History of Batson v. Kentucky and Its Progeny

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BATSON CHALLENGES

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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).