the New Yor...

BRIEF OF MARGARET A. BERGER, EDWARD J. IMWINKELRIED, AND STEPHEN A. SALTZBURG AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

1998 WL 762013
Kumho Tire Co., Ltd, v. Patrick Carmichael; Margaret A. Berger
Supreme Court of the United States
Oct. 19, 1998

...FN*Counsel of Record Amici curiae are three law professors who specialize in the field of evidence law and have devoted particular attention during the past two decades to the topic of expert testimony...

Brief for Defendant-Appellant

without more, to require the trial court to find a prima facie showing of discrimination. Defendant was explicitly invited to articulate any facts and circumstances that would support a prima facie showing of discrimination. Instead of making a record comparing Caucasians accepted with similarly situated African-Americans challenged, or by ***501** establishing objective facts indicating that the prosecutor had challenged members of a particular racial group who might be expected to favor the prosecution because of their backgrounds, defense counsel responded that certain persons excused by prosecution peremptories had no prior jury service or had attended college and, thus, gave no indication that they could not be "fair." Accordingly, defendant's numerical argument was unsupported by factual assertions or comparisons that would serve as a basis for a prima facie case of impermissible discrimination.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Expert and Opinion Evidence §§ 56, 57, 60-64, 392; Jury §§ 244, 247, 251, 252.

Carmody-Wait 2d, Criminal Procedure §§ 172:2247, 172:2275-172:2277, 172:2474, 172:2484-2486.

NY Jur 2d, Criminal Law §§ 1986, 1991, 1994, 2292-2295.

ANNOTATION REFERENCES

See ALR Index under Expert and Opinion Evidence; Jury and Jury Trial; Peremptory Challenges.

POINTS OF COUNSEL

Legal Aid Society, New York City (*Andrew E. Abraham* and *Andrew C. Fine* of counsel), for appellant.
I. Appellant was deprived of a fair trial by the trial court's permitting the prosecutor to introduce expert evidence concerning the roles played by various participants in a drug organization and the methods used by them to dispose of drugs and buy money where the "drug operation" in this case consisted of one individual acting alone. (*People v Taylor,* 75 NY2d 277; *De Long v County of Erie,* 60 NY2d 296; *People v Cronin,* 60 NY2d 430; *People v Colon,* 238 AD2d 18, 92 NY2d 909; *Cassano v Hagstrom,* 5 NY2d 643; *People v Jones,* 73 NY2d 427; *Matott v Ward,* 48 NY2d 455; *Price v New York City Hous. Auth.,* 92 NY2d 553; *People v Raco,* 68 AD2d 258; *United States v Castillo,* 924 F2d 1227.) II. The trial court erroneously ruled that appellant had not established a prima facie case of purposeful discrimination under *Batson* after the prosecutor used seven of his first eight peremptory challenges to remove African-Americans from the jury and appellant's counsel supplemented this statistical showing by detailing favorable characteristics possessed by the excused jurors. (*Batson v Kentucky,* 476 US 79; *People v Bolling,* 79 NY2d 317; *People v Kern,* 75 NY2d 638, 498 US 824; *People v Chambers,* 80 NY2d 519; *People v **502 Jenkins,* 75 NY2d 550; *Hernandez v New York,* 500 US 352; *People v Childress,* 81 NY2d 263; *Texas Dept. of Community Affairs v Burdine,* 450 US 248; *United States v Alvarado,* 923 F2d 253; *People v Allen,* 86 NY2d 101.)
Robert T. Johnson, District Attorney, Bronx (*Rafael A. Curbelo, Joseph N. Ferdenzi* and *Allen H. Saperstein* of counsel), for respondent.
I. Defendant's guilt was proven beyond a reasonable doubt by overwhelming evidence. (*People v Malizia,* 62 NY2d 755, 469 US 932; *People v Contes,* 60 NY2d 620.) II. The trial court did not abuse its discretion in allowing limited expert testimony, accompanied by cautionary instructions, on the operation of street-level drug sales where such testimony was relevant, probative of contested issues, and did not unfairly prejudice defendant. (*People v Feerick,* 93 NY2d 433; *People v Hale,* 93 NY2d 454; *Herrera v Collins,* 506 US 390; *In re Winship,* 397 US 358; *People v Jelke,* 1 NY2d 321; *People v Iannelli,* 69 NY2d 684; *People v Lee,* 96 NY2d 157; *People v Miller,* 91 NY2d 372; *People v Cronin,* 60 NY2d 430; *People v Mooney,* 76 NY2d 827.) III. Defendant failed to establish a prima facie case of purposeful discrimination during jury selection. (*Batson v Kentucky,* 476 US 79; *People v Smith,* 81 NY2d 875; *People v Hernandez,* 75 NY2d 350, 500 US 352; *People v Payne,* 88 NY2d 172; *People v Allen,* 86 NY2d 101; *People v Jenkins,* 84 NY2d 1001; *People v Childress,* 81 NY2d 263; *People v Bolling,* 79 NY2d 317; *People v Steele,* 79 NY2d 317; *People v Robinson,* 88 NY2d 1001.)

OPINION OF THE COURT

Graffeo, J.

(1) In this appeal we are asked to determine whether the trial court abused its discretion in allowing the introduction of expert testimony by a police officer in a criminal trial regarding the general operating methods and terminology used in street-level narcotics transactions. Under the facts and circumstances presented, we hold that the trial court did not abuse its discretion.

An undercover narcotics police officer working in Bronx County approached a group of approximately five or six men congregating in front of a grocery store and, in an attempt to locate a crack cocaine seller, asked them who was "working the rock." Commenting on the officer's disheveled appearance, the group derided the officer as a "crack head" and told him to "get out of here." Another man then exited the grocery store and *503 called over the officer. The officer remarked that he was "really hurting" for drugs, and in reply, the man indicated that he "understood" and asked the officer what he was looking for. When the officer responded that he was "looking for a little rock," the man turned and pointed down the street at defendant, stating "see the girl in the orange shirt? She's working. She [*sic*] her?"

The officer walked toward defendant and asked if she was selling crack. Defendant began quizzing the officer about whether he had ever before bought drugs in the area. After the officer answered her questions, defendant acknowledged "okay, I got nicks, come on." She then led the officer back to the group of men by the store. Again, the men made disparaging remarks to the officer. Joining in their banter, defendant declared that he looked like a cop and that "no one here knows you." Nevertheless, she asked the officer how much money he had. When the officer told her that he had $20, defendant offered to sell him three bags, advising him she would keep the fourth for herself. The officer agreed, paid defendant $20 in prerecorded buy money and received three bags of what later tested positive as cocaine. As he walked away, the officer turned and observed that defendant remained with the group of men near the grocery store.

After completing the transaction, the officer radioed his back-up team that he made a "positive buy" and described defendant as an African-American female dressed in a bright orange shirt with a blue baseball cap. Another officer arrived at the scene minutes later and discovered defendant, who matched the description. About five minutes after the drug purchase, the undercover officer made a drive-by confirmatory identification of defendant as the seller. Defendant was placed under arrest and searched; however, no prerecorded buy money or drugs were recovered from her person. Because the site of the transaction was within 1,000 feet of two schools, defendant was charged in an indictment with, among other counts, criminal sale of a controlled substance in or near school grounds (Penal Law § 220.44 [2]).

In his opening remarks to the jury, defense counsel suggested that because no drugs or marked money were found on defendant, her arrest was a "mistake" by the police. In response to this misidentification defense, and after presenting *504 the testimony of the undercover and arresting officers, the prosecution sought to call an expert witness, a police sergeant who was not a participant in the drug transaction but had an extensive background in drug enforcement and training. The People intended to offer the sergeant's testimony to assist the jury in understanding a key issue--why an individual who was accused of selling drugs to an undercover officer might not have either the drugs or prerecorded buy money on his or her person even if arrested soon after the transaction. Defendant objected on the ground that an adequate foundation had not been established for the admission of such testimony. After an extensive colloquy during which the trial court discussed the purpose of the testimony, the voir dire of the sergeant proceeded and the court found the witness to be an expert "in the area of street level narcotics." Before allowing the sergeant to testify, the court gave the jury cautionary instructions concerning the limited purpose of the testimony, emphasizing that it was not being offered as evidence of what actually happened on the day of defendant's arrest.

Under direct examination by the prosecutor, the sergeant stated that he was not present when defendant made the sale and was arrested. In describing street-level narcotics transactions, he referred to the different roles and functions performed by persons commonly involved in street drug sales and how these individuals work together. A "pitcher" was described as the person who physically hands a buyer the drugs; a "money man" handles and protects the money; a "stash man" is responsible for safeguarding and handling the supply of drugs; a "lookout" watches for police and other threats; a "steerer" directs buyers to particular sellers based on what drug a potential buyer is seeking; and a "manager" oversees all these persons. The sergeant also defined certain terminology used by drug sale participants such as "are you working," "stash" and "nicks."

Explaining why buy money and additional drugs are not always recovered by the police in street-level narcotics arrests, the sergeant testified that the members of a narcotics street operation will try to "save the money by moving it, secreting it somewhere else, getting it off the street before [the police] get there ... so they do everything they can to keep the money from not staying too long in the street or the drugs from staying too long in the street where it can be seized." During cross-examination, the witness conceded that one of the reasons why a person arrested might not be in possession of drugs or prerecorded ***505** buy money at the time of arrest is that the individual may have been misidentified and wrongly arrested.

Ultimately, defendant was convicted of criminal sale of a controlled substance in or near school grounds and sentenced to a term of 2 to 6 years in prison. The Appellate Division affirmed the conviction. A Judge of this Court granted defendant leave to appeal and we now affirm.

In *People v Lee* (96 NY2d 157, 162 [2001]), we recently restated the long-standing general rule that "the admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court." The role of the trial court is to "determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness" (*People v Cronin*, 60 NY2d 430, 433 [1983]). In other words, the trial court must decide whether, depending on the facts of each case, the proffered expert testimony would be helpful in aiding a lay jury reach a verdict (*see Lee*, 96 NY2d at 162; *People v Taylor*, 75 NY2d 277, 288 [1990]). As part of this process, the purpose for which the expert testimony is being offered must be examined (*see Taylor*, 75 NY2d at 292).

Here, defendant's primary defense was misidentification. As the basis of that claim, defendant relied on the fact that no prerecorded buy money or drugs were recovered. By presenting testimony regarding the general characteristics and operating methods of street-level drug transactions, the prosecution offered one plausible explanation as to why a person might not possess money or drugs shortly after selling narcotics to an undercover officer; defendant offered another.

Although the average juror may be familiar with the reality that drugs are sold on neighborhood streets, it cannot be said that the average juror is aware of the specialized terminology used in the course of narcotics street sales or the intricacies of how drugs and money are shuttled about in an effort to prevent their discovery and seizure by the police (*cf. Lee*, 96 NY2d at 162; *Cronin*, 60 NY2d at 433; *Selkowitz v County of Nassau*, 45 NY2d 97, 102 [1978]). Testimony of this nature, from a source other than the undercover officer (a fact witness), may be helpful to the jury in understanding the evidence presented and in resolving material factual issues (*accord State v Berry*, 140 NJ 280, 302, 658 A2d 702, 713-714 [1995]; *United States v Diaz*, 878 F2d 608, 616-617 [2d Cir], *cert denied* 493 US 993 [1989]). ***506** Just as in *People v Taylor* (75 NY2d at 292-293), where we permitted the introduction of expert testimony regarding rape trauma syndrome in order to dispel juror misconceptions regarding the behavioral responses of rape victims, the expert testimony in this case was admitted to explain what might seem, to a lay observer, to be an anomalous fact--that someone who allegedly sold drugs to an undercover officer did not have money or drugs when arrested shortly thereafter.

When a trial court finds that expert testimony is appropriate, it is incumbent on the judge to determine the scope and extent of the testimony to be offered in light of the evidence before the jury. Here, despite a general objection to the People's offer of expert testimony, defendant did not object to the limiting instruction, nor did she seek to limit the scope of the sergeant's testimony in any way. As to the latter, the court nevertheless properly precluded the sergeant from opining that defendant sold drugs to the undercover officer or even that defendant's specific actions or behavior were consistent with participation in a street drug sale (*cf. United States v Boissoneault*, 926 F2d 230, 233 [2d Cir 1991]).

Based on our concern that expert testimony be admitted only for a permissible purpose, we hold that this type of testimony must be paired with appropriate limiting instructions. If and when the trial court allows such testimony, it should inform the jury that it is free to reject it and that the testimony being admitted should in no manner be taken as proof that the defendant was engaged in the sale of narcotics. These crucial instructions should be reemphasized in the concluding charge to the jury.

We caution that such expert testimony is not necessarily proper in every drug sale case where a defendant asserts a misidentification defense. Indeed it would be perverse if the

very absence of drugs or marked money on the accused served as an automatic basis to introduce expert testimony addressing the general characteristics of street drug transactions. But in this case we disagree with the dissent's conclusion that there was an inadequate factual basis to allow expert testimony on the nature of street-level narcotics transactions. Specifically, the undercover officer detailed the sequence of events and the interactions of the various individuals he encountered before, during and after the cocaine sale. He testified that after he asked the group of men standing by the grocery store who was "working the rock," a man exited the store, called him over and pointed defendant out as someone who was "working." The officer ***507** then approached defendant and inquired about the purchase of crack. Defendant acknowledged she had "nicks" and led the officer back to this group of men. Once at the street corner, she conversed with the group in evaluating the officer before finally selling him three packages of crack. She then remained with the men after the sale was -consummated. Given this evidence, the trial court did not abuse its discretion in permitting the expert's testimony.

We next turn to defendant's *Batson* contention (*see Batson v Kentucky*, 476 US 79 [1986]). It is well settled that, in order to establish a prima facie case of discrimination in the selection of jurors under *Batson*, a defendant asserting a claim must show that the exercise of peremptory challenges by the prosecution removes one or more members of a cognizable racial group from the venire and that facts and other relevant circumstances support a finding that the use of these peremptory challenges excludes potential jurors because of their race (*see People v Childress*, 81 NY2d 263, 266 [1993]). When these showings are made, the burden shifts to the prosecution to come forward with a race-neutral explanation for its peremptory challenges.

"There are no fixed rules for determining what evidence will ... establish a prima facie case of discrimination" (*People v Bolling*, 79 NY2d 317, 323-324 [1992]). A disproportionate number of strikes used against members of a particular racial or ethnic group may be indicative of a discriminatory pattern, but such a fact is rarely conclusive in the absence of other facts or circumstances. In *Bolling*, for example, the *Batson* objection was grounded in both a numerical argument--that the prosecution peremptorily struck four of five African-Americans in the panel--and on the basis that two of the four jurors excused by the People had proprosecution backgrounds. Taken together, this Court found these arguments sufficient to shift the burden to the People (*see id.* at 325). The absence of other evidence indicating that peremptory challenges were exercised for discriminatory purposes was a consideration in *People v Steele*, the companion case to *Bolling* (79 NY2d 317 [1992]). Although three of four prosecution challenges excused African-Americans in *Steele*, "that alone [was] not sufficient to establish a pattern of exclusion of African-Americans" (*id.* at 325). Similarly, in *Jenkins* and *Childress*, where no showing was made beyond the disproportionate number of strikes of African-Americans, defendants' claims fell short of the requisite burden (*People v Jenkins*, 84 NY2d 1001, 1003 [1994]; *Childress*, 81 NY2d at 267).***508**

(2) We join our dissenting colleague fully in his condemnation of invidious discrimination in jury selection. In this case, however, defendant's reliance on the People's removal of seven African-Americans through the exercise of eight peremptory challenges was inadequate, without more, to require the trial court to find a prima facie showing of discrimination. After defendant raised her *Batson* challenge during the second round of voir dire, the Judge stated that, by his count, nine potential jurors in the first panel and six in the second panel appeared to be African-American and as such the People had challenged 7 of the 15 African-Americans in the venire. Further, four of the seven sworn jurors were African-American.

Defendant was explicitly invited by the trial court to articulate any facts and circumstances that would support a prima facie showing of discrimination. Instead of making "a record comparing Caucasians accepted with similarly situated African-Americans challenged, or by establishing objective facts indicating that the prosecutor has challenged members of a particular racial group who might be expected to favor the prosecution because of their backgrounds" (*Bolling*, 79 NY2d at 324), defense counsel responded that certain persons excused by prosecution peremptories had no prior jury service or had attended college and, thus, gave no indication that they could not be "fair." Based on the numbers and arguments presented, the trial court ruled that it did not find a discriminatory pattern. No further *Batson* objection was raised during the remainder of voir dire proceedings. Upon this record, we conclude that defendant's numerical argument was unsupported by factual assertions or comparisons that would serve as a basis for a prima facie case of impermissible discrimination (*see Jenkins*, 84 NY2d at 1003; *Steele*, 79 NY2d at 325).

Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge Kaye

(Concurring). Let there be no doubt: This Court stands as one in its recognition of the prized right of Americans to serve on juries, in its denunciation of invidious discrimination in jury selection and in its commitment to apply the law to assure that objective.

The law, moreover, is clear--well known to Trial Judges and in particular, as the record establishes in this case, well known to the Trial Judge here. To establish a prima facie case of a *Batson* violation, a defendant must show that the exercise of *509 peremptory challenges by the prosecution removes one or more members of a cognizable racial (in this case) group from the venire, and that other facts and circumstances support a finding that the use of peremptory challenges excludes potential jurors because of their race.

I agree with Judge Graffeo and my Colleagues in the majority that defendant has not satisfied the test. When defendant first raised a *Batson* challenge, the trial court explicitly invited defense counsel to make the necessary record supporting a finding that the prosecutor was using peremptory challenges to exclude potential jurors because of their race. The Trial Judge pointedly asked defense counsel for "facts and other relevant circumstances to create an inference of exclusion of a cognizable group." That would have shifted the burden to the People to provide race-neutral reasons for its strikes. Defense counsel, however, did not make that showing, arguing instead that challenged jurors had attended college, or had (or lacked) prior jury service. Attendance at college, or prior jury service, does not satisfy the test for a prima facie showing of purposeful discrimination. Many college graduates and former jurors are appropriately challenged. As the Trial Judge made clear, counsel simply had to indicate that *accepted* jurors had qualities similar to *challenged* jurors, thereby indicating that race may have had a role, but did not do so.

Experience is indeed a great teacher. My own years on this extraordinary Court, dealing with countless *Batson* challenges, have brought me far closer to the perception of Justice Thurgood Marshall, that 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" (*Batson v Kentucky*, 476 US 79, 107 [Marshall, J., concurring]). The intense focus on factors such as skin color, accent and surname in jury selection is wholly at odds with our societal goal of dealing with people as individuals, on their personal qualities.

In this State, moreover, we have both an exceedingly, perhaps uniquely, high number of peremptory challenges, and a requirement that all peremptories be exhausted in order to preserve a claim of error. The opportunity for mischief-- let alone the huge, expensive waste of juror time--therefore abounds. My nearly 16-year experience with *Batson* persuades me that, if peremptories are not entirely eliminated (as many have urged), they should be very significantly reduced.

Smith, J.

(Dissenting). Because I believe that the admission of expert testimony was unwarranted, prejudicial and unfair to *510 the defendant and because I believe further that the defendant established a prima facie case of racial discrimination which required the prosecutor to explain his peremptory challenges, I dissent.

Defendant was found guilty, after a jury trial, of the criminal sale of a controlled substance in or near school grounds in violation of Penal Law § 220.44 (2). The prosecution introduced evidence that the defendant, when approached by an undercover police officer, asked the officer what he wanted, and he answered four bags. The defendant allegedly reached into the waistband of her sweat pants, took out four bags and told him that she was keeping one for herself. The officer gave her $20 for the bags. Prior to the officer obtaining the crack cocaine, he had been ridiculed when he approached several men on a corner and asked them where he could obtain drugs. The officer was in a torn and dirty outfit and some of the men stated that he was a crackhead or a cop. A male allegedly pointed out the defendant and told the undercover officer that he could obtain drugs from her.

The defense in the case was mistaken identification. The defendant testified that she never sold crack cocaine. She stated that she had been with several girlfriends and that she went into a store to get change to use a public telephone. When she returned to the public telephone, she was arrested. No drugs or marked money were found on her. She had no prior criminal record.

Expert Testimony

Expert testimony is properly admitted to assist lay persons to understand matters that are not ordinarily within their understanding. Here, whatever the articulated reason for the introduction of the evidence, it was prejudicial and tipped the scale against the defendant. It should be remembered that defendant was not accused of a drug conspiracy or of being part of a drug organization. Yet, the effect of the admission of this evidence was to do just that--tie the defendant, without evidence, to a drug organization. No other person allegedly associated with defendant in the drug transaction was arrested.

In the expert testimony, a police officer described an organization selling drugs. He stated that the "pitcher" is a person who actually hands out the drugs, the "money man" keeps and protects the money, the "stash man" protects the narcotics, the *511 "lookout" watches for police or anyone else who might cause a problem, the "steerer" points out the person who has the drugs and the "manager" manages everybody. The effect of the testimony was to accuse defendant of being a participant in the organization.

There was no necessity for this expert testimony. In effect, all the expert testimony did was to suggest to the jury, again without proof, how defendant got rid of the marked money, the retained packet of cocaine she refused to give to the officer and any other drugs in her sweat suit. In admitting the expert testimony, the Trial Judge stated that he would give "a limiting instruction to the jury as to the purpose of the testimony and that the testimony is not being offered by anyone who was present who can say that this is what happened but it's being offered to propose as a contention of the People an explanation as to why there's no buy money recovered or stash." This, in my view, reduced the People's burden in the case. If the People contend that defendant was acting with someone else, they ought to prove it, not speculate upon it.

During summation, the prosecutor implied that the defendant was part of a drug organization. His words were as follows:

"But you now know, ladies and gentlemen, after hearing the testimony of both Detective Farro and the additional testimony of Sergeant Gary McDonald [the expert] ..., there was about a four minute period that went by where nobody saw what the defendant was doing, that nobody saw where she went, that nobody saw who she was talking to, nobody saw whether she went into the grocery store.

"You heard from Sergeant McDonald, he explained to you the nature of these types of operations, the nature of the street level drug trade.

"He explained to you what can happen to the prerecorded buy money, to additional drugs.

"Is that evidence in this case? For the substance of this case, of course not.

"Does it raise plausible reasons as to what may have happened to the prerecorded buy money? Of course it does, of course."*512

In its charge to the jury, the court stated that the expert's testimony was based on facts the expert was asked to assume. The court further charged the jury that Sergeant McDonald "was allowed to express his opinion concerning how street level drug sales are conducted." The court also charged the following:

"He wasn't testifying based on actual observation. [He] wasn't testifying as to what he actually observed or what actually occurred but he was testifying in an area that would otherwise be not known to the jury.

"It does concern a fact in issue and he was offering an explanation with regard to buy money and additional narcotics and this was the limited purpose for his testimony."

Thus, in this case, the introduction of expert testimony was prejudicial, first, because it nullified the presumption of innocence by replacing it with a presumption of guilt in which the jury was given information on how defendant got rid of marked money and drugs. Moreover, the introduction of the expert testimony shifted the burden of proof from the prosecution to the defendant, requiring her to explain why the expert's statements did not apply to her and leaving the jury to conclude that she had no explanation.

Expert testimony, similar to that admitted here, is admissible in some drug cases to explain to the jury some aspect of the case. For example, the standard in New Jersey for allowing such evidence is rule 702 of the New Jersey Rules of Evidence, which, in pertinent part, is identical to rule 702 of the Federal Rules of Evidence, and reads as follows: "If scientific,

technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." First, the New Jersey rule requires that the testimony concern a matter which is beyond the ken of the average juror, the subject must be such that the expert's testimony may be considered reliable and the witness must have sufficient expertise to testify concerning the subject (*State v Berry,* 140 NJ 280, 289-290, 658 A2d 702, 706 [1995]).

Second, the facts of the case must lend themselves to expert testimony. Thus, in *State v Cannon,* decided with *State v Berry,* the evidence was that defendant Cannon gave drugs to a person ***513** in return for money. Cannon then handed the money to another person. When Cannon was arrested, he had neither drugs nor money. The New Jersey Supreme Court permitted expert testimony, including testimony about the purpose of a "money man."

Cases in the District of Columbia have permitted expert testimony under similar factual circumstances. In *Thompson v United States* (745 A2d 308 [DC Ct App 2000]), Thompson was observed handing something which turned out to be drugs to his codefendant who was also observed dropping the object to the floor of the vehicle they were sitting in. In *Spencer v United States* (688 A2d 412 [DC Ct App 1997]), the two defendants were conversing with each other when they were approached by the undercover police officer, and they each responded to the officer's request for drugs, "a fact which strongly suggests that the two were acting in concert" (*id.* at 415). In *Blakeney v United States* (653 A2d 365 [DC Ct App 1995]), one defendant acted consistently with being a lookout and the other defendant actually gave the drugs to the undercover officer. In *Lowman v United States* (632 A2d 88 [DC Ct App 1993]), one defendant took the undercover police officer to the other defendant, who, when asked, responded that he had drugs and directed them to wait while he proceeded to get the drugs.

In *United States v Brown* (776 F2d 397, 400 [2d Cir 1985], *cert denied* 475 US 1141 [1986]), the Second Circuit allowed a police expert to testify that drug sales in Harlem usually involved two to five people and that one person is employed as a steerer to determine whether the buyer is an addict or cop. In this transaction, however, there was actual conversation between the initial seller and the steerer, evidencing the conspiracy and providing a foundation for admitting expert testimony. The police expert also was allowed to testify that defendant was exercising the role of a steerer.

Thus, expert testimony of this kind should be limited to cases where there is sufficient incriminating evidence of more than one person being involved in a drug transaction or sufficient incriminating evidence of a drug organization. Here, the evidence is insufficient. Defendant had no conversation or interaction with the man exiting the store. That she joined the group of men in bantering with the undercover officer is not enough.

In addition, the expert was allowed to testify to matters that were not beyond the understanding of the average juror. It is true that average jurors may be unfamiliar with the specialized ***514** terminology used in narcotics street sales, such as "nicks" or "working the rock." Such testimony is indeed helpful to the jury. But as the majority concedes, drug dealing in neighborhood streets is an altogether familiar scene to average jurors, particularly the average urban juror. It is a scene that is part of the "day-to-day experience." It is not beyond the average juror's understanding that drug dealers would "do everything they can to keep the money [or drugs] from ... staying too long in the street where [they] can be seized" by the police. That drug dealers on neighborhood corners would minimize the risk of getting caught with drugs or prerecorded buy money by assigning a "money man," a "stash man," or "steerer," is within the understanding of the average juror. This is not the kind of intricate drug operation requiring the explanation of an expert police officer. In the absence of an allegation that defendant was part of a conspiracy, this kind of expert testimony should not come in.

This case is distinguishable from *People v Taylor* (75 NY2d 277 [1990]), where we allowed expert testimony to explain why a rape victim would be unwilling to identify the defendant as the man who raped her, and why she had not seemed upset following the attack. Rape, we found, "is a crime that is permeated by misconceptions" (*id.* at 288). The patterns of response among rape victims are not within the ordinary understanding of the lay juror, because "cultural myths still affect common understanding of rape and rape victims" (*id.* at 289). In this case, there is no claim that the lay jurors' understanding of the drug operation, of which defendant was allegedly a part, is permeated by misconceptions.

Racial Discrimination

It is also clear that the defendant made out a prima facie case of racial discrimination which required the prosecutor to give racially neutral reasons for peremptorily excluding the jurors. The exclusion of African Americans from juries has long been a problem in American courts. Few problems have been as great a threat to the fairness of the American jury system as the exclusion of African Americans on a racially discriminatory basis (*Strauder v West Virginia*, 100 US 303 [1879]). In recent years, both the Supreme Court of the United States and this Court have sought to protect the right of African Americans to serve on juries (*Batson v Kentucky*, 476 US 79 [1986], *overruling Swain v Alabama*, 380 US 202 [1965]; *People v Kern*, 75 NY2d 638 [1990]). In fact, *Kern* held both that the exclusion of ***515** African Americans from juries violated the Equal Protection Clause of the New York State Constitution (art I, § 11) and that jury service is a civil right (art I, § 1; *see also People v Allen*, 86 NY2d 101, 108 [1995]). This Court stated in *Kern:*

"Jury service, by contrast, is a civil right established by Constitution and statute. First, jury service is a 'privilege[ ] of citizenship' secured to the citizens of this State by article I, § 1 of the State Constitution. Service on the jury has long been recognized to be both a privilege and duty of citizenship .... Indeed, it is because jury service is a means of participation in government that, in the words of Mr. Justice Black, '[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concept of a democratic society and a representative government' (*Smith v Texas*, 311 US 128, 130)" (75 NY2d at 651-652 [citations omitted]).

The evidence was sufficient to require some explanation from the prosecutor. In the first round of jury selection, 15 jurors were subject to peremptory challenges. The record indicates that 9 of the 15 were African American. Of this number, eight were challenged, six by the prosecutor and two by the defense. Of the six, five were African Americans. Seven were seated as jurors. The prosecutor thus used 83% of his challenges against African Americans who constituted 60% of the initial jury venire. These numbers alone are sufficient to raise a prima facie case of jury discrimination requiring some explanation from the prosecutor.

In the second round, 6 of the 15 jurors were African American. After questioning of the second round of jurors was completed, the prosecutor peremptorily struck two African American jurors of the five jurors being considered. At that point, the prosecutor had made eight challenges, seven of which (87%) were against African Americans. The defense attorney then challenged the prosecutor's striking of African Americans from the jury. While recognizing that a challenge could be made to the striking of even a single juror, the trial court ***516** refused to require an explanation of the prosecutor's use of eight challenges to strike seven African Americans. The record indicates that four of seven seated jurors were African American when the challenges were made.

While the numbers alone established a prima facie case, the defense attorney presented additional reasons why the striking of African Americans could not be upheld. For example, as to the first prospective juror, the defense counsel stated that the juror had no prior jury experience, had no prior relations with the police, had two years of college and gave no answers that would call into question her qualifications to serve on the jury. Prospective juror number four had a Bachelor of Arts degree in psychology and gave no indication that he could not be fair. Another challenged prospective juror was a single woman with two years of college who helped her mother and brother at home and had no prior jury experience. A fourth prospective juror had worked at the Offtrack Betting Corporation for 30 years, had served on many juries and was not asked a single question by the prosecutor.

Both *Batson* and *Kern* require that a defense attorney or prosecutor seeking to challenge the peremptory jury strikes by the other must first establish a prima facie case of jury discrimination "by showing that the prosecution [or defense attorney] exercised its peremptory challenges to remove one or more members of a cognizable racial group from the venire and that there exist facts and other relevant circumstances sufficient to raise an inference that the prosecution used its peremptory challenges to exclude potential jurors because of their race" (*People v Childress*, 81 NY2d 263, 266 [1993]). The prosecution must then answer the challenge by giving race neutral reasons for the peremptory strikes. The court may then determine if those reasons are pretextual (*People v Allen*, 86 NY2d at 109-110).

A prima facie case may be established by statistical evidence alone, by a pattern of strikes, by questions and statements made by the prosecution during voir dire, by comparing

rejected African Americans to similarly situated Caucasians and by identifying excluded African Americans who, because of their background or experience, could be expected to favor the prosecution (*see Batson v Kentucky*, 476 US at 97; *People v Hawthorne*, 80 NY2d 873 [1992]; *People v Bolling*, 79 NY2d at 323-325). In *Batson*, the Court stated that in making a determination of whether or not a prima facie case had been made out, it should be remembered that those of a mind to discriminate will do so (476 US at 96).***517**

It is unquestionable that statistics alone may be a sufficient reason for requiring some explanation from a prosecutor. In *People v Hawthorne* (80 NY2d at 874), this Court modified an Appellate Division order by remitting the matter to the trial court. This Court agreed that defendant had made a prima facie showing of race discrimination in pointing to the fact that the prosecutor challenged four of six African American venire persons. This Court remitted because the prosecutor was not asked to provide a racially neutral reason for one of the challenged jurors in question. This Court concluded that if a satisfactory explanation were provided by the People, the judgment of conviction should be amended to show the result. Otherwise, the judgment of conviction should be vacated and a new trial ordered.

In *People v Bolling* (79 NY2d at 322), 16 persons were originally put into the jury box. Five of the first 12 jurors were African American. The prosecutor peremptorily challenged five jurors, four African Americans and one Asian. The defense attorney then struck the other African American and three non-African American jurors. At this point, the defense attorney objected to the prosecutor's challenges as racially motivated. The court did not rule on the challenges. The four remaining jurors of the original venire were seated; two of the four were African American. This Court remanded the case to Supreme Court for the People to provide race neutral reasons for their challenges, failing which, the conviction was to be vacated and a new trial ordered.

In *People v Jenkins* (75 NY2d 550, 556 [1990]), this Court agreed with the Appellate Division that a prima facie case of juror discrimination had been shown when the prosecutor used 10 peremptory challenges, 7 of which were used to strike 7 of the 10 African Americans on the venire, while only 3 challenges were used against the 37 non-African Americans.

The ruling by the Trial Judge that he did not believe a pattern had been shown that would require a prosecutor to respond with race neutral reasons was also in error. It is inconsequential that four African Americans had been chosen ***518** to sit on the jury at the time the *Batson* challenge was made, and it makes no difference to the ruling challenged here that African Americans sat on the jury (*People v Bolling*, 79 NY2d at 321-322). The exclusion of a single juror based on race is impermissible (*id.*).

The differences between the majority and the dissent are clear. First, the majority contends that a prima facie case was not established. When the defense attorney made his challenge to the actions of the prosecutor, the record more than adequately established a prima facie case. It showed the number of African Americans among the first 30 prospective jurors and the prosecutor's action in striking African Americans. In *People v Bolling*, this Court stated that a challenge on a racial basis did not have to wait until the end of jury selection but could, and should, be raised at any point during the process.

In *People v Kern*, the case in which this Court applied *Batson* to peremptory challenges by the defense, this Court upheld the action of the trial court in requiring race neutral reasons for peremptory strikes by the defendant in the midst of jury selection and without a requirement that the race of all prospective jurors be ascertained (75 NY2d 638 [1990], *affg* 149 AD2d 187, 222-237 [1989]). In fact, the prosecution argued, after the first round of jury selection, that the defense was striking prospective jurors on the basis of race. While that initial challenge was rejected by the trial court, the *Batson* challenge was upheld before the second round of jury selection was completed.

In *People v Bennett* (186 AD2d 812, 812 [1992]), the Appellate Division concluded that the "defendant has established a prima facie case of purposeful discrimination in the jury selection by the prosecutor, who exercised her peremptory challenges in the first three rounds of the voir dire to exclude 7 out of 11 [African Americans] from the jury, or nearly 64% of the prospective [African American] jurors. The prosecutor challenged only 36% of the non [African Americans] during those rounds ...." The Court remanded the case for the prosecutor to give race neutral reasons for the challenges. On appeal after the remand, the Appellate Division reversed the conviction and ordered a new trial based on a determination that some of the prosecutor's reasons for peremptory strikes were "pretextual, and insufficient" (*People v Bennett*, 206 AD2d 382, 384 [1992]).

In *People v Vega* (198 AD2d 56, 56 [1993], *lv denied* 82 NY2d 932), the People "established a prima facie case of purposeful ***519** racial discrimination in the use of peremptory challenges when they established that the defense used 7 of its 8 challenges to exclude all but one of the white persons on the panel of 16." In *People v Harris* (283 AD2d 520, 520 [2001]), the People "established a prima facie case of discrimination" when the "defense counsel peremptorily challenged four of the five remaining white venirepersons in the second round of jury selection."

Moreover, a defendant is not obligated to include the race of all jurors in the entire panel from which jurors are to be selected before an adequate assessment of discriminatory practices can be made, even when a defendant is relying heavily or primarily upon the exclusion of a disproportionate number of persons of a particular ethnic group. Nor has this Court stated that there must be a comparison of the characteristics of African American jurors and Caucasians before an adequate assessment of a prima facie case can be made.

Second, the majority states that more than statistical evidence was needed here to make out a prima facie case. In several cases, this Court has stated that a disproportionate number of challenges against African Americans may be sufficient to raise an inference of jury discrimination (*People v Childress*, 81 NY2d at 267; *People v Hawthorne*, 80 NY2d at 874; *People v Bolling*, 79 NY2d at 324; *People v Jenkins*, 75 NY2d at 558). The striking of a disproportionate number of African Americans may also establish, prima facie, a pattern of strikes (*Batson v Kentucky*, 476 US at 97; *People v Jenkins*, 75 NY2d at 556). Moreover, the defense attorney went into the qualifications of at least some of the excluded prospective jurors. Those qualifications included the fact that none of the prospective jurors gave answers that would disqualify them from jury service. All appeared to be citizens with both work and educational experiences. Their qualifications indicated that they were not unsuited for jury service (*see People v Jenkins*, 75 NY2d at 556).

Third, as we enunciated in *Kern*, jury service is a civil right that only a court can protect at the trial stage. Of course, a defendant may still raise the issue of jury service as a civil right on appeal. Considering that we are dealing with the right of African Americans, as well as people of all races, to serve on juries, a constitutional civil right, establishing a prima facie showing of discrimination should not require more than what defendant established in this case. To require more is unwarranted, particularly when viewed in proportion to the minimal ***520** showing (any racially neutral reason) required by the prosecutor to rebut the presumption of discrimination (*see People v Allen*, 86 NY2d at 109). As this Court stated in *People v Jenkins*:

"Surely, jurors dismissed because of their race will leave the courtroom with a lasting impression of exclusion from jury participation and perhaps of isolation from mainstream society generally .... No argument based on percentages of the population would remove from these excluded prospective jurors the sense of exclusion resulting from being assumed to be incompetent to sit on a jury solely because of their race" (75 NY2d at 558).

Since jury service is a civil right, courts have an obligation to see that persons are not excluded from juries on a racial basis.

Accordingly, both because the expert testimony rendered the trial unfair and because the prosecutor should have been required to give race neutral reasons for his exclusion of African Americans from the jury, I dissent.

Chief Judge Kaye and Judges Levine, Ciparick, Wesley and Rosenblatt concur with Judge Graffeo; Chief Judge Kaye concurs in a separate concurring opinion in which Judges Wesley and Rosenblatt concur; Judge Smith dissents and votes to reverse in another opinion.
Order affirmed.

APPENDIX

A small sample of the many cases indicating that statistics alone are sufficient to establish a prima facie case will show that a prima facie case was established here. They include the following:

Linscomb v State (829 SW2d 164 [Tex Crim App 1992]):

Out of a pool of 32 venire members, 6 of whom were African Americans, prosecutor used 4 of 10 peremptory challenges to strike African Americans. The two other African Americans were seated.

Snow v State (800 So 2d 472 [Miss 2001]):

Prosecutor used eight of eight peremptory challenges against African Americans. The prosecution was required to give race neutral reasons for the strikes. The seated jury was less than 17% African American out of a venire that was at least 46% African American. Defendant was African American and the victims were White. The conviction was affirmed.*521

Hall v Daee (602 So 2d 512 [Fla 1992]):

The striking of four out of five African American venire members, with nothing in the record adequately explaining the challenges, established a prima facie case. Six of the 35 venire members were African American, and one served on the jury.

Capitol Hill Hosp. v Baucom (697 A2d 760 [DC Ct App 1997]):

Defendant used peremptory challenges to remove three prospective White jurors, ensuring that the resulting jury was all African American.

Turner v Marshall (63 F3d 807 [9th Cir 1995], *cert denied* 522 US 1153 [1998], *overruled on other grounds by Tolbert v Page*, 182 F3d 677 [9th Cir 1999]):

Prosecutor exercised 56% (five out of nine) of his or her challenges against African Americans, who comprised about 30% of the venire.

United States v Alvarado (923 F2d 253 [2d Cir 1991]):

Prosecutor struck 50% of the non-White jurors (three of six), who constituted 29% of the venire. Approximately four of seven challenges were used against minorities.

State v Watkins (114 NJ 259, 553 A2d 1344 [1989]):

Prosecutor exercised peremptory challenge against every African American juror except one who was challenged for cause. In Burlington County, African Americans made up 10% of the population. The prosecutor used 9 of 12 peremptory challenges and struck all three African Americans.

United States v Horsley (864 F2d 1543 [11th Cir 1989]):

Prima facie case of purposeful discrimination could be established where prosecution used peremptory challenge to strike the single African American venire person on the panel.*522

Footnotes

* Trial testimony revealed that a "nick," or "nickel bag," is a quantity of drugs sold for $5.

* Specifically, this Court stated: "Defendant--pointing to the fact that the prosecutor peremptorily challenged four of the six African-American members of the venire--contends that he has made a prima facie showing that the prosecution exercised its peremptory challenges in a racially discriminatory manner, and that the burden therefore shifted to the prosecution to come forward with racially neutral reasons for the strikes (*see, Batson v Kentucky*, 476 US 79, 96; *People v Bolling*, 79 NY2d 317). We agree." (*Id.*)

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99 N.Y.2d 264, 784 N.E.2d 1152, 755 N.Y.S.2d 43, 2002 N.Y. Slip Op. 09339

People v James
Court of Appeals of New York December 17, 2002 99 N.Y.2d 264 784 N.E.2d 1152 755 N.Y.S.2d 43 2002 N.Y. Slip Op. 09339 *(Approx. 7 pages)*

The People of the State of New York, Respondent,

Terick James, Also Known as Issac Delay, Appellant.

The People of the State of New York, Respondent,

v.

Anthony Jones, Also Known as Ray Anthony Brown, Appellant.

Court of Appeals of New York
159, 160
Argued November 13, 2002;
Decided December 17, 2002

CITE TITLE AS: People v James

SUMMARY

Appeal, in the first above-entitled action, by permission of a Justice of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered April 12, 2001, which affirmed a judgment of the Supreme Court (Joan C. Sudolnik, J.), rendered in New York County upon a verdict convicting defendant of attempted criminal possession of a weapon in the second degree.

Appeal, in the second above-entitled action, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered May 17, 2001, which affirmed a judgment of the Supreme Court (Dorothy A. Cropper, J.), rendered in New York County upon a verdict convicting defendant of robbery in the first degree, robbery in the second degree, and attempted robbery in the third degree.

People v James, 282 AD2d 264, affirmed.

People v Jones, 284 AD2d 46, affirmed.

HEADNOTES

Crimes
Jurors
Selection of Jury--Preservation of Claim of Race-Based Discrimination

(1) When a moving party in a criminal prosecution raises an issue of a pattern of race-based discrimination in excluding jurors, and the court accepts the race-neutral reasons given, the moving party must make a specific objection to the exclusion of any juror still claimed to have been the object of discrimination. It is incumbent upon the moving party to be clear about any person still claimed to be improperly challenged. Accordingly, although defense counsel named four women in alleging a pattern and a prima facie case, by limiting his argument to the prosecutor's peremptory challenge of one other woman, he failed to preserve his argument concerning the other four.

Crimes
Jurors
Selection of Jury--Preservation of Claim of Race-Based Discrimination

(2) When a moving party in a criminal prosecution raises an issue of a pattern of race-based discrimination in excluding jurors, and the court accepts *265 the race-neutral reasons given, the moving party must make a specific objection to the exclusion of any juror still claimed to

SELECTED TOPICS

Jury

Competency of Jurors, Challenges, and Objections
Defendant Showing of Prima Facie Case of Prosecutor Discriminatory Use of Peremptory Challenge

Eligibility

Duty of Jury Service

Criminal Law

Review
Particular Ground of Disqualification of Prospective Juror

Secondary Sources

APPENDIX IV: ADMINISTRATIVE LETTER RULINGS: DOL, WAGE AND HOUR DIVISION

FLSA Emp. Exemption Hdbk. Appendix IV

...(The following article appeared in the July 1995 update to the Employer's Guide to the Fair Labor Standards Act, published by Thompson Publishing Group. It is intended to provide basic information on c...

Selecting the Jury-Plaintiff's View

5 Am. Jur. Trials 143 (Originally published in 1966)

...Voir dire is the most effective tool available to assist the attorney in obtaining a suitable jury. It is used both to eliminate unsuitable persons from the jury panel and to influence persons who rema...

APPENDIX II: FAIR LABOR STANDARDS ACT REGULATIONS TITLE 29 CODE OF FEDERAL REGULATIONS

Fair Labor Stds. Hdbk. for States, Local Govs. and Schools Appendix II

...The U.S. Department of Labor published rule changes in October 2013 that will modify the companionship and live-in domestic services exemptions (but not the babysitting exemption) effective on Jan. 1, ...

See More Secondary Sources

Briefs

JOINT APPENDIX, VOL. II

2004 WL 2891870
Thomas Joe Miller-El, Petitioner, v. Doug Dretke, Director, Texas Department Of Criminal Justice, Correctional Institutions Division, Respondent.
Supreme Court of the United States
Sep. 02, 2004

...called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows: Q Good morning, Ms. Young. ...

Thomas Joe MILLER-EL, Petitioner, v. Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.

2002 WL 32102969
Thomas Joe MILLER-EL, Petitioner, v. Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.

have been the object of discrimination. It is incumbent upon the moving party to be clear about any person still claimed to be improperly challenged. Where it is unclear from defense counsel's language whether he was alleging that one or two males currently before the court were improperly struck, his language cannot be construed to include a female struck in a previous round, and by accepting without additional objection the prosecutor's explanation for its challenge of the female, defendant failed to preserve his present contention that the explanation was pretextual.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Jury §§ 244, 273.

Carmody-Wait 2d, Criminal Procedure §§ 172:2917, 172:2920, 172:2924, 172:2926, 172:2930.

NY Jur 2d, Criminal Law §§ 2293-2295, 2298.

ANNOTATION REFERENCES

See ALR Index under Appeal and Error; Jury and Jury Trial; Peremptory Challenges.

POINTS OF COUNSEL

Legal Aid Society, New York City *(Richard Joselson* and *Andrew C. Fine* of counsel), for appellant in the first above-entitled action.

Because the prosecutor failed to proffer any neutral reason for his peremptory challenge to one of the African-American women identified by counsel when she established a prima facie case of discrimination, the court's refusal to order *Batson* relief violated equal protection and due process. *(Batson v Kentucky,* 476 US 79; *J.E.B. v Alabama ex rel. T.B.,* 511 US 127; *People v Payne,* 88 NY2d 172; *People v Allen,* 86 NY2d 101; *People v Brown,* 97 NY2d 500; *Purkett v Elem,* 514 US 765; *People v Lopez,* 284 AD2d 115; *People v Davis,* 253 AD2d 634; *People v Hawthorne,* 80 NY2d 873; *People v Simmons,* 79 NY2d 1013.)

Robert M. Morgenthau, District Attorney, New York City *(Deborah L. Morse* and *Sylvia Wertheimer* of counsel), for respondent in the first above-entitled action.

The record and the settled existing precedent provide ample basis for the conclusion of the Appellate Division that defendant's unpreserved claim of a *Batson* violation does not warrant any relief. *(Batson v Kentucky,* 476 US 79; *People v Kern,* 75 NY2d 638, 498 US 824; *People v Payne,* 88 NY2d 172; ***266** *People v Allen,* 86 NY2d 101; *People v Bolling,* 79 NY2d 317; *People v Scott,* 70 NY2d 420; *People v Alston,* 222 AD2d 294, 88 NY2d 519; *People v Williams,* 92 NY2d 993; *People v Stephen,* 84 NY2d 990; *People v Childress,* 81 NY2d 263.)

Legal Aid Society Criminal Appeals Bureau, New York City *(Amy Donner* and *Andrew C. Fine* of counsel), for appellant in the second above-entitled action.

The court erroneously denied appellant's *Batson* motion, where the prosecutor's lone explanation for striking a black prospective juror was that he subsequently accepted a different black juror. *(Batson v Kentucky,* 476 US 79; *People v Payne,* 88 NY2d 172; *People v Allen,* 86 NY2d 101; *People v Bolling,* 79 NY2d 317; *People v Childress,* 81 NY2d 263; *People v Jenkins,* 75 NY2d 550; *Purkett v Elem,* 514 US 765; *People v Reid,* 212 AD2d 642; *People v Lopez,* 284 AD2d 115; *People v Davis,* 253 AD2d 634.)

Robert M. Morgenthau, District Attorney, New York City *(Sylvia Wertheimer* and *Deborah L. Morse* of counsel), for respondent in the second above-entitled action.

Defendant's appellate *Batson* claim is unpreserved and without merit. *(Batson v Kentucky,* 476 US 79; *People v Kern,* 75 NY2d 638, 498 US 824; *People v Payne,* 88 NY2d 172; *People v Allen,* 86 NY2d 101; *People v Jenkins,* 84 NY2d 1001; *People v Hernandez,* 75 NY2d 350, 500 US 352; *People v Brown,* 97 NY2d 500; *People v Childress,* 81 NY2d 263; *People v Lynn,* 224 AD2d 294.)

OPINION OF THE COURT

Smith, J.

The issue in both of these cases is whether the *Batson* (*Batson v Kentucky,* 476 US 79 [1986]) challenges were appropriately preserved. Because they were not, we affirm the orders of the Appellate Division upholding defendants' convictions.

People v James

On October 24, 1996, an off duty corrections officer observed defendant attempting to break into the officer's car. Following a confrontation, the officer held the defendant at gunpoint until police arrived.

Defendant was indicted for attempted criminal possession of a weapon in the second degree. The defense sought to persuade the jury that defendant suffered from a mental defect precluding him from forming the requisite intent. During jury selection, he raised a *Batson* challenge, arguing that the People's *267 challenge of five of six African-American women was an equal protection violation. In seeking to make out a prima facie case, the defense attorney named four African-American women the prosecutor had previously struck from the panel. The defense then focused on the fifth woman, Bemejam, a social worker and substance abuse counselor, who had been peremptorily challenged, stating:

"Judge, at this time I am making a Batson challenge on behalf of my client. This is now--Mr. Jaffe [the prosecutor] kicked off Miss Nicholas who is a Black female. Miss Freeman [*sic*] on the last round was a Black female. Alice Newton is a Black female. Jacqueline Accoo is a Black female and now Miss Benejam [*sic*], and I am asking him to give a reason why he is kicking her off. She said she could be fair. She has no problems. She doesn't have any family in law enforcement. She didn't say much at all."

In response to this challenge, the prosecutor indicated he did not want social workers or nurses on the jury. [1] After hearing the People's explanation, the court ruled that there was no *268 *Batson* violation. With no further word or objection by the defendant, jury selection continued.

Defendant was convicted of attempted criminal possession of a weapon in the second degree and sentenced to a determinate prison term of six years. On appeal he argued that his equal protection and due process rights were violated by the prosecutor's peremptory challenges and the trial court's disposition. The Appellate Division affirmed with two Justices dissenting. The majority held that the defendant's *Batson* challenge was to one juror only--Bemejam, not as to all jurors as the dissenters contended. One of the dissenting Justices granted leave to appeal. We affirm.

People v Jones

On March 9, 1997, defendant Anthony Jones and two other men robbed an individual outside a Manhattan grocery store using a razor. Two weeks later defendant attempted to rob another individual outside the same store. Three store employees chased defendant until the police apprehended him.

Defendant was indicted for one count of robbery in the first degree and one count of robbery in the second degree based on the March 9 incident, and one count of attempted robbery in the third degree based on the March 27 incident.

During jury selection, defendant raised a *Batson* challenge, arguing that the People struck an African-American female during the first round of jury selection and two African-American males during the fourth round.

In seeking to make out a prima facie case, the defense stated:

"Your Honor, I'll exercise a Batson at this point. Your Honor, let me make the record that on the first panel, your Honor, Mr. Snyder [prosecutor] excluded juror number ten, Francis Tuckedt, a black woman; Wilson Nau, a black man was excused [for cause by the court]. Then in the second panel, a black man, Pierre Noel the People exercised a peremptory. Now another black man, Caviness, People exercise peremptory. At this point I think it's the prosecutor's burden to show that this isn't race based."

The prosecutor explained his reasons for challenging each juror. As to Caviness, the prosecutor stated that he overheard him making comments during the defense's voir dire, that when he struck Tuckedt, he kept another black woman, and *269 finally that Noel expressed problems with the police in the past. [2]

The court rejected the *Batson* challenge, stating it "accepts there are non race based reasons for the exercise of peremptories by the People." Thereafter, the defendant made no further objection concerning jury selection.

Defendant was convicted of robbery in the first degree, robbery in the second degree and attempted robbery in the third degree and was sentenced accordingly. On appeal, the Appellate Division rejected defendant's contention that the trial court had improperly failed to mention Tuckedt as part of the *Batson* challenge, and held that the challenge pertained only to the two male jurors in the fourth round. In affirming the conviction, the Court stated:

"It is, however, clear from the record that no claim as to her was made when she was peremptorily challenged nor during the remainder of questioning in the first pool. Not until

questioning the fourth pool of prospective jurors and defendant's objection to the prosecutor's use of a peremptory against Caviness was F.T. mentioned and then only as part of a pattern which, upon closer examination, did not exist. At no time did defendant state that F.T.'s ***270** removal from the panel was itself discriminatory. An unarticulated claim is an unpreserved claim." (284 AD2d 46, 49-50 [2001].)

A Judge of this Court granted leave to appeal, and we now affirm.

Discussion

(1)(2) In making a *Batson* challenge, the moving party has the initial burden of establishing that the other side is using peremptory strikes to remove a cognizable racial[3] group and that facts and other relevant circumstances support a finding that the use of these peremptory challenges excludes potential jurors because of their race (*Batson v Kentucky*, 476 US at 96; *People v Childress*, 81 NY2d 263, 266 [1993]). "There are no fixed rules for determining what evidence will ... establish a prima facie case of discrimination" (*People v Bolling*, 79 NY2d 317, 323-324 [1992]). "[A] party asserting a claim under *Batson* ... should articulate and develop all of the grounds supporting the claim, both factual and legal, during the colloquy in which the objection is raised and discussed" (*Childress* at 268 [citation omitted]). Proof sufficient to make a prima facie showing shifts the burden of going forward to the other party, but "'the ultimate burden of persuasion' must be carried by the person alleging the intentional discrimination ..." (*People v Hernandez*, 75 NY2d 350, 355 [1990] [citation omitted]).

In the second step, after the moving party has established a prima facie case, the nonmoving party must give a race neutral reason for each and every person challenged in step one. If a defendant does not specifically question a particular strike, the prosecutor is not required to provide an explanation for it (*see People v Manigo*, 165 AD2d 660, 662 [1st Dept 1990]). "Although the ... race neutral[ ] reason for exercising a peremptory challenge need not rise to the level of a challenge for cause ..., it must be legitimate and not merely a pretext for discrimination ..." (*People v Allen*, 86 NY2d 101, 106 [1995] [citations and internal quotation marks omitted]). Once the prosecutor gives race neutral reasons for peremptory challenges, the issue of whether a prima facie case has been made is moot (*Hernandez v New York*, 500 US 352, 359 [1991]).***271**

In step three, the moving party may contend that the race neutral reasons given are pretextual. "When defendant challenges as pretextual the People's explanation as to a particular juror, the inquiry has become factual in nature and moves to step three. Unlike step two, step three permits the trial court to resolve factual disputes, and whether the prosecutor intended to discriminate is a question of fact ..." (*Allen* at 110 [citation omitted]). The court then determines if the reasons given are pretextual.

(1) Turning to the cases before us, in *James*, although the defense attorney named four other women in alleging a pattern and a prima facie case, it is clear that the defense challenged only Bemejam when she stated "and now Miss Benejam [*sic*], and I am asking [the prosecutor] to give a reason why he is kicking her off. She said she could be fair. She has no problems. She doesn't have any family in law enforcement. She didn't say much at all." If defendant intended to challenge all five prospective jurors, as he now alleges for the first time on appeal, rather than solely challenging Bemejam, he should have expressed that contention. Since he did not, this issue is unpreserved.

(2) The defense attorney in *Jones*, in seeking to make out a prima facie case, named four individuals, three that the People struck with peremptory challenges during voir dire and one that was removed by the court for cause. From the wording used by the defense, it is clear that he was not challenging all four people. Thus, defendant did not challenge the court for excusing potential juror Nau for cause. He also did not challenge the prosecutor's peremptory challenge of Tuckedt in the first round. Only when the prosecution exercised a peremptory challenge against Caviness did the defense attorney say, "Now another black man, Caviness, People exercise peremptory. At this point I think it's the prosecutor's burden to show that this isn't race based." From this wording, it is unclear whether the defense was challenging Caviness only or both males currently before the court in the fourth round of voir dire. In any event, this wording cannot be interpreted to include Tuckedt.

The People went on to give an explanation as to why they used all three peremptory challenges. The defendant now contends that the reason given for challenging Tuckedt was pretextual. However, defendant did not assert, at the time of the *Batson* challenge, that he was including Tuckedt. Even after the People's response, defendant remained silent, an indication that the challenge did not originally include Tuckedt. *272 By accepting the

People's explanation without any additional objection at a time that it could have been addressed, defendant failed to preserve a challenge to Tuckedt.

Finally, the exclusion of jurors on the basis of race continues to plague the judicial system, and courts must be vigilant in eradicating this problem. The Equal Protection Clauses of both the Federal Constitution (14th Amend) and State Constitution (art I, § 11) prohibit the exclusion of persons on the basis of race (*People v Kern*, 75 NY2d 638, 649 [1990]). Moreover, service on a jury is a civil right which cannot be arbitrarily denied (NY Const, art I, § 1; Civil Rights Law § 13; *People v Kern*, 75 NY2d at 649). Nevertheless, any claim of improper discrimination in the selection of jurors must be specific and timely made. When, as here, a party raises an issue of a pattern of discrimination in excluding jurors, and the court accepts the race neutral reasons given, the moving party must make a specific objection to the exclusion of any juror still claimed to have been the object of discrimination. It is incumbent upon the moving party to be clear about any person still claimed to be improperly challenged. [4]

Accordingly, in each case, the order of the Appellate Division should be affirmed.

Chief Judge Kaye and Judges Levine, Ciparick, Wesley, Rosenblatt and Graffeo concur. In each case: Order affirmed. *273

Footnotes

1 The prosecutor explained:
"Your Honor, I focused on occupations. I tried to keep off social workers. Miss Accoo, I stated the reason for her already. She believed that her personal beliefs--she can't impose them upon anybody else. I don't think she is someone who should be a juror in my personal opinion. I am trying to keep social workers off the jury. And, Miss Nichol[a]s, she is a nurse. I am trying to keep nurses off the jury. There was a discussion about the medical records that the defendant was prematurely released from a hospital. ...
"I don't want a nurse--for the following reason. I don't want anybody on the jury who comes in contact with people in the hospital. I think that just talking to people in the profession, I think there's tension between the people who make decisions about medical issues and those who have to carry them out, and basically my concern in this case is that arguments were made to the jury-- to a nurse that this person was so bad and they were let out but never should have been let out. They don't get to make the decision about who stays in and who doesn't. They have to follow someone else's opinion. I bet there's a lot of resentment there. And, they would sympathize with the Defense' position that the defendant has been sick all along and acutely schizophrenic. The doctor made the wrong call and that's why the person is out. It's a mistake. It happens all the time. I think that any nurse--have a concern with any nurse being on the jury. That went into my decision."

2 The prosecutor explained his reasons for the strikes as follows: First, as to Caviness:
"Most telling for me was when Mr. Smith [defense attorney] was asking Mr. Montalto [another prospective juror] [whose] roommate is a detective, he was asking him if he thought that it happens sometimes that detectives sometimes pressure confessions out of defendants and I glanced over to Mr. Caviness, he was not even being asked alike [*sic*], sure they are, sure, yop yop, ... this is the heart of my case, this is the more serious by far of my two charges and as I've gone over with your Honor and the jury, the only evidence we have is this confession, it's a powerful piece of evidence until it's ripped apart by the theory that it's pressured out of the defendant."
Second as to Ms. Tuckedt:
"[W]hile it's true I did exercise a peremptory as to a black woman in the second row. I chose a black woman, she's the second juror we picked ...."
Finally, as to Mr. Noel:
"[H]e told me that he had some problems with police officers in the past and because again my most important piece of evidence is this detective and how she treated this defendant, I don't think it's wise to pick someone who may

have a problem with police officers, may be looking for a way to overly scrutinize the testimony because they have a problem with police officers."

3 "Under the Equal Protection Clause, a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race. See, *e.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (gender); *Hernandez* v. *New York*, 500 U.S. 352 (1991) (ethnic origin); *Batson v. Kentucky*, 476 U.S. 79 (1986) (race)" (*United States v Martinez-Salazar*, 528 US 304, 315 [2000]).

4 In *Batson v Kentucky* (476 US 79, 102 [1986]), Justice Thurgood Marshall wrote a concurring opinion in which he detailed the limitations of the *Batson* procedure and argued for the elimination of peremptory challenges. Several Judges of this Court have also questioned the peremptory procedure and called on the Legislature to revisit peremptory challenges (*see*, *People v Hernandez*, 75 NY2d 350, 358 [1990] [Titone, J., concurring]; *People v Bolling*, 79 NY2d 317, 325 [1992] [Bellacosa, J., joined by Wachtler, Ch. J., and Titone, J., concurring]; *People v Brown*, 97 NY2d 500, 508 [2002] [Kaye, Ch. J., concurring, with Wesley and Rosenblatt, JJ., joining in the concurrence]). I join with those members of this Court, past and present, who urge the Legislature to take a hard look at the issue of peremptory challenges.

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People v Childress 81 N.Y.2d 263, 614 N.E.2d 709, 598 N.Y.S.2d 146
Court of Appeals of New York February 23, 1993 81 N.Y.2d 263 614 N.E.2d 709 598 N.Y.S.2d 146 *(Approx. 5 pages)*

The People of the State of New York, Respondent,

v.

Craig Childress, Appellant.

Court of Appeals of New York

31

Argued January 12, 1993;

Decided February 23, 1993

CITE TITLE AS: People v Childress

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 4, 1991, which affirmed a judgment of the Nassau County Court (Edward A. Baker, J.), rendered upon a verdict convicting defendant of burglary in the second degree and possession of burglar's tools.

People v Childress, 177 AD2d 498, affirmed.

HEADNOTES

Crimes
Jurors
Discriminatory Use of Peremptory Challenges--Prima Facie Case-- Articulation of Sound Factual Basis during Colloquy

(1) In the prosecution of an African-American defendant for burglary, the trial court properly overruled defense counsel's objection under *Batson v Kentucky* (476 US 79) to the prosecutor's exercise of peremptory challenges to exclude certain African-American jurors, since defense counsel did not satisfy his obligation to articulate a sound factual basis for his claim during the *Batson* colloquy. That the prosecutor exercised his peremptories to strike two of the three African- American jurors is not sufficient, by itself, on this record, to establish a pattern of purposeful exclusion sufficient to raise an inference of discrimination. Nor did defense counsel's perfunctory assertions that the "questioning [of those prospective jurors] was proper" and that "[t]hey indicated no reason why they could not serve fairly on [the] jury", establish the existence of facts and other relevant circumstances sufficient to raise an inference that the prosecutor had used his peremptory challenges to exclude individuals because of their race.

Crimes
Jurors
Discriminatory Use of Peremptory Challenges--Burden of Proving Pattern of Purposeful Exclusion

(2) The defendant's burden of proving a pattern of purposeful exclusion of potential jurors because of their race under *Batson v Kentucky* (476 US 79) is not lessened when the size of a particular racial group in a given community is so small as to make statistical evidence inherently unreliable.

Crimes
Jurors

SELECTED TOPICS

Jury

Competency of Jurors, Challenges, and Objections
Defendant Showing of Prima Facie Case of Prosecutor Discriminatory Use of Peremptory Challenge

Competency of Jurors, Challenges, and Objections

Trial Court Determinations of Jury Impartiality Absent Clear Abuse of Discretion

Secondary Sources

s 191:50. Relationship between juror and prosecutor or defense counsel as precluding prospective juror from rendering impartial verdict

35 Carmody-Wait 2d § 191:50

...Relationships between jurors and persons in the district attorney's office or with the trial prosecutor which are so remote in all respects that it does not render them inherently biased cannot form th...

s 191:60. Discriminatory use of peremptory challenges, generally

35 Carmody-Wait 2d § 191:60

...As a matter of federal and state constitutional law, neither the prosecution nor the defense may exercise peremptory challenges in a discriminatory manner. The discriminatory use of peremptory challeng...

s 2614. Juror acquaintance with witness

34 N.Y. Jur. 2d Criminal Law: Procedure § 2614

...The existence of implied bias arising from a prospective juror's relationship with a potential witness requires automatic exclusion even if the prospective juror declares that the relationship will not...

See More Secondary Sources

Briefs

Brief for Respondent

1999 WL 33659939
THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. Karim JOHNSON, Defendant-Appellant.
Court of Appeals of New York.
Aug 1999

...The Sixth Amendment of the United States Constitution provides: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and distr...

BRIEF FOR RESPONDENT

1991 WL 538725
Hernandez (Dionisio) v. New York
Supreme Court of the United States
Jan. 07, 1991

...FN* Counsel of Record for Respondent The opinion of the New York Court of Appeals (Joint App. at 26-45) is reported at 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85 (1990). The opinion of the New Yor...

Brief for Defendant-Appellant

2011 WL 7451361
THE PEOPLE OF THE STATE OF NEW

Discriminatory Use of Peremptory Challenges--Minutes of Voir Dire Not Always Required for Appellate Review

(3) The minutes of the voir dire need not be provided in every instance as a precondition for obtaining relief on appeal under *Batson v Kentucky* (476 US 79). In order to give the trial court a proper foundation to evaluate the claim--as well as to ensure an adequate record for appellate review--a party asserting a claim under *Batson* should articulate and develop all of the grounds supporting the claim, both factual and legal, during the colloquy in which the objection is raised and discussed. Despite the absence of ***264** voir dire minutes, however, a trial or appellate court may determine, based on facts elicited during the *Batson* colloquy, whether a prima facie case of discriminatory use of peremptory challenges has been established.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Jury, §§ 173-176.

NY Jur 2d, Criminal Law, §2392.

ANNOTATION REFERENCES

Group or class discrimination in selection of grand or petit jury as prohibited by Federal Constitution. 33 L Ed 2d 783.

POINTS OF COUNSEL

Alfred O'Connor, Hempstead, *Matthew Muraskin* and *Kent V. Moston* for appellant.
Appellant established a prima facie case of race discrimination by objecting to the prosecution's peremptory strikes against two of three African-Americans in the jury panel. *(Strauder v West Virginia,* 100 US 303; *Swain v Alabama,* 380 US 202; *Batson v Kentucky,* 476 US 79; *People v Kern,* 75 NY2d 638; *Powers v Ohio,* 499 US 400; *People v Bolling,* 79 NY2d 317; *People v Brown [Larry],* 144 AD2d 373; *People v Dove,* 154 AD2d 705; *People v Howard,* 128 AD2d 804; *People v Hassell,* 149 AD2d 530.)
Denis Dillon, District Attorney of Nassau County, Mineola *(Peter A. Weinstein* of counsel), for respondent.
Defendant failed to establish a prima facie case of race discrimination by the prosecutor in the exercise of his peremptory challenges. *(Batson v Kentucky,* 476 US 79; *People v Kern,* 75 NY2d 638; *People v Bolling,* 79 NY2d 317; *People v Jenkins,* 75 NY2d 550; *Alvarado v United States,* 497 US 543; *People v Hernandez,* 75 NY2d 350; *United States v Clemons,* 843 F2d 741; *United States v Dawn,* 897 F2d 1444; *United States v Allison,* 908 F2d 1531; *People v Simmons,* 79 NY2d 1013.)

OPINION OF THE COURT

Titone, J.

This appeal involving the application of *Batson v Kentucky* (476 US 79) concerns the minimum showing that must be made to establish a prima facie case of unlawful discrimination in the use of peremptory challenges. Also at issue is ***265** whether the minutes of the voir dire must be furnished in order to obtain relief on appeal under *Batson v Kentucky (supra).*

Defendant, an African-American, was charged with burglarizing an apartment in Freeport, Long Island. During the selection of the jury preceding his trial, defense counsel asserted that the prosecutor was using his peremptory challenges to exclude African-American jurors. The following colloquy ensued:

"[DEFENSE COUNSEL]: Your Honor, I would like to raise an objection at this point. The district attorney has excluded black jurors on the panel. I feel that their questioning was proper. They indicated no reason why they could not serve fairly on this jury. I think that there must be some motivation for that challenging. And I would ask the Court to exclude those challenges.

"THE COURT: I am old fashioned. I think the word peremptorily means exactly what it says. However, aside from that, I don't notice anything. Of course, you have your exception.

"[PROSECUTOR]: If I could just make a record?

"THE COURT: Go ahead.

YORK, Respondent, v. Scott C. FUREY, Defendant-Appellant.
Court of Appeals of New York.
Feb. 07, 2011

...FN1. It should be noted that the one-year jail sentence for Menacing 3rd (a class B misdemeanor) is illegal (Penal Law § 70.15 (2)). This error was pointed out to the Appellate Division, which did not a...

See More Briefs

Trial Court Documents

The People of the State of New York v. Degondea

2001 WL 36097913
THE PEOPLE OF THE STATE OF NEW YORK, v. David DEGONDEA, Defendant.
Supreme Court, New York.
Dec. 20, 2001

...MARCY L. KAHN, J.: Defendant was convicted on January 5, 1995, after a jury trial before a different Justice of this court, of murder in the first degree, attempted murder in the first degree, criminal...

The People of the State of New York v. Degondea

2001 WL 36103704
THE PEOPLE OF THE STATE OF NEW YORK, v. David DEGONDEA, Defendant.
Supreme Court, New York.
July 09, 2001

...[This opinion is uncorrected and not selected for official publication.] On January 5, 1995, defendant was convicted after a jury trial before a different Justice of this court' of murder in the first ...

People of the State of New York v. Mateo

1997 WL 34904654
THE PEOPLE OF THE STATE OF NEW YORK, v. Angel MATEO.
County Court of New York
Aug. 25, 1997

...Connell, J. The following constitutes the Opinion, Decision & Order of the Court. The headings and numbering in this Decision correspond as nearly as possible to those of the motion papers. To the exte...

"[THE PROSECUTOR]: There were three black jurors on this particular panel, and I accepted one black juror. And it is not as if I was excluding black jurors because of their race.

"THE COURT: Okay. You have an exception."

A panel of 12 jurors was ultimately seated. Defendant was tried and convicted of burglary in the second degree and possession of burglar's tools.

On his appeal from the judgment of conviction, defendant argued, among other things, that the trial court had erred in refusing to require the prosecutor to furnish a race-neutral explanation for his use of peremptories to exclude African-American jurors. The Appellate Division rejected this argument, holding that defendant had "failed to substantiate his claim ... since the voir dire proceedings have not been made available as part of the record on appeal" (177 AD2d 498, 499, citing *People v Campanella,* 176 AD2d 813). Defendant subsequently appealed to this Court by permission of one of its Judges. We now affirm the order of the Appellate Division, but on a somewhat different analysis.*266

Initially, to the extent that the trial court based its ruling on any purported right of the prosecutor to make peremptory challenges regardless of their racial basis, the court clearly misstated the law. The Supreme Court's landmark ruling in *Batson v Kentucky (supra)* definitively foreclosed any such arguments and articulated a new standard for establishing a claim of racial discrimination in the use of peremptory challenges. Since *Batson* was decided, this Court, as well as the Supreme Court, have elaborated upon that new standard *(see, e.g., Powers v Ohio,* 499 US 400, 111 S Ct 1364; *Griffith v Kentucky,* 479 US 314; *People v Bolling,* 79 NY2d 317; *People v Kern,* 75 NY2d 638; *People v Jenkins,* 75 NY2d 550). As we noted in *People v Jenkins (supra,* at 555), it is "no longer open to question" that "the racially motivated exercise of peremptory challenges ... violates the Equal Protection Clause of the Fourteenth Amendment." The time is long since past for questioning the basic premises underlying *Batson* and its progeny.

The standard mandated by *Batson* is a relatively straightforward one. First, a defendant asserting a claim under the *Batson* formula must present a prima facie case by showing that the prosecution exercised its peremptory challenges to remove one or more members of a cognizable racial group from the venire and that there exist facts and other relevant circumstances sufficient to raise an inference that the prosecution used its peremptory challenges to exclude potential jurors because of their race *(Batson v Kentucky, supra,* at 96-98; *People v Jenkins,* 75 NY2d 550, 555-556, *supra; see, Powers v Ohio,* 499 US 400, *supra).* Once that prima facie showing has been made, the burden shifts and the prosecution must come forward with a race-neutral explanation for its challenged peremptory choices *(Batson v Kentucky, supra,* at 96-97).

The first element of a prima facie case--demonstrating that members of a cognizable racial group have been excluded--is seldom problematic. The more difficult aspect of the prima facie case delineated in *Batson* is the second element--a showing of "facts and other relevant circumstances" that would support an inference of impermissible discrimination. That is the element that concerns us here.

"There are no fixed rules for determining what evidence will give rise to an inference sufficient to establish a prima facie case" *(People v Bolling,* 79 NY2d 317, 323-324, *supra).* A *267 pattern of strikes or questions and statements made during the voir dire may be sufficient in a particular case *(see, Batson v Kentucky, supra,* at 97; *see also, People v Jenkins,* 75 NY2d 550, 556, *supra).* Additionally, this element may be established by a showing that members of the cognizable group were excluded while others with the same relevant characteristics were not *(see, People v Bolling, supra,* at 324). Another legally significant circumstance may exist where the prosecution has stricken members of this group who, because of their background and experience, might otherwise be expected to be favorably disposed to the prosecution *(see, People v Scott,* 70 NY2d 420, 425). The court should also take into consideration the fact that the mere existence of a system of peremptory challenges may serve as a vehicle for discrimination by those with racially motivated inclinations *(see, Batson v Kentucky, supra,* at 96).

Further, although rarely dispositive, the fact that a disproportionate number of strikes have been used against members of a particular racial or ethnic group may be indicative of an impermissible discriminatory motive *(see, People v Jenkins, supra,* at 556). Conversely, "[t]he mere inclusion of some members of defendant's ethnic group will not defeat an otherwise meritorious *[Batson]* motion" *(People v Bolling, supra,* at 324). The inclusion of token

members of a racial group is not an acceptable substitute for a jury selected by racially neutral criteria, and the exclusion of even one member of a group for racial reasons is abhorrent to a fair system of justice.

(1, 2) Under the circumstances presented here, defense counsel's sketchy assertions during the colloquy on the *Batson* claim did not establish a basis for relief. While the prosecutor admittedly exercised his peremptories to strike two of the three African-American jurors, that fact alone is not sufficient, on this record, to establish a "pattern of purposeful exclusion sufficient to raise an inference of discrimination" *(People v Steele,* 79 NY2d 317, 325; *cf., People v Hawthorne,* 80 NY2d 873). We reject defendant's argument that the burden of proving a pattern of purposeful exclusion should be lessened when the size of a particular racial group in a given community is so small as to make statistical evidence inherently unreliable.

(1) Defense counsel's other assertions during the *Batson* colloquy that "[the prospective jurors'] questioning was proper" and that "[t]hey indicated no reason why they could ***268** not serve fairly on this jury" were also insufficient to establish a prima facie case on this record. The latter assertion served only to highlight that the stricken jurors demonstrated no biases that would disqualify them for service or support a challenge for cause. The former assertion was simply too broad and conclusory to support an inference of discriminatory motive.

(3) We note that, in order to give the trial court a proper foundation to evaluate the claim--as well as to ensure an adequate record for appellate review--a party asserting a claim under *Batson v Kentucky (supra)* should articulate and develop all of the grounds supporting the claim, both factual and legal, during the colloquy in which the objection is raised and discussed. Where counsel has perceived something suggesting a discriminatory motive in the questioning of prospective jurors or in the answers the jurors have given, the specific facts underlying counsel's concerns should be fully articulated and described. Despite the absence of voir dire minutes, a trial or appellate court may determine, based on facts elicited during the *Batson* colloquy, whether a prima facie case of discriminatory use of peremptory challenges has been established *(see, People v Bolling,* 79 NY2d 317, 324, *supra; People v Scott,* 70 NY2d 420, 423-424, *supra).* In most instances, the minutes of the voir dire will be helpful or useful only to the extent that it becomes necessary to resolve specific factual disputes arising during, or as a result of, the *Batson* colloquy. Thus, contrary to the suggestion in the Appellate Division's opinion below, the minutes of the voir dire need not be provided in every instance as a precondition for obtaining *Batson* relief. Indeed, the cases in which the voir dire minutes are necessary to resolve the appeal should be relatively rare.

Here, defense counsel did not satisfy his obligation to articulate a sound factual basis for his claim during the *Batson* colloquy. His perfunctory statements in support of the defense motion for *Batson* relief plainly did not establish the existence of facts and other relevant circumstances sufficient to raise an inference that the prosecutor had used his peremptory challenges to exclude individuals because of their race *(Batson v Kentucky, supra,* at 96-98). Thus, the defense's objection to the prosecutor's actions was properly overruled, and the Appellate Division correctly affirmed the judgment of conviction.***269**

Accordingly, the order of the Appellate Division should be affirmed.

Acting Chief Judge Simons and Judges Kaye, Hancock, Jr., Bellacosa and Smith concur. Order affirmed.***270**

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Distinguished by People v. Guardino, N.Y.A.D. 1 Dept., May 21, 2009

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People v Smocum, 99 N.Y.2d 418, 786 N.E.2d 1275, 757 N.Y.S.2d 239, 2003 N.Y. Slip Op. 11297
Court of Appeals of New York February 25, 2003 99 N.Y.2d 418 786 N.E.2d 1275 757 N.Y.S.2d 239 2003 N.Y. Slip Op. 11297 (Approx. 5 pages)

The People of the State of New York, Respondent,

v.

John Smocum, Appellant.

Court of Appeals of New York
2/, 22
Argued January 16, 2003;
Decided February 25, 2003

CITE TITLE AS: People v Smocum

SUMMARY

Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 24, 2001, which affirmed a judgment of the Supreme Court (Lawrence Knipel, J.), rendered in Kings County upon a verdict convicting defendant of criminal possession of stolen property in the fifth degree.

People v Smocum, 286 AD2d 782, affirmed.

HEADNOTES

Crimes
Jurors
Selection of Jury--*Batson* Procedure

(1) In a criminal prosecution in which defendant alleged that the prosecution was using its peremptory challenges to exclude jurors on the basis of race, although the trial court improperly rushed and compressed the *Batson* inquiry, defendant failed at the time to raise his present claims and, thus, he did not meet his burden of establishing an equal protection violation. Defendant's argument regarding the challenge of a particular potential juror is unpreserved and cannot be reached. Based on the record, the prosecutor's proffered reason for challenging the juror might have been nonpretextual. However, while defense counsel persisted in challenging two other stricken jurors, she said nothing further about the juror in question at a time when any ambiguity could have been clarified.

Crimes
Jurors
Selection of Jury--*Batson* Procedure

(2) When defendant first raised a *Batson* objection with regard to the prosecutor's use of three peremptory challenges, the trial court should have decided whether the defense met its initial burden of establishing a prima facie case of discrimination. That issue became moot when the People stated their reasons and the court ruled on the ultimate issue. By immediately concluding that the reasons were acceptable as to two of the potential jurors, without first allowing defense counsel to make an argument that the reasons were pretextual, the court failed to make a meaningful inquiry into the question of discrimination. Moreover, the fact that satisfactory reasons were given for striking two jurors does not defeat defendant's prima facie case as to the third, since improper removal of even a single juror may be a violation of equal protection. The court should have moved on to a determination of pretext, the final step.

SELECTED TOPICS

Habeas Corpus

Grounds for Relief; Illegality of Restraint
Challenged Peremptory Strikes of Minority Jurors

Criminal Law
Review
Prosecutor Exercise of Peremptory Challenge of Prospective Juror Based on Race, Ethnicity or National Origin

Secondary Sources

s 44:37. Examination of individual jurors-Peremptory challenges-Discriminatory exercise of peremptory challenges-Race neutral explanation

3 Criminal Procedure in New York § 44:37 (2d)

...The prosecutions' credibility in explaining its justification for peremptory strikes of racial minorities can be measured by, among other factors, the prosecution's demeanor, by how reasonable or how i...

s 53:2. Statutory basis

3 Criminal Procedure in New York § 53:2 (2d)

...The statutory basis underlying the right to petition for a writ of habeas corpus is a codification of the principles enunciated by the Supreme Court. The statutory grounds upon which federal motion for...

s 2629. Assertion of racially neutral explanation for use of peremptory challenges

34 N.Y. Jur. 2d Criminal Law: Procedure § 2629

...After the moving party establishes a prima facie case for the racially discriminatory use of peremptory challenges by the opposition, the nonmoving party must give a race-neutral reason for each and ev...

See More Secondary Sources

Briefs

BRIEF FOR RESPONDENT

1991 WL 538725
Hernandez (Dionisio) v. New York
Supreme Court of the United States
Jan. 07, 1991

...FN* Counsel of Record for Respondent The opinion of the New York Court of Appeals (Joint App. at 26-45) is reported at 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85 (1990). The opinion of the New Yor...

Brief for Respondent

2005 WL 2841656
Bertram RICE, Warden, et al., Petitioners, v. Steven Martell COLLINS, Respondent.
Supreme Court of the United States
Oct. 25, 2005

...FN* Counsel of Record Respondent Steven Collins ("Collins"), an African-American man, JA II 11, was tried in the Los Angeles County Superior Court for possessing 0.10 grams of rock cocaine. PA 109-10. ...

BRIEF FOR PETITIONER

1990 WL 515099
Hernandez (Dionisio) v. New York

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Criminal Law §§ 1087, 1088, 1090.*419

Carmody-Wait 2d, Criminal Procedure §§ 172:2917, 172:2920, 172:2921, 172:2924-172:2926.

NY Jur 2d, Criminal Law §§ 2292-2295, 2298, 3125-3127, 3134.

ANNOTATION REFERENCES

See ALR Index under Jury and Jury Trial; Peremptory Challenges.

POINTS OF COUNSEL

Alan S. Axelrod, New York City, and *Andrew C. Fine* for appellant.
The court erroneously denied appellant's *Batson* claim, where after first requiring the prosecutor to give reasons for three peremptory challenges, it accepted the reasons for two panelists, but as to the third, it improperly returned from the second and third steps of the requisite analysis to the first, prima facie case step, finding "no pattern" of discrimination, despite that the prosecutor's reason for challenging her--that her son had died--was utterly unrelated to her suitability for jury service and was thus a pretext for racial discrimination. *(Hernandez v New York,* 500 US 352; *United States v Clemmons,* 892 F2d 1153; *Johnson v Love,* 40 F3d 658; *Durant v Strack,* 151 F Supp 2d 226; *Batson v Kentucky,* 476 US 79; *People v Payne,* 88 NY2d 172; *People v Bolling,* 79 NY2d 317; *People v Childress,* 81 NY2d 263; *People v Jenkins,* 75 NY2d 550; *Purkett v Elem,* 514 US 765.)
Charles J. Hynes, District Attorney, Brooklyn *(Jacqueline M. Linares* and *Leonard Joblove* of counsel), for respondent.
The trial court properly rejected defendant's *Batson* claim after finding that the prosecutor did not discriminate on the basis of race in the exercise of his peremptory challenges. *(Batson v Kentucky,* 476 US 79; *People v Allen,* 86 NY2d 101; *People v Brown,* 97 NY2d 500; *People v Smith,* 81 NY2d 875; *People v Payne,* 88 NY2d 172; *Georgia v McCollum,* 505 US 42; *People v Kern,* 75 NY2d 638, 498 US 824; *Hernandez v New York,* 500 US 352; *Purkett v Elem,* 514 US 765; *People v Bolling,* 79 NY2d 317.)

OPINION OF THE COURT

Chief Judge Kaye.

This appeal spotlights the three-step test for determining whether peremptory challenges have been used to exclude **420* potential jurors on account of race (*see Batson v Kentucky,* 476 US 79, 94-98 [1986]). As a first step, the moving party bears the burden of establishing a prima facie case of discrimination in the exercise of peremptory challenges. Second, the nonmoving party must give a race-neutral reason for each potential juror challenged. In step three, the court determines whether the reason given is merely a pretext for discrimination. Against this background we evaluate the challenged voir dire in the present case, in which defendant's conviction for criminal possession of stolen property--an automobile--was affirmed by the Appellate Division.

I.

During the first round of jury selection, the prosecutor exercised peremptory challenges to three of the first 12 prospective jurors. After the prosecutor removed one Hispanic and two African-American women, defense counsel stated, "I am wondering if we are having a Batson issue here." Although the prosecutor maintained that the defense had failed to make a prima facie case, and thus no race-neutral reasons were yet required, the court responded, "I am asking anyway. Why have you challenged them?" The prosecutor replied that two, Torres and Gordon, were challenged for family involvement with police officers, and the third, Mapp, because her son had died and the prosecutor "didn't think it was appropriate to go into it." The following colloquy ensued:

"THE COURT: Clearly there is good reason to challenge Torres and Gordon. And the only question is Mapp, but that doesn't make a pattern. I can understand not wanting to go into her son's death. The challenge is denied. Overruled. Let's go with defense peremptories.

"[Defense counsel]: I would just like to speak as to that. I don't see how it doesn't make a pattern.

"THE COURT: There are reasons to challenge.

"[Defense counsel]: In the back row we have one black man left, otherwise he has knocked [out] every one--

"THE COURT: Let's not argue. Let's not belabor it. There are very good reasons to challenge Torres and Gordon where the whole case reflects on police *421 officers, and both ... have serious problems in their family with police officers.

"[Defense counsel]: Torres and Gordon.

"THE COURT: Both had members of their family--

"[Defense counsel]: They don't seem to [be] serious. She said a cop embarrassed her son and she told him not to do anything about it. How is that elevated to a serious problem with the police? She answered all the other questions about the police as honestly and openly as everyone else.

"THE COURT: That's a good reason to challenge. Denied. You have an exception.

"[Defense counsel]: Thank you."

Before us, defendant maintains that the court improperly revisited step one-- the prima facie case--after the prosecutor had given his reasons for the challenged strikes; that any possible ruling on pretext as to prospective juror Mapp is unsupported by the record; and that inadequacies in the record were chargeable to the court's impatience in conducting the inquiry. Although we agree that the trial court's analysis was less than ideal, because we conclude that defendant--who bore the ultimate burden of persuasion--failed at the time to raise his present claims, we affirm.

II.

In furtherance of the United States Supreme Court's "unceasing efforts to eradicate racial discrimination" in the jury selection process, the Court in *Batson v Kentucky* (476 US at 85, 94-98) prescribed a now-familiar three-step test for determining whether peremptory challenges are based on invidious discrimination. That test is drawn from "disparate treatment" cases under title VII of the Civil Rights Act of 1964 (*id.* at 94 n 18).

Under *Batson* and its progeny, the party claiming discriminatory use of peremptories must first make out a prima facie case of purposeful discrimination by showing that the facts and circumstances of the voir dire raise an inference that the other party excused one or more jurors for an impermissible reason. "There are no fixed rules for determining what evidence will ... establish a prima facie case of discrimination" (*People v Bolling*, 79 NY2d 317, 323-324 [1992]). Although as part of *422 their prima facie case parties often rely on numbers to show a pattern of strikes against a particular group of jurors, a prima facie case may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination.

Once a prima facie showing of discrimination is made, the nonmovant must come forward with a race-neutral explanation for each challenged peremptory--step two. If the nonmovant cannot meet this burden, an equal protection violation is established. However, once race-neutral reasons are given, the inference of discrimination is overcome. At this second stage the reasons need be only facially permissible.

The third step of the *Batson* inquiry requires the trial court to make an ultimate determination on the issue of discriminatory intent based on all of the facts and circumstances presented. Unlike step two, this determination is a question of fact, focused on the credibility of the race-neutral reasons. Courts may determine that the proffered reasons are pretextual without further arguments by the moving party, but the moving party has the ultimate burden of persuading the court that the reasons are merely a pretext for intentional discrimination (*People v Payne*, 88 NY2d 172, 183-184 [1996]). It is therefore the moving party's burden to make a record that would support a finding of pretext.

As should be clear from this summary, the *Batson* procedure effectuates its purpose only if the steps are followed in sequence. It makes no sense, for example, to revisit the issue of whether a prima facie case has been made once the prosecutor has come forward with race-neutral reasons. At that point, the presumption of discrimination raised by the movant's initial prima facie case has been rebutted, and to revisit the adequacy of the step one showing "unnecessarily evade[s] the ultimate question of discrimination" (*Durant v Strack*, 151 F Supp 2d 226, 236 [ED NY 2001]). Similarly, when courts combine steps two and three by requiring the nonmoving party to provide *nonpretextual* race-neutral reasons, they

inappropriately shift the ultimate burden from the moving party (*see Payne*, 88 NY2d at 186-187).

III.

(1) Applying these principles to the present case, we conclude that although the court improperly rushed and compressed the *Batson* inquiry, defendant failed to meet his burden of establishing an equal protection violation.

(2) When defendant first raised a *Batson* objection, the trial court should have decided whether the defense met its step-one ***423** burden of establishing a prima facie case of discrimination. That issue became moot when the People stated their reasons and the court ruled on the ultimate issue (*see People v James*, 99 NY2d 264 [2002]). The prosecutor's reasons for all three challenged strikes were facially race-neutral, and thus met the step-two burden of production. The court appears to have melded steps two and three, however, by immediately concluding that the reasons were acceptable as to Torres and Gordon, without first allowing defense counsel to make an argument that the reasons were pretextual. This practice falls short of a "meaningful inquiry into the question of discrimination," and we caution trial courts to avoid undue haste and compression in this crucial process (*Jordan v Lefevre*, 206 F3d 196, 201 [2d Cir 2000]).

In this case the proffered reasons as to Torres and Gordon are clearly nonpretextual, and defendant does not challenge those reasons on appeal. The situation is different with respect to prospective juror Mapp. The trial court was wrong in dismissing defendant's *Batson* challenge with the statement that "the only question is Mapp, but that doesn't make a pattern." The fact that satisfactory reasons were given for striking two other jurors does not defeat defendant's prima facie case as to Mapp. Improper removal of even a single juror may be a violation of equal protection. The court should have moved on to a determination of pretext, or step three.

(1) Here, however, defendant's argument regarding Mapp is unpreserved and cannot be reached. Based on this record, the prosecutor's proffered reason for challenging Mapp--the death of her child--also might have been nonpretextual (*see, by contrast, Jordan*, 206 F3d at 201). Matters such as the prospective juror's demeanor may well have prompted the court's conclusion that "I can understand not wanting to go into her son's death." While defense counsel persisted in her challenge regarding Torres and Gordon despite the court's impatience, she said nothing further about Mapp at a time when any ambiguity-- if indeed she actually perceived any ambiguity--could have been clarified.

Finally, we reject defendant's argument that counsel was "squelched" and not permitted to make her pretext case with respect to Mapp. Despite the sometimes enormous pressures of trial, it is for courts to discharge their responsibilities under the law and for counsel to voice objection when they do not. In particular, we underscore the importance both of trial court attention to each of *Batson*'s well-articulated, sequential steps,and***424** of trial counsel attention to placing their objections on the record so they may be addressed by the court. In this way, the law can be observed and potential error avoided.

Accordingly, the order of the Appellate Division should be affirmed.

Judges Smith, Ciparick, Wesley, Rosenblatt, Graffeo and Read concur.
Order affirmed.***425**

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224 A.D.2d 922, 637 N.Y.S.2d 584

Superior Sales & Salvage, Inc., Appellant,

Superior Sales & Salvage v Time Release Sciences
Supreme Court, Appellate Division, Fourth Department, New York February 02, 1996 224 A.D.2d 922 637 N.Y.S.2d 584 *(Approx. 2 pages)*

Time Release Sciences, Inc., Respondent.

Supreme Court, Appellate Division, Fourth Department, New York

1730

(February 2, 1996)

CITE TITLE AS: Superior Sales & Salvage v Time Release Sciences

HEADNOTE

JURY
SELECTION OF JURY

(1) Decision reserved and matter remitted to Supreme Court for further proceedings --- During jury selection in civil action, dispute arose when defendant exercised two of its three peremptory challenges to exclude only two African-American women from jury; jury selection was not recorded, and court reporter was not present when parties appeared before Judge supervising jury selection; at Judge's direction, parties put matter on record before Judicial Hearing Officer who presided over trial, but parties did not request relief from Supreme Court at that time; transcript contains brief account of defendant's reason for striking second prospective juror, and plaintiff's contention that reason was pretextual; transcript contains no discussion, however, concerning first prospective juror --- Rule of Batson v Kentucky (476 US 79), that peremptory challenges cannot be used to exclude jurors from service based on impermissible considerations such as race or gender, applies in civil cases; once prima facie showing of discrimination has been made, opposing party must offer neutral explanation for striking each prospective juror within class; because court did not require defendant to place on record reasons for exclusion of each challenged juror, matter must be remitted for evidentiary hearing before Judge who supervised jury selection; at hearing, defendant must give reasons for its challenges for each juror, and court must report its findings; although voir dire was not recorded, those minutes need not be provided in every instance as precondition for obtaining Batson relief.

Case held, decision reserved and matter remitted to Supreme Court for further proceedings in accordance with the following Memorandum: During jury selection in this civil action, a dispute arose when defendant exercised two of its three peremptory challenges to exclude the only two African-American women from the jury. Jury selection was not recorded, and a court reporter was not present when the parties appeared before the Judge supervising jury selection. At the Judge's direction, the parties put the matter on the record before the Judicial Hearing Officer who presided over the trial, but the parties did not request relief from Supreme Court at that time. The transcript contains a brief account of defendant's reason for striking the second prospective juror, and plaintiff's contention that the reason was pretextual. The transcript contains no discussion, however, concerning the first prospective juror.

The rule of *Batson v Kentucky* (476 US 79), that peremptory challenges cannot be used to exclude jurors from service based on impermissible considerations such as race or gender, applies in civil cases *(see, Edmonson v Leesville Concrete Co.,* 500 US 614, 630). Once a prima facie showing of discrimination has been made, the opposing party must offer a neutral explanation for striking each prospective juror within the class *(People v Bolling,* 79 NY2d 317, 320, *rearg denied sub nom. People v Steele,* 80 NY2d 827). Because the court did not require defendant to place on the record the reasons for the exclusion of each challenged juror, the matter must be remitted for an evidentiary hearing before the Judge

SELECTED TOPICS

Criminal Law

Review
Exercise of State First Peremptory Challenge of Minority Veniremember Prosecutor Exercise of Peremptory Challenge of Prospective Juror Based on Race, Ethnicity or National Origin

Secondary Sources

APPENDIX C: U.S. SUPREME COURT DECISIONS

Investigating Sexual Harassment Appendix C

...Respondent Kimberly Ellerth quit her job after 15 months as a salesperson in one of petitioner Burlington Industries' many divisions, allegedly because she had been subjected to constant sexual harassm...

s 44:37. Examination of individual jurors-Peremptory challenges-Discriminatory exercise of peremptory challenges-Race neutral explanation

3 Criminal Procedure in New York § 44:37 (2d)

...The prosecutions' credibility in explaining its justification for peremptory strikes of racial minorities can be measured by, among other factors, the prosecution's demeanor, by how reasonable or how i...

Discrimination in Jury Selection-Systematic Exclusion or Underrepresentation of Identifiable Group

9 Am. Jur. Proof of Facts 2d 407 (Originally published in 1976)

...The right to a trial by jury is fundamental in nature, and is guaranteed by federal and state constitutions, statutes, and court rules. With respect to criminal defendants, the right to a jury trial is...

See More Secondary Sources

Briefs

BRIEF FOR RESPONDENT

1991 WL 538725
Hernandez (Dionisio) v. New York
Supreme Court of the United States
Jan. 07, 1991

...FN* Counsel of Record for Respondent The opinion of the New York Court of Appeals (Joint App. at 26-45) is reported at 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85 (1990). The opinion of the New Yor...

Brief for Petitioner

2004 WL 2190703
Thomas Joe MILLER-EL, Petitioner, v. Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.
Supreme Court of the United States
Sep. 02, 2004

...The opinion of the court of appeals (JA 1-20) is reported at 361 F.3d 849. This Court's previous opinion (JA 21-64), reversing and remanding the case to the Fifth Circuit, is reported at 537 U.S. 322. ...

BRIEF FOR PETITIONER

1990 WL 515099
Hernandez (Dionisio) v. New York

who supervised jury selection *(see, People v McDougle,* 203 AD2d 593, 593-594; *People v* ***923** *Bennett,* 186 AD2d 812; *People v Reed,* 178 AD2d 666, 667). At the hearing, defendant must give the reasons for its challenges for each juror *(see, People v McDougle, supra),* and the court must report its findings *(see, e.g., People v Reed,* 186 AD2d 159). Although the voir dire was not recorded, those minutes "need not be provided in every instance as a precondition for obtaining *Batson* relief" *(People v Childress,* 81 NY2d 263, 268). (Appeal from Judgment of Supreme Court, Erie County, Ostrowski, J.H.O.--Mechanic's Lien.)

Denman, P. J., Lawton, Wesley, Balio and Davis, JJ.

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206 A.D.2d 324, 615 N.Y.S.2d 14

Lawrence A. Ancrum et al., Appellants,

Ancrum v Eisenberg
Supreme Court, Appellate Division, First Department, New York July 28, 1994 206 A.D.2d 324 615 N.Y.S.2d 14 *(Approx. 2 pages)*

William Eisenberg, Respondent.

Supreme Court, Appellate Division, First Department, New York
52163
(July 28, 1994)

CITE TITLE AS: Ancrum v Eisenberg

HEADNOTE

JURY
SELECTION OF JURY

(1) Judgment in favor of defendant reversed, and matter remanded for new trial ---In podiatric malpractice action, plaintiffs argue defendant exercised his peremptory challenges for discriminatory purposes in violation of Equal Protection Clauses of Federal and State Constitutions; defense counsel offered race-neutral explanations for using his three peremptory challenges to exclude three black persons from panel; he noted that one 'was the mother of seven and a widow' who would presumably identify with financial hardship experienced by plaintiffs due to income lost as result of alleged malpractice; second potential juror had received 'extensive podiatric treatment'; third assisted Traffic Court Judge and 'mentioned that everyone is considered guilty until proven innocent in Traffic Court' --- Plaintiffs have stated prima facie case of discrimination; plaintiffs are black, defense counsel had only three peremptory challenges and used all three to exclude only potential black jurors; only reason stated by defense counsel directly relevant to circumstances of case is podiatric treatment of one prospective juror and, even with respect to this individual, there is no indication experience with treatment was negative.

Judgment of the Supreme Court, New York County (Walter M. Schackman, J., on the application; Stanley Sklar, J., at trial), entered November 18, 1992 which, after a jury verdict in favor of defendant, dismissed the complaint, unanimously reversed, on the law, without costs, the complaint reinstated, and the matter remanded to Supreme Court for a new trial.

Plaintiff Lawrence Ancrum alleges that, by reason of defendant'smalpractice*325 in rendering podiatric care and treatment, he suffers pain and continues to require extensive medical care and treatment. Specifically, it is alleged that Dr. Eisenberg was negligent in failing to employ internal or external fixation during surgery to correct a nonunion on the first metatarsal of the right foot, a site at which he had performed a previous radical bunionectomy. The complaint also includes a cause of action by plaintiff's wife for loss of consortium.

Plaintiffs' main argument on appeal is that defendant exercised his peremptory challenges for discriminatory purposes in violation of the Equal Protection Clauses of the Federal and State Constitutions. Plaintiffs' counsel moved to disband the jury on the grounds that: "My clients, the Ancrums, are black and it is my contention that they are being denied a fair cross section of the community in that the only black jurors that were in the empaneling room have been systematically excluded by my adversary."

In response, defense counsel offered race-neutral explanations for using his three peremptory challenges to exclude three black persons from the panel. He noted that one "was the mother of seven and a widow" who would presumably identify with the financial hardship experienced by plaintiffs due to income lost as a result of the alleged malpractice.

A second potential juror had received "extensive podiatric treatment at various times." The third assisted a Traffic Court Judge and "mentioned that everyone is considered guilty until proven innocent in Traffic Court."

Supreme Court denied the motion, ruling: "I don't believe that the Plaintiff has made out any sufficient proof of any systematic exclusion on the grounds of race. There were reasonable grounds for you [to] exercise peremptory challenges on these potential jurors."

Plaintiffs have stated a prima facie case of discrimination. Plaintiffs are black, defense counsel had only three peremptory challenges and used all three to exclude the only potential black jurors *(see, Batson v Kentucky,* 476 US 79, 96- 97). Therefore, the issue on appeal is whether the court abused its discretion in determining that defense counsel offered non- pretextual, race-neutral explanations for these challenges. We note that the only reason stated by defense counsel directly relevant to the circumstances of this case is the podiatric treatment of one prospective juror and, even with respect to this individual, there is no indication that the experience with treatment was negative.*326

Defendant relies on the principle that great deference should be accorded a court's determination that a race-neutral explanation for a peremptory challenge is not mere pretext *(People v Hernandez,* 75 NY2d 350, 356, ***affd*** 500 US 352). However, that decision rests on the advantage of the ruling court in being able to observe the demeanor of the attorney who exercises the challenge *(Hernandez v New York,* 500 US 352, ***supra).*** In the matter on appeal, the Justice who heard the application to disband the jury was not present during the voir dire. Unlike a criminal trial, no minutes are generally taken of the voir dire in a civil matter. Therefore, this Court is placed in the untenable position of attempting to evaluate the proffered explanations in a vacuum. In view of the disposition in this matter, it is unnecessary to reach plaintiffs' other contentions.

The unpublished decision and order of this Court entered herein on June 21, 1994 is *sua sponte* recalled and vacated.

Concur--Murphy, P. J., Carro, Rubin and Williams, JJ.

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...FN* Counsel of Record Miller-El claims the State peremptorily struck six veniremen because they were African-American. The State gave race-neutral explanations for the strikes. Thus, under Batson v. Ke...

See More Briefs

Trial Court Documents

People of the State of New York v. Mateo

1997 WL 34904654
THE PEOPLE OF THE STATE OF NEW YORK, v. Angel MATEO.
County Court of New York
Aug. 25, 1997

...Connell, J. The following constitutes the Opinion, Decision & Order of the Court. The headings and numbering in this Decision correspond as nearly as possible to those of the motion papers. To the exte...

WESTLAW

Not Followed on State Law Grounds State v. Mukhtaar, Conn., May 17, 2000

Original Image of 106 S.Ct. 1712 (PDF)

Batson v. Kentucky
Supreme Court of the United States April 30, 1986 476 U.S. 79 106 S.Ct. 1712 90 L.Ed.2d 69 54 USLW 4425 (Approx. 38 pages)

106 S.Ct. 1712
Supreme Court of the United States

James Kirkland BATSON, Petitioner,
v.
KENTUCKY.

No. 84-6263.
Argued Dec. 12, 1985.
Decided April 30, 1986.

Petitioner, a black man, was convicted in a Kentucky state court, and he appealed. The Kentucky Supreme Court affirmed, and petitioner sought review. The Supreme Court, Justice Powell, held that: (1) Equal Protection Clause forbids prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant, and (2) to establish a prima facie case of purposeful discrimination in selection of the petit jury defendant must first show that he is a member of a cognizable racial group, that prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race and that the 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.

Reversed and remanded.

Justice White filed a concurring opinion.

Justice Marshall filed a concurring opinion.

Justice Stevens filed a concurring opinion in which Justice Brennan joined.

Justice O'Connor filed a concurring opinion.

Chief Justice Burger filed a dissenting opinion in which Justice Rehnquist joined.

Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger joined.

West Headnotes (6)

1713 *79 Syllabus

During the criminal trial in a Kentucky state court of petitioner, a black man, the judge conducted *voir dire* examination of the jury venire and excused certain jurors for cause. The prosecutor then 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 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. Without expressly ruling on petitioner's request for a hearing, the trial judge denied the motion, and the jury ultimately convicted petitioner. Affirming the conviction, the Kentucky Supreme Court observed that recently, in another case, it had relied on *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759, and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire.

SELECTED TOPICS

Criminal Law

Review
Judgment Entry of Criminal Case

Competency of Jurors, Challenges, and Objections

Defendant Challenging Validity of Jury Presents Prima Facie Case of Discrimination

Jury

Competency of Jurors, Challenges, and Objections
Challenged Peremptory Strike of Prospective Juror

Secondary Sources

s 17:29. Peremptory challenges

Trial Handbook for Ky. Law. § 17:29 (2016-2017 ed.)

...In civil cases, each side shall have three peremptory challenges, but co-parties having antagonistic interests shall have three peremptory challenges each. Williams v. Whitaker decided that parties are...

APPENDIX III - JUDICIAL OPINIONS

FDA Enforcement Man. Appendix III

...No. 74-215 Supreme Court of the United States 421 U.S. 658; 95 S. Ct. 1903 2d 489 Argued March 18-19, 1975 June 9, 1975 Mr. Chief Justice Burger delivered the opinion of the Court. We granted certiorar...

Rule 47.03. Peremptory challenges

7 Ky. Prac. R. Civ. Proc. Ann. Rule 47.03

...(Adopted eff. 1-1-80) Rule 47.03 was added by the amendments to the Civil Rules in 1980. It spells out the number of peremptory challenges for each side in a civil case, and prescribes the manner of ma...

See More Secondary Sources

Briefs

Brief of the NAACP Legal Defense and Educational Fund, Inc., The American Civil Liberties Union, The American Civil Liberties Union of Northern California, The Lawyers' Committee for Civil Rights Under Law, and the National Association of Criminal De fense Lawyers as Amici Curiae in Support of Petitioner%tc

2005 WL 429978
Jay Shawn JOHNSON, Petitioner, v. STATE OF CALIFORNIA, Respondent.
Supreme Court of the United States
Feb. 17, 2005

...FN* Counsel of Record FN* Letters of consent to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person o...

Brief Amici Curiae of the NAACP Legal Defense and Educational Fund, Inc., the American Jewish Committee, and the American Jewish Congress

1984 WL 563939
James Kirkland BATSON, Petitioner, v. COMMONWEALTH OF KENTUCKY, Respondent.
Supreme Court of the United States
1984

Held:

1. The principle announced in *Strauder v. West Virginia,* 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664, that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded, is reaffirmed. Pp. 1715-1719.

(a) A defendant has no right to a petit jury composed in whole or in part of persons of his own race. *Strauder v. West Virginia,* 10 Otto 303, 305, 100 U.S. 303, 305, 25 L.Ed. 664. However, 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. By denying a person participation in jury service on account of his race, the State also unconstitutionally discriminates against the excluded juror. Moreover, selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Pp. 1716-1718.

(b) The same equal protection principles as are applied to determine whether there is discrimination in selecting the venire also govern the State's use of peremptory challenges to strike individual jurors from the petit jury. Although a prosecutor ordinarily is entitled to exercise **80* peremptory challenges for any reason, 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. Pp. 1718-1719.

2. The portion of *Swain v. Alabama, supra,* concerning the evidentiary burden placed on a defendant who claims that he has been denied equal protection through ***1714* the State's discriminatory use of peremptory challenges is rejected. In *Swain,* it was held that a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system as a whole was being perverted. Evidence offered by the defendant in *Swain* did not meet that standard because it did not demonstrate the circumstances under which prosecutors in the jurisdiction were responsible for striking black jurors beyond the facts of the defendant's case. This evidentiary formulation is inconsistent with equal protection standards subsequently developed in decisions relating to selection of the jury venire. 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. Pp. 1719-1722.

3. A defendant may establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. 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. The defendant may also rely on the fact 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 such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race. 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. The prosecutor may not rebut a prima facie showing by stating that he challenged the jurors on the assumption that they would be partial to the defendant because of their shared race or by affirming his good faith in individual selections. Pp. 1722-1724.

4. While the peremptory challenge occupies an important position in trial procedures, the above-stated principles will not undermine the contribution that the challenge generally makes to the administration of justice. Nor will application of such principles create serious administrative difficulties. Pp. 1724-1725.

**81* 5. Because the trial court here flatly rejected petitioner's objection to the prosecutor's removal of all black persons on the venire without requiring the prosecutor to explain his action, the case is remanded for further proceedings. Pp. 1725-1726.

Reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. WHITE and MARSHALL, JJ., filed concurring opinions, *post,* p. ---. STEVENS, J., filed a concurring opinion, in which

BRENNAN, J., joined, *post,* p. ---. O'CONNOR, J., filed a concurring opinion, *post,* p. ---. BURGER, C.J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post,* p. ---. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C.J., joined, *post,* p. ---.

Attorneys and Law Firms

J. David Niehaus argued the cause for petitioner. With him on the briefs were *Frank W. Heft, Jr.,* and *Daniel T. Goyette.*

Rickie L. Pearson, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief were *David L. Armstrong,* Attorney General, and *Carl T. Miller, Jr.,* Assistant Attorney General.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Fried, Assistant Attorney General Trott,* and *Sidney M. Glazer.**

* Briefs of *amici curiae* urging reversal were filed for the NAACP Legal Defense and Educational Fund, Inc., by *Julius LeVonne Chambers, Charles Stephen Ralston, Steven L. Winter, Anthony G. Amsterdam,* and *Samuel Rabinove;* for the Lawyers' Committee for Civil Rights Under Law by *Barry Sullivan, Fred N. Fishman, Robert H. Kapp, Norman Redlich, William L. Robinson,* and *Norman J. Chachkin;* and for Michael McCray et al. by *Steven R. Shapiro.*

Robert E. Weiss, Donald A. Kuebler, Robert J. Miller, and *Jack E. Yelverton* filed a brief for the National District Attorneys Association, Inc., as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the National Legal Aid and Defender Association by *Patricia Unsinn;* and for Elizabeth Holtzman by *Elizabeth Holtzman, pro se,* and *Barbara D. Underwood.*

Opinion

***82** Justice POWELL delivered the opinion of the Court.

This case requires us to reexamine that portion of *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), 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 ****1715** exclude members of his race from the petit jury. [1]

I

Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. On the first day of trial in Jefferson Circuit Court, the judge conducted *voir dire* examination of the venire, excused certain jurors for cause, and permitted the parties to ***83** exercise peremptory challenges. [2] 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. On appeal to the Supreme Court of Kentucky, petitioner pressed, among other claims, the argument concerning the prosecutor's use of peremptory challenges. Conceding that *Swain v. Alabama, supra,* apparently foreclosed an equal protection claim based solely on the prosecutor's conduct in this case, petitioner urged the court to follow decisions of other States, *People v. Wheeler,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); *Commonwealth v. Soares,* 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979), and to hold that such conduct violated his rights under the Sixth Amendment and § 11 of the Kentucky Constitution ****1716** to a jury drawn from a cross section of the community. Petitioner also contended ***84** that the facts showed that the prosecutor had engaged in a "pattern" of discriminatory challenges in this case and established an equal protection violation under *Swain.*

The Supreme Court of Kentucky affirmed. In a single paragraph, the court declined petitioner's invitation to adopt the reasoning of *People v. Wheeler, supra,* and *Commonwealth v. Soares, supra.* The court observed that it recently had reaffirmed its reliance on *Swain,* and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire. See *Commonwealth v. McFerron,* 680 S.W.2d 924 (1984). We granted certiorari, 471 U.S. 1052, 105 S.Ct. 2111, 85 L.Ed.2d 476 (1985), and now reverse.

II

1 In *Swain v. Alabama,* this Court recognized that 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." 380 U.S., at 203-204, 85 S.Ct., at 826-27. This principle has been "consistently and repeatedly" reaffirmed, *id.,* at 204, 85 S.Ct., at 827, in numerous decisions of this Court both preceding and following *Swain.*[3] We reaffirm the principle today.[4]

***85** 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. *Strauder v. West Virginia,* 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880). That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In *Strauder,* the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. *Id.,* at 306-307. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

****1717** In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in *Strauder* recognized, however, that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race." *Id.,* at 305.[5] "The number of our races and nationalities stands in the way of evolution of such a conception" of the demand of equal protection. *Akins v. Texas,* 325 U.S. 398, 403, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945).[6] But the defendant does have the right to be ***86** tried by a jury whose members are selected pursuant to nondiscriminatory criteria. *Martin v. Texas,* 200 U.S. 316, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497 (1906); *Ex parte Virginia,* 10 Otto 339, 100 U.S. 339, 345, 25 L.Ed. 676 345 (1880). 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, *Strauder, supra,* 100 U.S., at 305,[7] or on the false assumption that members of his race as a group are not qualified to serve as jurors, see *Norris v. Alabama,* 294 U.S. 587, 599, 55 S.Ct. 579, 584, 79 L.Ed. 1074 (1935); *Neal v. Delaware,* 13 Otto 370, 397, 103 U.S. 370, 397, 26 L.Ed. 567 (1881).

Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body ... composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder, supra,* 100 U.S., at 308; see *Carter v. Jury Comm'n of Greene County,* 396 U.S. 320, 330, 90 S.Ct. 518, 524, 24 L.Ed.2d 549 (1970). The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. *Duncan v. Louisiana,* 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968).[8] Those on the ****1718** venire ***87** must be "indifferently chosen,"[9] to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." *Strauder, supra,* 100 U.S., at 309.

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. See *Thiel v. Southern Pacific Co.,* 328 U.S. 217, 223-224, 66 S.Ct. 984, 987-88, 90 L.Ed. 1181 (1946). A person's race simply "is unrelated to his fitness as a juror." *Id.,* at 227, 66 S.Ct., at 989 (Frankfurter, J., dissenting). As long ago as *Strauder,* therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. 100 U.S., at 308; see *Carter v. Jury Comm'n of Greene County, supra,* 396 U.S., at 329-330, 90 S.Ct., at 523-524; *Neal v. Delaware, supra,* 103 U.S., at 386.

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. See *Ballard v. United States,* 329 U.S. 187, 195, 67 S.Ct. 261, 265, 91 L.Ed. 181 (1946); *McCray v. New York,* 461 U.S. 961, 968, 103 S.Ct. 2438, 2443, 77 L.Ed.2d 1322 (1983) (MARSHALL, J., dissenting from denial of certiorari). Discrimination within the ***88** judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Strauder,* 100 U.S., at 308.

B

In *Strauder,* the Court invalidated a state statute that provided that only white men could serve as jurors. *Id.,* at 305. We can be confident that no State now has such a law. The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford "protection against action of the State through its administrative officers in effecting the prohibited discrimination." *Norris v. Alabama, supra,* 294 U.S., at 589, 55 S.Ct. 579, 580, 79 L.Ed. 1074; see *Hernandez v. Texas,* 347 U.S. 475, 478-479, 74 S.Ct. 667, 670-71, 98 L.Ed. 866 (1954); *Ex parte Virginia, supra,* 100 U.S., at 346-347. Thus, the Court has found a denial of equal protection where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds, [10] and has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors. [11] 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, *Hill v. Texas,* 316 U.S. 400, 406, 62 S.Ct. 1159, 1162, 86 L.Ed. 1559 (1942), 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," *Avery v. Georgia,* 345 U.S. 559, 562, 73 S.Ct. 891, 893, 97 L.Ed. 1244 (1953); see ***1719** *McCray v. New York, supra,* 461 U.S., at 965, 968, 103 S.Ct., at 2440, 2443 ***89** (MARSHALL, J., dissenting from denial of certiorari); see also *Alexander v. Louisiana,* 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972).

2 3 Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause. [12] 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, *United States v. Robinson,* 421 F.Supp. 467, 473 (Conn.1976), mandamus granted *sub nom. United States v. Newman,* 549 F.2d 240 (CA2 1977), 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

The principles announced in *Strauder* never have been questioned in any subsequent decision of this Court. ***90** Rather, the Court has been called upon repeatedly to review the application of those principles to particular facts. [13] A recurring question in these cases, as in any case alleging a violation of the Equal Protection Clause, was whether the defendant had met his burden of proving purposeful discrimination on the part of the State. *Whitus v. Georgia,* 385 U.S. 545, 550, 87 S.Ct. 643, 646-647, 17 L.Ed.2d 599 (1967); *Hernandez v. Texas, supra,* 347 U.S., at 478-481, 74 S.Ct., at 670-672; *Akins v. Texas,* 325 U.S., at 403-404, 65 S.Ct., at 1279; *Martin v. Texas,* 200 U.S. 316, 26 S.Ct. 338, 50 L.Ed. 497 (1906). That question also was at the heart of the portion of *Swain v. Alabama* we reexamine today. [14]

***1720** A

Swain required the Court to decide, among other issues, whether a black defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. 380 U.S., at 209-210, 85 S.Ct., at 830. The record in *Swain* showed that the prosecutor ***91** had used the State's peremptory challenges to strike the six black persons included on the petit jury venire. *Id.,* at 210, 85 S.Ct., at 830. While rejecting the defendant's claim for failure to prove purposeful discrimination, the Court nonetheless indicated that the Equal Protection Clause placed some limits on the State's exercise of peremptory challenges. *Id.,* at 222-224, 85 S.Ct., at 837-838.

The Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control, *id.*, at 214-220, 85 S.Ct., at 832-836, and the constitutional prohibition on exclusion of persons from jury service on account of race, *id.*, at 222-224, 85 S.Ct., at 837-838. While the Constitution does not confer a right to peremptory challenges, *id.*, at 219, 85 S.Ct., at 835 (citing *Stilson v. United States*, 250 U.S. 583, 586, 40 S.Ct. 28, 29-30, 63 L.Ed. 1154 (1919)), those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury, 380 U.S., at 219, 85 S.Ct., at 835.[15] To preserve the peremptory nature of the prosecutor's challenge, the Court in *Swain* declined to scrutinize his actions in a particular case by relying on a presumption that he properly exercised the State's challenges. *Id.*, at 221-222, 85 S.Ct., at 836-837.

The Court went on to observe, however, that a State may not exercise its challenges in contravention of the Equal Protection Clause. It was impermissible for a prosecutor to use his challenges to exclude blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.*, at 224, 85 S.Ct., at 838. Accordingly, a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system was "being perverted" in that manner. *Ibid.* For example, an inference of purposeful discrimination would be raised on evidence that a prosecutor, "in case after case, whatever the ***92** 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." *Id.*, at 223, 85 S.Ct., at 837. Evidence offered by the defendant in *Swain* did not meet that standard. While the defendant showed that prosecutors in the jurisdiction had exercised their strikes to exclude blacks from the jury, he offered no proof of the circumstances under which prosecutors were responsible for striking black jurors beyond the facts of his own case. *Id.*, at 224-228, 85 S.Ct., at 838-840.

A number of lower courts following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause.[16] ***1721** Since this interpretation of *Swain* has placed on defendants a crippling burden of proof,[17] prosecutors' peremptory challenges are now largely immune ***93** from constitutional scrutiny. For reasons that follow, we reject this evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause.

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. 229, 240, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (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." *Whitus v. Georgia*, 385 U.S., at 550, 87 S.Ct., at 646-47 (citing *Tarrance v. Florida*, 188 U.S. 519, 23 S.Ct. 402, 47 L.Ed. 572 (1903)). 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." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977). Circumstantial evidence of invidious intent may include proof of disproportionate impact. *Washington v. Davis*, 426 U.S., at 242, 96 S.Ct., at 2049. 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." *Ibid.* For example, "total or seriously disproportionate exclusion of Negroes from jury venires," *ibid.*, "is itself such an 'unequal application of the law ... as to show intentional discrimination,' " *id.*, at 241, 96 S.Ct., at 2048 (quoting *Akins v. Texas*, 325 U.S., at 404, 65 S.Ct., at 1279).

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 ***94** facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *Washington v. Davis, supra*, 426 U.S., at 239-242, 96 S.Ct., at 2047-49. Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. *Alexander v. Louisiana*, 405 U.S., at 632, 92 S.Ct., at 1226. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. See

Alexander v. Louisiana, supra, 405 U.S., at 632, 92 S.Ct., at 1226; *Jones v. Georgia,* 389 U.S. 24, 25, 88 S.Ct. 4, 5, 19 L.Ed.2d 25 (1967). Rather, the State must demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander v. Louisiana, supra,* at 632, 92 S.Ct., at 1226; see *Washington v. Davis, supra,* 426 U.S., at 241, 96 S.Ct., at 2048.[18]

***1722** 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. *E.g., Castaneda v. Partida,* 430 U.S. 482, 494-495, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977); *Alexander v. Louisiana, supra,* 405 U.S., at 631-632, 92 S.Ct., at 1225-1226. The defendant initially must show that he is a member of a racial group capable of being singled out for differential treatment. *Castaneda v. Partida, supra,* 430 U.S., at 494, 97 S.Ct., at 1280. 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. *Id.,* at 494, 97 S.Ct., at 1280. Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the "result bespeaks discrimination." ***95** *Hernandez v. Texas,* 347 U.S., at 482, 74 S.Ct., at 672-73; see *Arlington Heights v. Metropolitan Housing Development Corp., supra,* 429 U.S., at 266, 97 S.Ct., at 564.

Since the ultimate issue is whether the State has discriminated in selecting the defendant's venire, however, the defendant may establish a prima facie case "in other ways than by evidence of long-continued unexplained absence" of members of his race "from many panels." *Cassell v. Texas,* 339 U.S. 282, 290, 70 S.Ct. 629, 633, 94 L.Ed. 839 (1950) (plurality opinion). 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." *Whitus v. Georgia, supra,* 385 U.S., at 552, 87 S.Ct., at 647; see *Castaneda v. Partida, supra,* 430 U.S., at 494, 97 S.Ct., at 1280; *Washington v. Davis, supra,* 426 U.S., at 241, 96 S.Ct., at 2048; *Alexander v. Louisiana, supra,* 405 U.S., at 629-631, 92 S.Ct., at 1224-26. 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. *Alexander v. Louisiana, supra,* at 630, 92 S.Ct., at 1225.

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 Department 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." 429 U.S., at 266, n. 14, 97 S.Ct., at 564, n. 14. For evidentiary requirements ***96** to dictate that "several must suffer discrimination" before one could object, *McCray v. New York,* 461 U.S., at 965, 103 S.Ct., at 2440 (MARSHALL, J., dissenting from denial of certiorari), would be inconsistent with the promise of equal protection to all.[19]

***1723** C

4 The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since *Swain.* See *Castaneda v. Partida, supra,* 430 U.S., at 494-495, 97 S.Ct., at 1280; *Washington v. Davis,* 426 U.S., at 241-242, 96 S.Ct., at 2048-2049; *Alexander v. Louisiana, supra,* 405 U.S., at 629-631, 92 S.Ct., at 1224-1226. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida, supra,* 430 U.S., at 494, 97 S.Ct., at 1280, 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." *Avery v. Georgia,* 345 U.S., at 562, 73 S.Ct., at 892. 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.

5 In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. *97 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.

6 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. See *McCray v. Abrams,* 750 F.2d, at 1132; *Booker v. Jabe,* 775 F.2d 762, 773 (CA6 1985), cert. pending, No. 85-1028. 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. Cf. *Norris v. Alabama,* 294 U.S., at 598-599, 55 S.Ct., at 583-84; see *Thompson v. United States,* 469 U.S. 1024, 1026, 105 S.Ct. 443, 445, 83 L.Ed.2d 369 (1984) (BRENNAN, J., dissenting from denial of certiorari). 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, *supra,* at 1716, 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. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of *98 such assumptions, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by **1724 denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." *Alexander v. Louisiana,* 405 U.S., at 632, 92 S.Ct., at 1226. If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement." *Norris v. Alabama, supra,* 294 U.S. at 598, 55 S.Ct., at 583-84. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.[20] The trial court then will have the duty to determine if the defendant has established purposeful discrimination.[21]

IV

The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge. Conceding that the Constitution does not guarantee a right to peremptory challenges and that *Swain* did state that their use ultimately is subject to the strictures of equal protection, the State argues 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 *99 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.[22] 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.

Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those States applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens,[23] and the peremptory challenge system has survived. We decline, however, to formulate particular procedures to be followed **1725 upon a defendant's timely objection to a prosecutor's challenges.[24]

*100 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. *E.g., Whitus v. Georgia,* 385 U.S., at 549-550, 87 S.Ct., at 646-47; *Hernandez v. Texas,* 347 U.S., at 482, 74 S.Ct., at 672-673; *Patton v. Mississippi,* 332 U.S., at 469, 68 S.Ct., at 187.[25]

It is so ordered.

Justice WHITE, concurring.
The Court overturns the principal holding in *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), that the Constitution does not require in any given case an inquiry into the prosecutor's reasons for using his peremptory challenges to strike blacks from the petit jury panel in the criminal trial of a black defendant and that in such a case it will be presumed that the prosecutor is acting for legitimate trial-related reasons. The Court now rules that such use of peremptory challenges in a given case may, but does not necessarily, raise an inference, which the prosecutor carries the burden of refuting, ***101** that his strikes were based on the belief that no black citizen could be a satisfactory juror or fairly try a black defendant.

I agree that, to this extent, *Swain* should be overruled. I do so because *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. If the defendant objects, the judge, in whom the Court puts considerable trust, may determine that the prosecution must respond. If not persuaded otherwise, the judge may conclude that the challenges rest on the belief that blacks could not fairly try a black defendant. This, in effect, attributes to the prosecutor the view that all blacks should be eliminated from the entire venire. Hence, the Court's prior cases dealing with jury venires rather than petit juries are not without relevance in this case.

****1726** 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 ***102** satisfactory ground other than the belief that black jurors should not be allowed to judge a black defendant.

Much litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid. But I agree with the Court that the time has come to rule as it has, and I join its opinion and judgment.

I would, however, adhere to the rule announced in *DeStefano v. Woods,* 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), that *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), which held that the States cannot deny jury trials in serious criminal cases, did not require reversal of a state conviction for failure to grant a jury trial where the trial began prior to the date of the announcement in the *Duncan* decision. The same result was reached in *DeStefano* with respect to the retroactivity of *Bloom v. Illinois,* 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), as it was in *Daniel v. Louisiana,* 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975) (*per curiam*), with respect to the decision in *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), holding that the systematic exclusion of women from jury panels violated the Sixth and Fourteenth Amendments.

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 Court's opinion cogently explains the pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the Equal Protection

Clause. The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that "justice ... sit supinely by" and be flouted in case after case before a remedy is available. [1] I nonetheless write separately to express my views. The decision today will not end the racial discrimination ***103** that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

I

A little over a century ago, this Court invalidated a state statute providing that black citizens could not serve as jurors. *Strauder v. West Virginia,* 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880). State officials then turned to somewhat more subtle ways of keeping blacks off jury venires. See *Swain v. Alabama,* 380 U.S. 202, 231-238, 85 S.Ct. 824, 841-846, 13 L.Ed.2d 759 (1965) (Goldberg, J., dissenting); Kuhn, Jury Discrimination: The Next Phase, 41 S.Cal.L.Rev. 235 (1968); see also J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 155-157 (1977) (hereinafter Van Dyke). Although the means used to exclude blacks have changed, the same pernicious consequence has continued.

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. See ***1727** *United States v. Carter,* 528 F.2d 844, 848 (CA8 1975) (in 15 criminal cases in 1974 in the Western District of Missouri involving black defendants, prosecutors peremptorily challenged 81% of black jurors), cert. denied, 425 U.S. 961, 96 S.Ct. 1745, 48 L.Ed.2d 206 (1976); *United States v. McDaniels,* 379 F.Supp. 1243 (ED La.1974) (in 53 criminal cases in 1972-1974 in the Eastern District of Louisiana involving black defendants, federal prosecutors used 68.9% of their peremptory challenges against black jurors, who made up less than one-quarter of the venire); *McKinney v. Walker,* 394 F.Supp. 1015, 1017-1018 (SC 1974) (in 13 criminal trials in 1970-1971 in Spartansburg County, South Carolina, involving black defendants, prosecutors peremptorily challenged 82% of black jurors), affirmance order, 529 F.2d 516 (CA4 1975). [2] Prosecutors ***104** have explained to courts that they routinely strike black jurors, see *State v. Washington,* 375 So.2d 1162, 1163-1164 (La.1979). 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.' " [3] 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. [4]

The Court's discussion of the utter unconstitutionality of that practice needs no amplification. This Court explained more than a century ago that " 'in the selection of jurors to pass upon [a defendant's] life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.' " *Neal v. Delaware,* 13 Otto 370, 394, 103 U.S. 370, 394, 26 L.Ed. 567 (1881), quoting *Virginia v. Rives,* 10 Otto 313, 323, 100 U.S. 313, 323, 25 L.Ed. 667 (1880). 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. *Post,* at 1745. 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. Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks ***105** lack the "intelligence, experience, or moral integrity," *Neal, supra,* 103 U.S., at 397, to be entrusted with that role.

II

I wholeheartedly concur in the Court's conclusion that use of the peremptory challenge to remove blacks from juries, on the basis of their race, violates the Equal Protection Clause. I would go further, however, in fashioning a remedy adequate to eliminate that discrimination. 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, *ante,* at 1723, has been adopted as a matter of state law in States including Massachusetts and California. Cases from those jurisdictions illustrate the ***1728** 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. See *Commonwealth v. Robinson,* 382 Mass. 189, 195, 415 N.E.2d 805, 809-810 (1981) (no prima facie case of discrimination where defendant is black, prospective jurors include three blacks and one Puerto Rican, and prosecutor excludes one for cause and strikes the remainder peremptorily, producing all-white jury); *People v. Rousseau,* 129 Cal.App.3d 526, 536-537, 179 Cal.Rptr. 892, 897-898 (1982) (no prima facie case where prosecutor peremptorily strikes only two blacks on jury panel). 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. See ***106** *King v. County of Nassau,* 581 F.Supp. 493, 501-502 (EDNY 1984). 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, see *People v. Hall,* 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (1983), or seemed "uncommunicative," *King, supra,* at 498, 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," *Hall, supra,* at 165, 197 Cal.Rptr. at 73, 672 P.2d, at 856? 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. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." *King, supra,* at 502. 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. *Post,* at 1745; see also THE CHIEF JUSTICE's dissenting opinion, *post,* at 1736-1737. 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 ***107** our society as a whole." *Rose v. Mitchell,* 443 U.S. 545, 558-559, 99 S.Ct. 2993, 3001, 61 L.Ed.2d 739 (1979), quoted in *Vasquez v. Hillery,* 474 U.S. 254, 264, 106 S.Ct. 617, 624, 88 L.Ed.2d 598 (1986).

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. See Van Dyke, at 167-169; Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loyola (LA) L.Rev. 247, 269-270 (1973). Justice Goldberg, dissenting in *Swain,* emphasized that "[w]ere it necessary to make an absolute choice between ****1729** 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." 380 U.S., at 244, 85 S.Ct., at 849. 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," *Lewis v. United States,* 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed. 1011 (1892), and "one of the most important of the rights secured to the accused," *Pointer v. United States,* 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894). See Van Dyke, at 167; Brown, McGuire, & Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse, 14 New England L.Rev. 192 (1978). I would not find that an acceptable solution. Our criminal justice system "requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes v. Missouri,* 120 U.S. 68, 70, 7 S.Ct. 350, 353, 30 L.Ed. 578 (1887). We can maintain that balance, not by permitting both prosecutor

and defendant to engage in racial discrimination in jury selection, but by banning the use of *108 peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptories as well.

Much ink has been spilled regarding the historic importance of defendants' peremptory challenges. The approving comments of the *Lewis* and *Pointer* Courts are noted above; the *Swain* Court emphasized the "very old credentials" of the peremptory challenge, 380 U.S., at 212, 85 S.Ct., at 813, and cited the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Id.*, at 219, 85 S.Ct., at 835. But this Court has also repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial. *Frazier v. United States*, 335 U.S. 497, 505, n. 11, 69 S.Ct. 201, 206, n. 11, 93 L.Ed. 187 (1948); *United States v. Wood*, 299 U.S. 123, 145, 57 S.Ct. 177, 185, 81 L.Ed. 78 (1936); *Stilson v. United States*, 250 U.S. 583, 586, 40 S.Ct. 28, 29-30, 63 L.Ed. 1154 (1919); see also *Swain*, 380 U.S., at 219, 85 S.Ct., at 835. The potential for racial prejudice, further, inheres in the defendant's challenge as well. If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay.

I applaud the Court's holding that the racially discriminatory use of peremptory challenges violates the Equal Protection Clause, and I join the Court's opinion. However, only by banning peremptories entirely can such discrimination be ended.

Justice STEVENS, with whom Justice BRENNAN joins, concurring.
In his dissenting opinion, THE CHIEF JUSTICE correctly identifies an apparent inconsistency between my criticism of the Court's action in *Colorado v. Connelly*, 474 U.S. 1050, 106 S.Ct. 785, 88 L.Ed.2d 763 (1986) (memorandum of BRENNAN, J., joined by STEVENS, J.), and *New Jersey v. T.L.O.*, 468 U.S. 1214, 104 S.Ct. 3583, 82 L.Ed.2d 881 (1984) (STEVENS, J., dissenting)-cases in which the Court directed the State to brief and argue questions not presented in its petition *109 for certiorari-and our action today in finding a violation of the Equal Protection Clause despite the failure of petitioner's counsel to rely on that ground of decision. *Post*, at 1732-1733, nn. 1 and 2. In this case, however-unlike *Connelly* and *T.L.O.* -the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance. In defending the **1730 Kentucky Supreme Court's judgment, Kentucky's Assistant Attorney General emphasized the State's position on the centrality of the equal protection issue:

"... Mr. Chief Justice, and may it please the Court, the issue before this Court today is simply whether Swain versus Alabama should be reaffirmed....

"... We believe that it is the Fourteenth Amendment that is the item that should be challenged, and presents perhaps an address to the problem. Swain dealt primarily with the use of peremptory challenges to strike individuals who were of a cognizable or identifiable group.

"Petitioners show no case other than the State of California's case dealing with the use of peremptories wherein the Sixth Amendment was cited as authority for resolving the problem. So, we believe that the Fourteenth Amendment is indeed the issue. That was the guts and primarily the basic concern of Swain.

"In closing, we believe that the trial court of Kentucky and the Supreme Court of Kentucky have firmly embraced Swain, and we respectfully request that this Court affirm the opinion of the Kentucky court as well as to reaffirm Swain versus Alabama." [1]

In addition to the party's reliance on the equal protection argument in defense of the judgment, several *amici curiae* *110 also addressed that argument. For instance, the argument in the brief filed by the Solicitor General of the United States begins:

"PETITIONER DID NOT ESTABLISH THAT HE WAS DEPRIVED OF A PROPERLY CONSTITUTED PETIT JURY OR DENIED EQUAL PROTECTION OF THE LAWS

"A. Under *Swain v. Alabama* A Defendant Cannot Establish An Equal Protection Violation By Showing Only That Black Veniremen Were Subjected To Peremptory Challenge By The Prosecution In His Case" [2]

Several other *amici* similarly emphasized this issue.[3]

In these circumstances, although I suppose it is possible that reargument might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years,[4] ***1731*** I believe the Court acts wisely in ***111*** resolving the issue now on the basis of the arguments that have already been fully presented without any special invitation from this Court.[5]

Justice O'CONNOR, concurring.
I concur in the Court's opinion and judgment, but also agree with the views of THE CHIEF JUSTICE and Justice WHITE that today's decision does not apply retroactively.

112 Chief Justice BURGER, joined by Justice REHNQUIST, dissenting.
We granted certiorari to decide whether petitioner was tried "in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community." Pet. for Cert. i.

I

Today the Court sets aside the peremptory challenge, a procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years. It does so on the basis of a constitutional argument that was rejected, without a single dissent, in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Reversal of such settled principles would be unusual enough on its own terms, for only three years ago we said that "*stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420, 103 S.Ct. 2481, 2487, 76 L.Ed.2d 687 (1983). What makes today's holding truly extraordinary is that it is based on a constitutional argument that the petitioner has *expressly* declined to raise, both in this Court and in the Supreme Court of Kentucky.

In the Kentucky Supreme Court, petitioner disclaimed specifically any reliance on the Equal Protection Clause of the Fourteenth Amendment, pressing instead only a claim based on the Sixth Amendment. See Brief for Appellant 14 and Reply Brief for Appellant 1 in No. 84-SC-733-MR (Ky.). As petitioner explained at oral argument here: "We have not made an equal protection claim.... We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such." Tr. of Oral Arg. 6-7. Petitioner has not suggested any barrier prevented raising an equal protection claim in the Kentucky courts. In such circumstances, review of an equal protection argument is improperin ***113*** this Court: " 'The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state ***1732*** court decisions....' " *Illinois v. Gates*, 459 U.S. 1028, 1029, n. 2, 103 S.Ct. 436, 437, n. 2, 74 L.Ed.2d 595 (1982) (STEVENS, J., dissenting) (quoting *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162-63, 22 L.Ed.2d 398 (1969)). Neither the Court nor Justice STEVENS offers any justification for departing from this time-honored principle, which dates to *Owings v. Norwood's Lessee*, 5 Cranch 344, 3 L.Ed. 120 (1809), and *Crowell v. Randell*, 10 Pet. 368, 9 L.Ed. 458 (1836).

Even if the equal protection issue had been pressed in the Kentucky Supreme Court, it has surely not been pressed here. This provides an additional and completely separate procedural novelty to today's decision. Petitioner's "question presented" involved only the "constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community." Pet. for Cert. i. These provisions are found in the Sixth Amendment, not the Equal Protection Clause of the Fourteenth Amendment relied upon by the Court. In his brief on the merits, under a heading distinguishing equal protection cases, petitioner noted "the irrelevance of the *Swain* analysis to the present case," Brief for Petitioner 11; instead petitioner relied solely on Sixth Amendment analysis found in cases such as *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). During oral argument, counsel for petitioner was pointedly asked:

"QUESTION: Mr. Niehaus, Swain was an equal protection challenge, was it not?

"MR. NIEHAUS: Yes.

"QUESTION: Your claim here is based solely on the Sixth Amendment?

"MR. NIEHAUS: Yes.

"QUESTION: Is that correct?

"MR. NIEHAUS: That is what we are arguing, yes.

*114 "QUESTION: You are not asking for a reconsideration of Swain, and you are making no equal protection claim here. Is that correct?

"MR. NIEHAUS: We have not made an equal protection claim. I think that Swain will have to be reconsidered to a certain extent if only to consider the arguments that are made on behalf of affirmance by the respondent and the solicitor general.

"MR. NIEHAUS: We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such...." Tr. of Oral Arg. 5-7.

A short time later, after discussing the difficulties attendant with a Sixth Amendment claim, the following colloquy occurred:

"QUESTION: So I come back again to my question why you didn't attack Swain head on, but I take it if the Court were to overrule Swain, you wouldn't like that result.

"MR. NIEHAUS: Simply overrule Swain without adopting the remedy?

"QUESTION: Yes.

"MR. NIEHAUS: I do not think that would give us much comfort, Your Honor, no.

"QUESTION: That is a concession." *Id.*, at 10.

Later, petitioner's counsel refused to answer the Court's questions concerning the implications of a holding based on equal protection concerns:

"MR. NIEHAUS: ... [T]here is no state action involved where the defendant is exercising his peremptory challenge.

*115 "QUESTION: But there might be under an equal protection challenge if it is the state system that allows that kind of a strike.

"MR. NIEHAUS: I believe that is possible. I am really not prepared to answer that specific question...." *Id.*, at 20.

In reaching the equal protection issue despite petitioner's clear refusal to present **1733 it, the Court departs dramatically from its normal procedure without any explanation. When we granted certiorari, we could have-as we sometimes do-directed the parties to brief the equal protection question in addition to the Sixth Amendment question. See, *e.g.*, *Paris Adult Theatre I v. Slaton*, 408 U.S. 921, 92 S.Ct. 2487, 33 L.Ed.2d 331 (1972); *Colorado v. Connelly*, 474 U.S. 1050, 106 S.Ct. 785, 88 L.Ed.2d 763 (1986).[1] Even following oral argument, we could have-as we sometimes do-directed reargument on this particular question. See, *e.g.*, *Brown v. Board of Education*, 345 U.S. 972, 73 S.Ct. 1114, 97 L.Ed. 1388 (1953); *Illinois v. Gates*, *supra*; *New Jersey v. T.L.O.*, 468 U.S. 1214, 82 L.Ed.2d 881, 104 S.Ct. 3583, (1984).[2] This step is particularly appropriate where reexamination *116 of a prior decision is under consideration. See, *e.g.*, *Garcia v. San Antonio Metropolitan Transit Authority*, 468 U.S. 1213, 104 S.Ct. 3582, 82 L.Ed.2d 880 (1984) (directing reargument and briefing on issue of whether *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), should be reconsidered); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 422 U.S. 1005, 95 S.Ct. 2624, 45 L.Ed.2d 668 (1975) (directing reargument and briefing on issue of whether the holding in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), should be reconsidered). Alternatively, we could have simply dismissed this petition as improvidently granted.

The Court today rejects these accepted courses of action, choosing instead to reverse a 21-year-old unanimous constitutional holding of this Court on the basis of constitutional arguments expressly disclaimed by petitioner. The only explanation for this action is found in Justice STEVENS' concurrence. Justice STEVENS apparently believes that this issue is properly before the Court because "the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance." *Ante*, at 1729. Cf. *Illinois v. Gates*, 459 U.S., at 1029, n. 1, 103 S.Ct., at 437, n. 1 (STEVENS, J., dissenting) ("[T]here is no impediment to presenting a new argument as an alternative basis for *affirming* the

decision below") (emphasis in original). To be sure, respondent and supporting *amici* did cite *Swain* and the Equal Protection Clause. But their arguments were largely limited to explaining ***117** that *Swain* placed a negative gloss on the Sixth Amendment claim actually raised by petitioner. In any event, ****1734** it is a strange jurisprudence that looks to the arguments made by respondent to determine the breadth of the questions presented for our review by petitioner. Of course, such a view is directly at odds with our Rule 21.1(a), which provides that "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." Justice STEVENS does not cite, and I am not aware of, *any* case in this Court's nearly 200-year history where the alternative grounds urged by respondent to affirm a judgment were then seized upon to permit petitioner to obtain relief from that very judgment despite petitioner's failure to urge that ground.

Justice STEVENS also observes that several *amici curiae* address the equal protection argument. *Ante,* at 1730. But I thought it well settled that, even if a "point is made in an *amicus curiae* brief," if the claim "has never been advanced by petitioners ... we have no reason to pass upon it." *Knetsch v. United States,* 364 U.S. 361, 370, 81 S.Ct. 132, 137, 5 L.Ed.2d 128 (1960).

When objections to peremptory challenges were brought to this Court three years ago, Justice STEVENS agreed with Justice MARSHALL that the challenge involved "a significant and recurring question of constitutional law." *McCray v. New York,* 461 U.S. 961, 963, 103 S.Ct. 2438, 2439, 77 L.Ed.2d 1322 (1983) (MARSHALL, J., dissenting from denial of certiorari), referred to with approval, *id.,* at 961, 103 S.Ct., at 2438 (opinion of STEVENS, J., respecting denial of certiorari). Nonetheless, Justice STEVENS wrote that the issue could be dealt with "more wisely at a later date." *Id.,* at 962, 103 S.Ct., at 2439. The same conditions exist here today. Justice STEVENS concedes that reargument of this case "might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years." *Ante,* at 1730. Thus, at bottom his position is that we should overrule an extremely important prior constitutional decision of this Court on a claim not advanced here, even though briefing and oral ***118** argument on this claim might convince us to do otherwise.[3] I believe that "[d]ecisions made in this manner are unlikely to withstand the test of time." *United States v. Leon,* 468 U.S. 897, 962, 104 S.Ct. 3430, 3448, 82 L.Ed.2d 702 (1984) (STEVENS, J., dissenting). Before contemplating such a holding, I would at least direct reargument and briefing on the issue of whether the equal protection holding in *Swain* should be reconsidered.

II

Because the Court nonetheless chooses to decide this case on the equal protection grounds not presented, it may be useful to discuss this issue as well. The Court acknowledges, albeit in a footnote, the " 'very old credentials' " of the peremptory challenge and the " 'widely held belief that ****1735** peremptory challenge is a necessary part of trial by jury.' " *Ante,* at 1720, n. 15 (quoting *Swain,* 380 U.S., at 219, 85 S.Ct., at 835). But proper resolution of this case requires more than a nodding reference to the purpose of the challenge. Long ago it was ***119** recognized that "[t]he right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial." W. Forsyth, History of Trial by Jury 175 (1852). The peremptory challenge has been in use without scrutiny into its basis for nearly as long as juries have existed. "It was in use amongst the Romans in criminal cases, and the *Lex Servilia* (B.C. 104) enacted that the accuser and the accused should severally propose one hundred *judices,* and that each might reject fifty from the list of the other, so that one hundred would remain to try the alleged crime." *Ibid.;* see also J. Pettingal, An Enquiry into the Use and Practice of Juries Among the Greeks and Romans 115, 135 (1769).

In *Swain* Justice WHITE traced the development of the peremptory challenge from the early days of the jury trial in England:

> "In all trials for felonies at common law, the defendant was allowed to challenge peremptorily 35 jurors, and the prosecutor originally had a right to challenge any number of jurors without cause, a right which was said to tend to 'infinite delayes and danger.' Coke on Littleton 156 (14th ed. 1791). Thus The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), provided that if 'they that sue for the King will challenge any ... Jurors, they shall assign ... a Cause certain.' So persistent was the view that a proper jury trial required peremptories on both sides, however, that the statute was construed to allow the prosecution to direct any juror after examination to 'stand aside' until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect to jurors recalled to make up the required number. Peremptories on both sides became the settled

law of England, continuing in the above form until after the separation of the Colonies." 380 U.S., at 212-213, 85 S.Ct., at 831-32 (footnotes omitted).

*120 Peremptory challenges have a venerable tradition in this country as well:

"In the federal system, Congress early took a part of the subject in hand in establishing that the defendant was entitled to 35 peremptories in trials for treason and 20 in trials for other felonies specified in the 1790 Act as punishable by death, 1 Stat. 119 (1790). In regard to trials for other offenses without the 1790 statute, both the defendant and the Government were thought to have a right of peremptory challenge, although the source of this right was not wholly clear....

"The course in the States apparently paralleled that in the federal system. The defendant's right of challenge was early conferred by statute, the number often corresponding to the English practice, the prosecution was thought to have retained the Crown's common-law right to stand aside, and by 1870, most if not all, States had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half, but often equal to, the number had by the defendant." *Id.*, at 214-216, 85 S.Ct., at 833 (footnotes omitted).

The Court's opinion, in addition to ignoring the teachings of history, also contrasts with *Swain* in its failure to even discuss the rationale of the peremptory challenge. *Swain* observed:

"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 for them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high **1736 function in the best way, "justice must satisfy the appearance of justice." ' " *Id.*, at 219, 85 S.Ct., at 835 (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955)).

*121 Permitting unexplained peremptories has long been regarded as a means to strengthen our jury system in other ways as well. One commentator has recognized:

"The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes.... Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals and in which each is held reasonable and open to compromise.... [For example,] [a]lthough experience reveals that black males as a class can be biased against young alienated blacks who have not tried to join the middle class, to enunciate this in the concrete expression required of a challenge for cause is societally divisive. Instead we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not." Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan.L.Rev. 545, 553-554 (1975).

For reasons such as these, this Court concluded in *Swain* that "the [peremptory] challenge is 'one of the most important of the rights' " in our justice system. *Swain*, 380 U.S., at 219, 85 S.Ct., at 835 (quoting *Pointer v. United States*, 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894)). For close to a century, then, it has been settled that "[t]he denial or impairment of the right is reversible error without a showing of prejudice." *Swain, supra*, at 219, 85 S.Ct., at 835 (citing *Lewis v. United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892)).

Instead of even considering the history or function of the peremptory challenge, the bulk of the Court's opinion is spent recounting the well-established principle that intentional exclusion of racial groups from jury venires is a *122 violation of the Equal Protection Clause. I too reaffirm that principle, which has been a part of our constitutional tradition since at least *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880). But if today's decision is nothing more than mere "application" of the "principles announced in *Strauder*," as the Court maintains, *ante*, at 1719, some will consider it curious that the application went unrecognized for over a century. The Court in *Swain* had no difficulty in unanimously concluding that cases such as *Strauder* did not require inquiry into the basis for a peremptory challenge. See *post*, at 1743-1744 (REHNQUIST, J., dissenting). More

recently we held that "[d]efendants are not entitled to a jury of any particular composition...." *Taylor v. Louisiana*, 419 U.S., at 538, 95 S.Ct, at 702.

A moment's reflection quickly reveals the vast differences between the racial exclusions involved in *Strauder* and the allegations before us today:

> "Exclusion from the venire summons process implies that the government (usually the legislative or judicial branch) ... has made the general determination that those excluded are unfit to try *any* case. Exercise of the peremptory challenge, by contrast, represents the discrete decision, made by one of two or more opposed *litigants* in the trial phase of our adversary system of justice, that the challenged venireperson will likely be more unfavorable to that litigant in that *particular case* than others on the same venire.
>
> "Thus, excluding a particular cognizable group from all venire pools is stigmatizing and discriminatory in several interrelated ways that the peremptory ***1737** challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclusion bespeaks *a priori* across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular ***123** isolated case. Exclusion from venires focuses on the inherent attributes of the excluded group and infers its *inferiority,* but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not." *United States v. Leslie,* 783 F.2d 541, 554 (CA5 1986) (en banc).

Unwilling to rest solely on jury venire cases such as *Strauder,* the Court also invokes general equal protection principles in support of its holding. But peremptory challenges are often lodged, of necessity, for reasons "normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." *Swain, supra,* 380 U.S., at 220, 85 S.Ct., at 835-36. Moreover, in making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch. The process cannot be indicted on the sole basis that such decisions are made on the basis of "assumption" or "intuitive judgment." *Ante,* at 1723. As a result, unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum "rationality" in government actions has no application to " 'an arbitrary and capricious right,' " *Swain, supra,* at 219, 85 S.Ct., at 835 (quoting *Lewis v. United States, supra,* 146 U.S., at 378, 13 S.Ct., at 139); a constitutional principle that may invalidate state action on the basis of "stereotypic notions," *Mississippi University for Women v. Hogan,* 458 U.S. 718, 725, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982), does not explain the breadth of a procedure exercised on the " 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.' " *Lewis, supra,* 146 U.S., at 376, 13 S.Ct., at 138 (quoting 4 W. Blackstone, Commentaries * 353).

That the Court is not applying conventional equal protection analysis is shown by its limitation of its new rule to allegations of impermissible challenge *on the basis of race;* the ***124** Court's opinion clearly contains such a limitation. See *ante,* at 1723 (to establish a prima facie case, "the defendant first must show that he is a member of a cognizable *racial group*") (emphasis added); *ibid.* ("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* ") (emphasis added). But if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex, *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); age, *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976); religious or political affiliation, *Karcher v. Daggett,* 462 U.S. 725, 748, 103 S.Ct. 2653, 2668-2669, 77 L.Ed.2d 133 (1983) (STEVENS, J., concurring); mental capacity, *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); number of children, *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); living arrangements, *Department of Agriculture v. Moreno,* 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); and employment in a particular industry, *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981), or profession, ***1738** *Williamson v. Lee Optical Co.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). [4]

In short, it is quite probable that every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristic not shared by the remaining members of the venire, it constituted a "classification" subject to equal protection

scrutiny. See *McCray v. Abrams*, 750 F.2d 1113, 1139 (CA2 1984) (Meskill, J., dissenting), cert. pending, No. 84-1426. Compounding the difficulties, under conventional equal protection principles some uses of peremptories would be reviewed under "strict scrutiny and ... sustained only if ... suitably tailored to serve a compelling state interest," ***125** *Cleburne*, 473 U.S., at 440, 105 S.Ct., at 3255; others would be reviewed to determined if they were "substantially related to a sufficiently important government interest," *id.*, at 441, 105 S.Ct., at 3255; and still others would be reviewed to determine whether they were "a rational means to serve a legitimate end." *Id.*, at 442, 105 S.Ct., at 3255.

The Court never applies this 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. Nearly a century ago the Court stated that the peremptory challenge is "essential to the fairness of trial by jury." *Lewis v. United States*, 146 U.S., at 376, 13 S.Ct., at 138. Under conventional equal protection principles, a state interest of this magnitude and ancient lineage might well overcome an equal protection objection to the application of peremptory challenges. However, the Court is silent on the strength of the State's interest, apparently leaving this issue, among many others, to the further "litigation [that] will be required to spell out the contours of the Court's equal protection holding today...." *Ante*, at 1725 (WHITE, J., concurring).[5]

The Court also purports to express "no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by *defense* counsel." *Ante*, at 1718, n. 12 (emphasis added). But the clear and inescapable import of this novel holding will inevitably be to limit the use of this valuable ***126** tool to both prosecutors and defense attorneys alike. Once the Court has held that *prosecutors* are limited in their use of peremptory challenges, could we rationally hold that defendants are not?[6] "Our criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' " *Ante*, at 1729 (MARSHALL, J., concurring) (quoting *Hayes v. Missouri*, 120 U.S. 68, 70, 7 S.Ct. 350, 351, 30 L.Ed. 578 (1887)).

Rather than applying straightforward equal protection analysis, the Court substitutes ***1739** for the holding in *Swain* a curious hybrid. The defendant must first establish a "prima facie case," *ante*, at 1721, of invidious discrimination, then the "burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Ante*, at 1723. The Court explains that "the operation of prima facie burden of proof rules" is established in "[o]ur decisions concerning 'disparate treatment'...." *Ante*, at 1721, n. 18. The Court then adds, borrowing again from a Title VII case, that "the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Ante*, at 1723, n. 20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981)).[7]

While undoubtedly these rules are well suited to other contexts, particularly where (as with Title VII) they are required by an Act of Congress,[8] they seem curiously out ***127** of place when applied to peremptory challenges in criminal cases. 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 called a peremptory challenge, because the prisoner may challenge peremptorily, on his own dislike, *without showing of any cause.*" H. Joy, On Peremptory Challenge of Jurors 1 (1844) (emphasis added). Analytically, there is no middle ground: A challenge either has to be explained or it does 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." *United States v. Clark*, 737 F.2d 679, 682 (CA7 1984). Indeed, the Court recognized without dissent in *Swain* that, if scrutiny were permitted, "[t]he challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards." *Swain*, 380 U.S., at 222, 85 S.Ct., at 837.

Confronted with the dilemma it created, the Court today attempts to decree a middle ground. To rebut a prima facie case, the Court requires a "neutral explanation" for the challenge, but is at pains to "emphasize" that the "explanation need not rise to the level justifying exercise of a challenge for cause." *Ante*, at 1723. I am at a loss to discern the governing principles here. A "clear and reasonably specific" explanation of "legitimate reasons" for exercising the

challenge will be difficult to distinguish from a challenge for cause. Anything *128 short of a challenge for cause may well be seen as an "arbitrary and capricious" challenge, to use Blackstone's characterization of the peremptory. See 4 W. Blackstone, Commentaries * 353. 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*," *ante,* at 1723, they have no experience in administering rules like this.

**1740 An example will quickly demonstrate how today's holding, while purporting to "further the ends of justice," *ante,* at 1724, will not have that effect. Assume an Asian defendant, on trial for the capital murder of a white victim, asks prospective jury members, most of whom are white, whether they harbor racial prejudice against Asians. See *Turner v. Murray,* 476 U.S. 28, 36-37, 106 S.Ct. 1683, ----, 90 L.Ed.2d 27 (1986). The basis for such a question is to flush out any "juror who believes that [Asians] are violence-prone or morally inferior...." *Ante,* at ----.[9] Assume further that all white jurors deny harboring racial prejudice but that the defendant, on trial for his life, remains unconvinced by these protestations. Instead, he continues to harbor a hunch, an "assumption," or "intuitive judgment," *ante,* at 1723, that these white jurors will be prejudiced against him, presumably based in part on race. The time-honored rule before today was that peremptory challenges could be exercised on such a basis. The Court explained in *Lewis v. United States:*

> "[H]ow necessary it is that a prisoner (when put to defend his life) should have good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom *129 he has conceived a prejudice even without being able to assign a reason for such his dislike." 146 U.S., at 376, 13 S.Ct., at 138.
>
> The effect of the Court's decision, however, will be to force the defendant to come forward and "articulate a neutral explanation," *ante,* at 1723, for his peremptory challenge, a burden he probably cannot meet. This example demonstrates that today's holding will produce juries that the parties do not believe are truly impartial. This will surely do more than "disconcert" litigants; it will diminish confidence in the jury system.

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." In *Avery v. Georgia,* 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953), for instance, the Court confronted a situation where the selection of the venire was done through the selection of tickets from a box; the names of whites were printed on tickets of one color and the names of blacks were printed on different color tickets. The Court had no difficulty in striking down such a scheme. Justice Frankfurter observed that "opportunity for working of a discriminatory system exists whenever the mechanism for jury selection *has a component part,* such as the slips here, *that differentiates between white and colored* ...." *Id.,* at 564, 73 S.Ct., at 894 (concurring) (emphasis added).

Today we mark the return of racial differentiation as the Court accepts a positive evil for a perceived one. Prosecutors and defense attorneys alike will build records in support of their claims that peremptory challenges have been exercised in a racially discriminatory fashion by asking jurors to state their racial background and national origin for the record, despite the fact that "such questions may be offensive to some jurors and thus are not ordinarily asked on voir dire." *130 *People v. Motton,* 39 Cal.3d 596, 604, 217 Cal.Rptr. 416, 420, 704 P.2d 176, 180, modified, 40 Cal.3d 4b (1985) (advance sheet).[10] This process is sure to **1741 tax even the most capable counsel and judges since determining whether a prima facie case has been established will "require a continued monitoring and recording of the 'group' composition of the panel present and prospective...." *People v. Wheeler,* 22 Cal.3d 258, 294, 148 Cal.Rptr. 890, 915, 583 P.2d 748, 773 (1978) (Richardson, J., dissenting).

Even after a "record" on this issue has been created, disputes will inevitably arise. In one case, for instance, a conviction was reversed based on the assumption that no blacks were on the jury that convicted a defendant. See *People v. Motton, supra.* However, after the court's decision was announced, Carolyn Pritchett, who had served on the jury, called the press to state that the court was in error and that she was black. 71 A.B.A.J. 22 (Nov. 1985). The California court nonetheless denied a rehearing petition.[11]

The Court does not tarry long over any of these difficult, sensitive problems, preferring instead to gloss over them as swiftly as it slides over centuries of history: "[W]e make no attempt to instruct [trial] courts how best to implement *131 our holding today." *Ante,* at 1724, n. 24. That leaves roughly 7,000 general jurisdiction state trial judges and approximately 500 federal trial judges at large to find their way through the morass the Court

creates today. The Court essentially wishes these judges well as they begin the difficult enterprise of sorting out the implications of the Court's newly created "right." I join my colleagues in wishing the Nation's judges well as they struggle to grasp how to implement today's holding. To my mind, however, attention to these "implementation" questions leads quickly to the conclusion that there is no "good" way to implement the holding, let alone a "best" way. As one apparently frustrated judge explained after reviewing a case under a rule like that promulgated by the Court today, judicial inquiry into peremptory challenges

> "from case to case will take the courts into the quagmire of quotas for groups that are difficult to define and even more difficult to quantify in the courtroom. The pursuit of judicial perfection will require both trial and appellate courts to provide speculative and impractical answers to artificial questions." *Holley v. J & S Sweeping Co.*, 143 Cal.App.3d 588, 595-596, 192 Cal.Rptr. 74, 79 (1983) (Holmdahl, J., concurring) (footnote omitted).

The Court's effort to "furthe[r] the ends of justice," *ante,* at 1724, and achieve hoped-for utopian bliss may be admired, but it is far more likely to enlarge the evil "sporting contest" theory of criminal justice roundly condemned by Roscoe Pound almost 80 years ago to the day. See Pound, Causes of Popular Dissatisfaction with the Administration of Justice, August 29, 1906, reprinted in The Pound Conference: Perspectives on Justice in the Future 337 (A. Levin & R. Wheeler eds. 1979). Pound warned then that "too much of the current dissatisfaction has a just origin in our judicial organization and procedure." *Id.,* at 352. I am afraid that today's newly created constitutional right will justly give rise to similar disapproval.

***132** III

I also add my assent to Justice WHITE's conclusion that today's decision does not apply retroactively. *Ante,* at 1726 (concurring); see also *ante,* at 1731 (O'CONNOR, J., concurring). We held in *Solem v.* ****1742** *Stumes,* 465 U.S. 638, 643, 104 S.Ct. 1338, 1343, 79 L.Ed.2d 579 (1984), that

> " '[t]he criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.' *Stovall v. Denno,* 388 U.S. 293, 297 [87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199] (1967)."

If we are to ignore Justice Harlan's admonition that making constitutional changes prospective only "cuts this Court loose from the force of precedent," *Mackey v. United States,* 401 U.S. 667, 680, 91 S.Ct. 1160, 1174, 28 L.Ed.2d 404 (1971) (concurring in judgment), then all three of these factors point conclusively to a nonretroactive holding. With respect to the first factor, the new rule the Court announces today is not designed to avert "the clear danger of convicting the innocent." *Tehan v. United States ex rel. Shott,* 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453 (1966). Second, it is readily apparent that "law enforcement authorities and state courts have justifiably relied on a prior rule of law...." *Solem,* 465 U.S., at 645-646, 104 S.Ct., at 1343. Today's holding clearly "overrule[s] [a] prior decision" and drastically "transform[s] standard practice." *Id.,* at 647, 104 S.Ct., at 1343-1344. This fact alone "virtually compel[s]" the conclusion of nonretroactivity. *United States v. Johnson,* 457 U.S. 537, 549-550, 102 S.Ct. 2579, 2586-87, 73 L.Ed.2d 202 (1982). Third, applying today's decision retroactively obviously would lead to a whole host of problems, if not utter chaos. Determining whether a defendant has made a "prima facie showing" of invidious intent, *ante,* at 1723, and, if so, whether the state has a sufficient "neutral explanation" for its actions, *ibid.,* essentially requires reconstructing ***133** the entire *voir dire,* something that will be extremely difficult even if undertaken soon after the close of the trial.[12] In most cases, therefore, retroactive application of today's decision will be "a virtual impossibility." *State v. Neil,* 457 So.2d 481, 488 (Fla.1984).

In sum, under our prior holdings it is impossible to construct even a colorable argument for retroactive application. The few States that have adopted judicially created rules similar to that announced by the Court today have all refused full retroactive application. See *People v. Wheeler,* 22 Cal.3d, at 283, n. 31, 148 Cal.Rptr., at 908, n. 31, 583 P.2d, at 766, n. 31; *State v. Neil, supra,* at 488; *Commonwealth v. Soares,* 377 Mass. 461, 493, n. 38, 387 N.E.2d 499, 518, n. 38, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979).[13] I therefore am persuaded by Justice WHITE's position, *ante,* at 1725-26 (concurring), that today's novel decision is not to be given retroactive effect.

IV

An institution like the peremptory challenge that is part of the fabric of our jury system should not be casually cast aside, especially on a basis not raised or argued by the petitioner. As one commentator aptly observed:

> "The real question is whether to tinker with a system, be it of jury selection or anything else, that has done the job for centuries. We stand on the shoulders of our ancestors, as Burke said. It is not so much that the past is always worth preserving, he argued, but rather that 'it is with infinite caution that any man ought to venture upon pulling down an edifice, which has answered in any tolerable degree for ages the common purposes ***134** of ****1743** society....' " Younger, Unlawful Peremptory Challenges, 7 Litigation 23, 56 (Fall 1980).

At the very least, this important case reversing centuries of history and experience ought to be set for reargument next Term.

Justice REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.
The Court states, in the opening line of its opinion, that this case involves only a reexamination of that portion of *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), 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." *Ante,* at 1714 (footnote omitted). But in reality the majority opinion deals with much more than "evidentiary burden[s]." With little discussion and less analysis, the Court also overrules one of the fundamental substantive holdings of *Swain,* namely, that the State may use its peremptory challenges to remove from the jury, on a case-specific basis, prospective jurors of the same race as the defendant. Because I find the Court's rejection of this holding both ill considered and unjustifiable under established principles of equal protection, I dissent.

In *Swain,* this Court carefully distinguished two possible scenarios involving the State's use of its peremptory challenges to exclude blacks from juries in criminal cases. In Part III of the majority opinion, the *Swain* Court concluded that the first of these scenarios, namely, the exclusion of blacks "for reasons wholly unrelated to the outcome of the particular case on trial ... to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population," 380 U.S., at 224, 85 S.Ct., at 838, might violate the guarantees of equal protection. See *id.,* at 222-228, 85 S.Ct., at 837-40. The Court felt that the important and historic purposes of the peremptory challenge were not furthered by the ***135** exclusion of blacks "in case after case, whatever the circumstances, whatever the crime *and whoever the defendant or the victim may be.*" *Id.,* at 223, 85 S.Ct., at 837 (emphasis added). Nevertheless, the Court ultimately held that "the record in this case is not sufficient to demonstrate that th[is] rule has been violated.... Petitioner has the burden of proof and he has failed to carry it." *Id.,* at 224, 226, 85 S.Ct., at 838, 839. Three Justices dissented, arguing that the petitioner's evidentiary burden was satisfied by testimony that no black had ever served on a petit jury in the relevant county. See *id.,* at 228-247, 85 S.Ct., at 840-50 (Goldberg, J., joined by Warren, C.J., and Douglas, J., dissenting).

Significantly, the *Swain* Court reached a very different conclusion with respect to the second kind of peremptory-challenge scenario. In Part II of its opinion, the Court held that the State's use of peremptory challenges to exclude blacks from a particular jury based on the assumption or belief that they would be more likely to favor a black defendant does not violate equal protection. *Id.,* at 209-222, 85 S.Ct., at 829-37. Justice WHITE, writing for the Court, explained:

> "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. *Hayes v. Missouri,* 120 U.S. 68, 70 [7 S.Ct. 350, 352, 30 L.Ed. 578] [1887]. It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' *Lewis* [*v. United States,* 146 U.S. 370,] 376 [13 S.Ct. 136, 138, 36 L.Ed. 1011] [1892], upon a juror's 'habits and associations,' *Hayes v. Missouri, supra,* [120 U.S.,] at 70, [7 S.Ct., at 351], or upon the feeling that 'the bare questioning [a juror's] indifference may sometimes provoke a resentment,' *Lewis, supra,* [146 U.S.,] at 376 [13 S.Ct., at 138]. It is no less frequently ****1744** exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people ***136** 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.... 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. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto,* would no longer be peremptory...." *Id.,* at 220-222, 85 S.Ct., at 835-837 (emphasis added; footnotes omitted).

At the beginning of Part III of the opinion, the *Swain* Court reiterated: "We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, *the particular defendant involved* and the particular crime charged." *Id.,* at 223, 85 S.Ct., at 837 (emphasis added).

Even the *Swain* dissenters did not take issue with the majority's position that the Equal Protection Clause does not prohibit the State from using its peremptory challenges to exclude blacks based on the assumption or belief that they would be partial to a black defendant. The dissenters emphasized that their view concerning the evidentiary burden facing a defendant who alleges an equal protection claim based on the State's use of peremptory challenges "would ***137** [not] mean that where systematic exclusion of Negroes from jury service has not been shown, a prosecutor's motives are subject to question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury *in a particular case.*" *Id.,* at 245, 85 S.Ct., at 849 (Goldberg, J., dissenting) (emphasis added).

The Court today asserts, however, that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely ... on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Ante,* at 1719. Later, in discussing the State's need to establish a nondiscriminatory basis for striking blacks from the jury, the Court states that "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." *Ante,* at 1723. Neither of these statements has anything to do with the "evidentiary burden" necessary to establish an equal protection claim in this context, and both statements are directly contrary to the view of the Equal Protection Clause shared by the majority and the dissenters in *Swain.* Yet the Court in the instant case offers absolutely no analysis in support of its decision to overrule *Swain* in this regard, and in fact does not discuss Part II of the *Swain* opinion at all.

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." *Swain,* 380 U.S., at 219, 85 S.Ct., at 835. 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 ***1745** defendants, Asians in cases involving Asian defendants, and so ***138** 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.[1] 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.

Nor does such use of peremptory challenges by the State infringe upon any other constitutional interests. The Court does not suggest that exclusion of blacks from the jury through the State's use of peremptory challenges results in a violation of either the fair-cross-section or impartiality component of the Sixth Amendment. See *ante,* at 1716, n. 4. And because the case-specific use of peremptory challenges by the State does not deny blacks the right to serve as jurors in cases involving nonblack defendants, it harms neither the excluded jurors nor the remainder of the community. See *ante,* at 1717-1718.

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. See *Swain, supra; United States v. Leslie,* 783 F.2d 541 (CA5 1986) (en banc); *United States v. Carter,* 528 F.2d 844 (CA8 1975), cert. denied, 425 U.S. 961, 96 S.Ct. 1745, 48 L.Ed.2d 206 (1976). Indeed, given the need for reasonable ***139** limitations on the time devoted to *voir dire,* the use of such "proxies" by both the State and the defendant[2] may be extremely useful in eliminating from the jury persons who might be biased in one way or another. The Court today holds that the State may not use its peremptory challenges to strike black prospective jurors on this basis without violating the Constitution. But I do not believe there is anything in the Equal Protection Clause, or any other constitutional provision, that justifies such a departure from the substantive holding contained in Part II of *Swain.* Petitioner in the instant case failed to make a sufficient showing to overcome the presumption announced in *Swain* that the State's use of peremptory challenges was related to the context of the case. I would therefore affirm the judgment of the court below.

All Citations

476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, 54 USLW 4425

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Following the lead of a number of state courts construing their State's Constitution, two Federal Courts of Appeals recently have accepted the view that peremptory challenges used to strike black jurors in a particular case may violate the Sixth Amendment. *Booker v. Jabe,* 775 F.2d 762 (CA6 1985), cert. pending, No. 85-1028; *McCray v. Abrams,* 750 F.2d 1113 (CA2 1984), cert. pending, No. 84-1426. See *People v. Wheeler,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); *Riley v. State,* 496 A.2d 997, 1009-1013 (Del.1985); *State v. Neil,* 457 So.2d 481 (Fla.1984); *Commonwealth v. Soares,* 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979). See also *State v. Crespin,* 94 N.M. 486, 612 P.2d 716 (App.1980). Other Courts of Appeals have rejected that position, adhering to the requirement that a defendant must prove systematic exclusion of blacks from the petit jury to establish a constitutional violation. *United States v. Childress,* 715 F.2d 1313 (CA8 1983) (en banc), cert. denied, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984); *United States v. Whitfield,* 715 F.2d 145, 147 (CA4 1983). See *Beed v. State,* 271 Ark. 526, 530-531, 609 S.W.2d 898, 903 (1980); *Blackwell v. State,* 248 Ga. 138, 281 S.E.2d 599, 599-600 (1981); *Gilliard v. State,* 428 So.2d 576, 579 (Miss.), cert. denied, 464 U.S. 867, 104 S.Ct. 40, 78 L.Ed.2d 179 (1983); *People v. McCray,* 57 N.Y.2d 542, 546-549, 457 N.Y.S.2d 441, 442-445, 443 N.E.2d 915, 916-919 (1982), cert. denied, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983); *State v. Lynch,* 300 N.C. 534, 546-547, 268 S.E.2d 161, 168-169 (1980). Federal Courts of Appeals also have disagreed over the circumstances under which supervisory power may be used to scrutinize the prosecutor's exercise of peremptory challenges to strike blacks from the venire. Compare *United States v. Leslie,* 783 F.2d 541 (CA5 1986) (en banc), with *United States v. Jackson,* 696 F.2d 578, 592-593 (CA8 1982), cert. denied, 460 U.S. 1073, 103 S.Ct. 1531, 75 L.Ed.2d 952 (1983). See also *United States v. McDaniels,* 379 F.Supp. 1243 (ED La.1974).

2 The Kentucky Rules of Criminal Procedure authorize the trial court to permit counsel to conduct *voir dire* examination or to conduct the examination itself. Ky.Rule Crim.Proc. 9.38. After jurors have been excused for cause, the parties exercise their peremptory challenges simultaneously by striking names from a list of qualified jurors equal to the number to be seated plus the number of allowable peremptory challenges. Rule 9.36. Since the offense charged in this case was a felony, and an alternate juror was called, the prosecutor was entitled to six peremptory challenges, and defense counsel to nine. Rule 9.40.

3

See, *e.g.*, *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880); *Neal v. Delaware*, 13 Otto 370, 103 U.S. 370, 26 L.Ed. 567 (1881); *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); *Hollins v. Oklahoma*, 295 U.S. 394, 55 S.Ct. 784, 79 L.Ed. 1500 (1935) (*per curiam*); *Pierre v. Louisiana*, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939); *Patton v. Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76 (1947); *Avery v. Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954); *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967); *Jones v. Georgia*, 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed.2d 25 (1967) (*per curiam*); *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970); *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

The basic principles prohibiting exclusion of persons from participation in jury service on account of their race "are essentially the same for grand juries and for petit juries." *Alexander v. Louisiana*, 405 U.S. 625, 626, n. 3, 92 S.Ct. 1221, 1223, n. 3, 31 L.Ed.2d 536 (1972); see *Norris v. Alabama*, *supra*, 294 U.S., at 589, 55 S.Ct., at 583-584. These principles are reinforced by the criminal laws of the United States. 18 U.S.C. § 243.

4 In this Court, petitioner has argued that the prosecutor's conduct violated his rights under the Sixth and Fourteenth Amendments to an impartial jury and to a jury drawn from a cross section of the community. Petitioner has framed his argument in these terms in an apparent effort to avoid inviting the Court directly to reconsider one of its own precedents. On the other hand, the State has insisted that petitioner is claiming a denial of equal protection and that we must reconsider *Swain* to find a constitutional violation on this record. We agree with the State that resolution of petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments.

5 See *Hernandez v. Texas*, *supra*, 347 U.S., at 482, 74 S.Ct., at 672-73; *Cassell v. Texas*, 339 U.S. 282, 286-287, 70 S.Ct. 629, 631-32, 94 L.Ed. 839 (1950) (plurality opinion); *Akins v. Texas*, 325 U.S. 398, 403, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945); *Martin v. Texas*, 200 U.S. 316, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497 (1906); *Neal v. Delaware*, *supra*, 103 U.S., at 394.

6 Similarly, though the Sixth Amendment guarantees that the petit jury will be selected from a pool of names representing a cross section of the community, *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), we have never held that the Sixth Amendment requires that "petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population," *id.*, at 538, 95 S.Ct., at 702. Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society. Such impossibility is illustrated by the Court's holding that a jury of six persons is not unconstitutional. *Williams v. Florida*, 399 U.S. 78, 102-103, 90 S.Ct. 1893, 1906-1907, 26 L.Ed.2d 446 (1970).

7 See *Hernandez v. Texas*, *supra*, 347 U.S., at 482, 74 S.Ct., at 672-673; *Cassell v. Texas*, *supra*, 339 U.S., at 287, 70 S.Ct., at 632; *Atkins v. Texas*, *supra*, 325 U.S., at 403, 65 S.Ct., at 1279; *Neal v. Delaware*, *supra*, 103 U.S., at 394.

8 See *Taylor v. Louisiana*, *supra*, 419 U.S., at 530, 95 S.Ct., at 697-698; *Williams v. Florida*, *supra*, 399 U.S., at 100, 90 S.Ct., at 1905-1906. See also Powell, Jury Trial of Crimes, 23 Wash. & Lee L.Rev. 1 (1966).

In *Duncan v. Louisiana*, decided after *Swain*, the Court concluded that the right to trial by jury in criminal cases was such a fundamental feature of the American system of justice that it was protected against state action by the Due Process Clause of the Fourteenth Amendment. 391 U.S., at 147-158, 88 S.Ct., at 1446-52. The Court emphasized that a defendant's right to be tried by a jury of his peers is designed "to prevent oppression by the Government." *Id.*, at 155, 156-157, 88 S.Ct., at 1450-52. For a jury to

perform its intended function as a check on official power, it must be a body drawn from the community. *Id.*, at 156, 88 S.Ct., at 1451; *Glasser v. United States*, 315 U.S. 60, 86-88, 62 S.Ct. 457, 473, 86 L.Ed. 680 (1942). By compromising the representative quality of the jury, discriminatory selection procedures make "juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities." *Akins v. Texas, supra*, 325 U.S., at 408, 65 S.Ct., at 1281 (Murphy, J., dissenting).

9 4 W. Blackstone, Commentaries 350 (Cooley ed. 1899) (quoted in *Duncan v. Louisiana*, 391 U.S., at 152, 88 S.Ct., at 1449).

10 *E.g., Sims v. Georgia*, 389 U.S. 404, 407, 88 S.Ct. 523, 525, 19 L.Ed.2d 634 (1967) (*per curiam*); *Whitus v. Georgia*, 385 U.S., at 548-549, 87 S.Ct., at 645-46; *Avery v. Georgia*, 345 U.S., at 561, 73 S.Ct., at 892.

11 See *Norris v. Alabama*, 294 U.S., at 589, 55 S.Ct., at 580; *Martin v. Texas*, 200 U.S., at 319, 26 S.Ct., at 338; *Neal v. Delaware*, 103 U.S., at 394, 397.

12 We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.

Nor do we express any views on the techniques used by lawyers who seek to obtain information about the community in which a case is to be tried, and about members of the venire from which the jury is likely to be drawn. See generally J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 183-189 (1977). Prior to *voir dire* examination, which serves as the basis for exercise of challenges, lawyers wish to know as much as possible about prospective jurors, including their age, education, employment, and economic status, so that they can ensure selection of jurors who at least have an open mind about the case. In some jurisdictions, where a pool of jurors serves for a substantial period of time, see *id.*, at 116-118, counsel also may seek to learn which members of the pool served on juries in other cases and the outcome of those cases. Counsel even may employ professional investigators to interview persons who have served on a particular petit jury. We have had no occasion to consider particularly this practice. Of course, counsel's effort to obtain possibly relevant information about prospective jurors is to be distinguished from the practice at issue here.

13 See, *e.g., Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979); *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Alexander v. Louisiana*, 405 U.S., at 628-629, 92 S.Ct., at 1224-1225; *Whitus v. Georgia, supra*, 385 U.S., at 549-550, 87 S.Ct., at 646-647, 17 L.Ed.2d 599 (1967); *Swain v. Alabama*, 380 U.S. 202, 205, 85 S.Ct. 824, 827-828, 13 L.Ed.2d 759 (1965); *Coleman v. Alabama*, 377 U.S. 129 (1964); *Norris v. Alabama, supra*, 294 U.S., at 589, 55 S.Ct., at 580; *Neal v. Delaware, supra*, 103 U.S., at 394.

14 The decision in *Swain* has been the subject of extensive commentary. Some authors have argued that the Court should reconsider the decision. *E.g.*, Van Dyke, *supra*, at 166-167; Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loyola (LA) L.Rev. 247, 268-270 (1973); Kuhn, Jury Discrimination: The Next Phase, 41 S.Cal.L.Rev. 235, 283-303 (1968); Note, Rethinking Limitations on the Peremptory Challenge, 85 Colum.L.Rev. 1357 (1985); Note, Peremptory Challenge-Systematic Exclusion of Prospective Jurors on the Basis of Race, 39 Miss.L.J. 157 (1967); Comment, *Swain v. Alabama:* A Constitutional Blueprint for the Perpetuation of the All-White Jury, 52 Va.L.Rev. 1157 (1966). See also Johnson, Black Innocence and the White Jury, 83 Mich.L.Rev. 1611 (1985).

On the other hand, some commentators have argued that we should adhere to *Swain*. See Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md.L.Rev. 337 (1982).

15 In *Swain*, the Court reviewed the "very old credentials" of the peremptory challenge system and noted the "long and widely held belief that peremptory

challenge is a necessary part of trial by jury." 380 U.S., at 219, 85 S.Ct., at 835; see *id.*, at 212-219, 85 S.Ct., at 831-835.

16 *E.g., United States v. Jenkins,* 701 F.2d 850, 859-860 (CA10 1983); *United States v. Boykin,* 679 F.2d 1240, 1245 (CA8 1982); *United States v. Pearson,* 448 F.2d 1207, 1213-1218 (CA5 1971); *Thigpen v. State,* 49 Ala.App. 233, 241, 270 So.2d 666, 673 (1972); *Jackson v. State,* 245 Ark. 331, 336, 432 S.W.2d 876, 878 (1968); *Johnson v. State,* 9 Md.App. 143, 148-150, 262 A.2d 792, 796-797 (1970); *State v. Johnson,* 125 N.J.Super. 438, 311 A.2d 389 (1973) (*per curiam*); *State v. Shaw,* 284 N.C. 366, 200 S.E.2d 585 (1973).

17 See *McCray v. Abrams,* 750 F.2d, at 1120, and n. 2. The lower courts have noted the practical difficulties of proving that the State systematically has exercised peremptory challenges to exclude blacks from the jury on account of race. As the Court of Appeals for the Fifth Circuit observed, the defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges. *United States v. Pearson,* 448 F.2d 1207, 1217 (1971). The court believed this burden to be "most difficult" to meet. *Ibid.* In jurisdictions where court records do not reflect the jurors' race and where *voir dire* proceedings are not transcribed, the burden would be insurmountable. See *People v. Wheeler,* 22 Cal.3d, at 285-286, 148 Cal.Rptr., at 908-909, 583 P.2d, at 767-768 (1978).

18 Our decisions concerning "disparate treatment" under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules. See *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion. *Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S., at 252-256, 101 S.Ct., at 1093-95.

19 Decisions under Title VII also recognize that a person claiming that he has been the victim of intentional discrimination may make out a prima facie case by relying solely on the facts concerning the alleged discrimination against him. See cases in n. 18, *supra.*

20 The Court of Appeals for the Second Circuit observed in *McCray v. Abrams,* 750 F.2d, at 1132, that "[t]here are any number of bases" on which a prosecutor reasonably may believe that it is desirable to strike a juror who is not excusable for cause. As we explained in another context, however, the prosecutor must give a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S., at 258, 101 S.Ct., at 1096.

21 In a recent Title VII sex discrimination case, we stated that "a finding of intentional discrimination is a finding of fact" entitled to appropriate deference by a reviewing court. *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. *Id.,* at 575-576, 105 S.Ct., at 1512-1513.

22 While we respect the views expressed in Justice MARSHALL's concurring opinion concerning prosecutorial and judicial enforcement of our holding today, we do not share them. The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race. We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes. Certainly, this Court may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination. Nor do we think that this historic trial practice, which long has served the selection of an impartial jury, should

be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution.

23 For example, in *People v. Hall*, 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (1983), the California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard, imposed five years earlier, were burdensome for trial judges.

24 In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, see *Booker v. Jabe*, 775 F.2d, at 773, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire, see *United States v. Robinson*, 421 F.Supp. 467, 474 (Conn.1976), mandamus granted *sub nom. United States v. Newman*, 549 F.2d 240 (CA2 1977).

25 To the extent that anything in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), is contrary to the principles we articulate today, that decision is overruled.

* Nor would it have been inconsistent with *Swain* for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant.

1 *Commonwealth v. Martin*, 461 Pa. 289, 299, 336 A.2d 290, 295 (1975) (Nix, J., dissenting), quoted in *McCray v. New York*, 461 U.S. 961, 965, n. 2, 103 S.Ct. 2438, 2440, n. 2, 77 L.Ed.2d 1322 (1983) (MARSHALL, J., dissenting from denial of certiorari).

2 See also *Harris v. Texas*, 467 U.S. 1261, 104 S.Ct. 3556, 82 L.Ed.2d 858 (1984) (MARSHALL, J., dissenting from denial of certiorari); *Williams v. Illinois*, 466 U.S. 981, 104 S.Ct. 2364, 80 L.Ed.2d 836 (1984) (MARSHALL, J., dissenting from denial of certiorari).

3 Van Dyke, at 152, quoting Texas Observer, May 11, 1973, p. 9, col. 2. An earlier jury-selection treatise circulated in the same county instructed prosecutors: "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." Quoted in Dallas Morning News, Mar. 9, 1986, p. 29, col. 1.

4 *Id.*, at 1, col. 1; see also Comment, A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process, 18 St. Louis U.L.J. 662 (1974).

1 Tr. of Oral Arg. 27-28, 43.

2 Brief for United States as *Amicus Curiae* 7.

3 The argument section of the brief for the National District Attorneys Association, Inc., as *amicus curiae* in support of respondent begins as follows:

> "This Court should conclude that the prosecutorial peremptory challenges exercised in this case were proper under the fourteenth amendment equal protection clause and the sixth amendment. This Court should further determine that there is no constitutional need to change or otherwise modify this Court's decision in *Swain v. Alabama*." *Id.*, at 5.
>
> *Amici* supporting petitioner also emphasized the importance of the equal protection issue. See, *e.g.*, Brief for NAACP Legal Defense and Educational Fund, American Jewish Committee, and American Jewish Congress as *Amici Curiae* 24-36; Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* 11-17; Brief for Elizabeth Holtzman as *Amicus Curiae* 13.

4

See *McCray v. New York,* 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983) (opinion of STEVENS, J., respecting denial of certiorari); *id.,* at 963, 103 S.Ct., at 2439 (MARSHALL, J., dissenting from denial of certiorari).

> The eventual federal habeas corpus disposition of *McCray,* of course, proved to be one of the landmark cases that made the issues in this case ripe for review. *McCray v. Abrams,* 750 F.2d 1113 (CA2 1984), cert. pending, No. 84-1426. See also Pet. for Cert. 5-7 (relying heavily on *McCray* as a reason for review). In *McCray,* as in almost all opinions that have considered similar challenges, the Court of Appeals for the Second Circuit explicitly addressed the equal protection issue and the viability of *Swain.* 750 F.2d, at 1118-1124. The pending petition for certiorari in *McCray* similarly raises the equal protection question that has long been central to this issue. Pet. for Cert. in No. 84-1426 (Question 2). Indeed, shortly after agreeing to hear *Batson,* the Court was presented with a motion to consolidate *McCray* and *Batson,* and consider the cases together. Presumably because the Court believed that *Batson* adequately presented the issues with which other courts had consistently grappled in considering this question, the Court denied the motion. See *Abrams v. McCray,* 471 U.S. 1097, 105 S.Ct. 2318, 85 L.Ed.2d 837 (1985). Cf. *Ibid.* (BRENNAN, MARSHALL, and STEVENS, JJ., dissenting from denial of motion to consolidate).

5 Although I disagree with his criticism of the Court in this case, I fully subscribe to THE CHIEF JUSTICE's view, expressed today, that the Court should only address issues necessary to the disposition of the case or petition. For contrasting views, see, *e.g., Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 551, 106 S.Ct. 1326, 1336, 89 L.Ed.2d 501 (1986) (BURGER, C.J., dissenting) (addressing merits even though majority of the Court found a lack of standing); *Colorado v. Nunez,* 465 U.S. 324, 104 S.Ct. 1257, 79 L.Ed.2d 338 (1984) (concurring opinion, joined by BURGER, C.J.) (expressing view on merits even though writ was dismissed as improvidently granted because state-court judgment rested on adequate and independent state grounds); *Florida v. Casal,* 462 U.S. 637, 639, 103 S.Ct. 3100, 3101-3102, 77 L.Ed.2d 277 (1983) (BURGER, C.J., concurring) (agreeing with Court that writ should be dismissed as improvidently granted because judgment rested on adequate and independent state grounds, but noting that "the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement"). See also *Colorado v. Connelly,* 474 U.S. 1050, 106 S.Ct. 785, 88 L.Ed.2d 763 (1986) (ordering parties to address issue that neither party raised); *New Jersey v. T.L.O.,* 468 U.S. 1214 (1984) (same).

1 In *Colorado v. Connelly,* Justice BRENNAN, joined by Justice STEVENS, filed a memorandum objecting to this briefing of an additional question, explaining that "it is hardly for this Court to 'second chair' the prosecutor to alter his strategy or guard him from mistakes. Under this Court's Rule 21.1(a), '[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court.' Given petitioner's express disclaimer that [this] issue is presented, that question obviously is not 'fairly included' in the question submitted. The Court's direction that the parties address it anyway makes meaningless in this case the provisions of this Rule and is plainly cause for concern, particularly since it is clear that a similar dispensation would not be granted a criminal defendant, however strong his claim." 474 U.S., at 1052, 106 S.Ct., at 786-87. If the Court's limited step of directing briefing on an additional point at the time certiorari was granted was "cause for concern," I would think *a fortiori* that the far more expansive action the Court takes today would warrant similar concern.

2 Justice STEVENS, joined by Justice BRENNAN and Justice MARSHALL, dissented from the order directing reargument in *New Jersey v. T.L.O.* They explained:

> "The single question presented to the Court has now been briefed and argued. Evidently unable or unwilling to decide the question presented by the parties, the Court, instead of dismissing the writ of certiorari as improvidently granted, orders reargument directed to the questions that

[petitioner] decided not to bring here.... Volunteering unwanted advice is rarely a wise course of action.

"I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review." 468 U.S., at 1215-1216, 104 S.Ct., at 3584-3585.

Justice STEVENS' proffered explanation notwithstanding, see *ante,* at 1729 (concurring opinion), I am at a loss to discern how one can consistently hold these views and still reach the question the Court reaches today.

3 This fact alone distinguishes the cases cited by Justice STEVENS as support for today's unprecedented action. See *ante,* at 1730-1731, n. 5. In *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 551, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) (BURGER, C.J., dissenting), *Colorado v. Nunez*, 465 U.S. 324, 104 S.Ct. 1257, 79 L.Ed.2d 338 (1984) (WHITE, J., concurring), and *Florida v. Casal*, 462 U.S. 637, 639, 103 S.Ct. 3100, 3101-02, 77 L.Ed.2d 277 (1983) (BURGER, C.J., concurring), the issues discussed were all the primary issues advanced, briefed, and argued by the petitioners in this Court or related directly to the Court's basis for deciding the case. To be sure, some of the discussion in these separate statements might be parsimoniously viewed as "[un]necessary to the disposition of the case or petition." *Ante,* at 1730-1731, n. 5. But under this approach, many dissenting opinions and dissents from the denial of certiorari would have to be condemned as well. More important, in none of these separate statements was it even suggested that it would be proper to overturn a state-court judgment on issues that had not been briefed and argued by petitioner in this Court, as the Court does today. Finally, in *Colorado v. Connelly*, 474 U.S. 1050, 106 S.Ct. 824, 13 L.Ed.2d 759 (1986), and *New Jersey v. T.L.O.*, 468 U.S. 1214, 104 S.Ct. 3583, 82 L.Ed.2d 881 (1984), we directed briefing and argument on particular questions before deciding them. Such a procedure serves the desirable end of ensuring that the issues which the Court wishes to consider will be fully briefed and argued. My suggestion that the Court hear reargument of this case serves the same end.

4 While all these distinctions might support a claim under conventional equal protection principles, a defendant would also have to establish standing to raise them before obtaining any relief. See *Alexander v. Louisiana*, 405 U.S. 625, 633, 92 S.Ct. 1221, 1226-27, 31 L.Ed.2d 536 (1972).

5 The Court is also silent on whether a State may demonstrate that its use of peremptories rests not merely on "assumptions," *ante,* at 1723, but on sociological studies or other similar foundations. See Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md.L.Rev. 337, 365, and n. 124 (1982). For "[i]f the assessment of a juror's prejudices based on group affiliation is accurate, ... then counsel has exercised the challenge as it was intended-to remove the most partial jurors." *Id.*, at 365.

6 "[E]very jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited." *United States v. Leslie*, 783 F.2d 541, 565 (CA5 1986) (en banc).

7 One court has warned that overturning *Swain* has "[t]he potential for stretching out criminal trials that are already too long, by making the voir dire a Title VII proceeding in miniature." *United States v. Clark*, 737 F.2d 679, 682 (CA7 1984). That "potential" is clearly about to be realized.

8 It is worth observing that Congress has been unable to locate the constitutional deficiencies in the peremptory challenge system that the Court discerns today. As the Solicitor General explains in urging a rejection of the Sixth Amendment issue presented by this petition and an affirmance of the decision below, "[i]n reconciling the traditional peremptory challenge system with the requirements of the Sixth Amendment it is instructive to consider the accommodation made by Congress in the Jury Selection and Service Act of

1968, 28 U.S.C. 1861 *et seq.* ... [T]he House Report makes clear that ... 'the bill leaves undisturbed the right of a litigant to exercise his peremptory challenges to eliminate jurors for purely subjective reasons.' " Brief for United States as Amicus Curiae at 20, n. 11 (quoting H.R.Rep. No. 1076, 90th Cong., 2d Sess., 5-6 (1968)), U.S.Code Cong. & Admin.News 1968, pp. 1792, 1795.

9 This question, required by *Turner* in certain capital cases, demonstrates the inapplicability of traditional equal protection analysis to a jury *voir dire* seeking an impartial jury. Surely the question rests on generalized, stereotypic racial notions that would be condemned on equal protection grounds in other contexts.

10 The California Supreme Court has attempted to finesse this problem by asserting that "discrimination is more often based on appearances than verified racial descent, and a showing that the prosecution was systematically excusing persons who appear to be Black would establish a prima facie case" of racial discrimination. *People v. Motton,* 39 Cal.3d, at 604, 217 Cal.Rptr., at 420, 704 P.2d, at 180. This suggests, however, that proper inquiry here concerns not the actual race of the jurors who are excluded, but rather counsel's subjective impressions as to what race they spring from. It is unclear just how a "record" of such impressions is to be made.

11 Similar difficulties may lurk in this case on remand. The Court states as fact that "a jury composed only of white persons was selected." *Ante,* at 1715. The only basis for the Court's finding is the prosecutor's statement, in response to a question from defense counsel, that "[i]n looking at them, yes; it's an all-white jury." App. 3.

It should also be underscored that the Court today does *not* hold that petitioner has established a "prima facie case" entitling him to any form of relief. *Ante,* at 1725.

12 Petitioner concedes that it would be virtually impossible for the prosecutor in this case to recall why he used his peremptory challenges in the fashion he did. Brief for Petitioner 35.

13 Although Delaware has suggested that it might follow a rule like that adopted by the Court today, see *Riley v. State,* 496 A.2d 997 (1985), the issue of retroactive application of the rule does not appear to have been litigated in a published decision.

1 I note that the Court does not rely on the argument that, because there are fewer "minorities" in a given population than there are "majorities," the equal use of peremptory challenges against members of "majority" and "minority" racial groups has an unequal impact. The flaws in this argument are demonstrated in Judge Garwood's thoughtful opinion for the en banc Fifth Circuit in *United States v. Leslie,* 783 F.2d 541, 558-561 (1986).

2 See, *e.g., Commonwealth v. DiMatteo,* 12 Mass.App. 547, 427 N.E.2d 754 (1981) (under State Constitution, trial judge properly rejected white defendant's attempted peremptory challenge of black prospective juror).

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People v Smocum, 99 N.Y.2d 418, 786 N.E.2d 1275, 757 N.Y.S.2d 239, 2003 N.Y. Slip Op. 11297
Court of Appeals of New York February 25, 2003 99 N.Y.2d 418 786 N.E.2d 1275 757 N.Y.S.2d 239 2003 N.Y. Slip Op. 11297 (Approx. 5 pages)

The People of the State of New York, Respondent,

v.

John Smocum, Appellant.

Court of Appeals of New York
2/, 22
Argued January 16, 2003;
Decided February 25, 2003

CITE TITLE AS: People v Smocum

SUMMARY

Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 24, 2001, which affirmed a judgment of the Supreme Court (Lawrence Knipel, J.), rendered in Kings County upon a verdict convicting defendant of criminal possession of stolen property in the fifth degree.

People v Smocum, 286 AD2d 782, affirmed.

HEADNOTES

Crimes
Jurors
Selection of Jury--*Batson* Procedure

(1) In a criminal prosecution in which defendant alleged that the prosecution was using its peremptory challenges to exclude jurors on the basis of race, although the trial court improperly rushed and compressed the *Batson* inquiry, defendant failed at the time to raise his present claims and, thus, he did not meet his burden of establishing an equal protection violation. Defendant's argument regarding the challenge of a particular potential juror is unpreserved and cannot be reached. Based on the record, the prosecutor's proffered reason for challenging the juror might have been nonpretextual. However, while defense counsel persisted in challenging two other stricken jurors, she said nothing further about the juror in question at a time when any ambiguity could have been clarified.

Crimes
Jurors
Selection of Jury--*Batson* Procedure

(2) When defendant first raised a *Batson* objection with regard to the prosecutor's use of three peremptory challenges, the trial court should have decided whether the defense met its initial burden of establishing a prima facie case of discrimination. That issue became moot when the People stated their reasons and the court ruled on the ultimate issue. By immediately concluding that the reasons were acceptable as to two of the potential jurors, without first allowing defense counsel to make an argument that the reasons were pretextual, the court failed to make a meaningful inquiry into the question of discrimination. Moreover, the fact that satisfactory reasons were given for striking two jurors does not defeat defendant's prima facie case as to the third, since improper removal of even a single juror may be a violation of equal protection. The court should have moved on to a determination of pretext, the final step.

SELECTED TOPICS

Habeas Corpus

Grounds for Relief; Illegality of Restraint
Challenged Peremptory Strikes of Minority Jurors

Criminal Law
Review
Prosecutor Exercise of Peremptory Challenge of Prospective Juror Based on Race, Ethnicity or National Origin

Secondary Sources

s 191:71. Facially race-neutral explanation for striking prospective juror as sufficient

35 Carmody-Wait 2d § 191:71

...In the second step of a Batson challenge, the nonmovant's reasons given for each challenged peremptory strike of a prospective juror need be only facially permissible. The race-neutral explanation tend...

s 44:37. Examination of individual jurors-Peremptory challenges-Discriminatory exercise of peremptory challenges-Race neutral explanation

3 Criminal Procedure in New York § 44:37 (2d)

...The prosecutions' credibility in explaining its justification for peremptory strikes of racial minorities can be measured by, among other factors, the prosecution's demeanor, by how reasonable or how i...

s 53:2. Statutory basis

3 Criminal Procedure in New York § 53:2 (2d)

...The statutory basis underlying the right to petition for a writ of habeas corpus is a codification of the principles enunciated by the Supreme Court. The statutory grounds upon which federal motion for...

See More Secondary Sources

Briefs

BRIEF FOR RESPONDENT

1991 WL 538725
Hernandez (Dionisio) v. New York
Supreme Court of the United States
Jan. 07, 1991

...FN* Counsel of Record for Respondent The opinion of the New York Court of Appeals (Joint App. at 26-45) is reported at 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85 (1990). The opinion of the New Yor...

Brief for Respondent

2005 WL 2841656
Bertram RICE, Warden, et al., Petitioners, v. Steven Martell COLLINS, Respondent.
Supreme Court of the United States
Oct. 25, 2005

...FN* Counsel of Record Respondent Steven Collins ("Collins"), an African-American man, JA II 11, was tried in the Los Angeles County Superior Court for possessing 0.10 grams of rock cocaine. PA 109-10. ...

BRIEF FOR PETITIONER

1990 WL 515099
Hernandez (Dionisio) v. New York
Supreme Court of the United States
Nov. 28, 1990

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Criminal Law §§ 1087, 1088, 1090.**419*

Carmody-Wait 2d, Criminal Procedure §§ 172:2917, 172:2920, 172:2921, 172:2924-172:2926.

NY Jur 2d, Criminal Law §§ 2292-2295, 2298, 3125-3127, 3134.

ANNOTATION REFERENCES

See ALR Index under Jury and Jury Trial; Peremptory Challenges.

POINTS OF COUNSEL

Alan S. Axelrod, New York City, and *Andrew C. Fine* for appellant.
The court erroneously denied appellant's *Batson* claim, where after first requiring the prosecutor to give reasons for three peremptory challenges, it accepted the reasons for two panelists, but as to the third, it improperly returned from the second and third steps of the requisite analysis to the first, prima facie case step, finding "no pattern" of discrimination, despite that the prosecutor's reason for challenging her--that her son had died--was utterly unrelated to her suitability for jury service and was thus a pretext for racial discrimination. *(Hernandez v New York,* 500 US 352; *United States v Clemmons,* 892 F2d 1153; *Johnson v Love,* 40 F3d 658; *Durant v Strack,* 151 F Supp 2d 226; *Batson v Kentucky,* 476 US 79; *People v Payne,* 88 NY2d 172; *People v Bolling,* 79 NY2d 317; *People v Childress,* 81 NY2d 263; *People v Jenkins,* 75 NY2d 550; *Purkett v Elem,* 514 US 765.)
Charles J. Hynes, District Attorney, Brooklyn (*Jacqueline M. Linares* and *Leonard Joblove* of counsel), for respondent.
The trial court properly rejected defendant's *Batson* claim after finding that the prosecutor did not discriminate on the basis of race in the exercise of his peremptory challenges. *(Batson v Kentucky,* 476 US 79; *People v Allen,* 86 NY2d 101; *People v Brown,* 97 NY2d 500; *People v Smith,* 81 NY2d 875; *People v Payne,* 88 NY2d 172; *Georgia v McCollum,* 505 US 42; *People v Kern,* 75 NY2d 638, 498 US 824; *Hernandez v New York,* 500 US 352; *Purkett v Elem,* 514 US 765; *People v Bolling,* 79 NY2d 317.)

OPINION OF THE COURT

Chief Judge Kaye.

This appeal spotlights the three-step test for determining whether peremptory challenges have been used to exclude **420* potential jurors on account of race (*see Batson v Kentucky,* 476 US 79, 94-98 [1986]). As a first step, the moving party bears the burden of establishing a prima facie case of discrimination in the exercise of peremptory challenges. Second, the nonmoving party must give a race-neutral reason for each potential juror challenged. In step three, the court determines whether the reason given is merely a pretext for discrimination. Against this background we evaluate the challenged voir dire in the present case, in which defendant's conviction for criminal possession of stolen property--an automobile--was affirmed by the Appellate Division.

I.

During the first round of jury selection, the prosecutor exercised peremptory challenges to three of the first 12 prospective jurors. After the prosecutor removed one Hispanic and two African-American women, defense counsel stated, "I am wondering if we are having a Batson issue here." Although the prosecutor maintained that the defense had failed to make a prima facie case, and thus no race-neutral reasons were yet required, the court responded, "I am asking anyway. Why have you challenged them?" The prosecutor replied that two, Torres and Gordon, were challenged for family involvement with police officers, and the third, Mapp, because her son had died and the prosecutor "didn't think it was appropriate to go into it." The following colloquy ensued:

"THE COURT: Clearly there is good reason to challenge Torres and Gordon. And the only question is Mapp, but that doesn't make a pattern. I can understand not wanting to go into her son's death. The challenge is denied. Overruled. Let's go with defense peremptories.

"[Defense counsel]: I would just like to speak as to that. I don't see how it doesn't make a pattern.

"THE COURT: There are reasons to challenge.

...FN* Counsel of Record The opinion of the New York State Court of Appeals is reported at 75 N.Y.2d 350, 553 N.Y.S.2d 85, 552 N.E.2d 621 (1990) and found in the Joint Appendix at A26. The opinion of the...

See More Briefs

Trial Court Documents

People of the State of New York v. Mateo

1997 WL 34904654
THE PEOPLE OF THE STATE OF NEW YORK, v. Angel MATEO.
County Court of New York
Aug. 25, 1997

...Connell, J. The following constitutes the Opinion, Decision & Order of the Court. The headings and numbering in this Decision correspond as nearly as possible to those of the motion papers. To the exte...

"[Defense counsel]: In the back row we have one black man left, otherwise he has knocked [out] every one--

"THE COURT: Let's not argue. Let's not belabor it. There are very good reasons to challenge Torres and Gordon where the whole case reflects on police *421 officers, and both ... have serious problems in their family with police officers.

"[Defense counsel]: Torres and Gordon.

"THE COURT: Both had members of their family--

"[Defense counsel]: They don't seem to [be] serious. She said a cop embarrassed her son and she told him not to do anything about it. How is that elevated to a serious problem with the police? She answered all the other questions about the police as honestly and openly as everyone else.

"THE COURT: That's a good reason to challenge. Denied. You have an exception.

"[Defense counsel]: Thank you."

Before us, defendant maintains that the court improperly revisited step one-- the prima facie case--after the prosecutor had given his reasons for the challenged strikes; that any possible ruling on pretext as to prospective juror Mapp is unsupported by the record; and that inadequacies in the record were chargeable to the court's impatience in conducting the inquiry. Although we agree that the trial court's analysis was less than ideal, because we conclude that defendant--who bore the ultimate burden of persuasion--failed at the time to raise his present claims, we affirm.

II.

In furtherance of the United States Supreme Court's "unceasing efforts to eradicate racial discrimination" in the jury selection process, the Court in *Batson v Kentucky* (476 US at 85, 94-98) prescribed a now-familiar three-step test for determining whether peremptory challenges are based on invidious discrimination. That test is drawn from "disparate treatment" cases under title VII of the Civil Rights Act of 1964 (*id.* at 94 n 18).

Under *Batson* and its progeny, the party claiming discriminatory use of peremptories must first make out a prima facie case of purposeful discrimination by showing that the facts and circumstances of the voir dire raise an inference that the other party excused one or more jurors for an impermissible reason. "There are no fixed rules for determining what evidence will ... establish a prima facie case of discrimination" (*People v Bolling*, 79 NY2d 317, 323-324 [1992]). Although as part of *422 their prima facie case parties often rely on numbers to show a pattern of strikes against a particular group of jurors, a prima facie case may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination.

Once a prima facie showing of discrimination is made, the nonmovant must come forward with a race-neutral explanation for each challenged peremptory--step two. If the nonmovant cannot meet this burden, an equal protection violation is established. However, once race-neutral reasons are given, the inference of discrimination is overcome. At this second stage the reasons need be only facially permissible.

The third step of the *Batson* inquiry requires the trial court to make an ultimate determination on the issue of discriminatory intent based on all of the facts and circumstances presented. Unlike step two, this determination is a question of fact, focused on the credibility of the race-neutral reasons. Courts may determine that the proffered reasons are pretextual without further arguments by the moving party, but the moving party has the ultimate burden of persuading the court that the reasons are merely a pretext for intentional discrimination (*People v Payne*, 88 NY2d 172, 183-184 [1996]). It is therefore the moving party's burden to make a record that would support a finding of pretext.

As should be clear from this summary, the *Batson* procedure effectuates its purpose only if the steps are followed in sequence. It makes no sense, for example, to revisit the issue of whether a prima facie case has been made once the prosecutor has come forward with race-neutral reasons. At that point, the presumption of discrimination raised by the movant's initial prima facie case has been rebutted, and to revisit the adequacy of the step one showing "unnecessarily evade[s] the ultimate question of discrimination" (*Durant v Strack*, 151 F Supp 2d 226, 236 [ED NY 2001]). Similarly, when courts combine steps two and three by requiring the nonmoving party to provide *nonpretextual* race-neutral reasons, they

inappropriately shift the ultimate burden from the moving party (*see Payne*, 88 NY2d at 186-187).

III.

(1) Applying these principles to the present case, we conclude that although the court improperly rushed and compressed the *Batson* inquiry, defendant failed to meet his burden of establishing an equal protection violation.

(2) When defendant first raised a *Batson* objection, the trial court should have decided whether the defense met its step-one ***423** burden of establishing a prima facie case of discrimination. That issue became moot when the People stated their reasons and the court ruled on the ultimate issue (*see People v James*, 99 NY2d 264 [2002]). The prosecutor's reasons for all three challenged strikes were facially race-neutral, and thus met the step-two burden of production. The court appears to have melded steps two and three, however, by immediately concluding that the reasons were acceptable as to Torres and Gordon, without first allowing defense counsel to make an argument that the reasons were pretextual. This practice falls short of a "meaningful inquiry into the question of discrimination," and we caution trial courts to avoid undue haste and compression in this crucial process (*Jordan v Lefevre*, 206 F3d 196, 201 [2d Cir 2000]).

In this case the proffered reasons as to Torres and Gordon are clearly nonpretextual, and defendant does not challenge those reasons on appeal. The situation is different with respect to prospective juror Mapp. The trial court was wrong in dismissing defendant's *Batson* challenge with the statement that "the only question is Mapp, but that doesn't make a pattern." The fact that satisfactory reasons were given for striking two other jurors does not defeat defendant's prima facie case as to Mapp. Improper removal of even a single juror may be a violation of equal protection. The court should have moved on to a determination of pretext, or step three.

(1) Here, however, defendant's argument regarding Mapp is unpreserved and cannot be reached. Based on this record, the prosecutor's proffered reason for challenging Mapp--the death of her child--also might have been nonpretextual (*see, by contrast, Jordan*, 206 F3d at 201). Matters such as the prospective juror's demeanor may well have prompted the court's conclusion that "I can understand not wanting to go into her son's death." While defense counsel persisted in her challenge regarding Torres and Gordon despite the court's impatience, she said nothing further about Mapp at a time when any ambiguity-- if indeed she actually perceived any ambiguity--could have been clarified.

Finally, we reject defendant's argument that counsel was "squelched" and not permitted to make her pretext case with respect to Mapp. Despite the sometimes enormous pressures of trial, it is for courts to discharge their responsibilities under the law and for counsel to voice objection when they do not. In particular, we underscore the importance both of trial court attention to each of *Batson*'s well-articulated, sequential steps,and ***424** of trial counsel attention to placing their objections on the record so they may be addressed by the court. In this way, the law can be observed and potential error avoided.

Accordingly, the order of the Appellate Division should be affirmed.

Judges Smith, Ciparick, Wesley, Rosenblatt, Graffeo and Read concur.
Order affirmed. ***425**

End of Document

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Distinguished by People v. Burroughs, N.Y.A.D. 4 Dept., November 15, 2002

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People v Childress 81 N.Y.2d 263, 614 N.E.2d 709, 598 N.Y.S.2d 146
Court of Appeals of New York February 23, 1993 81 N.Y.2d 263 614 N.E.2d 709 598 N.Y.S.2d 146 *(Approx. 5 pages)*

The People of the State of New York, Respondent,

v.

Craig Childress, Appellant.

Court of Appeals of New York
31
Argued January 12, 1993;
Decided February 23, 1993

CITE TITLE AS: People v Childress

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 4, 1991, which affirmed a judgment of the Nassau County Court (Edward A. Baker, J.), rendered upon a verdict convicting defendant of burglary in the second degree and possession of burglar's tools.

People v Childress, 177 AD2d 498, affirmed.

HEADNOTES

Crimes
Jurors
Discriminatory Use of Peremptory Challenges--Prima Facie Case-- Articulation of Sound Factual Basis during Colloquy

(1) In the prosecution of an African-American defendant for burglary, the trial court properly overruled defense counsel's objection under *Batson v Kentucky* (476 US 79) to the prosecutor's exercise of peremptory challenges to exclude certain African-American jurors, since defense counsel did not satisfy his obligation to articulate a sound factual basis for his claim during the *Batson* colloquy. That the prosecutor exercised his peremptories to strike two of the three African- American jurors is not sufficient, by itself, on this record, to establish a pattern of purposeful exclusion sufficient to raise an inference of discrimination. Nor did defense counsel's perfunctory assertions that the "questioning [of those prospective jurors] was proper" and that "[t]hey indicated no reason why they could not serve fairly on [the] jury", establish the existence of facts and other relevant circumstances sufficient to raise an inference that the prosecutor had used his peremptory challenges to exclude individuals because of their race.

Crimes
Jurors
Discriminatory Use of Peremptory Challenges--Burden of Proving Pattern of Purposeful Exclusion

(2) The defendant's burden of proving a pattern of purposeful exclusion of potential jurors because of their race under *Batson v Kentucky* (476 US 79) is not lessened when the size of a particular racial group in a given community is so small as to make statistical evidence inherently unreliable.

Crimes
Jurors

SELECTED TOPICS

Jury

Competency of Jurors, Challenges, and Objections
Defendant Showing of Prima Facie Case of Prosecutor Discriminatory Use of Peremptory Challenge

Competency of Jurors, Challenges, and Objections

Trial Court Determinations of Jury Impartiality Absent Clear Abuse of Discretion

Secondary Sources

s 2614. Juror acquaintance with witness

34 N.Y. Jur. 2d Criminal Law: Procedure § 2614

...The existence of implied bias arising from a prospective juror's relationship with a potential witness requires automatic exclusion even if the prospective juror declares that the relationship will not...

Challenges for Cause in Jury Selection Process

58 Am. Jur. Proof of Facts 3d 395 (Originally published in 2000)

...Jury selection, when lawyers are allowed to interact directly with the jurors, is a complex phase of trial which is botched more often than not. Too frequently, counsel waste this invaluable opportunit...

s 44:34. Examination of individual jurors-Peremptory challenges-Discriminatory exercise of peremptory challenges

3 Criminal Procedure in New York § 44:34 (2d)

...There is a three-step process for determining whether a party has exercised its peremptory challenges for reasons that implicate equal protection concerns. First, the party objecting to the challenges ...

See More Secondary Sources

Briefs

Brief for Respondent

1999 WL 33659939
THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. Karim JOHNSON, Defendant-Appellant.
Court of Appeals of New York.
Aug 1999

...The Sixth Amendment of the United States Constitution provides: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and distr...

BRIEF FOR RESPONDENT

1991 WL 538725
Hernandez (Dionisio) v. New York
Supreme Court of the United States
Jan. 07, 1991

...FN* Counsel of Record for Respondent The opinion of the New York Court of Appeals (Joint App. at 26-45) is reported at 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85 (1990). The opinion of the New Yor...

Brief for Defendant-Appellant

Discriminatory Use of Peremptory Challenges--Minutes of Voir Dire Not Always Required for Appellate Review

(3) The minutes of the voir dire need not be provided in every instance as a precondition for obtaining relief on appeal under *Batson v Kentucky* (476 US 79). In order to give the trial court a proper foundation to evaluate the claim--as well as to ensure an adequate record for appellate review--a party asserting a claim under *Batson* should articulate and develop all of the grounds supporting the claim, both factual and legal, during the colloquy in which the objection is raised and discussed. Despite the absence of ***264** voir dire minutes, however, a trial or appellate court may determine, based on facts elicited during the *Batson* colloquy, whether a prima facie case of discriminatory use of peremptory challenges has been established.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Jury, §§ 173-176.

NY Jur 2d, Criminal Law, §2392.

ANNOTATION REFERENCES

Group or class discrimination in selection of grand or petit jury as prohibited by Federal Constitution. 33 L Ed 2d 783.

POINTS OF COUNSEL

Alfred O'Connor, Hempstead, *Matthew Muraskin* and *Kent V. Moston* for appellant.
Appellant established a prima facie case of race discrimination by objecting to the prosecution's peremptory strikes against two of three African-Americans in the jury panel. (*Strauder v West Virginia*, 100 US 303; *Swain v Alabama*, 380 US 202; *Batson v Kentucky*, 476 US 79; *People v Kern*, 75 NY2d 638; *Powers v Ohio*, 499 US 400; *People v Bolling*, 79 NY2d 317; *People v Brown [Larry]*, 144 AD2d 373; *People v Dove*, 154 AD2d 705; *People v Howard*, 128 AD2d 804; *People v Hassell*, 149 AD2d 530.)
Denis Dillon, District Attorney of Nassau County, Mineola (*Peter A. Weinstein* of counsel), for respondent.
Defendant failed to establish a prima facie case of race discrimination by the prosecutor in the exercise of his peremptory challenges. (*Batson v Kentucky*, 476 US 79; *People v Kern*, 75 NY2d 638; *People v Bolling*, 79 NY2d 317; *People v Jenkins*, 75 NY2d 550; *Alvarado v United States*, 497 US 543; *People v Hernandez*, 75 NY2d 350; *United States v Clemons*, 843 F2d 741; *United States v Dawn*, 897 F2d 1444; *United States v Allison*, 908 F2d 1531; *People v Simmons*, 79 NY2d 1013.)

OPINION OF THE COURT

Titone, J.

This appeal involving the application of *Batson v Kentucky* (476 US 79) concerns the minimum showing that must be made to establish a prima facie case of unlawful discrimination in the use of peremptory challenges. Also at issue is ***265** whether the minutes of the voir dire must be furnished in order to obtain relief on appeal under *Batson v Kentucky (supra)*.

Defendant, an African-American, was charged with burglarizing an apartment in Freeport, Long Island. During the selection of the jury preceding his trial, defense counsel asserted that the prosecutor was using his peremptory challenges to exclude African-American jurors. The following colloquy ensued:

"[DEFENSE COUNSEL]: Your Honor, I would like to raise an objection at this point. The district attorney has excluded black jurors on the panel. I feel that their questioning was proper. They indicated no reason why they could not serve fairly on this jury. I think that there must be some motivation for that challenging. And I would ask the Court to exclude those challenges.

"THE COURT: I am old fashioned. I think the word peremptorily means exactly what it says. However, aside from that, I don't notice anything. Of course, you have your exception.

"[PROSECUTOR]: If I could just make a record?

"THE COURT: Go ahead.

2011 WL 7451361
THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. Scott C. FUREY, Defendant-Appellant.
Court of Appeals of New York.
Feb. 07, 2011

...FN1. It should be noted that the one-year jail sentence for Menacing 3rd (a class B misdemeanor) is illegal (Penal Law § 70.15 (2)). This error was pointed out to the Appellate Division, which did not a...

See More Briefs

Trial Court Documents

The People of the State of New York v. Degondea

2001 WL 36097913
THE PEOPLE OF THE STATE OF NEW YORK, v. David DEGONDEA, Defendant.
Supreme Court, New York.
Dec. 20, 2001

...MARCY L. KAHN, J.: Defendant was convicted on January 5, 1995, after a jury trial before a different Justice of this court, of murder in the first degree, attempted murder in the first degree, criminal...

The People of the State of New York v. Degondea

2001 WL 36103704
THE PEOPLE OF THE STATE OF NEW YORK, v. David DEGONDEA, Defendant.
Supreme Court, New York.
July 09, 2001

...[This opinion is uncorrected and not selected for official publication.] On January 5, 1995, defendant was convicted after a jury trial before a different Justice of this court' of murder in the first ...

People of the State of New York v. Mateo

1997 WL 34904654
THE PEOPLE OF THE STATE OF NEW YORK, v. Angel MATEO.
County Court of New York
Aug. 25, 1997

...Connell, J. The following constitutes the Opinion, Decision & Order of the Court. The headings and numbering in this Decision correspond as nearly as possible to those of the motion papers. To the exte...

"[THE PROSECUTOR]: There were three black jurors on this particular panel, and I accepted one black juror. And it is not as if I was excluding black jurors because of their race.

"THE COURT: Okay. You have an exception."

A panel of 12 jurors was ultimately seated. Defendant was tried and convicted of burglary in the second degree and possession of burglar's tools.

On his appeal from the judgment of conviction, defendant argued, among other things, that the trial court had erred in refusing to require the prosecutor to furnish a race-neutral explanation for his use of peremptories to exclude African-American jurors. The Appellate Division rejected this argument, holding that defendant had "failed to substantiate his claim ... since the voir dire proceedings have not been made available as part of the record on appeal" (177 AD2d 498, 499, citing *People v Campanella,* 176 AD2d 813). Defendant subsequently appealed to this Court by permission of one of its Judges. We now affirm the order of the Appellate Division, but on a somewhat different analysis. *266

Initially, to the extent that the trial court based its ruling on any purported right of the prosecutor to make peremptory challenges regardless of their racial basis, the court clearly misstated the law. The Supreme Court's landmark ruling in *Batson v Kentucky (supra)* definitively foreclosed any such arguments and articulated a new standard for establishing a claim of racial discrimination in the use of peremptory challenges. Since *Batson* was decided, this Court, as well as the Supreme Court, have elaborated upon that new standard *(see, e.g., Powers v Ohio,* 499 US 400, 111 S Ct 1364; *Griffith v Kentucky,* 479 US 314; *People v Bolling,* 79 NY2d 317; *People v Kern,* 75 NY2d 638; *People v Jenkins,* 75 NY2d 550). As we noted in *People v Jenkins (supra,* at 555), it is "no longer open to question" that "the racially motivated exercise of peremptory challenges ... violates the Equal Protection Clause of the Fourteenth Amendment." The time is long since past for questioning the basic premises underlying *Batson* and its progeny.

The standard mandated by *Batson* is a relatively straightforward one. First, a defendant asserting a claim under the *Batson* formula must present a prima facie case by showing that the prosecution exercised its peremptory challenges to remove one or more members of a cognizable racial group from the venire and that there exist facts and other relevant circumstances sufficient to raise an inference that the prosecution used its peremptory challenges to exclude potential jurors because of their race *(Batson v Kentucky, supra,* at 96-98; *People v Jenkins,* 75 NY2d 550, 555-556, *supra; see, Powers v Ohio,* 499 US 400, *supra).* Once that prima facie showing has been made, the burden shifts and the prosecution must come forward with a race-neutral explanation for its challenged peremptory choices *(Batson v Kentucky, supra,* at 96-97).

The first element of a prima facie case--demonstrating that members of a cognizable racial group have been excluded--is seldom problematic. The more difficult aspect of the prima facie case delineated in *Batson* is the second element--a showing of "facts and other relevant circumstances" that would support an inference of impermissible discrimination. That is the element that concerns us here.

"There are no fixed rules for determining what evidence will give rise to an inference sufficient to establish a prima facie case" *(People v Bolling,* 79 NY2d 317, 323-324, *supra).* A *267 pattern of strikes or questions and statements made during the voir dire may be sufficient in a particular case *(see, Batson v Kentucky, supra,* at 97; *see also, People v Jenkins,* 75 NY2d 550, 556, *supra).* Additionally, this element may be established by a showing that members of the cognizable group were excluded while others with the same relevant characteristics were not *(see, People v Bolling, supra,* at 324). Another legally significant circumstance may exist where the prosecution has stricken members of this group who, because of their background and experience, might otherwise be expected to be favorably disposed to the prosecution *(see, People v Scott,* 70 NY2d 420, 425). The court should also take into consideration the fact that the mere existence of a system of peremptory challenges may serve as a vehicle for discrimination by those with racially motivated inclinations *(see, Batson v Kentucky, supra,* at 96).

Further, although rarely dispositive, the fact that a disproportionate number of strikes have been used against members of a particular racial or ethnic group may be indicative of an impermissible discriminatory motive *(see, People v Jenkins, supra,* at 556). Conversely, "[t]he mere inclusion of some members of defendant's ethnic group will not defeat an otherwise meritorious *[Batson]* motion" *(People v Bolling, supra,* at 324). The inclusion of token

members of a racial group is not an acceptable substitute for a jury selected by racially neutral criteria, and the exclusion of even one member of a group for racial reasons is abhorrent to a fair system of justice.

(1, 2) Under the circumstances presented here, defense counsel's sketchy assertions during the colloquy on the *Batson* claim did not establish a basis for relief. While the prosecutor admittedly exercised his peremptories to strike two of the three African-American jurors, that fact alone is not sufficient, on this record, to establish a "pattern of purposeful exclusion sufficient to raise an inference of discrimination" *(People v Steele,* 79 NY2d 317, 325; *cf., People v Hawthorne,* 80 NY2d 873). We reject defendant's argument that the burden of proving a pattern of purposeful exclusion should be lessened when the size of a particular racial group in a given community is so small as to make statistical evidence inherently unreliable.

(1) Defense counsel's other assertions during the *Batson* colloquy that "[the prospective jurors'] questioning was proper" and that "[t]hey indicated no reason why they could **268* not serve fairly on this jury" were also insufficient to establish a prima facie case on this record. The latter assertion served only to highlight that the stricken jurors demonstrated no biases that would disqualify them for service or support a challenge for cause. The former assertion was simply too broad and conclusory to support an inference of discriminatory motive.

(3) We note that, in order to give the trial court a proper foundation to evaluate the claim--as well as to ensure an adequate record for appellate review--a party asserting a claim under *Batson v Kentucky (supra)* should articulate and develop all of the grounds supporting the claim, both factual and legal, during the colloquy in which the objection is raised and discussed. Where counsel has perceived something suggesting a discriminatory motive in the questioning of prospective jurors or in the answers the jurors have given, the specific facts underlying counsel's concerns should be fully articulated and described. Despite the absence of voir dire minutes, a trial or appellate court may determine, based on facts elicited during the *Batson* colloquy, whether a prima facie case of discriminatory use of peremptory challenges has been established *(see, People v Bolling,* 79 NY2d 317, 324, *supra; People v Scott,* 70 NY2d 420, 423-424, *supra).* In most instances, the minutes of the voir dire will be helpful or useful only to the extent that it becomes necessary to resolve specific factual disputes arising during, or as a result of, the *Batson* colloquy. Thus, contrary to the suggestion in the Appellate Division's opinion below, the minutes of the voir dire need not be provided in every instance as a precondition for obtaining *Batson* relief. Indeed, the cases in which the voir dire minutes are necessary to resolve the appeal should be relatively rare.

Here, defense counsel did not satisfy his obligation to articulate a sound factual basis for his claim during the *Batson* colloquy. His perfunctory statements in support of the defense motion for *Batson* relief plainly did not establish the existence of facts and other relevant circumstances sufficient to raise an inference that the prosecutor had used his peremptory challenges to exclude individuals because of their race *(Batson v Kentucky, supra,* at 96-98). Thus, the defense's objection to the prosecutor's actions was properly overruled, and the Appellate Division correctly affirmed the judgment of conviction.**269*

Accordingly, the order of the Appellate Division should be affirmed.

Acting Chief Judge Simons and Judges Kaye, Hancock, Jr., Bellacosa and Smith concur. Order affirmed.**270*

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161 Misc.2d 512, 614 N.Y.S.2d 700

Siriano v Beth Israel Hosp. Ctr.
Supreme Court, New York County March 29, 1994 161 Misc.2d 512 614 N.Y.S.2d 700 *(Approx. 4 pages)*

Joseph Siriano et al., Plaintiffs,

Beth Israel Hospital Center et al., Defendants.
Gazetten Construction, Inc., Third-Party Plaintiff,
v.
Alpha Mechanical Corp. et al., Third-Party Defendants.
(And Two Other Third-Party Actions.)

Supreme Court, New York County,
16083/89, 94-348
March 29, 1994

CITE TITLE AS: Siriano v Beth Israel Hosp. Ctr.

HEADNOTES

Jury
Selection of Jury
Use of Peremptory Challenges in Discriminatory Manner

(1) In a personal injury action, it is directed that three minority jurors, who had been excused on peremptory challenges by defendants but were still available and examined by the court, be seated together with the two jurors previously selected, and that the jury selection continue, since defendants engaged in purposeful discrimination against minority jurors by using their peremptory challenges to excuse all nine minority venirepersons who had been examined. Peremptory challenges granted by CPLR 4109, which normally permit a party to excuse a juror without offering a reason, are not constitutionally protected fundamental rights, but rather are State-created means of achieving an impartial jury. Determination of the issue of whether to deprive defendants of their exercised peremptory challenges depends on whether the defendants have exercised their challenges in a purposefully discriminatory manner. Here, while defendants' counsel may have believed that they were acting in the best interests of their respective clients and were not intentionally racist, the impact of their actions, resulting in the elimination to date of all minority jurors, has had a discriminatory impact. It is improper to exclude minority jurors because of a general perception that it is likely that they may be more sympathetic to an injured plaintiff.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Jury, §§ 173, 174.

Carmody-Wait 2d, Selection and Impanelment of Jury §§ 55:31, 55:32.

CPLR 4109.

NY Jur 2d, Jury, §§98, 99.

ANNOTATION REFERENCES

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury--post-Batson state cases. 20 ALR5th 398.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury--post-Batson federal cases. 110 ALR Fed 690. ***513**

APPEARANCES OF COUNSEL

Weitz & Luxenberg, New York City, for plaintiffs. *Bower & Gardner*, New York City, for Beth Israel Hospital Center. *Smith, Mazure, Director, Wilkins, Young, Yagerman & Tarallo*, New York City, for Gazetten Construction, Inc. *Farley, Holohan, Wagner & Doman*, Mineola, for Intrepid Electrical Contracting Company, Inc. *Joseph C. Scibilia*, Hempstead, for Intrepid Sheet Metal & Mechanical, Inc. *Quirk & Bakalor, P. C.*, New York City, for Cord Contracting, Inc. *Francis W. Turner*, New York City, for Alpha Mechanical Corp.

OPINION OF THE COURT

Edward H. Lehner, J.

During jury selection the six codefendants have used their peremptory challenges to excuse all nine minority venirepersons (six black [1] and three Latino) who have to date been examined. Plaintiffs assert that this exclusion has been impermissibly based on race and request judicial relief.

FACTS

The plaintiff Joseph Siriano, a white of Italian ancestry, asserts that he was injured in a construction accident and has instituted this action against the owner of premises where the accident occurred and five contractors and subcontractors.

Justice Helen Freedman granted each defendant three peremptory challenges and gave plaintiffs nine challenges. As of March 16, when an application was made to me, two jurors (both white) had been seated. Plaintiffs had exercised five challenges (four white and one black) while defendants jointly exercised 11 challenges (the nine referred to above as well as two whites). In addition the parties jointly excused approximately 180 prospective jurors, the vast majority of whom were apparently excused due to problems resulting from the stated length of the trial. No breakdown of the racial composition of these persons was available.

In the afternoon of March 16, plaintiffs' counsel complained of the actions of the defendants in excusing all of the minority jurors. After hearing argument, I determined that the statistics displayed a prima facie case of racial discrimination and directed defendants to offer race neutral explanations for their ***514** challenges. On the following two afternoons I heard defendants' explanations for the exercise of their challenges and examined, together with counsel, the three minority jurors (two black and one Latina) who were then available.

DISCUSSION

In *Swain v Alabama* (380 US 202 [1965]), it was held that purposeful exclusion of blacks from juries violates the Equal Protection Clause, but proof was required that the prosecutor had followed such a pattern in cases other than the one before the court. This formulation was found unworkable and was therefore rejected in *Batson v Kentucky* (476 US 79 [1986]), where it was held that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial" (at 96). The Court ruled that 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 ... [and that the] 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" (at 96). As an example it was stated that a " 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination", and that once there is a "prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors, [and the] trial court then will have the duty to determine if the defendant has established purposeful discrimination" (at 97-98).

Although in 1993 the First Department in *People v Doran* (195 AD2d 364) restated the foregoing requirements, including the necessity of showing that the prosecutor removed "members of [the] defendant's race from the panel" (at 365), it was held in *Powers v Ohio* (499 US 400 [1991]), that a juror has a constitutional right not to be excluded from a jury on account of race and a defendant of a different race "can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race" (at 415).

Two months after the decision in *Powers (supra),* in *Edmonson v Leesville Concrete Co.* (500 US 614 [1991]), it was announced that the harms recognized in *Powers* are not limitedto**515* the criminal sphere, and that courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial, concluding that it would be left to the trial courts in the first instance to develop evidentiary rules for implementing the decision. Although many courts have dealt with this issue in criminal cases, there are very few decisions in the civil area, with no reported case having been located in New York.

Coming to the action at bar, the explanations for the exercise of peremptory challenges offered by defendants predominately involved concerns because the jurors, members of their family or close friends had at some time been injured in an accident (Smith, Walker, Flores, Cypher, Allen and Stubblefield). Some of the other partial explanations offered as to the following prospective jurors were: (Rosario) two young jurors had already been selected and a third young juror would not provide a desired mix; (Stubblefield) father had died at Beth Israel Hospital, a defendant herein, although no fault was ascribed by the juror to the hospital; (Guzman) three brothers were in the construction trade; (Smith) wife works in the medical records room at Presbyterian Hospital.

The three jurors who were examined by counsel and the court (Smith, Walker and Guzman) appeared to be sensible, intelligent persons, who all stated that they could and would fairly try the action, for which promise I could see no valid reason to question.

After having heard from the aforesaid three jurors and the submissions and arguments of counsel, I now have to decide whether to deprive defendants of their exercised peremptory challenges granted by CPLR 4109, which challenges normally permit a party to excuse a juror without offering a reason. Such challenges are not constitutionally protected fundamental rights, but rather are State-created means of achieving an impartial jury *(Georgia v McCollum,* 505 US ___, 112 S Ct 2348 [1992]). The determination of this issue, as indicated above, depends on whether these defendants have exercised their challenges in a purposefully discriminatory manner. The question poses great difficulty for a Trial Judge. As noted by Judge Bellacosa in his concurring opinion (on behalf of Chief Judge Wachtler and Judge Titone) in *People v Bolling* (79 NY2d 317 [1992]), "[a]nalytically, peremptories and race-neutral articulations present a quintessential and untenable dualism" (at 326). In that opinion the three Judges urged, as did Justice Marshall in his concurring opinion in *Batson (supra),* theelimination**516* of the peremptory challenge process, stating that it now produces "a seemingly endless variety of issues and permutations, manifesting the intractable struggle of the lower courts to implement the unmanageable and self-contradictory *Batson* remedy, [and that it] has become virtually impossible for appellate courts or trial courts to discern proper gradations and variations and to provide meaningful procedural guidance guaranteeing some measure of consistent application" (at 329).

In deciding the present issue, I must observe that I am aware of a general perception of lawyers involved in the personal injury field of a preference of plaintiff's counsel for minority jurors and an opposite preference of defense counsel. These preferences are, of course, not true of all counsel, nor in all situations. But this general perception is reflected in the numerous venue motions wherein plaintiffs seek a trial in Bronx County (where there is more likely to be a minority jury), whereas defendants are likely to oppose such a trial location.

Although I do not in any manner doubt that the attorneys for the defendants in asserting the challenges aforesaid believed that they were acting in the best interests of their respective clients and were not intentionally racist, the impact of their actions, resulting in the elimination to date of all minority jurors, has had a discriminatory impact. As noted in *Batson,* " [c]ircumstantial evidence of invidious intent may include proof of disproportionate impact ... [and 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' " (476 US 79, 93, *supra).*

Just as it is impermissible to eliminate blacks from a jury "on the assumption that they will be biased in a particular case simply because the defendant is black" *(Batson v Kentucky, supra,* at 97), it is improper to exclude them from a jury because of a general perception that it is likely that they may be more sympathetic to an injured plaintiff.

In view of all of the evidence before me, I find that there has been a purposeful discrimination against the minority jurors excused and I therefore direct that to the extent that **517* they are still available,[2] the three examined jurors (Smith, Walker and Guzman) be seated together with the two jurors previously selected, and that jury selection continue.

(See, People v Frye, 191 AD2d 581 [2d Dept 1993], where the Court permitted the retention of jurors seated prior to the day the discriminatory pattern was revealed; *People v Mitchell,* 80 NY2d 519, 530 [1992], where it was held that a *Batson* claim was sustained because "the exclusion of even a single juror on racial grounds is constitutionally forbidden".)

[Portions of opinion omitted for purposes of publication.]***518*

Footnotes

1 Some of the defendants have questioned whether one of these six persons (Juliette Cullell) asserted by plaintiff to be black is in fact black.

2 One of the examined jurors (Smith) indicated that he may be entering the hospital this week.

End of Document

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160 Misc.2d 1086, 612 N.Y.S.2d 303

Patrick O'Neill, Plaintiff,

O'Neill v City of New York
Civil Court of the City of New York, New York County April 25, 1994 160 Misc.2d 1086 612 N.Y.S.2d 303 *(Approx. 4 pages)*

City of New York et al., Defendants.

Civil Court of the City of New York, New York County,
108622/89, 94-259
April 25, 1994

CITE TITLE AS: O'Neill v City of New York

HEADNOTES

Jury
Selection of Jury
Racially Discriminatory Use of Peremptory Challenge

(1) Defendant's motion to disband the jury in an action for false arrest and false imprisonment, and malicious prosecution on the grounds that plaintiff's counsel had allegedly used his peremptory challenges (CPLR 4109) in a racially discriminatory fashion is granted. Peremptory challenges may be exercised against a regular juror for any or no reason, with the significant exception that they may not be used to exclude a prospective juror because of his or her race. The moving party has the burden of proving that the attorney for the other party has purposely discriminated in jury voir dire; then the burden shifts to the other party to give sufficient reasons for the exclusion of the prospective jurors. Here, since defendant met its burden by demonstrating that plaintiff's counsel used all of his peremptory challenges to remove the only African-Americans on the jury panel at the time, the burden shifted to plaintiff. Plaintiff did not meet his burden. While plaintiff's attorney stated that the reason that he removed the three African-American prospective jurors was that the Caucasian jurors were better qualified to act as jurors on this particular case, due to, *inter alia*, their educational background, he in no way supported that conclusion with any specifics as to the educational backgrounds of either the African-American or Caucasian prospective jurors.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Jury, § 173.

Carmody-Wait 2d, Selection and Impanelment of Jury §§ 55:31, 55:32.

CPLR 4109.

NY Jur 2d, Jury, §§87,97-99.

ANNOTATION REFERENCES

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

APPEARANCES OF COUNSEL

Wallace Gossett, Brooklyn *(Sharon Buckle* of counsel), for New York City Transit Authority, defendant. *Laurence E. Jacobson,* New York City *(Melvin Dubinsky* of counsel), for plaintiff.**1087*

OPINION OF THE COURT

Richard F. Braun, J.

This is an action for false arrest and false imprisonment, and malicious prosecution. The action was removed to this court, pursuant to CPLR 325 (d). Plaintiff claims that on April 28, 1986 he was unlawfully arrested and imprisoned by Carl Dyer (Dyer), a police officer of defendant the New York City Transit Authority (TA), and that then he was maliciously prosecuted for disorderly conduct (Penal Law § 240.20) and resisting arrest (Penal Law § 205.30).

Over the course of parts of two days, the attorneys for plaintiff and defendant TA [1] selected a jury, under the supervision of a Judicial Hearing Officer (JHO). The attorneys said that all of the inquiry of the jurors was done by the attorneys. As is customary practice in a civil action to be tried before a jury, the jury voir dire was not conducted on the record. During the jury selection process, the attorney for defendant TA made an oral motion before the JHO to disband the jury to the extent that it had been selected. The basis for the motion was that plaintiff's counsel had allegedly used his peremptory challenges in a racially discriminatory fashion. The JHO gave the attorney for defendant TA leave to make her motion subsequently to a Civil Court Judge. After jury selection was completed, the trial was assigned to this Judge, and the counsel for defendant TA renewed her motion.

Pursuant to CPLR 4109, each party to a civil action generally has three peremptory challenges to use regarding regular jurors and one for each alternate juror. Different from challenges for cause (CPLR 4110), peremptory challenges may be exercised against a regular juror for any or no reason, with a significant exception. A peremptory challenge may not be used in an impermissibly discriminatory fashion to exclude a prospective juror, including because of his or her race *(Edmonson v Leesville Concrete Co.*, 500 US 614 [1991]; *Batson v Kentucky*, 476 US 79 [1986]; *People v Scott*, 70 NY2d 420 [1987]; Fox, *Bias Found in Picking Jury for Civil Suit*, NYLJ, Nov. 10, 1988, at 1, col 5, and *Today's News*, NYLJ, Dec. 8, 1988, at 1, col 2, both discussing *Taylor v Fisher Liberty Co.*, NYLJ, Dec. 8, 1988, at 24, col 5 [Sup Ct, NY County]; *see also, J.E.B. v Alabama ex rel. T.B.*, 511 US ___, 128 L Ed 2d 89 [1994] [same as to female jurors]; ***1088** *People v Hernandez*, 75 NY2d 350, 356 [1990], *affd Hernandez v New York*, 500 US 352 [1991] [same as to Latino jurors]; *People v Irizarry*, 165 AD2d 715 [1st Dept 1990] [same as to female jurors]; *cf., People v Kaplan*, 176 AD2d 821 [2d Dept 1991] [holding that the prosecution provided sufficient reasons for excluding two prospective jurors with "Jewish-sounding names" and two potential African-American alternate jurors]).

This court held a hearing on the motion of defendant TA *(see, Batson v Kentucky, supra,* 476 US, at 100; *People v Scott, supra,* 70 NY2d, at 426). At the hearing, both the attorneys for defendant TA and plaintiff argued their client's positions, explained their behavior during the jury selection process, and introduced their jury voir dire notes into evidence. Furthermore, the JHO stated on the record at the hearing his impressions regarding the use of peremptory challenges by plaintiff's attorney. [2] The court made efforts to determine whether the challenged jurors could be brought to the courtroom for further inquiry, but was informed that they were not available because they had been dispersed to various other jury panels *(see, People v Irizarry, supra,* 165 AD2d, at 718).

Plaintiff and plaintiff's trial counsel are both Caucasian men. Police Officer Dyer is an African-American man, and the trial attorney for defendant TA is an African-American woman.

There were three African-American women on the initial jury panel and no African-American men. Plaintiff's attorney used his three peremptory challenges to remove those three women from the jury. Thereafter, an African-American man and an African-American woman were seated on the jury panel. Plaintiff's attorney had no more peremptory challenges to exercise against them, as he had already used up all of his allotted peremptory challenges.

The moving party has the burden of proving that the attorney for the other party has purposely discriminated in jury voir dire *(Batson v Kentucky, supra,* 476 US, at 93). Once the burden has been met by the moving party, the burden shifts to the other party to give sufficient reasons for the ***1089** exclusion of the prospective jurors *(Batson v Kentucky, supra,* at 94).

Defendant TA met its burden by demonstrating that plaintiff's counsel used all of his peremptory challenges to remove the only African-Americans on the jury panel at the time *(Edmonson v Leesville Concrete Co., supra,* 500 US, at 630; *Batson v Kentucky, supra,* 476 US, at 96-97; *People v Scott, supra,* 70 NY2d, at 425). Furthermore, the attorney for defendant TA stated that, after a dispute arose subsequently over how many peremptory challenges each attorney had left, the JHO offered to give each attorney one more

peremptory challenge, until plaintiff's counsel asserted that he would use it to strike a subsequently seated fourth African-American juror.

Once the burden shifted to plaintiff, plaintiff did not meet his burden. His attorney stated that the reason that he removed the three African- American prospective jurors was that the Caucasian jurors were better qualified to act as jurors on this particular case, including due to their educational backgrounds. He in no way supported that conclusion with any specifics as to the educational backgrounds of either the African-American or Caucasian prospective jurors, or with any other specifics as to the relative qualifications of the former versus the latter. Nor did he explain why any special level of education was needed to serve as a juror on this particular case. The attorney for defendant TA, on the other hand, stated that one of the removed African-American prospective jurors was a school teacher of special education and another was a production manager at a textile company.

When plaintiff's attorney was asked by this court as to each of the three challenged jurors to specify any further reasons for challenging each juror, he said that he could not remember why he challenged each one. His assertion at that point that he could not remember any other specifics of his challenges from one day earlier is not credited by this court.

Plaintiff's attorney later indicated that he challenged one of the African-American women because she was a grandmother on the verge of retirement who wanted to spend more time with her grandchildren, and thus might be distracted from jury service. Defendant TA's attorney stated that plaintiff's attorney was not even identifying that juror correctly. That explanation by plaintiff's counsel is discredited by this court as a vain attempt by him to stretch to come up with some ***1090*** justification for his actions. Even if the court credited his explanation, his striking of the other two African-American jurors for racial reasons was constitutionally impermissible *(People v Jenkins,* 75 NY2d 550, 559 [1990]).

Plaintiff's attorney further argued that the counsel for defendant TA subsequently employed her three peremptory challenges to remove three prospective Caucasian jurors from the panel and thus that the attorney for defendant TA did not have clean hands. First, as the attorney for defendant TA stated, after plaintiff's attorney exercised his three peremptory challenges, there were only Caucasians among the three prospective jurors left on the jury panel until new jury prospects were added to the panel. Second, she gave a satisfactory explanation at least as to why she struck one juror. More important, the concept barring the impermissible use of peremptory challenges is not based on equity, but rather on the constitutional provision of equal protection of law *(Swain v Alabama,* 380 US 202, 203-204 [1965]). The discriminatory use of peremptory challenges by a party to civil litigation is not only violative of the rights of the opposing party but also of the prospective jurors improperly removed, who have the right to be selected to serve on a jury, and furthermore such discrimination is an affront to American society and our system of justice *(Edmonson v Leesville Concrete Co., supra,* 500 US, at 618-619; ***see,*** *Batson v Kentucky, supra,* 476 US, at 87; *People v Irizarry, supra,* 165 AD2d, at 717). Thus, even if the attorney for defendant TA had also improperly exercised her peremptory challenges, that would in no way excuse the unconstitutional use thereof by plaintiff's attorney.

Finally, only after counsel for defendant TA said that she had in part employed her peremptory challenges against one or two Caucasian jurors because of her perceived lack of eye contact with that juror or jurors did plaintiff's counsel state that he was not getting the same degree of "concentration and attention", including satisfactory eye contact, from the African-American jurors. The court does not credit his explanation, as he seemed to be borrowing it from the attorney for defendant TA.

Although it may have been good trial strategy for plaintiff and his attorney to attempt to keep prospective African-American jurors off the jury which would sit in this action, such a ***1091*** motive is constitutionally barred. This court found that such was the motive of plaintiff. Therefore, the jury was disbanded, and the parties were ordered to pick a new jury, under the supervision of the JHO and this court.***1093***

Footnotes

1 Defendant The City of New York had earlier settled with plaintiff for $1,000.

2 The JHO was asked to take the stand by this court. Although the court gave significant weight to the JHO's conclusion that plaintiff's attorney had not

exercised his peremptory challenges with biased motivation, because the JHO was at jury selection, the court placed the greatest weight on the explanations of the attorneys for the parties, which the JHO did not have the benefit of hearing.

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Mock Jury Selection with Case Law Analysis

Noreen Dewire Grimmick, Esq.
Hodgson Russ LLP, Albany

Betty Lugo, Esq.
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The Pagan Law Firm, PC, NYC

Gene Primomo, Esq.
Federal Public Defender's Office, Albany

Violet Samuels, Esq.
Samuels & Associates, PC, Rosedale

Charlie Siegel, Esq.
Law Offices of Charles J. Siegel, NYC

Jesus Zeno, Esq.
Jesus M Zeno, PC, Brooklyn

Speaker Biographies

MARISA CABRERA, ESQ.

Biography

Marisa Cabrera is a criminal defense attorney working as Appellate Counsel at the Center for Appellate Litigation. CAL is a not-for-profit law firm located in lower Manhattan, handling appeals and post-conviction proceedings on behalf of indigent criminal defendants in cases assigned by the Appellate Division, First Department.

Marisa graduated with a B.A. in psychology in 2007 from Williams College in Williamstown, MA. In 2011, Marisa graduated cum laude from American University Washington College of Law in Washington, D.C. where she worked as a teaching assistant for a first-year legal writing course.

Prior to working at CAL, Marisa worked as a law clerk for the Law Offices of Gary M. Gilbert & Associates, a plaintiff-side employment discrimination law firm, and as a judicial intern for Hon. Ariel Belen at the Appellate Division, Second Department.

Additionally, while in law school, Marisa worked as a student attorney at the DC Law Students in Court civil litigation clinical program where she represented low-income tenants in DC landlord-tenant and small claims courts.

NOREEN DEWIRE GRIMMICK, ESQ.

Biography

Areas of Practice
Employment Litigation
Labor & Employment
Torts, Insurance & Products Liability

Admissions
New York
Massachusetts
U.S. District Courts for the Northern, Southern, and Eastern Districts of New York
U.S. Supreme Court
U.S. Court of Appeals for the Second Circuit

Education
A.A.S., Maria College
B.A., magna cum laude, Siena College
M.B.A., Graduate College of Union University
J.D., Albany Law School of Union University

Noreen has a varied background that includes academic preparation and hands-on experience in the fields of health care and business. As a seasoned litigator with more than 20 years of experience in state and federal courts, she has defended a diverse array of clients in complex cases that cover the gamut from medical malpractice to products liability and employment discrimination cases. In addition to the depth of litigation experience that Noreen brings to her practice, she has also counseled many clients on topics such as compliance with employment laws and rules, and licensure issues for health care providers and professional practices. Noreen has given presentations on current topics in employment law, discovery in litigation, and interpretation of medical records. Prior to entering legal practice, Noreen practiced as a registered professional nurse at health care facilities in the Capital District of New York State. She is a registered professional nurse licensed in New York State.

Honors
- Listed, Upstate New York Super Lawyers, 2007-10
- Martindale-Hubbell AV Rating
- Certified senior professional in human resources (HR), as accredited by the HR Certification Institute

News

Lawyers React to High Court Ruling on Retaliation Suits Law360, June 24, 2013
Hodgson Russ Opens Law Office in Saratoga Springs, NY May 16, 2013
Hodgson Russ Announces New Partners February 10, 2005

Presentations

-The Modern American Workplace: An Update on Employment Discrimination in New York State, St. Petersburg, Florida, June 3, 2016
-An Employment Law Update for New York Employers: What You Don't Know Can Hurt You! New Paltz, NY, October 8, 2015
-21st National Conference on Employment Practices Liability Insurance: Avoiding and Defending Retaliation Claims, Chicago, IL, June 23, 2014
-19th Annual Labor & Employment Conference Hodgson Russ, Amherst, NY, November 7, 2013
-8th Annual National Employment Practices Liability Insurance ExecuSummit Uncasville, CT, October 1, 2013
-2012 New York State Society for Human Resource Management State Conference Saratoga Springs, NY, July 19, 2012
-Ultimate Software's Interactive Human Resources Workshop, September 24, 2009

Publications

-*Domestic Violence: Some Considerations for the Workplace Capital District Women's Bar Newsletter*, February 25, 2015
-Business Report: Employment and Medical Marijuana, *Saratoga Business Journal*, February 5, 2015
-What Every Employer Needs to Know About the New Compassionate Care Act (AKA the 'Medical Marijuana Law'), *Employers' Advisor Blog Archives*, February 4, 2015
-President Seeks Expansion of Overtime Requirements, *Employers' Advisor Blog Archives*, March 24, 2014
-Independent Contractor Relationships, *Saratoga Business Journal*, February 6, 2014
-U.S. Supreme Court Reins in Retaliation Claims Under Title VII, *Employment Litigation Alert*, June 27, 2013
-Second Circuit Tackles Third-Party Harassment of Employees, Sets New Legal Standard, *Labor & Employment Alert*, April 26, 2013
-A Transformative Time for the American Workplace, *For the Defense*, August 14, 2012
-Uncertainty in the Pharmaceutical Industry: FLSA Classification of Pharmaceutical Sales Representatives to Be Determined, *The Voice, a publication of the DRI*, March 16, 2012
-The U.S. Supreme Court Rules That Title VII Anti-Retaliation Provisions Apply to Third Parties, *Employment Litigation Alert*, January 28, 2011

Professional Affiliations

Noreen is chair of the New York State Bar Association (NYSBA) Trial Lawyers Section having previously served as its vice chair and treasurer; she also served as chair of the section's Diversity Committee and as a member of the section's Executive Committee. She is also a member of the NYSBA Labor & Employment and Health Law Sections. In addition, Noreen previously served on the board of directors for the Capital District Women's Bar Association and was a past chairperson for its Caregivers Committee. She is currently a member of the Programming Committee for the Capital Region Human Resource Association. She is also a member of the following professional organizations:

- Defense Research Institute Employment Law Subsection
- American Association of Nurse Attorneys
- Society for Human Resource Management
- Capital District Trial Lawyers Association
- National Association of Women Lawyers
- Albany Claims Association
- American Bar Association
- Albany and Saratoga County Bar Associations
- Capital District Women's Bar Association
- Women's Bar Association of the State of New York
- New York State Bar Association

Community & Pro Bono

Noreen is a member of the Guardianship Committee of Warren, Washington and Albany Counties ARC, which serves individuals with intellectual and developmental disabilities. Noreen is the chairperson for the Diversity Committee of the NYSBA Trial Lawyers Section, and as such, she has organized and acted as moderator for programs presented at law schools throughout New York that highlight the achievements of women and minorities in legal practice. She has mentored high school students and law school students competing in state-wide moot court programs. Noreen was a founding member and past chairperson of the Caregivers Committee of the Capital District Women's Bar Association, which is a support group for people in professional practice who are rendering care to elderly or infirm friends and family members.

JUDGE WILMA GUZMAN

Biography

Justice Guzman was born and raised in The Bronx and attended New York City public schools. She worked as a Secretary/Paralegal for a prestigious negligence New York law firm. She received her bachelor degree from John Jay College of Criminal Justice. Justice Guzman attended law school at night while working full time and raising two daughters. She received her J.D. from St. John's University School of Law. After law school, she developed a skill and passion for trials, and became a member of the Million Dollar Advocates Forum, an association of trial attorney throughout the United States who have achieved a verdict of one million dollars or more.

Justice Guzman was first elected in 1998 to a Citywide position as Judge of the Civil Court of the City of New York. In 2005 she was appointed Acting Supreme Court Justice in Bronx County and in November 2005 she was elected Supreme Court Justice in the Twelfth Judicial District.

Justice Guzman is President of the Supreme Court Justices Association of the City of New York, Inc., President-Elect of the Puerto Rican Bar Association, and Immediate Past President of the Latino Judges Association, Inc. She is an Adjunct Professor at Pace University. Justice Guzman serves as a mentor for John Jay College of Criminal Justice Pre Law Institute and the Sonia & Celina Sotomayor Judicial Internship Program, Thurgood Marshall Mock Trial Competition among others.

Justice Guzman has received numerous recognition for her work and dedication from Puerto Rican Bar Association, United States Coast Guard, National Association of Professional Women, among others.

BETTY LUGO, ESQ.

Biography

Betty Lugo is a founding member of Pacheco & Lugo, PLLC. Pacheco & Lugo, PLLC is the first Hispanic women owned law firm in New York established at One World Trade Center in 1992.

Ms. Lugo leads the firm's litigation practice in the areas of general and commercial liability, construction, restrictive covenants, labor law, real estate, and white collar crime. She conducts trials, hearings, arbitrations, and appeals in complex matters in both State and Federal Courts.

Betty Lugo received her Juris Doctor degree in 1984 from Albany Law School of Union University and her Bachelor of Arts degree *cum laude* from Brooklyn College of the City University of New York. She is admitted to practice in New York, as well as before the U.S. District Court for the Southern and Eastern Districts of New York. She began her legal career as the first Hispanic woman to work as an Assistant District Attorney in the Nassau County District Attorney's Office from 1984 to 1987.

Ms. Lugo is a fellow of the New York State Bar Foundation. She is a member of the New York State Bar Association House of Delegates; Trial Lawyers Section, Executive Committee and Diversity Committee member; Commercial and Federal Litigation Section Member and Lecturer; Committee on Federal Priorities and Initiatives Committee and served as Co-Chair of the Committee on Diversity and Inclusion (2010-2013) and the Task Force on the Future of the Legal Profession. She is the Past-President of the Puerto Rican Bar Association (2015-2017) (the oldest minority bar association in the United States). She is also a member of the American Bar Association, Brooklyn Bar Association, Catholic Lawyers Guild, Nathan R. Sobel Kings County Inns of Court, Hispanic National Bar Association and the Puerto Rican Bar Association. She served as Regional President of the Hispanic National Bar Association in 1993.

She lectures as a provider of Continuing Legal Education on matters involving commercial matters, litigation and diversity of the legal profession for various bar associations. She has been a speaker and lecturer at Albany Law School, St. John's University Law School, Columbia University Law School, Fordham Law School, Brooklyn College, and the Diversity Research Institute. She serves on the New York City Mayor's Marshall's Committee. She is a member of the Brooklyn College Pre-Law Advisory Council.

Ms. Lugo served as a member of the Board of Trustees of Albany Law School of Union University (2004 to 2010). She served as President of the National Alumni Association of Albany Law School of Union University (2009- 2010) and continues to serve on the Board. She served as a board member of Aspira of New York; National Congressional Business Advisory Council, a delegate alternate to the White House Conference on Small Business and as an United States of America delegate to the Annual Summit for Businesswomen of the Americas. She is a founding member of 100 Hispanic Women, Inc. Ms. Lugo has served as an instructor with the National Institute for Trial Advocacy. She has lectured in real estate, corporate and diversity for various organizations and institutional lending agencies including the Federal National Mortgage Agency, State of New York Mortgage Agency, lending institutions, for profit and not for profit organizations.

Ms. Lugo is fluent in the Spanish language.

WILLIAM PAGAN, ESQ.

Biography

William Pagan is a 1987 graduate of the St. John's University School of Law. He obtained in undergraduate degree from Fordham University in 1984. He was admitted to the New York Bar in 1988.

He is admitted to practice in the Federal Southern and Eastern District Courts of New York and has been admitted *pro hac vice* to the United States District Court for the Districts of Puerto Rico and Hawaii, as well as New Jersey Superior Court. His professional memberships include the Puerto Rican Bar Association, American Association for Justice, New York State Trial Lawyers Association, New York County Lawyers Association, New York City Bar Association, and the Bronx, Kings, Queens and New York County Bar Associations as well as the Dominican Bar Association.

He's a member of The Pagan Law Firm, P.C. and has accumulated over twenty-five years' experience in trying highly complex medical malpractice cases, serious injuries from construction, lead paint poisoning, municipal premise and general accident cases in State and Federal court in all boroughs of the City of New York, statewide in New York and *pro hac vice* nationwide.

He's a member of The National Trial Lawyers, "Top 100 Trial Lawyers."

GENE V. PRIMOMO ESQ.

Biography

Gene Primomo graduated from the University of Tulsa College of Law in 1986. He practiced as an Assistant United States Attorney in the Eastern District of Oklahoma, a partner in the Law Firm of Wilcoxen & Primomo before joining the Federal Public Defender's Office in the Northern District of New York in 1999 as a Senior Assistant Federal Public Defender. He is a recipient of the Thurgood Marshall Award in 2008.

VIOLET E. SAMUELS, ESQ.

Biography

Education

TOURO COLLEGE JACOB D. FUCHSBERG LAW CENTER, Huntington, NY
J.D. January 1999
Honors: Law Review

NEW YORK UNIVERSITY, NY
M.A. Nursing Administration 1990

CITY COLLEGE, New York, NY
B.S. Nursing 1983

BOROUGH OF MANHATTAN COMMUNITY COLLEGE, New
New York, NY
AA: Liberal Arts 1980
Honors: Dean's List multiple semesters.

Admission to Practice Law

Admitted in New York (2000); New Jersey (2000); United States District Court – Eastern District (2000), United States District Court Southern District (2000), United States District Court - New Jersey (2000); United States Supreme Court (2010); United States. Court of Appeals for the Armed Forces (2010); United States Court of Appeals for the Federal Circuit (2010); United States Court of Federal Claims (2010).

Legal Experience

Mallilo & Grossman, Flushing, NY, November 1999 to May 2003 - associate attorney in the areas of general practice (worked on family law, estate planning Title VII, false arrest and personal injury matters; trial attorney - personal injury cases).

Castro & Associates, P.C., New York, May 2003 to November 2006 - Lead trial and Appellate Counsel

.

Samuels & Associates, P.C., Rosedale, New York – November 2006 to present – Principal – Areas of practice – personal injury, family law, Title VII, immigration matters (mainly family based petitions), and appellate work. Successfully negotiates; arbitrates and mediates numerous settlements in a variety of cases and successfully litigates cases at trial.

Membership and Affiliations in the Legal Community

New York State Bar Association (NYSBA) – member since August 25, 2000; member of Young Lawyers Section 2000-2005 approximately; member of Property and Employment sections approximately 2009-2010; NYSBA Committee on Membership – member (2016-2017); member of subcommittee on solo and Small Firm Practice (2016-2017); member of subcommittee on Diversity and Inclusion (2016-2017).

Member of Trial Lawyers Section since March 2008 to present; co-chair of Trial Lawyers Section Membership Committee since 2010 to present; member of Trial Lawyers Section Diversity Committee since 2010 to present; faculty at Trial Lawyers Section annual Trial Academy (2014); treasurer Trial Lawyers Section 2014-2015; Judge in Trial Lawyers Section annual Trial Advocacy Competition 2014 and 2015; secretary for Trial Lawyers section 2015-2016..

Alternate member of the House of Delegates 2012 to 2013; member of the House of Delegates 2013-present;

Member of NYSBA nominating committee 2015 and 2016 appointed by Queens County Bar Association.

A. SECTIONS CAUCUS EXPERIENCE

Member of the Section Caucus Committee as a delegate from Trial Lawyers Section
Member of the Section Caucus Committee – Best Practice (2014-present)
Co-chair of Sections Caucus Membership Committee (2016)

B. OTHER BAR ASSOCIATIONS

Queens County Bar Association (QBA) – member; QBA Small & Solo Practitioners committee - co-chair; QBA Volunteer Lawyers Pro Bono Panels - uncontested divorces and foreclosure panels for volunteer attorney.

C. OTHER LEGAL COMMUNITY AFFILIATIONS

Civil Court of City of New York – volunteer guardian ad litem - landlord–tenant matters; Arbitrator - Small Claims Court – Queens County and Kings County Small Claims Court Panels

Touro College Jacob D. Fuchsberg Law Center – Active in many areas of volunteer work with Touro Law School - member of the alumni counsel; volunteer judge-moot court competitions, first year legal methods, oral arguments and intra school competitions; member of the law school's mentor-mentee program, member of Touro Law School Women in Law committee.

Other Licenses and Certifications
Registered Nurse (1983 to present)
New York State; Certified CPR Instructor (1985-present)
Regional; Certified Instructor for New York State Child Abuse Recognition and Reporting course (required for all healthcare practitioners, social workers school teachers etc. prior to licensure).

Nursing Experience
Worked as independent nurse consultant; and expert witness including giving testimony on behalf of medical malpractice for plaintiff and defense attorneys (1990 -1998);

Worked as general staff nurse (medical and surgery units); preceptor for new nurses (Medical. Surgery and step down intensive care units) and critical care nurse at Cornell University Medical Center, New York, NY (1983-1995);

Risk manager, home care coordinator and nurse instructor at Maximum Health Care Registry, Rosedale NY (1985-2005);

Worked as nursing supervisor in long term care facility (2012-2013 to alleviate nursing shortage associated with Hurricane Sandy).

Speaking Engagements and Presentations

November 2014 – Speaker - New York University Law School "Have we crossed the Line" a 3 CLE offering – NYSBA Trial Lawyers Section.

Fall – 2013 – Moderator - Touro Law School "Courtroom Etiquette" a presentation by the NYSBA Trial Lawyers Section Diversity Committee.

Summer 2015 Providence Rhode Island – Co-chair Summer Trial Meeting - a 6 CLE offering by NYSBA Trial Lawyers Section

January 2015 New York Hilton Hotel - Co-chair Joint presentation of a 6 CLE offering at the Annual Meeting by Trial Lawyers Section and Torts Insurance Compensation Law Section at NYSBA Annual Meeting

Other

Two children and two grandchildren.

CHARLES J. SIEGEL, ESQ.

Biography

Charles J. Siegel of New York City is the managing attorney at the Law Office of Charles J. Siegel, an insurance defense firm located in lower Manhattan. Prior to that, Mr. Siegel was an Assistant District Attorney in the Bronx County Homicide Bureau under Mario Merola. Mr. Siegel is the present chair of the Trial Lawyers Section. He received his BA from the State University of New York at Stony Brook. He received his Master's degree from Long Island University and his JD from Pace University School of Law. Mr. Siegel has been admitted to practice in New York for almost 35 years. He is a member of the Bar in Florida and New Jersey. Mr. Siegel has lectured over the years to various claim departments, organizations and attorneys in the topics of Website Use, Technologies for the Legal Profession, Premises Liability, Auto Liability, New York Labor Law and Bad Faith. He holds course certificates from Long Island University and C.W. Post College in Computer Repair, Computer Programming and Web Page Design. He has been a member of the New York State Bar Association for the past 25 years and was the past chair of its' Electronic Communication Committee (ECC) which has among other responsibilities general oversight of the NYSBA Website. Mr. Siegel was the past section chair and a member of the Executive Committee of the Torts, Insurance & Compensation Law Section (TICL). He presenting chairs both TICL Information Technology Committee and the TLS Website Committee.

PROFESSOR CHRISTIAN B. SUNDQUIST

Biography

Professor Sundquist is a nationally recognized scholar on issues of race and law. While his principal research interest lies at the intersection of genetics, race and law, he has published and presented widely on a variety of issues in the fields of constitutional law, evidence law, immigration law, critical race theory, education reform and welfare reform. His publications have appeared in numerous academic journals, including the Harvard Blackletter Law Journal, the N.Y.U. Annual Survey of American Law, the Columbia Journal on Race and Law, and the Georgetown Journal on Poverty Law and Policy. Professor Sundquist has delivered lectures and presentations in a variety of venues, including at the Facing Race annual conference on racial justice, the Kirwan Institute for the Study of Race and Ethnicity, the Society of American Law Teachers annual conference, the National People of Color legal conference, the LatCrit annual conference, and the Research Council for the Sociology of Law annual conference. Professor Sundquist has also delivered lectures to the New York State legislature (staff attorneys) and the New York State Department of Health.

Professor Sundquist teaches Evidence, Advanced Evidence, Federal Jurisdiction and Practice, Immigration Law and Policy, and Economic Justice at the law school. He is a member of the Society of American Law Teachers, the Capital District Black and Hispanic Bar Association, the American Bar Association, and the New York State Bar Association. Before entering academia, Professor Sundquist practiced in the litigation group at Chadbourne & Parke LLP in New York, N.Y., an internationally-known law firm.