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NY Criminal Justice Section Reporter

A publication of the Criminal Justice Section of the New York State Bar Association

***Batson* Objections 2025, Part I: What Is New, The Trial Within a Trial and Gratitude to Judge Steven Fisher**

Annual Meeting 2026 Awards Luncheon

CRIMINAL JUSTICE SECTION SPRING 2026 MEETING

Friday, May 8, 2026
1:00 p.m. – 4:00 p.m.
New York State Bar Association
Albany | Hybrid

3.0 MCLE CREDITS

150 Years | Criminal Justice Section

DAY IN THE LIFE OF A CRIMINAL JUSTICE LAWYER

Tuesday May 5, 2026
12:00 p.m. – 1:00 p.m.
Webinar

FREE FOR NYSBA MEMBERS

150 Years | Young Lawyers Section

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NY Criminal Justice Section Reporter

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Publication and Editorial Policy

This publication is a benefit of membership for members of the Criminal Justice Section of the New York State Bar Association. Persons interested in writing for this newsletter are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *NY Criminal Justice Reporter* are appreciated, as are letters to the editor.

All articles should be e-mailed to: Jay Shapiro at cjseditor@outlook.com.

Submitted articles must include a signed copyright agreement giving permission for publication in the *Reporter.* For copyright terms, please see nysba.org/sec-pub-author. Authors are encouraged to include a brief biography with their submissions.

The articles in this publication represent the authors' viewpoints and research and not that of the editor, section or its officers, or the New York State Bar Association. The accuracy of the sources used and the cases cited in submissions is the responsibility of the authors.

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Message From the Chair

David M. Cohn

Spring is upon us, and there is much Criminal Justice Section news to report. First, please mark your calendars for the CJS spring meeting on May 8. We are excited to host a hybrid program – live in Albany and online – with two exceptional CLE panels. The first panel – an in-depth discussion of what prosecutorial discretion means today – will feature, among others, Albany County District Attorney Lee Kindlon and the county attorney from Saint Paul, Minnesota, John Choi. The second panel, moderated by our distinguished CJS colleague Norman Effman, will address the vexing issue of a defendant's competency to stand trial.

Our winter program at the NYSBA Annual Meeting was a tremendous success. We had a packed house for the CLE program and the awards lunch. Our CLE panels on Raise the Age and Less Is More garnered rave reviews. Our Awards Committee, chaired by CJS Past Chair Robert Masters, assembled a stellar list of awardees, including two Presiding Justices of the Appellate Division. Two longtime members of CJS leadership, Norman Effman and Marc Gann, were also among those honored. Please make sure to read the Annual Meeting recap in this issue.

Beyond that, I am happy to report that the section is thriving. We now have close to 2,000 members, which represents a substantial increase over the past two years. Some of the credit surely goes to NYSBA's new membership model, which allows members to select two sections at no additional charge. But much credit is also due to our dedicated staff, including CJS Section Liaison Tara Lana, who have worked tirelessly to promote and support our programs. We are also thrilled to have the assistance of Gina Bartosiewicz, who will be assisting Tara before eventually taking over as CJS liaison full-time.

Moreover, I would be remiss if I did not thank our excellent team of CJS officers: Nigel Farinha, Courtney McGowan, and Natasha Pooran. Our programs could not succeed without their invaluable assistance.

Finally, I would like to add two personal observations, and admittedly, these are beliefs that I have long held. First, the value of in-person programming cannot be understated. For various reasons, at the CJS Annual Meeting in Manhattan, there is no virtual option. Although I miss seeing those who are unable to attend in person, the level of energy and engagement at a "live" event is unmatched. It is tempting to multitask when attending a program virtually; by contrast, when an event is in person, the default rule is engagement. There is no true substitute for human interaction.

Second, bar associations in general, and CJS in particular, provide another invaluable benefit. Prosecutors, defense attorneys, and judges do not often interact on a personal level outside the realm of litigation. This dynamic, or, better said, the lack of one, can create an atmosphere of misunderstanding. When there is personal interaction, however, we gain a deeper understanding of the different people who work in the criminal justice system. We learn to talk to others with whom we might not ordinarily converse; we learn to listen to varying perspectives; and we learn to work with others to find common ground. That collegial environment is essential to a well-functioning justice system. And it is one of the many reasons I am proud to serve as CJS Chair.

I hope to see you all soon at a CJS event.

Yours,

David M. Cohn
Chair, Criminal Justice Section

Message From the Editor

The process of putting together an issue of the *Reporter* has remained the same over the last decade or so. For me, the most valuable time is when I can look over the content and determine the theme for my Message from the Editor. I find inspiration and direction from the subjects of our contributors' articles. This issue is no different, and I have found an important focus from the message from David M. Cohn, our Chair.

David has written about the value of in-person interaction in the context of our section. He stresses the benefits that arise when judges, defense counsel, and prosecutors interact in a non-adversarial setting. The ability to have conversations with each other provides new perspectives and even leads us to common ground. For defense counsel and prosecutors, the pursuit of fair resolutions to cases should be a mutual goal. For the bench, the ability to share priorities and principles with the attorneys who appear in court cannot be underestimated.

Consider the principal article in this issue from Judge Brunetti. Fairness in an unbiased jury selection process is an objective that we are all obligated to share. His article (and Part II, which will appear in the next issue) should be the foundation for in-person conversations amongst section members. In the collegial atmosphere that our Chair describes, we should take advantage of opportunities to compare notes, strategies and processes that ensure the protections that *Batson* mandates.

The section offers opportunities to meet in person, network, exchange ideas, and simply socialize. The photos in this issue from the Annual Meeting depict what was, once again, a special day for our section. David also points out how our section's membership has grown significantly in the last few years. That increase provides even more inspiration for our members to meet live, in-person, as opposed to on screens.

During one of my first felony trials, I was vigorously challenged by a defense counsel who had great presence and experience. To be candid, he was challenging me every step of the way. After the court charged the jury, the judge called us into his robing room and told us to get our coats so he could take us to dinner. At first, I refused. I told the judge I had no desire to sit down with someone who was attacking me day after day. The judge said, "That's his job. And you need to understand that when we walk out of the courtroom, we are all colleagues."

Dinner was wonderful.

Jay Shapiro

Please send articles and ideas to:
Jay Shapiro, Editor
cjseditor@outlook.com

Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

*For more information please visit: **NYSBA.ORG/CRIMINALJUSTICE** and click on "Publications."*

Criminal Justice Section 2026 Annual Meeting Awards Luncheon

On Tuesday, January 13, 2026, the Criminal Justice Section held its Annual Meeting Awards Luncheon. This year's honorees were selected by the Awards Committee, chaired by Robert J. Masters and joined by Daniel N. Arshack, Richard D. Collins, Catherine Christian, Kevin Thomas Kelly, Timothy J. Koller, Leah Nowortarski, and Jack Ryan. The recipients represented a stellar array of individuals who have contributed significantly and tirelessly to the cause of criminal justice.

Marc Gann

Charles F. Crimi Memorial Award

Marc Gann, Esq., is a principal in the law firm of Collins Gann McCloskey & Barry PLLC, with offices in Mineola, New York. Marc has defended all forms of criminal cases – from misdemeanors to major felonies including homicide — in the courts of Manhattan, Brooklyn, Queens, the Bronx, Staten Island, Nassau County and Suffolk County. He has handled serious felony charges in both the Southern and Eastern Federal Districts of New York. In fact, the pattern jury instructions were modified as a result of a case Marc tried on the issue of causation in *People v. James Ryan* that provides for consideration of intervening causation in criminal cases.

Marc is one of the most highly regarded lawyers on Long Island. An AV-rated attorney, Marc is on the "short list" of preeminent Nassau County criminal defense practitioners, having handled numerous high-profile cases throughout the metropolitan area. Most of his clients are referred by other lawyers, criminal court personnel, or previous clients whom he successfully defended. He has been interviewed by the media on many occasions regarding issues of criminal law, and he often appears on local television.

Marc is past president of the Nassau County Bar Association, having previously served as an elected director of the association. He is past chair of the Criminal Courts Law and Procedure Committee of the Bar, where he planned and chaired continuing legal education programs and seminars for criminal lawyers throughout the county. Marc served on the Grievance Committee for 12 years (reviewing the legal competence and professional conduct of lawyers in the 10th Judicial District). He is listed in the Bar Register of Preeminent Lawyers. He is a past president of the Former Assistant District Attorneys Association of Nassau County and is a member of the American Bar Association and other legal and professional associations. Marc is currently the 10th Judicial District representative to the Criminal Justice Section of the New York State Bar Association. Marc is highly active in community associations and volunteer programs, including serving for many years in a bar association program as a mentor at a local middle school.

Marc received his B.A. from Franklin and Marshall College and his law degree from Hofstra University School of Law. Following his tenure as a prosecutor in Nassau County, Marc spent several years in Baltimore handling both criminal and civil matters in state and federal court before returning to New York in 1990 to form Collins, McDonald and Gann, P.C., now known as Collins Gann McCloskey & Barry PLLC.

Patricia Warth

The Michele S. Maxian Award for Outstanding Public Defense Practitioner

Patricia Warth is the director of the New York State Office of Indigent Legal Services (ILS). She has been with ILS since August 2015, previously serving as chief attorney for the Hurrell-Harring Settlement Implementation Unit and then as counsel until her nomination as director in June 2021.

Patricia earned a B.A. from the University of Notre Dame in 1989, and a J.D. from Cornell Law School in 1996, after which she had a one-year clerkship for the District of Rhode Island.

Since she devoted her career to criminal justice advocacy and public defense reform. Ms. Warth worked for the New York State Capital Defender Office from 1997 until its closure in 2005, after which she worked for two years as managing attorney of the Buffalo office of Prisoner's Legal Services of New York. In 2008, she joined the Center for Community Alterna-

tives (CCA) as co-director and eventually director of Justice Strategies, where she worked until 2015 when she joined ILS.

The experiences of the people with whom she works have informed her research and advocacy. She has conducted research about and delivered presentations on sentencing advocacy, mitigation investigation, New York State sentencing law, prison-based programs, sex offense registration, state drug law reform, and the life-long consequences of a criminal conviction to many audiences. Ms. Warth was one of the co-authors of CCA's reports, "The Use of Criminal History Records in College Admissions Reconsidered," and "Boxed Out: Criminal History Screening and College Application Attrition," and she co-authored the 2013 article, "Barred Forever: Seniors, Housing, and Sex Offense Registration," published in the *Kansas Journal of Law and Public Policy*. She also wrote the article, "Unjust Punishment: The Impact of Incarceration on Mental Health," for the January/February 2023 *NYSBA Journal*.

Hon. Elizabeth A. Garry

The Vincent E. Doyle, Jr. Award for Outstanding Judicial Contribution in the Criminal Justice System

The Honorable Elizabeth A. Garry was appointed as the 16th presiding justice of the Appellate Division, Third Department in New York State on January 1, 2018; she had been appointed as an associate justice of that court in March 2009. She was first elected to serve on the trial court as a New York State Supreme Court justice in the Sixth Judicial District, encompassing Central New York, in 2006 and was reelected in 2020. She was twice elected and served as town justice in the Town of New Berlin from 2002 through 2006.

Presiding Justice Garry graduated from Alfred University and Albany Law School, with honors. She began her legal career as a law clerk to a justice of the New York State Supreme Court and was thereafter engaged in private practice with the Joyce Law Firm, practicing throughout Central New York for roughly a dozen years before taking the bench full time.

Presiding Justice Garry has been highly engaged in several recent court and bar initiatives seeking to enhance rural access to justice, including development of Rural Pathways, a summer internship designed to introduce law students to opportunities in our rural areas. She is a trustee of Albany Law School and was a founding member of a chapter of the Women's Bar Association of the State of New York. Presiding Justice Garry is a member of the Council of Chief Judges of the State Courts of Appeal (CCJSCA) and recently served as the chair of the Communications Committee. She is a founding co-chair and current commissioner of the Richard C. Failla LGBTQ Commission of the New York Courts. Presiding Justice Garry has served as a board member of the International Association of LGBTQ+ Judges and is a past president of its foundation, established to support the Judge Paul G. Feinman Scholarship. She has served on various other boards, community and cultural organizations and professional associations throughout her career and has been widely recognized for her contributions.

Hon. Gerald J. Whalen

The Vincent E. Doyle, Jr. Award for Outstanding Judicial Contribution in the Criminal Justice System

Hon. Gerald J. Whalen was designated by Governor Andrew M. Cuomo to the Appellate Division, Fourth Department on October 1, 2012, and as presiding justice of the court on January 7, 2016. He is a graduate of Canisius College where he earned his bachelor of arts degree in 1979. He earned his juris doctor degree in 1983 from the State University of New York at Buffalo.

Prior to taking the bench, Presiding Justice Whalen was a litigation partner with Hiscock & Barclay, LLP. He served on the firm's Diversity Committee and was the firm's associate and hiring partner for the Buffalo office. Presiding Justice Whalen was in private practice for 21 years, handling complex civil and criminal cases before he was elected as a New York State Supreme Court justice in 2005. He served for a term of 14 years in the Eighth Judicial District. He was awarded the Trial Justice of the Year award by the New York State Trial Lawyers Association, Western New York Regional Affiliate, in 2012. He was also an adjunct professor at Canisius College and a member of the Canisius Pre Law Advisory Committee from October 2006 to July 2014. For 25 years, Presiding Justice Whalen was a member of the Judge John J. Hillery Memorial Scholarship Foundation, which provides scholarships for students in need, and was the Hillery Foundation's Man of the Year in 1997.

Presiding Justice Whalen was elected and served as president of the Supreme Court Justices Association, Eighth Judicial District, in 2012. He also served as chair of the Bar Association of Erie County Judges' Committee in 2011 and 2012. From February 2002 to October 2012, Presiding Justice Whalen served on the Fourth Department, Eighth Judicial District Committee on Character and Fitness. Presiding Justice Whalen has also lectured at SUNY Buffalo on constitutional law and is a frequent lecturer at New York State and local bar association events. Among his many honors, Presiding Justice Whalen received the Distinguished Alumnus Award from the University at Buffalo Law Alumni Association in 2017 and the Lifetime Achievement Award for Judicial Excellence from the New York State Trial Lawyers Association in 2024. Presiding Justice Whalen has been married to his wife Nora for 40 years and they have two adult sons and daughters-in-law, Conor and Sara Jo, and Gerald II and Anna Mae.

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The Criminal Justice Section at the 2026 Annual Meeting

Left to right: Chair David Cohn, Past Chair Leah Nowotarski, and Patricia Warth, recipient of the Michele S. Maxian Award for Outstanding Public Defense Practitioner

Right: Hon. Gerald J. Whalen (on screen) and Norman Effman, recipient of the Martin Adelman Lifetime Achievement Award

Left: Patricia Warth

THE NEW YORK STATE BAR ASSOCIATION

Annual MEETING '26

150 Years NYSBA

Hon. Elizabeth A. Garry (middle), recipient of the Vincent E. Doyle, Jr. Award for Outstanding Judicial Contribution in the Criminal Justice System with Chair David Cohn (left) and Catherine Christian

Left: Past Chair Robert J. Masters

Right: Hon. Gerald J. Whalen, recipient of the Vincent E. Doyle, Jr. Award for Outstanding Judicial Contribution in the Criminal Justice System

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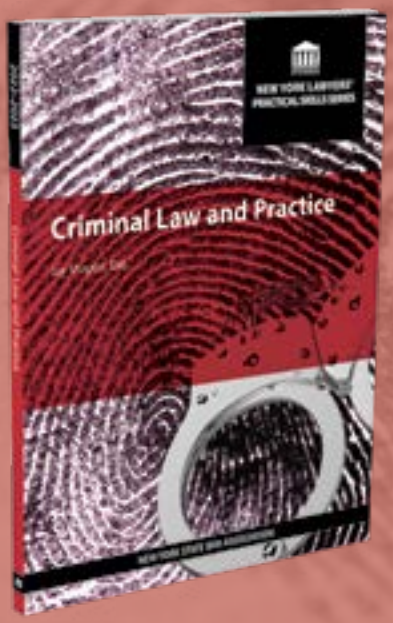
CRIMINAL LAW AND PRACTICE



Author: Jay Shapiro, Esq.

Covering the offenses and crimes that the general practitioner is most likely to encounter, this practice guide addresses pretrial motions, motions to suppress evidence of an identification, motions to suppress physical evidence, pretrial issues, special problems in narcotics cases, and more.

Criminal Law and Practice provides an excellent text of first reference for general practitioners as well as defense attorneys. With its many useful forms and charts, this book will be an invaluable part of your library.

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District Attorney Joseph G. Fazzary

Outstanding Prosecutor Award

Joseph Fazzary is the Schuyler County district attorney, a position he has held since 1998, when he was elected at the age of 29. He has been re-elected six times. Mr. Fazzary is responsible for prosecuting all criminal offenses committed within Schuyler County. He has tried numerous cases over his career, including homicides, sexual assaults, burglaries, arsons and larcenies. He has been assigned by Allegany, Broome, Chemung, Ontario, Seneca, Steuben, Tompkins, and Yates counties as a special prosecutor on many occasions throughout his career.

Mr. Fazzary writes and argues appeals in the appellate courts of New York State. He is a graduate of Syracuse University and the Syracuse University College of Law. He sits on the Board of Directors of the Southern Tier Law Enforcement Academy and is a former adjunct professor at Elmira College. Mr. Fazzary regularly lectures for the New York State Prosecutors Training Institute on subjects such as ethics, direct and cross-examination, and appeals.

He is also active in his community, having coached boys' and girls' basketball and Little League baseball for many years. He served on the Schuyler County Little League Board of Directors for six years. He also regularly makes presentations to local schools on subjects such as violence in relationships, sexting, bullying and drug use. DA Fazzary has advocated for crime victims his entire career and is frequently asked to present on the topic of child sexual abuse, a topic he is intimately familiar with. In 2023, he established the Justice Center of the Southern Tier to assist victims of crime. In 2024, he was given the Hogan Award by his colleagues, the highest honor given by the District Attorney's Association of the State of New York. In 2025, he was given the Lifetime Achievement Award by the New York State Office of Victim Services. He is married to his high school sweetheart, Susan, and has two children, a 24-year-old Isabella and a 21-year-old Georgio. They reside in Hector, New York.

Norman Effman, Esq.

Martin Adelman Lifetime Achievement Award

Norman Effman has been with the Wyoming County Public Defender's Office since 1990. He is the executive director of the Wyoming County-Attica Legal Aid Bureau, which conducts prisoners' rights litigation, and has practiced criminal law in both the private and public sector for 55 years. Mr. Effman has been a member of the Executive Committee of the New York State Bar Association's Criminal Justice Section since 1982, and he currently is co-chair of the Correctional Systems Committee of that section and chair of the Awards Committee.

Mr. Effman is the past chair of the NYSBA Committee To Ensure Quality Mandated Representation.

Mr. Effman has lectured on post-trial criminal practice for the New York State Bar Association and has taught pre-law and law courses at the State University of New York at Buffalo, where he received his J.D. in 1968. Mr. Effman is a vice president of the Board of Directors of the New York State Defenders Association. In 1984 Mr. Effman was the recipient of the New York State Bar Association's Criminal Justice Section Award for Outstanding Contribution to Defense Service. Mr. Effman is also the 1996 recipient of the New York State Bar Association's Criminal Justice Section Award for Outstanding Contribution to Correctional Services. From 1992 to 1998, Mr. Effman served on the Attorney Grievance Commission of the Appellate Division, Fourth Judicial Department, Eighth Judicial District, and is a member of the New York State Bar Association's House of Delegates. Mr. Effman is the elected vice president of the Eighth Judicial District and serves on the Executive Committee of the New York State Bar Association.

Ret. Chief Joseph M. Herbert

Outstanding Police Contribution in the Criminal Justice System

(Awarded Posthumously)

Joseph Michael Herbert, born and raised in Brooklyn, passed away at his home in Rockaway Beach, N.Y., on September 30, 2025, at the age of 68. He is survived by his devoted daughter, Kristin; his son-in-law, Christopher; and his beloved granddaughter, Mia Veronica. He is also survived by his sisters, Veronica Dineen (Ray) and Marian Herbert (Eddie); his brothers, Jeffrey Herbert (Irene) and Joel Herbert; and many nieces and nephews. He was predeceased by his cherished wife, Barbara Herbert; his parents, John and Veronica Herbert; and his brothers, John, James, and Jason Herbert.

Joseph dedicated his life to protecting his neighbors of New York City, proudly serving in the New York Police Department for 36 years. He joined the force in 1981 at just 23 years old and was made a detective by 28, quickly earning respect for his courage, sharp instincts, and steady leadership. Over the years, he led some of the city's most challenging investigations, including the capture of New York City's Zodiac Killer. After 9/11, Joseph was called to the Joint Terrorism Task Force, where he rose through the ranks and, in 2017, retired as deputy chief and commanding officer. He was the first NYPD officer appointed to a congressional committee and was awarded the Medal of Valor in 1985.

Affectionately known as "Pork Chop" by his brothers and sisters in blue, Joseph was admired not only for his professional accomplishments but also for the integrity, bravery, and loyalty that defined his extraordinary career. Perhaps no tribute speaks more clearly to his legacy than the words of former NYPD Chief of Counterterrorism James Waters, who once said, "If something happened to me or my family, I'd want Joe Herbert leading that investigation."

Even in retirement, Joseph's purpose never wavered. He remained mentally sharp, lending his expertise to cold cases, and continued to embody the same strength and compassion that defined his years of service. Away from the job, he found happiness in simple joys: cheering on the N.Y. Rangers with his daughter, lunching at the favorite spots with friends, writing his autobiography, and spending treasured time with his granddaughter. He brought calm to every room, met challenges with sharp wit, stood by friends with loyalty, and lived each day with love and integrity. His memory will continue to inspire all who were fortunate enough to know him.

Batson Objections 2025, Part I
What Is New, The Trial Within a Trial and Gratitude to Judge Steven Fisher

By Hon. John J. Brunetti

What Is New

It is the 40th anniversary of *Batson v. Kentucky*, the Supreme Court's landmark decision on jury selection. This year marks an appropriate time to look at some recent decisional developments and take a look at "what was new" over the last couple of years.

But, first, some historical perspective. In 1986, in *Batson v. Kentucky*, the United States Supreme Court ruled that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race.…"[1] New York courts were mandated to follow suit which they did, including the word **"**solely.**"**[2]

In 1994, our Court of Appeals reiterated: "In 1986, the Supreme Court ruled in *Batson* that a prosecutor's use of peremptory challenges to deliberately exclude African-Americans from the jury **solely** on the basis of their race unconstitutionally discriminated against the excluded jurors."[3]

In 2008, the Court of Appeals stated the then correct and existing rule under the New York Constitution, retaining the word **"**solely**,"** as follows:

> Until 1986, litigants could challenge a potential juror for any or no reason at all. In that year, the United States Supreme Court held that a prosecutor's exercise of peremptory challenges to excuse jurors **solely** on the basis of race violated the Equal Protection Clause of the United States Constitution (citing *Batson*). In the years since *Batson* this Court has adopted that rule under our own Constitution and extended it to discriminatory practices by defense counsel – in effect, reverse Batson challenges – on the basis of race, gender or any other status that implicates equal protection concerns.[4]

In 2016, the Court of Appeals restated the rule, again retaining the word **"**solely**"**: The Supreme Court of the United States held that "the Equal Protection Clause [of the Fourteenth Amendment] forbids [a] prosecutor to challenge potential jurors **solely** on account of their race."[5]

What Was New in 2024

In 2024, things changed. Chief Judge Wilson authored a dissent, a portion of which the majority agreed with:

> The trial court's Batson analysis was infected by an erroneous statement of law. The court repeatedly articulated Mr. Wright's burden at step 1 as establishing "a prima facie case that your adversary has excluded jurors **solely** on account of their [race]" (emphasis added). That was not a transcription error or errant misspeak: the court repeated its erroneous statement of the law by stating "I'm asking you what facts and inferences establish a prima facie case that the Prosecutor has excluded jurors **solely** on the account of their [race]"; and "your position is that you've established a prima facie case that these jurors were excluded **solely** because they were African American; is that correct?:" That misstates the law. The standard at step 1, 2 or 3 is the same in this regard: if race (or any other invidious classification) forms any part of a reason for use of a peremptory strike, Batson requires that the strike be rejected.

The only New York case cited for that assertion was *People v. Luciano,* which specifically held: "In 1986 … the United States Supreme Court held that a prosecutor's exercise of peremptory challenges to excuse jurors **solely** on the basis of race violated the Equal Protection Clause of the United States Constitution (Batson). In the years since Batson this Court has adopted **that rule** under our own Constitution.…"[6] What rule? The rule that the exercise of peremptory challenges to excuse jurors **solely** on the basis of race violates the state and federal constitutions. The chief judge did not cite that rule as phrased by the court in *Luciano*, but rather cited the *Luciano* court's mention of a rationale for *Batson*: "The purpose of the *Batson* rule is to eliminate discrimination, not minimize it."[7] The only other case cited to support the "wrong test" finding was a District of Columbia Court of Appeals case that cited a footnote in another case from that same court.[8] The majority agreed with the chief judge, without citing any case law: "[T]he trial court did articulate the wrong test at step one of defendant's *Batson* challenge relating to C.C., stating that the defendant had met

his burden of showing that the People were excluding jurors *solely* on the basis of race."[9]

That "wrong test" was used by the 11th Circuit just this year in 2025[10] in a federal habeas review of a state court conviction. In the future, defendants who are convicted in New York State court and later seek habeas relief in federal court based upon a *Batson* violation may have little chance of success. In order to prevail, the habeas applicant must show that the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[11] That would seem to pose an obstacle since our state courts will be applying New York, as opposed to federal law, in adjudicating *Batson* objections.

What Was New in 2025

Something else is new when it comes to *Batson*. Surprisingly, in the past the Appellate Division has expressly ruled that neither age[12] nor disability[13] constitutes a cognizable group for *Batson* purposes. A 2025 amendment to the New York Constitution,[14] popularly known as the "Equal Rights Amendment," likely "overruled" those cases and added cognizable groups to *Batson* law since our Court of Appeals has ruled that *Batson* extends to "any status that implicates equal protection concerns."[15] The new amendment reads:

> No person shall, because of race, color, ethnicity, national origin, age, disability, creed, religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy, be subjected to any discrimination in their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state, pursuant to law.

There is also the likelihood that the following rulings in the following cases that the group at issue was not cognizable for *Batson* purposes have been abrogated by the new constitutional provision: white males in 20's,[16] females under age 45, minority females under age 45,[17] disabled persons,[18] young persons,[19] and "minorities."[20]

Is There a New *Batson* Rule Under the New York State Constitution?

In light of the aforementioned *Batson* developments in 2024 and 2025, an up-to-date statement of the *Batson* rule in New York might accurately be expressed as follows: The Equal Protection Clauses of the 14th Amendment and New York Constitution forbid all lawyers in all cases[21] to challenge a potential juror if "a*ny part* of a reason for use of a peremptory strike"[22] is on account of their "race, color, ethnicity, national origin, age, disability, creed, religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcome, or reproductive healthcare and autonomy."[23]

The Trial Within a Trial

A *Batson* objection should be adjudicated with the solemnity it deserves. Permit me to explain.

1. The lawyer whose exercise of a peremptory challenge(s) prompted the *Batson* objection is accused of and put on trial for discrimination.

2. The objector must prove discrimination yet has no right to have that alleged discriminator placed under oath or to cross-examine her or him.

3. The objector shoulders the burden to prove, by a preponderance of the evidence,[24] that the challenge made by the alleged discriminator was based, at least in part, on the juror's membership in a cognizable group.

4. Since the objector may not cross-examine the alleged discriminator who exercised the challenge or have her or him placed under oath,[25] the court must give the objector the opportunity to sustain her or his burden by citing those parts of the record that support his or her claim. If the court cuts off the objector or makes a decision immediately after having heard the non-cognizable group reason(s) from the alleged discriminator, the court has "unlawfully compressed step 2 and 3 into one step."[26]

5. The court is required "to make a factual determination as to whether the [cognizable group]-neutral reason[s] are merely a pretext for discrimination."[27]

6. If the court finds that the reasons are a "pretext for discrimination," the court has found that a member of the bar and officer of the court has engaged in discrimination in open court, got caught, and lied in order to avoid the penalty of a lost challenge.

Note: A judge may *sua sponte* raise a *Batson* objection.[28]

How Should the Court Conduct the *Batson* Objection Procedure?

The author would like to express gratitude to and recognize the late Hon. Steven W. Fisher[29] for his many contributions to New York law and judicial seminar presentations. The bolded, italicized, uppercase text and questions that follow were expertly devised by Judge Fisher and handed out at a judicial education seminar in 1996. Any footnoted case that follows with a 1996 decision date or earlier was also included in the handout. It will become obvious to the astute reader that the twice-asked question Chief Judge Wilson complained about in his dissent[30] in the *Wright* case was, at the time, accurately formulated by Judge Fisher in 1996. In its reproduction here, the word "solely" has a line through it.

Identification of the Cognizable Group:

WHEN A BATSON OBJECTION IS INTERPOSED, THE FOLLOWING QUESTION SHOULD BE ADDRESSED TO THE OBJECTING ATTORNEY:

"WHAT IS THE COGNIZABLE GROUP BEING PURPOSEFULLY EXCLUDED FROM THE JURY THROUGH YOUR ADVERSARY'S USE OF PEREMPTORY CHALLENGES?"

As to Each Objection, the Court Must Engage in a Three Step Process:[31]

Step # 1 Prima Facie Case of Discrimination

Note: A *Batson* objection must be juror-specific. If the objector cites the exercise of a challenge as proof of a prima facie case of discrimination, that objector must specifically object to the exercise of each challenge that she or he claims makes out a prima facie case.[32]

If counsel says he or she is objecting to each challenge which comprised the pattern, then the court must entertain each objection separately," "[e]ven if the defendant makes timely *Batson* objections to all five of the prosecutor's peremptory challenges, once the prosecutor addresses one of them, it is incumbent on the defendant to call the court's attention to fact that the prosecutor failed to provide race-neutral explanations with respect to the remaining four challenges. The defendant's failure to do so renders his objections unpreserved for appellate review."[33]

Note: A *Batson* objection to any challenge may be made at any time before jury selection is over.[34] Thus, during the second or third pass, a *Batson* objection may be interposed as to a challenge made during the first pass,[35] and it may be enough for counsel to simply "renew" the *Batson* objection.

QUESTION TO THE OBJECTING ATTORNEY AS TO EACH SPECIFIC OBJECTION: "WHAT FACTS AND INFERENCES ESTABLISH A PRIMA FACIE CASE THAT YOUR ADVERSARY HAS EXCLUDED JURORS ~~SOLELY~~ ON ACCOUNT OF THEIR MEMBERSHIP IN THAT GROUP?"

FACT-FINDER TO CONSIDER FACTS AND INFERENCES TO DETERMINE WHETHER A PRIMA FACIE CASE OF DISCRIMINATION HAS BEEN MADE. IT MAY BE APPROPRIATE TO CONSIDER:

- A DISPROPORTIONATE USE OF STRIKES TO REMOVE MEMBERS OF THE COGNIZABLE GROUP;
- THE ABSENCE OF APPARENT RELATIONSHIP BETWEEN ANY ISSUES IN THE CASE AND THE STRUCK JURORS' BACKGROUND OR VOIR DIRE RESPONSES;
- THE FAILURE TO STRIKE OTHER JURORS WHO GAVE SIMILAR ANSWERS ON VOIR DIRE BUT WHO DO NOT BELONG TO THE COGNIZABLE GROUP AT ISSUE;
- ANY DIFFERENCE IN THE QUESTIONING OF SELECTED JURORS AND CHALLENGED JURORS BELONGING TO THE COGNIZABLE GROUP;

- THE FACT THAT CHALLENGED JURORS ARE HETEROGENEOUS, HAVING IN COMMON ONLY THEIR MEMBERSHIP IN THE COGNIZABLE GROUP.

NOTE: THE PROPER TERM IS "PRIMA FACIE CASE." PATTERN IS ONLY ONE METHOD BY WHICH TO PROVE A *PRIMA FACIE* CASE.

Reasons for a Judge To Lean Toward Finding a *Prima Facie* Case:

1. The Court of Appeals once said: "[T]he exclusion of even one member of a group for racial reasons is abhorrent to a fair system of justice."[36] The Court has also said that "the firststep burden in a *Batson* challenge is not intended to be onerous."[37]

2. In some cases, a *prima facie* case may be based upon the challenge of only one member[38] of a cognizable group, and in others, not.[39] Also, you want to avoid stopping the trial to do research on the numerical cases (e.g., 4 out of 9[40] and 5 out of 10,[41] not enough, but 4 out of 5 is enough).[42]

3. If the cognizable group is based upon skin color, you avoid the daunting task of making a proper record as suggested by Judge Garcia in his concurring opinion in *Bridgeforth.*[43]

4. Avoid reversal on appeal.

5. Even if you are wrong about a *prima facie* case, if you do everything else right and complete steps 2 and 3 by ruling "on the ultimate question of intentional discrimination,"[44] there is no error.[45]

Caution: If the judge does not do everything correctly, then the step one *prima facie* ruling is NOT moot.[46] If a *prima facie* case of discrimination is found, go to step 2.

This is a two-part article. Part Two, "Continuing the Process and How the Court Should Conduct the Batson *Objection Procedure," will appear in a forthcoming issue.*

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Endnotes

1. *Batson v. Kentucky,* 476 U.S. 79, 89 (1986).
2. *See, e.g., People v. Kern,* 149 A.D.2d 187, 225 (2d Dep't 1989), aff'd, 75 N.Y.2d 638 (1990)["On the next day of jury selection, the trial court rendered its decision and ruled that the principles set forth in *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, *supra,* were applicable to the defense. The court ruled further that the prosecution had made out a prima facie case that the defense was using its peremptory challenges to strike jurors solely on the basis of racial bias."].
3. *People v. Stephens*, 84 N.Y.2d 990, 991-92 (1994).
4. *People v. Luciano*, 10 N.Y.3d 499, 502-03 (2008).
5. *People v. Bridgeforth*, 28 N.Y.3d 567, 571 (2016).
6. *People v. Luciano*, 10 N.Y.3d 499, 502-03 (2008).
7. *People v. Wright*, 42 N.Y.3d 708, 727-28 (2024).
8. *People v. Wright*, 42 N.Y.3d 708, 727-28 (2024)["The standard at step 1, 2 or 3 is the same in this regard: if race (or any other invidious classification) forms *any part* of a reason for use of a peremptory strike, *Batson* requires that the strike be rejected (*People v. Luciano,* 10 N.Y.3d 499, 505, 860 N.Y.S.2d 452, 890 N.E.2d 214 [2008] ["The purpose of the Batson rule is to eliminate discrimination, not minimize it"] [citation and quotation marks omitted]; *Smith v. United States,* 966 A.2d 367, 369 [D.C. 2009], *as amended on rehearing* [May 14, 2009] ["race is an impermissible factor, even if a minor one, in exercising peremptory strikes"], quoting *Tursio v. United States,* 634 A.2d 1205, 1213 n. 7 [D.C. 1993])."].
9. *People v. Wright*, 42 N.Y.3d 708, 718 (2024).
10. *Sockwell v. Comm'r, Alabama Dep't of Corr.*, 141 F.4th 1231, 1237-38 (11th Cir. 2025)["In *Batson*, the Supreme Court ruled that "the Equal Protection Clause forbids the prosecutor [from] challeng[ing] potential jurors solely on account of their race or on the assumption that [B]lack jurors as a group will be unable impartially to consider the State's case against a [B]lack defendant." 476 U.S. at 89, 106 S.Ct. 1712."].
11. 28 U.S.C. § 2254(d).
12. *People v. Falkenstein*, 288 A.D.2d 922, 732 N.Y.S.2d 817 (4th Dep't, 2001), *lv. den.,* 97 N.Y.2d 704 ["While it is impermissible to exercise a peremptory challenge on the basis of race (*see Batson v. Kentucky,* 476 U.S. 79) or gender (*see J.E.B. v. Alabama ex rel. T.B.,* 511 US 127), no such prohibition applies to physical disabilities (*see United States v. Harris,* 197 F3d 870, 874-875, *cert. denied* 529 U.S. 1044)].

13. *People v. Assi*, 63 A.D.3d 19, 28-29, 877 N.Y.S.2d 231, 238 (1st Dep't, 2009), *aff'd,* 14 N.Y.3d 335 (2010)["Potential jurors challenged because of their age do not constitute a cognizable group for *Batson* purposes."].

14. N.Y. Const. art. I, § 11 [Equal protection of laws; discrimination in civil rights prohibited].

> a. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, ethnicity, national origin, age, disability, creed, religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy, be subjected to any discrimination in their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state, pursuant to law.
>
> b. Nothing in this section shall invalidate or prevent the adoption of any law, regulation, program, or practice that is designed to prevent or dismantle discrimination on the basis of a characteristic listed in this section, nor shall any characteristic listed in this section be interpreted to interfere with, limit, or deny the civil rights of any person based upon any other characteristic identified in this section.

15. *People v. Luciano*, 10 N.Y.3d 499, 502-03 (2008).

16. *People v. Lebron*, 294 A.D.2d 105 (1st Dep't, 2002), *lv. den.* 98 N.Y.2d 698.

17. *People v. Huggins*, 292 A.D.2d 543 (2d Dep't, 2002), *lv. den*. 98 N.Y.2d 676.

18. *People v. Falkenstein*, 288 A.D.2d 922 (4th Dep't, 2001), *lv. den*. 97 N.Y.2d 704.

19. *People v. Ortiz*, 302 A.D.2d 257 (1st Dep't, 2003), *lv. den*. 100 N.Y.2d 541.

20. *People v. Greene*, 282 A.D.2d 757 (2d Dep't, 2001), *lv. den*. 96 N.Y.2d 918.

21. *Edmonson v. Leesville*, 111 S.Ct. 2077 (1991) (racial discrimination in a civil litigant's exercise of peremptory challenges is unconstitutional).

22. *People v. Wright*, 42 N.Y.3d 708, 727–28 (2024).

23. New York Constitution § 11. [Equal protection of laws; discrimination in civil rights prohibited] "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, ethnicity, national origin, age, disability, creed, religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy, be subjected to any discrimination in their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state, pursuant to law."

24. *Johnson v. California*, 545 U.S. 162, 170 (2005)[issue is whether Ait was more likely than not that the challenge was improperly motivated"]; *McKinney v. Artuz*, 326 F.3 87, 98 (2d Cir 2003) [objector has burden to show "by a preponderance of the evidence" that the challenge was based upon the juror's membership in a cognizable group].

25. *People v. Hameed,* 88 N.Y.2d 232 (1996).

26. *People v. Smocum*, 99 N.Y.2d 418 (2003)["compressing steps two and three in *Batson* analysis without first allowing defense counsel to make an argument that prosecutor›s reasons for peremptory strikes were pretextual fell short of a meaningful inquiry into question of discrimination, and court should have avoided such undue haste and compression."].

27. *People v. Jones*, 139 A.D.3d 878, 879 (2d Dep't, 2016)., quoting *People v. Carillo*, 9 A.D.3d 333 (1st Dep't 2004), *lv. den*., 3 N.Y.3d 739.

28. *People v. Foxworth,* 176 A.D.3d 1229 2d Dep't, (2019)["Moreover, the court did not act improperly by, sua sponte, directing the defendant's counsel to provide race-neutral explanations for the peremptory challenges (*see generally People v. Payne*, 88 N.Y.2d 172, 184, 643 N.Y.S.2d 949, 666 N.E.2d 542)."]; *People v. Nelson*, 214 A.D.2d 411 (1st Dep't, 1995), *lv. den*., 85 N.Y.2d 977 ["The record does not support defendant's claim that the trial court interfered excessively and improperly in the proceedings. The trial court properly noted, sua sponte, the prima facie existence of a *Batson* violation when the defense peremptorily challenged eight out of ten white venirepersons, and properly requested that defense counsel provide race-neutral reasons for the challenges (*see People v. Maisonet*, 209 A.D.2d 297, 618 N.Y.S.2d 718). In this connection, we note that defense counsel's explanations were accepted by the court."].

29. Historical Society of the New York Courts: Justice Steven W. Fisher was born on May 19, 1946 in Manhattan and lived most of his life in Queens. He studied physics at Queens College, earning a bachelor's degree in 1968, then studied nuclear engineering at the University of Florida before earning his law degree from Brooklyn Law School in 1972. He began his legal career as an assistant district attorney in Brooklyn from 1972 to 1976. He was a founding partner of Rhodes, Baker & Fisher, where he worked in private practice. Then, from 1979 to 1983, he held the position of principal law clerk to Presiding Justice Milton Mollen at the Second Department. Fisher joined the bench in 1983 when Mayor Koch appointed him to the Criminal Court in Manhattan. He was an acting Supreme Court justice until his election to the Supreme Court in 1993. From 1998 to 2004, he also held the position of administrative judge of the Queens Supreme Court. Between 2000 and 2003, Justice Fisher presided over the trial of two men for the murders of five employees at a Wendy's restaurant in Queens, and sentenced one of the defendants in this case, John B. Taylor, to the death penalty. He was the last New York judge to impose this sentence, which was later vacated after the Court of Appeals declared New York's death penalty unconstitutional in 2004. Fisher was designated by Gov. Pataki as an associate justice of the Appellate Division, Second Department in 2004.

    He was married to Judith Karen Schall in 1969 and had two children, Carrie and Daniel, and three grandchildren. He died on December 18, 2010 in Queens at the age of 64.

30. *People v. Wright*, 42 N.Y.3d 708, 727-28 (2024). "The court repeatedly articulated Mr. Wright's burden at step 1 as establishing 'a prima facie case that your adversary has excluded jurors solely on account of their [race]' (emphasis added). That was not a transcription error or errant misspeak: the court repeated its erroneous statement of the law by stating 'I'm asking you what facts and inferences establish a prima facie case that the Prosecutor has excluded jurors solely on the account of their [race].'"

31. *People v. Smocum*, 99 N.Y.2d 418 (2003)["As a first step, the moving party bears the burden of establishing a prima facie case of discrimination in the exercise of peremptory challenges. Second, the nonmoving party must give a raceneutral reason for each potential juror challenged. In step three, the court determines whether the reason[s] given [are] merely a pretext for discrimination. * * [T]he moving party has the ultimate burden of persuading the court that the reasons are merely a pretext for intentional discrimination").

32. *People v. James*, 99 N.Y.2d 264 (2002) ["The Equal Protection Clauses of both the Federal Constitution and State Constitution prohibit the

exclusion of persons on the basis of race. Moreover, service on a jury is a civil right which cannot be arbitrarily denied. Nevertheless, any claim of improper discrimination in the selection of jurors must be specific and timely made. When, as here, a party raises an issue of a pattern of discrimination in excluding jurors, and the court accepts the race neutral reasons given, the moving party must make a specific objection to the exclusion of any juror still claimed to have been the object of discrimination. It is incumbent upon the moving party to be clear about any person still claimed to be improperly challenged."); *People v. Thomas*, 92 A.D.3d 1084 (3d Dep't, 2012)["While defense counsel referred to the women on the first panel in alleging that the People were engaging in a pattern of exclusion, he did not expressly indicate that he was requesting race-neutral reasons for their exclusion."].

33. *People v. Garris*, 99 A.D.3d 1018 (2d Dep't, 2012), *lv. den*., 21 N.Y.3d 912; *accord People v. Orr*, 73 A.D.3d 596 (1st Dep't, 2010), *lv. den*., 15 N.Y.3d 894 ["Defendant argues that although his application under *Batson v. Kentucky*, applied to four panelists from the first round of jury selection as well as two panelists from the second, the prosecutor only gave reasons for peremptorily challenging the latter two. Defendant failed to preserve this claim and we decline to review it in the interest of justice. Regardless of whether defendant had included all six panelists in his Batson application, when the prosecutor only addressed two of them, it was incumbent on defendant to call this to the court's attention 'at a time when the error complained of could readily have been corrected.'"].

34. *People v. Thomas*, 92 A.D.3d 1084 (3d Dep't, 2012)["On this record, while we agree with the dissent that the *Batson* challenge was timely made because it was made before the end of jury selection..."]; *People v. Grafton*, 132 A.D.3d 1065 (3d Dep't, 2015), *lv. den.*, 26 N.Y.3d 1145 (2016)["*Batson* application, made before the end of jury selection, was timely..."]; *People v. Battle*, 299 A.D.2d 416 (2d Dep't, 2002)["Contrary to the trial court's conclusion, the defendant's Batson application was timely, since it was made before the end of jury selection.").

35. *People v. Pagano,* 207 A.D.2d 685 (1st Dep't, 1994), *lv. den*., 87 N.Y.2d 849 ["At that point, although defendant did not specifically renew his request for explanations of the People's first-round challenges, he renewed his general *Batson* application. Therefore, the court should have required the People to explain their first-round challenges, as well."].

36. *People v. Childress*, 81 N.Y.2d 263 (1993).

37. *People v. Hecker*, 15 N.Y.3d at 651.

38. *People v. Davis*, 153 A.D.3d 1631 (4th Dep't, 2017), *lv. den*., 32 N.Y.3d 1203 [Here, defendant is African American, and the first prospective juror to be peremptorily challenged by the People was the only African American on the panel."]; *see also People v. Smocum*, 99 N.Y.2d 418 (2003)["Although as part of their prima facie case parties often rely on numbers to show a pattern of strikes against a particular group of jurors, a prima facie case may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination."]; P*eople v. Hurdle*, 99 A.D.3d 943 (2012); *People v. Gray,* 68 A.D.3d 1131 (2009)*; People v. Berry*, 302 A.D.2d 536 (2004).

39. *People v. Solares*, 309 A.D.2d 502 (1st Dep't, 2003), *lv. den*., 1 N.Y.3d 581 ["Defendant's application pursuant to *Batson v. Kentucky*, was properly denied on the ground that defendant did not establish a *prima facie* case of discrimination. Defendant's numerical argument was not so compelling as to warrant a finding of a prima facie case."); *People v. Colon*, 307 A.D.2d 378 (3d Dep't, 2003), *lv. den.* 100 N.Y.2d 619 (2003)["However, although "a *prima facie* case may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination," here, defendant failed to articulate "facts and other relevant circumstances sufficient to raise an inference that the prosecutor used the challenge[ ] to exclude [the prospective juror] because of [his] race." Without more, the mere exercise of the peremptory challenge was insufficient to raise an inference of discrimination requiring the People to come forward with a raceneutral explanation.); *People v. Miah*, 3 A.D.3d 457 (1st Dep't, 2004), *lv. den.*, 2 N.Y.3d 803 (2004. ["Defendant's numerical argument was unpersuasive, and he failed to show disparate treatment of similarly situated panelists or other relevant circumstances sufficient to raise an inference of a discriminatory purpose."); *People v. Thomas*, 302 A.D.2d 616 (2d Dep't, 2003), *lv. den.* 100 N.Y.2d 566 (2003)["The prosecutor's exercise of a peremptory challenge against one black prospective juror fails, without more, to establish a Batson violation.").

40. *People v. Mohabir*, 111 A.D.3d 851 (2d Dep't, 2013), *lv. den*., 23 N.Y.3d 965.

41. *People v. Lassiter,* 44 A.D.3d 877 (2d Dep't, 2007), *lv. den.*, 9 N.Y.3d 965.

42. *People v. Jones*, 136 A.D.3d 1153 (3d Dep't, 2016), *lv. den*., 27 N.Y.3d 1000.

43. *People v. Bridgeforth*, 28 N.Y.3d 567, 581 (2016)["The majority chooses this case with a garbled record at a moot stage of the proceeding to hold that 'skin color' " is a cognizable class for purposes of *Batson*. Such a monumental ruling should occur only after careful consideration, and on a record that properly presents the issue and contains a step one ruling for our review. Instead, the majority announces its holding without the benefit of a call for amicus briefing and without any discussion of the wideranging ramifications of its decision in the *Batson* context and beyond. Moreover, the only 'guidance offered to trial courts is that they should somehow "decide whether the individuals identified … share a similar skin color" (majority op at 574). The majority's vague assurance that these determinations can be made 'in the same way' they are made 'about race, gender, and ethnicity classifications' supplies little concrete or practical instruction for lower courts tasked with creating a record that allows for meaningful appellate review (majority op at 574)."]; *see also People v. Ortega,* 57 Misc. 3d 631 (N.Y. Sup. Ct. 2017).

44. *People v. Bridgeforth,* 28 N.Y.3d 567, 575 (2016).

45. *Hernandez v. New York*, 500 U.S. 352 (1991); *People v. Payne*, 88 NY 2d 172 (1996)["At the outset, all three defendants-appellants assert that the trial courts erred at the first step by concluding that the prosecution had satisfactorily shown a prima facie case of discrimination merely by noting that all of the challenged jurors were white. We need not address or resolve this threshold argument because the subsequent rulings by the trial courts in *Payne* and *Jones* on the ultimate issue of purposeful discrimination and pretext moot this first-step issue. As stated by the Supreme Court in *Hernandez v New York*: "Once a prosecutor [or defense counsel, as in these three cases] has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant [or prosecution] had made a prima facie showing becomes moot.'").

46. *People v. Smouse,* 160 A.D.3d 1353 (4th Dep't, 2018).

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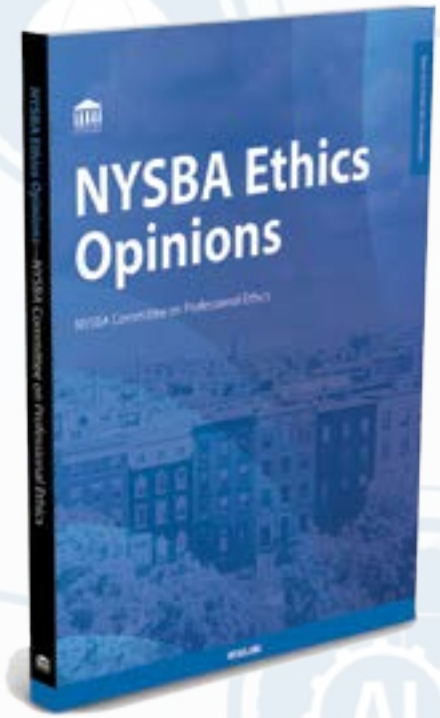

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