EQUAL PROTECTION IN JURY SELECTION

BATSON, MILLER-EL AND BEYOND

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This paper primarily focuses on civil and criminal voir dire after the Miller-El II case, decided by the United States Supreme Court in 2005; however for background purposes, several "pre Miller-El" cases are addressed.

I. UNITED STATES SUPREME COURT CASES

1. **Batson v. Kentucky,** 476 U.S. 79 (1986) held that under the Equal Protection Clause of the 14th Amendment, prosecutors may not use peremptory challenges to excuse jurors on the basis of race.

The familiar three-step Batson analysis was recently described in Rice v. Collins, 546 U.S. 333, 126 S.Ct. 969, 163 L.Ed.2d824 (2006), as follows.

> A defendant's Batson challenge to a peremptory strike requires a three-step inquiry. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
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> 546 U.S. at 336-38, 126 S.Ct. at 973-974.

Louisiana has codified the ruling of Batson in La. C. Cr. P. art. 795, which provides, in pertinent part:

> C. No peremptory challenge made by the state or the defendant shall be based solely upon the race of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race, and a prima facie case supporting that objection is made by the objecting party, the court may demand a satisfactory racially neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court,

shall be made outside of the hearing of any juror or prospective juror.

A. The court shall allow to stand each peremptory challenge exercised for a racially neutral reason either apparent from the examination or disclosed by counsel when required by the court. The provisions of Paragraph C and this Paragraph shall not apply when both the state and the defense have exercised a challenge against the same juror.

B. The court shall allow to stand each peremptory challenge for which a satisfactory racially neutral reason is given. Those jurors who have been peremptorily challenged and for whom no satisfactory racially neutral reason is apparent or given may be ordered returned to the panel, or the court may take such other corrective action as it deems appropriate under the circumstances. The court shall make specific findings regarding each such challenge.

2. **Georgia v. McCollum,** 112 S.Ct. 2348 (1992), held that defense lawyers may not use race – based peremptory challenges.

3. **J.E.B. v. Alabama,** 114 S. Ct. 1419 (1994) held that the Equal Protection Clause of the 14th Amendment prohibits discrimination in jury selection on the basis of gender or on the assumption that an individual will be biased in a particular case solely because of the fact that the person happens to be a woman or a man.

4. **Edmonson v. Leesville Concrete Co.,** 111 S.Ct 2077 (1991) held that private parties in civil cases could not exercise their peremptory challenges in a racially discriminatory manner. Edmonson involved a suit by an African-American construction worker who was injured in a job site accident and sued the defendant for negligence. The defendant used two of its three peremptory challenges to strike African-American jurors from the prospective jury, and the plaintiff, citing Batson, requested that the Court require the defendant to provide a race-neutral explanation for striking the prospective minority jurors. The district court denied the plaintiff's request, stating that Batson does not apply in a civil proceeding. After an appeal in which the Fifth Circuit Court of Appeals, en banc, ruled that the use of peremptory challenges by private parties does not constitute state action such that there are no constitutional implications, the Supreme Court granted certiorari and reversed.

Specifically at issue in Edmonson, was whether a private party in a civil case may use peremptory challenges to exclude jurors on the basis of race, or stated another way, does a private litigant's alleged discriminatory use of peremptory challenges constitute "state action" sufficient to invoke constitutional protections? The Court responded to this important question in the affirmative, by stating that, "[r]ecognizing the impropriety of racial bias in the courtroom, we hold that a race-based exclusion violates the equal protection rights of the challenged jurors."

5. Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L.Ed. 2d 931 (2003); (**Miller-El I**)

Thomas Joe Miller-El sought federal habeas relief from his state court conviction for capital murder and death penalty imposition. The federal district court denied his petition and the U.S. Court of Appeals for the Fifth Circuit denied certificate of appealability (COA). Certiorari was granted, and the United States Supreme Court[1] reversed and remanded holding that reasonable jurists could have debated whether the prosecution's use of peremptory strikes against African Americans prospective jurors was the result of purposeful discrimination, and thus petition was entitled to COA.[2]

Miller-El, his wife Dorothy Miller-El, and one Kenneth Flowers robbed Holiday Inn clerks in Dallas, Texas. They emptied the cash drawers and ordered the two employees to lie on the floor. The employees were gagged and their hands and feet were bound. Miller-El asked Flowers if he was going to kill them. When Flowers hesitated or refused, Miller-El shot one of the victims twice in the back, thereby killing him, and shot the other employee in the side.

He was indicted for capital murder and his trial began in 1986. At the conclusion of jury selection, the defense counsel moved to strike the jury on grounds that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding African Americans by use of peremptory challenges.

It should be noted that Miller-El's trial occurred before the decision in Batson. The case of Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), was then the controlling precedent.

As Swain required, the defendant sought to show that the prosecution's conduct was part of a larger pattern of discrimination aimed at excluding African-Americans from jury service. In a pretrial hearing, he presented extensive evidence in support of his motion. The trial judge, however, found "no evidence…that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office; while it may have been done by individual prosecutors in individual cases." The state court then denied petitioner's motion to strike the jury. The jury found Miller-El guilty and he was sentenced to death.

Miller-El obtained no relief on this issue through the state system nor through federal habeas proceedings in the district and circuit courts; however, a record was made, of which the

[1] Miller-El I was a 7-2 decision authored by Justice Kennedy with a concurring opinion by Justice Scalia and a vigorous dissent by Justice Thomas.

[2] It is submitted by this writer that the federal procedural status is somewhat confusing and need not be the focus of this case summary. From the perspective of a district court judge, the obvious significance of the opinion is the Supreme Court's treatment of the issue of use of peremptory challenges against a particular race and under what circumstances it results in purposeful discrimination under Batson.

U.S. Supreme Court was obviously very concerned. A summary of the relevant facts are as follows:

> Of the 108 possible jurors reviewed by the prosecution and defense, 20 were African American. Nine of them were excused for cause or by agreement of the parties. Of the 11 African-American jurors remaining, however, all but one were excluded by peremptory strikes exercised by the prosecutors. On this basis, 91% of the eligible black jurors were removed by peremptory strikes. In contrast, the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner's jury.

More specifically, during voir dire, the prosecution questioned venire members as to their views concerning the death penalty and their willingness to serve on a capital case. Responses that disclosed reluctance or hesitation to impose capital punishment were cited as a justification for striking a potential juror for cause or by peremptory challenge. Under Wainwright v. Witt, the Court found from the record that the manner in which members of the venire were questioned varied by race. The Supreme Court observed "to the extent that a divergence in responses can be attributed to the racially disparate mode of examination, it is relevant to our inquiry."

Most African-Americans (53%, or 8 out of 15) were first given a detailed description of the mechanics of an execution in Texas by prosecutors as follows:

> [I]f those three [sentencing] questions are answered yes, at some point [,] Thomas Joe Miller-El will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death…as the result of the verdict in this case if those three questions are answered yes.

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

> Would you share with us… your personal feelings, if you could, in your own words how you do feel about the death penalty and capital punishment and secondly, do you feel you could serve on this type of a jury and death of the Defendant in this case based on evidence?

There was an even more pronounced difference on the apparent basis of race, in the manner the prosecutors questioned members of the venire about their willingness to impose the minimum sentence for murder. Under Texas law at the time of petitioner's trial, an

unwillingness to do so warranted removal for cause. The prosecutors first identified the statutory minimum sentence of five years' imprisonment to 34 out of 36 (94%) white venire members, and only then asked: "If you hear a case, to your way of thinking [that] calls for and warrants and justifies five years, you'll give it?" In contrast, only 1 out of 8 (12.5%) African-American prospective jurors were informed of the statutory minimum before being asked what minimum sentence they would impose. The typical questioning of the other seven black jurors was as follows:

> Prosecutor : Now, the maximum sentence for [murder]… is life under the law. Can you give me an idea of just your personal feelings what you feel a minimum sentence should be for the offense of murder the way I've set it out for you? Juror: Well, to me that's almost like it's premeditated. But you said they don't have a premeditated statute here in Texas.
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> Prosecutor: Again, we're not talking about self-defense or accident or insanity or killing in the heat of passion or anything like that. We're talking about the knowing --
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> Juror: I know you said the minimum. The minimum amount that I would say would be at least twenty years.

* * *

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

Of more importance, the defense presented evidence that the district attorney's office had adopted a formal policy to exclude minorities from jury service (i.e. manuals and circulars which had remained in circulation until 1976 and were available to one of the prosecutors in the case).

Writing for the majority, Justice Kennedy observed as follows:

> In this case, the statistical evidence alone raises some debate as to whether the prosecution acted with race-based reasons when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African American venire members, and only one served on petitioner's jury. In total, 10 of

the prosecutors' 14 peremptory strikes were used against African-Americans.
Happenstance is unlikely to produce this disparity.

The case for debatability is not weakened when we examine the State's defense of the disparate treatment. The Court of Appeals held that "[t]he presumption of correctness is especially strong, where, as here, the trial court and state habeas court are one and the same." 261 F.3d, at 449. As we have noted, the trial court held its Batson hearing two years after the voir dire. While the prosecutors had proffered contemporaneous race-neutral justifications for many of their peremptory strikes, the state trial court had no occasion to judge the credibility of these explanations at that time because our equal protection jurisprudence then, dictated by Swain, did not require it. As a result, the evidence presented to the trial court at the Batson hearing was subject to the usual risks of imprecision and distortion from the passage of time.

In this case, three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury. The prosecutors explained that their peremptory challenges against six African-American potential jurors were based on ambivalence about the death penalty; hesitancy to vote to execute defendants capable of being rehabilitated; and the jurors' own family history of criminality. In rebuttal of the prosecution's explanation, petitioner identified two empaneled white jurors who expressed ambivalence about the death penalty in a manner similar to their African-American counterparts who were the subject of prosecutorial peremptory challenges. One indicated that capital punishment was not appropriate for a first offense, and another stated that it would be "difficult" to impose a death sentence. Similarly, two white jurors expressed hesitation in sentencing to death a defendant who might be rehabilitated; and four white jurors had family members with criminal histories. As a consequence, even though the prosecution's reasons for striking African American members of the venire appear race neutral, the application of these rationales to the venire might have been selective and based on racial considerations. Whether a comparative juror analysis would demonstrate the prosecutors' rationales to have been pretexts for discrimination is an unnecessary determination at this stage, but the evidence does make debatable the District Court's conclusion that no purposeful discrimination occurred.

We question the Court of Appeals' and state trial court's dismissive and strained interpretation of petitioner's evidence of disparate questioning. 261 F.3d, at 452 ("The findings of the state court that there was no disparate questioning of the Batson jurors… [is] fully supported by the record"). Petitioner argues that the prosecutors' sole purpose in using disparate questioning was to elicit responses from the African-American venire members that reflected an opposition to the death penalty or an unwillingness to impose a minimum sentence, either of which justified for-cause challenges by the prosecution under the then applicable state law. This is more than a remote possibility**.** Disparate questioning did occur. Petitioner submits that disparate questioning created the appearance of divergent opinions even though the venire members' views on the relevant subject might have been same. It follows that, if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination. Batson, 476 U.S., at 97, 106 S.Ct. 1712 ("Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose").

As a preface to questions about views the prospective jurors held on the death penalty, the prosecution in some instances gave an explicit account of the execution process. Of those prospective jurors who were asked their views on capital punishment, the preface was used for 53% of the African-Americans questioned on the issue but for just 6% of white persons. The State explains the disparity by asserting that a disproportionate number of African American venire members expressed doubts as to the death penalty on their juror questionnaires. This cannot be accepted without further inquiry, however, for the State's own evidence is inconsistent with that explanation. By the State's calculations, 10 African-American and 10 white prospective jurors expressed some hesitation about the death penalty on their questionnaires; however, of that group, 7 out of 10 African-Americans and only 2 out of 10 whites were given the explicit description.

There is an even greater disparity along racial lines when we consider disparate questioning concerning minimum punishments. Ninety-four percent of whites were informed of the statutory minimum sentence, compared to only twelve and a half percent of

> African-Americans. No explanation is proffered for the statistical disparity.
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> * * *
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> It follows, in our view, that a fair interpretation of the record on this threshold examination in the COA analysis is that the prosecutors designed their questions to elicit responses that would justify the removal of African Americans from the venire. Batson supra, at 93, 106 S.Ct. 1712 ("Circumstantial evidence of invidious intent may include proof of disproportionate impact…We have observed that under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds'"). EMPHASIS SUPPLIED

In delivering a vigorous dissent, Justice Thomas wrote "[B]ecause petitioner has not shown, by clear and convincing evidence, that any peremptory strikes of black veniremen were exercised because of race, he does not merit a certificate of appealability…Quite simply, petitioner's arguments rest on circumstantial evidence and speculation that does not hold up to a thorough review of the record."

6. Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed 2d 196 (2005) (Sup.Ct. 2005); (**Miller-El II**)

Justice Souter wrote the opinion of the majority, in which Justices Stevens, O'Connor, Kennedy, Ginsburg, and Breyer joined. Justice Breyer concurred and filed an opinion. Justice Thomas dissented and filed an opinion in which Chief Justice Rehnquist and Justice Scalia joined.

The underlying facts are the same as Miller-El I. Defendant and his accomplices bound and gagged two hotel employees during their robbery of a Holiday Inn in Dallas, Texas. Defendant then shot them, killing one and severely injuring the other. The prosecution used 10 peremptory strikes against black prospective jurors. The case initially came into the federal court system as an application for habeas relief that was denied by the Northern District of Texas and the U.S. Fifth Circuit. In Miller-El I, the Supreme Court granted certiorari to review whether the Fifth Circuit erred in denying a certificate of appealability. The Supreme Court ordered that an appeal be heard, and after a hearing, Fifth Circuit rejected defendant's claim on the merits.[3]

[3] Although the procedural history is not directly relevant, it does reveal that while the Court remanded the matter in the first instance for a more intensive scrutiny of the facts by the lower courts, it ultimately rejected the conclusions reached by those courts.

The Court reviewed the history of the jurisprudence leading up to Batson, going back to Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880),[4][5] through Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)[6], up to the present. Justice Souter, writing for the majority, pointed out the deleterious effect of racial discrimination in jury selection upon defendants, the minorities themselves, and the perceived integrity of the judicial system. The Court then turned to the difficulty of identifying such discrimination and the complexity of determining upon what evidence to rely.

The Court pointed out that in Swain, the standard required a presumption that the prosecutor's strikes were legitimate except in the face of a "longstanding pattern of discrimination", when "giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge [were] being perverted." 545 U.S. at 239, citing Swain, supra, 380 U.S. at 223-224. Batson was crafted to address the difficulty of proving a "continuity of discrimination over time". Thus the relevant evidence for making a case of discrimination was broadened to "the totality of the relevant facts", and the three part analysis of Batson was implemented.

The Court then went on and identified what it characterized as the "weakness" of Batson.

> If any facially neutral reason sufficed to answer a Batson challenge, then Batson would not amount to much more than Swain. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence Batson's explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination. 545 U.S. at 240, citing 476 U.S., at 96-97, 106 S.Ct. 1712.

On that note, the Court turned to a review of the facts in Miller-El.

The Court first articulated the standard of review, pointing out that defendant was required to show that the Texas court's conclusion was an "unreasonable determination of the facts in the light of the evidence presented in the State court proceeding"[7], as required by the express language of 28 U.S.C. 2254, the Antiterrorism and Effective Death Penalty Act of 1996. Miller-El was required to rebut the presumption by clear and convincing evidence.

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[4] "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." Strauder v. West Virginia, 100 U.S. 303, 309, 25 L.Ed.

[5] (1880)

[6] This is the case in which Justice Goldberg's dissent is so often quoted by Justice Breyer in his antiperemptory challenge opinions.

[7] As Justice Thomas points out in his dissent, the Court did not, in fact, confine itself to the State court record.

The Court began its review of the factual history of the case and proceedings in almost the same fashion as in Miller-El I, pointing out that

> the numbers describing the prosecution's use of peremptories are remarkable. Out of 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution. Id., at 331, 123 S.Ct. 1029. “The prosecutors used their peremptory strikes to exclude 91% of the eligible African American venire members .... Happenstance is unlikely to produce this disparity.”

These “bare statistics”, however, were not enough. The Court then turned to a side-by-side comparison of some black prospective jurors who were excused to white panelists allowed to serve. The court pointed out

> that if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step. 545 U.S. at 241.

The Court focused upon two comparisons of prospective jurors.

The first juror summarized by the Court was a black male named Billy Jean Fields, who was excused by the prosecution.

> On the questionnaire filled out by all panel members before individual examination on the stand, Fields said that he believed in capital punishment, and during questioning he disclosed his belief that the State acts on God's behalf when it imposes the death penalty. “ Therefore, if the State exacts death, then that's what it should be.” He testified that he had no religious or philosophical reservations about the death penalty and that the death penalty deterred crime. He twice averred, without apparent hesitation, that he could sit on Miller-El's jury and make a decision to impose this penalty.
>
> Although at one point in the questioning, Fields indicated that the possibility of rehabilitation might be relevant to the likelihood that a defendant would commit future acts of violence, he responded to ensuing questions by saying that although he believed anyone could be rehabilitated, this belief would not stand in the way of a decision to impose the death penalty:

> "[B]ased on what you [the prosecutor] said as far as the crime goes, there are only two things that could be rendered, death or life in prison. If for some reason the testimony didn't warrant death, then life imprisonment would give an individual an opportunity to rehabilitate. But, you know, you said that the jurors didn't have the opportunity to make a personal decision in the matter with reference to what I thought or felt, but it was just based on the questions according to the way the law has been handed down." (alteration omitted).
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> Fields also noted on his questionnaire that his brother had a criminal history. During questioning, the prosecution went into this, too:
>
> "Q Could you tell me a little bit about that?" "A He was arrested and convicted on [a] number of occasions for possession of a controlled substance."
> "Q Was that here in Dallas?"
> "A Yes."
> "Q Was he involved in any trials or anything like that?" "A I suppose of sorts. I don't really know too much about it."
> "Q Was he ever convicted?"
> "A Yeah, he served time."
> "Q Do you feel that that would in any way interfere with your service on this jury at all?"
> "A No."

It is unclear from the Court's opinion if this represents the totality of Mr. Fields answers on the pertinent topics. The Court then turned to the prosecutor's proffered race-neutral reasons.

The prosecutor justified the strike as follows:

> "[W]e ... have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he later made the comment that any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case." 545 U.S. at 243.

The Court continued with this commentary on those reasons.

> Thus, Nelson simply mischaracterized Fields's testimony. He represented that Fields said he would not vote for death if rehabilitation was possible, whereas Fields unequivocally stated

> that he could impose the death penalty regardless of the possibility of rehabilitation. Perhaps Nelson misunderstood, but unless he had an ulterior reason for keeping Fields off the jury we think he would have proceeded differently. In light of Fields's outspoken support for the death penalty, we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.

The Court then contrasted Mr. Fields to Sandra Hearn, a white juror accepted by the prosecutor "with no evident reservations," and other white jurors who expressed similar views.

> Sandra Hearn said that she believed in the death penalty "if a criminal cannot be rehabilitated and continues to commit the same type of crime." Hearn went so far as to express doubt that at the penalty phase of a capital case she could conclude that a convicted murderer "would probably commit some criminal acts of violence in the future. "People change," she said, making it hard to assess the risk of someone's future dangerousness. "[T]he evidence would have to be awful strong.". But the prosecution did not respond to Hearn the way it did to Fields, and without delving into her views about rehabilitation with any further question, it raised no objection to her serving on the jury. White panelist Mary Witt said she would take the possibility of rehabilitation into account in deciding at the penalty phase of the trial about a defendant's probability of future dangerousness, but the prosecutors asked her no further question about her views on reformation, and they accepted her as a juror.
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> * * *
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> In sum, nonblack jurors whose remarks on rehabilitation could well have signaled a limit on their willingness to impose a death sentence were not questioned further and drew no objection, but the prosecution expressed apprehension about a black juror's belief in the possibility of reformation even though he repeatedly stated his approval of the death penalty and testified that he could impose it according to state legal standards even when the alternative sentence of life imprisonment would give a defendant (like everyone else in the world) the opportunity to reform. 545 U.S. at 244-245.[8]

The Court then continues to parse the prosecutor's reasoning with the following analysis:

> The unlikelihood that his position on rehabilitation had anything to do with the peremptory strike of Fields is underscored by the

[8] The Court concedes in a footnote that the prosecution did also excuse nonblack jurors who expressed views similar to those of Witt and others.

> prosecution's response after Miller-El's lawyer pointed out that the prosecutor had misrepresented Fields's responses on the subject. A moment earlier the prosecutor had finished his misdescription of Fields's views on potential rehabilitation with the words, "Those are our reasons for exercising our ... strike at this time." When defense counsel called him on his misstatement, he neither defended what he said nor withdrew the strike.. Instead, he suddenly came up with Fields's brother's prior conviction as another reason for the strike.
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> **It would be difficult to credit the State's new explanation, which reeks of afterthought**. While the Court of Appeals tried to bolster it with the observation that no seated juror was in Fields's position with respect to his brother, the court's readiness to accept the State's substitute reason ignores not only its pretextual timing but the other reasons rendering it implausible. Fields's testimony indicated he was not close to his brother, ("I don't really know too much about it"), and the prosecution asked nothing further about the influence his brother's history might have had on Fields, as it probably would have done if the family history had actually mattered. See, e.g., Ex parte Travis, 776 So.2d 874, 881 (Ala.2000) ("[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination"). **There is no good reason to doubt that the State's afterthought about Fields's brother was anything but makeweight.**
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> **EMPHASIS SUPPLIED**

The Court then critiqued the Court of Appeals analysis of the above, rejecting it as "unsupportable."

The Court then turned to the striking of Joe Warren, another black prospective juror. The Court summarized his examination and the prosecution's reasons.

> "I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment."
>
> The prosecution said nothing about these remarks when it struck Warren from the panel, but prosecutor Paul Macaluso referred to this answer as the first of his reasons when he testified at the later Batson hearing:

> "I thought [Warren's statements on voir dire] were inconsistent responses. At one point he says, you know, on a case-by-case basis and at another point he said, well, I think-I got the impression, at least, that he suggested that the death penalty was an easy way out, that they should be made to suffer more." 545 U.S. at 247-248.

The Court then pointed out that several jurors acceptable to the State shared the belief that death was actually a lighter punishment than life in prison. The Court examined the prosecutor's contention that strikes were being used more freely earlier in the voir dire process.

> The suggestion of pretext is not, moreover, mitigated much by Macaluso's explanation that Warren was struck when the State had 10 peremptory challenges left and could afford to be liberal in using them. If that were the explanation for striking Warren and later accepting panel members who thought death would be too easy, the prosecutors should have struck Sandra Jenkins, whom they examined and accepted before Warren. Indeed, the disparate treatment is the more remarkable for the fact that the prosecutors repeatedly questioned Warren on his capacity and willingness to impose a sentence of death and elicited statements of his ability to do so if the evidence supported that result and the answer to each special question was yes, whereas the record before us discloses no attempt to determine whether Jenkins would be able to vote for death in spite of her view that it was easy on the convict. Yet the prosecutors accepted the white panel member Jenkins and struck the black venireman Warren. 545 U.S. 249.

The Court actually turned that argument against the prosecutor when examining the sole black juror, a Mr. Woods.

> Macaluso's explanation that the prosecutors grew more sparing with peremptory challenges as the jury selection wore on does, however, weaken any suggestion that the State's acceptance of Woods, the one black juror, shows that race was not in play. Woods was the eighth juror, qualified in the fifth week of jury selection. When the State accepted him, 11 of its 15 peremptory strikes were gone, 7 of them used to strike black panel members. The juror questionnaires show that at least three members of the venire panel yet to be questioned on the stand were opposed to capital punishment, Janice Mackey, Paul Bailey, and Anna Keaton, With at least three remaining panel members highly undesirable to the State, the prosecutors had to exercise prudent restraint in using strikes. This late-stage decision to accept a black panel member willing to impose a death sentence does not,

> therefore, neutralize the early-stage decision to challenge a comparable venireman, Warren. In fact, if the prosecutors were going to accept any black juror to obscure the otherwise consistent pattern of opposition to seating one, the time to do so was getting late. 545 U.S. at 249-250.

The Court further rejected alternate bases offered by both the trial court and Court of Appeal.

> 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 reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions. 545 U.S. at 253.

Based on these comparisons, the court found that an "implausible light" was cast upon the prosecutor's reasons, and that race was a significant factor in the exercise of peremptory challenges.

The Court then turned to "broader patterns of practice" during jury selection, beginning with the prosecutor's exercise of the "jury shuffle", a Texas practice that allows either side to rearrange the order of the prospective jurors. The prosecution exercised this right 3 times during jury selection, while the defense exercised it 5 times. The record was incomplete as to the composition of the jury except as to the exercise of the prosecution's shuffles, which were exercised when a larger number of black venirepersons were seated near the front of the pool, and thus more likely to be questioned. The Court stated that since the prosecution never offered a race neutral reason for exercising this right, it was permissible to draw an inference that it was racially motivated.

The Court then turned to an analysis of the questions posed to jurors, contrasting those asked of white venire members with those asked of black venire persons. The Court examined the descriptions of the execution process given to white and black prospective jurors as it did in Miller-El I. The Court rejected the conclusions reached by Justice Thomas in his dissent in Miller-El I and adopted by the State and the Court of Appeals that there were race neutral reasons for the disparity. After a detailed review of portions of the record, the Court concluded that

> The State's attempt at a race-neutral rationalization thus simply fails to explain what the prosecutors did. But if we posit instead that the prosecutors' first object was to use the graphic script to make a case for excluding black panel members opposed to or ambivalent about the death penalty, there is a much tighter fit of fact and explanation. 545 U.S. at 260.

The Court concluded that the reasonable inference was that race was the "major consideration" for the disparity.

The Court then examined another area of disparate questioning, which it characterized as "trickery". This focused on questioning regarding the minimum sentence each juror would impose for murder. The Court repeated its description of the questioning from Miller-El I, and concluded that "once again, the implication of race in the prosecutors' choice of questioning cannot be explained away."

Finally, the Court revisits the same historical policy evidence that it discussed in Miller-El I. It points out that, among other things, one of the prosecutors had access to a 1968 manual on voir dire that contained an article on excluding minorities from jury service. It also notes that a former assistant district attorney testified that 8 years before the trial, he believed there was a policy of systematically excluding African-American jurors.

Ultimately, the Court held that the Court of Appeals' conclusion unsupportable, and reiterated its characterization of the lowers courts' interpretations of the evidence as "dismissive and strained." The Court found that "the strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State." 545 U.S. at 266. The Court's conclusion is very brief when contrasted with the extensive and copiously footnoted examination of the minutiae of the lower court records.

Justice Breyer concurred, setting forth his belief that peremptory challenges should be abolished entirely. He points to England's abolition of the practice in 1988 and cites extensive academic articles calling for the abolition of the practice. He characterizes the practice of peremptory challenges as "increasingly anomalous in our judicial system", and points out that jury selection consultants often present litigators with demographic breakdowns of "ideal" jurors for a particular case. He finally points out that while equal protection rights are constitutionally protected, the practice of peremptory challenges shares no such protection.[9]

Justice Thomas dissented, as he did in Miller-El I, although this time he was joined by the Chief Justice and Justice Scalia. Justice Thomas pointed out that the Court went beyond the record permitted for review by the governing statute. Many of the documents relied upon by the Court were not before the State court at the time it made its decisions. Justice Thomas pointed out that the majority seemed to have shifted the burden of proof onto the prosecution, stating that, "In the end, the majority's opinion is its own best refutation: It strains to demonstrate what should instead be patently obvious." 545 U.S. at 287.

[9] Justice Breyer AGAIN cites Justice Goldberg's dissent in Swain, written while Justice Breyer was his law clerk.

Justice Thomas then proceeded to refute the fact-findings of the majority, pointing to numerous omissions in the majority characterization of the record. He parsed the record as exhaustively as the majority, pointing out that the "clear and convincing evidence" relied upon by the majority was subject to numerous interpretations.

7. <u>Snyder v. Louisiana</u>, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008)

In this 7-2 opinion authored by Justice Alito[10], the United States Supreme Court reversed the first degree murder conviction and remanded. For factual background and extensive procedural history see my analysis of the La. Supreme Court opinion on page 24 of this outline.

At the United States Supreme Court level, Allen Snyder centered his Batson claim on the prosecution's strikes of two black jurors, Jeffrey Brooks and Elaine Scott. Citing <u>Miller-El v. Dretke,</u> finding merit to Snyder's claim regarding juror Brooks and observing the jurisprudential rule that "[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose", the Court concluded an Equal Protection violation and reversed the conviction.

Mr. Brooks, a college senior who was attempting to fulfill his student-teaching obligation, initially testified:

> I'm a student at Southern University, New Orleans. This is my last semester. My major requires me to student teach, and today I've already missed a half a day. That is part of my – it's required for me to graduate this semester.

He went on to describe that his regimen is 5 days per week, 8:30 – 3:00. The Court requested that his law clerk contact the university dean to determine Brooks' availability, and the clerk reported on the record the dean's response that week-long jury service would not be a problem, that he would "work with him" to make up the time. Upon hearing this, Brooks said "okay" and did not express any further concern about serving on the jury which was projected to last only a week. However, on the following day, the prosecutor issued a peremptory challenge stating:

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

The defense counsel disputed both explanations. The trial judge, Kernan Hand, ruled as follows:

[10] Justices Thomas and Scalia issued dissenting opinions.

> All right. I'm going to allow the challenge. I'm going to allow the challenge.

In analyzing the first proffered reason, the Court observed that the nervousness issue was disputed by defense counsel and not corroborated by the trial judge. The Court wrote:

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

On the second proffered reason the Court considered (1) it was speculative to conclude that Brooks' desire to hurry through the trial would result in a responsive verdict; it was equally plausible that he might vote guilty as charged; (2) the brevity of the trial as announced in voir dire; (3) the fact that the dean promised to "work with" Brooks to allow him to make up student teacher hours; (4) the fact that there was nothing in the record after the information about the dean to suggest that Brooks was troubled by the fact that he may be on a week-long jury trial.

In light of Miller-El v. Dretke**,** the Court examined the entirety of the voir dire record which revealed that the prosecutor had accepted white jurors who disclosed conflicting obligations that appeared to have been at least as serious as Mr. Brooks'. For example, during voir dire, Roland Laws, a white juror explained that jury service was "bad timing" – a "self employed general contractor with two houses nearing completion, a wife who had just had a hysterectomy, the fact that he had to run the kids back and forth to school…" Contrary to the examination of Brooks, the prosecutor tried to elicit assurances that Laws would be able to serve; and the prosecutor declined to issue a peremptory challenge as to Laws. The High Court noted another example with prospective juror Donnes in which he testified "I'd have to cancel too

many things". As with Laws, the prosecutor declined to issue a peremptory challenge on Donnes.

The Court concluded that the prosecutor's proffered reasons for peremptorily striking Brooks were pretextual, which "naturally gives rise to an inference of discriminatory intent".

> For present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution. And in light of the circumstances here – including absence of anything in the record showing that the trial judge credited the claim that Mr. Brooks was nervous, the prosecution's description of both of its proffered explanations as "main concern[s]," and the adverse inference noted above the record does not show that the prosecution would have preemptively challenged Mr.
> Brooks based on his nervousness alone.

Thus, the proffered reason of schedule conflict is pretextual in light of the prosecutor's treatment of two similarly situated white jurors and there was no judicial finding that Mr. Brooks was nervous.

8. Rice v. Collins, 546 U.S. 333, 126 S.Ct. 969, 163 L.Ed. 2d 824 (2006).

Justice Kennedy wrote the opinion for a unanimous Court in which the Batson case was revisited. (See page 6 of this outline). Justice Breyer wrote a concurring opinion, in which Justice Souter joined. (Habeas relief, not a direct appeal).

The Supreme Court ultimately held that while the trial court had reason to question the prosecutor's credibility, this did not "compel the conclusion that the trial court had no permissible alternative but to reject the prosecutor's race-neutral reasons." 126 S.Ct. at 975. The fact that reasonable minds could differ was insufficient to supersede the trial court's determination of credibility. The Supreme Court reversed the Federal Ninth Circuit, thus denying the defendant's application habeas review.

In the concurrence, Justice Breyer, joined by Justice Souter, agrees with the Court's holding as consistent with the present legal framework, but reiterates his earlier position that "legal life without peremptories is no longer unthinkable." 126 S.Ct. at 977. He agrees with Justice Thurgood Marshall's observation that Batson would be inadequate to "ferret out" unconstitutional discrimination from jury selection.[11]

[11] Justice Breyer, it must be remembered, clerked for Justice Goldberg, who first noted that "Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former" Swain v. Alabama, 380 U.S. 202, 244, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) (Goldberg, J., dissenting.

9. Johnson v. California, 545 U.S. 162, 125 S.Ct. 2410,162 L.Ed 2d 129 (2005)

Justice Stevens wrote majority opinion, joined by Chief Justice Rehnquist, and Justices O'Connor, Scalia, Souter, Ginsburg and Breyer. Justice Breyer concurred. Justice Thomas dissented.

The Court's holding, as a practical matter, is essentially that "a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to draw an inference that discrimination has occurred." 545 U.S. at 170. The Louisiana Supreme Court has already clarified this rule and its application, however, pointing out that the "mere invocation of Batson when minority prospective jurors are peremptorily challenged in the trial of a minority defendant does not present sufficient evidence [in that case] to lead to an inference of purposeful discrimination." State v. Draughn, --So.2d---, 2007 WL 102732 (La. 1/17/2007), p. 26. The court pointed out that an overly broad interpretation of Johnson would eliminate entirely the first step of the Batson analysis, and pointed out that the defendant objecting still retains the burden of production of the evidence to support the inference of purposeful discrimination. (Emphasis in original)(State v. Draughn, id.)

10. Thaler v. Haynes, 2010 WL 596511 (U.S.) (2010)--

The issue presented is whether any previous decision of the U. S. Supreme Court clearly establishes that a judge, in ruling on a Batson/Miller-El peremptory challenge, must reject a demeanor-based explanation for the challenge unless the judge personally observes and recalls the aspect of the prospective juror's demeanor on which the explanation was based. The Supreme Court wrote that the Federal appellate court has "read far too much into those decisions and its (the federal appellate ruling) holding, if allowed to stand, would have important implications". The scenario is usually presented as follows:

The DA articulates his race neutral reasons based on demeanor: (1) He was nervous; (2) he wouldn't look at me; (3) he gave me a negative look; (4) he had a sarcastic tone.

> In the event the trial judge does not validate or verify one way or the other these reasons, that does not mean that the U.S. Supreme Court will necessarily conclude that the demeanor–based explanation was actually a sham or pretext for a discriminatory peremptory challenge. The better practice, of course, is for the judge to either validate the reasons by supplying his own observations and impressions or to state that the attorney's reasons are not correct (in which case he may need to overrule the peremptory challenge and seat the juror).

Justice Breyer was Justice Goldberg's clerk for the 1964-65 term. Based on his career path, it is unlikely that Justice Breyer ever selected a jury.

11) Rivera v. Illinois, 129 S.Ct. 1446 (2009)

During jury selection in petitioner Rivera's state court first-degree murder trial, his counsel sought to use a peremptory challenge to excuse venire member Delores Gomez. Rivera had already exercised two peremptory challenges against women, one of whom was African-American. It is conceded that there was no basis to challenge Gomez for cause. She met the requirements for jury service, and Rivera does not contend that she was biased against him. The DA objected to Rivera's use of the peremptory challenge on the basis of gender discrimination. The trial court rejected the peremptory challenge out of concern that it was discriminatory. At trial, the jury, with Gomez as its foreperson, found Rivera guilty of first-degree murder. The Illinois Supreme Court subsequently affirmed the conviction, holding that the peremptory challenge should have been allowed, but rejecting Rivera's argument that the improper seating of Gomez was a reversible error. Observing that the Illinois Constitution does not mandate peremptory challenges and that they are not necessary for a fair trial, the court held that the denial of Rivera's peremptory challenge was not a structural error requiring automatic reversal.

The U.S. Supreme Court held: provided that all jurors seated in a criminal case are qualified and unbiased, the Due Process Clause does not require automatic reversal of a conviction because of the trial court's good-faith error in denying the defendants' peremptory challenge to a juror.

*But, note that Louisiana Constitution Article 1, Section 17A provides the right to challenge jurors peremptorily in criminal cases.

II. LOUISIANA SUPREME COURT CASES

1. Alex v. Rayne Concrete Service, et al, 05-1457, 05-2344, 05-2520 (La. 1/26/07), 951 So.2d 138, *rehearing denied.* Acadia Parish, Judge Don Aaron, Jr.

Following 2 previous jury trials in this personal injury lawsuit (the first ending in mistrial due to the jury's inability to reach a verdict and the second due to a motion for new trial being granted), a third jury trial was held before an all white jury. After jury selection and after the defense counsel peremptorily excused the only four African American venirepersons, the plaintiff made a Batson/Edmonson challenge objecting to the defendant's peremptory striking of those four jurors.

The trial court rejected the challenge and the plaintiff did not seek supervisory review by writ application. On appeal the plaintiff asserted that the trial court's ruling on the Batson/Edmonson challenge was manifestly erroneous.

The first issue addressed by the Supreme Court was whether a party must seek review of a Batson/Edmonson challenge by supervisory writ application or whether the party can wait until conclusion of the trial to seek appellate review. On this issue the Supreme Court held that the "precepts of judicial economy and fundamental fairness" allow that a party may have the ruling

on such an issue heard on appeal rather than solely on application for supervisory writs, which appellate practice is consistent with criminal cases. The Court did not hold that an aggrieved party is precluded from review by supervisory writ, which may be the more appropriate approach in some cases, but the split in the circuits is resolved by the Supreme Court's ruling.

The second issue was whether the trial court committed legal error with respect to the Batson/Edmonson challenge on one particular juror, Reva Mae Charlot, one of four black jurors in the venire.

The trial judge questioned all the prospective jurors as to their employment, marital status, and children. Prospective juror Charlot answered she was a housewife, married with five children, and her husband had a trucking company. Plaintiff's counsel conducted the only other questioning of Charlot, as follows:

> MR. REGISTER: All right, thank you, sir. Ms. Charlot, how are you doing?
> PROSPECTIVE JUROR CHARLOT: All right.
> MR. REGISTER: That's good. Can you think of any reason that you don't want to serve?
> PROSPECTIVE JUROR CHARLOT: None whatsoever.
> MR. REGISTER: You're ready to go, huh? All right. I like that attitude? Okay, great. Thank you so much…

After the panel had been questioned, the trial court challenged Taylor for cause and thereafter, Rayne Concrete used three of its peremptory challenges to excuse Thomas, Charlot and Jordan (a fourth black juror excused for cause).

Following the peremptory challenge of Ms. Charlot as well as the other two black veniremen, plaintiff counsel lodged the Batson/Edmonston objection. Without addressing whether the first tier of the three step process was satisfied, the defense counsel advanced reasons regarding his challenges. As to Ms. Charlot, he stated:

> She [Ms. Charlot] and I just didn't get revised. In brief, defense counsel contends his words were transcribed inaccurately, and what was really said was "She and I just didn't get good vibes."

The trial court incorrectly stated:

> And [Mr. Register], quite honestly, I don't believe it applies in civil matters, but I think it's applicable in criminal matters, and I do think they asserted race-neutral reasons for their peremptory challenges.

The plaintiff lawyer responded:

> MR. REGISTER: Right, and I certainly object to that. No disrespect to the Court, but I certainly feel that she still should have served. But the bottom line, Your Honor, what you have is a total elimination of all-unless I missed something, I don't think any black jurors are left. We would allege at this particular point that this is clearly not a jury of Mr. Alex's peers. And regardless of if it's civil or criminal, he still has a right to a jury among his peers. So we're simply going to object to the challenges made by opposing counsel. Thank you. Your Honor.

The Louisiana Supreme Court observed that defense counsel primarily relied upon a "gut feeling" that venireperson Charlot did not like him but liked plaintiff. The only elaboration defense counsel provided was that his "gut feeling" was generally based upon his observation of Charlot, but he did not include any particularization of his observations. Reviewing the transcript in light of Miller-El, with particular respect to examination of "all relevant circumstances to raise an inference of purposeful discrimination and the trial judge's expressed duty "to assess the plausibility" of a lawyer's proffered reasons for striking a potential juror "in light of all evidence with a bearing on it", the Louisiana Supreme Court wrote:

> After reviewing the appellate jurisprudence that has addressed "gut feeling" explanations, we agree that although "gut feelings" may factor into the decision to utilize a peremptory challenge, this reason, if taken alone, does not constitute a race-neutral explanation. We find such a reason as "gut feeling" is most ambiguous and inclusive of discriminatory feelings. Such an all inclusive reason falls far short of an articulable reason that enables the trial judge to assess the plausibility of the proffered reasons for striking a potential juror. Whatever is causing the "gut feeling" should be explained for proper evaluation of the proffered reason. Batson made it clear the neutral explanation must be one which is clear.

The Supreme Court concluded that the trial court failed to perform the third step of the Batson/Edmonson analysis and its ruling in favor of the defendant's peremptory challenge to prospective juror Charlot was manifestly erroneous.

It should be noted that a Batson/Edmonson violation is a structural defect which in criminal cases requires reversal and remand; however, in civil cases, the courts of appeal and the Louisiana Supreme Court have the authority to decline remand and conduct trial de novo. In this case, the Supreme Court remanded the case for (a fourth) trial.

It should be noted that this was a split decision with Justice Victory dissenting and Justices Johnson, Traylor and Weimer concurring in part and dissenting in part.

This following case was reversed by the United States Supreme Court on March 19, 2008 (see page 22) The Louisiana Supreme Court opinion is analyzed for background.

2. State v. Allen Snyder, 98-1078 (La. 9/6/06) 942 So.2d 484. Jefferson Parish, Judge Kernan A. Hand.

This case has a lengthy – and embarrassing history:

The defendant was convicted of first degree murder and sentenced to death. On direct appeal, the La. Supreme Court affirmed defendant's conviction and sentence. See State v. Snyder, 98-1078 (La. 4/14/99) 750 So.2d 832. The United States Supreme Court remanded the case back to the Louisiana Supreme Court directing that it again review the defendant's Batson claims in light of Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (Miller-El II). See Snyder v. Louisiana, 545 U.S. 1137, 125 S. Ct. 2956, 162 L.Ed. 2d 884 (2005). Finally, see U.S. Supreme Court ruling 128 S.Ct. 1203 (2008) which reversed the 2006 Louisiana Supreme Court opinion.

The defendant is black. He was tried by an all-white jury, which found him guilty as charged and rendered the death penalty. Fourteen (14%) percent of the qualified jury pool were black (those who survived cause challenges). The State used five (5) of its peremptory challenges to strike 100% of the black prospective jurors.

In addition to the discussion by the U.S. Supreme Court (see pages 22-25), one particularly problematic aspect in this case which ultimately became a factor in connection with the Miller-El-II analysis concerned a pretrial motion and hearing to determine whether the State would be permitted to introduce at trial evidence of five (5) incidents of domestic violence allegedly committed by defendant against his estranged wife to show defendant's motive and intent. Apparently, during this pretrial hearing the prosecutor made reference to the O.J. Simpson case "where this very thing happened" to illustrate the relevance of such incidents. The judge ruled that evidence of the other crimes would be admissible at trial. Thereafter, defense counsel filed a motion in limine specifically requesting the State be precluded at trial from referring to or making comparisons with O. J. Simpson or his trial, as such references would serve no purpose other than to confuse and prejudice the jury. The prosecutor responded:

> I think [the defense motion is] premature…I can assure the Court that I'm not going to get up in opening voir dire and say [that] "we're here for the Jefferson Parish O.J. Simpson…case." I have not intentions of doing that. I have no-perhaps in argument, I don't know.
>
> I have given the Court my word that I will not, at any time during the course of the taking of evidence or before the jury in this case, mention the O.J. Simpson case…I just ask [the court] not to grant this motion.

After the hearing, the trial court denied defendant's motion based on the prosecutor's representations.

Voir dire examination began against this backdrop; and, the prosecutor, at least arguably, broke his word inasmuch as he did make an indirect reference to O. J. Simpson during his rebuttal argument at the penalty phase of the trial.

The portion of the States' rebuttal argument that the defendant now complains about was in direct response to the above quoted argument. Specifically, the prosecutor stated:

> It's been very clear, and this is the last thing I'm going to say about Allen Snyder, that the kind of person he is, as Mr. Olinde described him in his opening statement, he's egocentric, and he has shown no remorse. More than that, as he stabbed his wife 15 times, put her through what Dr. Harkness described as a near-death experience, as she lay there gushing blood, as Mary Snyder sat in that seat right there, he left her there. He left her there to die. And when Detective Labat took the statement from him 12 hours later,…not a word at any time where you would have heard him, how's my wife? Is she okay? Not a word. Is that because he's depressed or because he's got a far deeper problem?
> Brief mention. Mr. Vasque tried to describe this man as being the man who-And it was 12 hours later when he called the Kenner Police Department, huddled up, claiming that he was suicidal, barricaded himself in the house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of.

At this point in the rebuttal argument, defense counsel voiced an objection, and both counsel approached the bench. The prosecutor argued the reference to the O.J. Simpson case was fair based on the similarities between what Snyder did and what Simpson did, specifically pretending to be suicidal. The trial court overruled the defense objection.

> The most famous murder case…happened in California very, very, very similar to this case. The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, he got away with it. Ladies and Gentlemen, is it outside the realm of possibility that that's not what that man was thinking about when he called in and claimed that he was going to kill himself?

The trial judge overruled the defense objection. The Supreme Court concluded that the remark should be considered in context; specifically, the statement during the motion in limine hearing referred to the fact that the Simpson trial involved alleged domestic violence; the remark during rebuttal referred to the fact that Simpson feigned suicidal intent. Neither remark referred to Simpson's or Snyder's race.

Even though the La. Supreme Court found no indication that race was the underlying reason for backstriking Brooks, the court then examined the record for "all relevant circumstances" and "all evidence with a bearing" on the Batson issue – which led to the Brooks backstrike challenge by the state. The court then examined and analyzed the O.J. Simpson references and, with particular regard to the context of the rebuttal prosecution argument concluded that there was no evidence in the record to substantiate defendant's claim of discriminatory use of peremptory challenges. The majority [Justices Weimer, Victory, Traylor and Sexton (Pro Tempore for Justice Knoll, recused)] affirmed the conviction and sentence:

> We conclude defendant did not carry his ultimate burden of persuasion that the State exercised peremptory challenges in a purposefully discriminatory manner. We reiterate that Snyder's 'proof, when weighted against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent'.

Justices Kimball, Calogero, and Johnson issued dissents. Obviously, the dissenting justices were vindicated by the 2008 pronouncement by the U.S. Supreme Court. Specifically, Justice Kimball wrote a scathing dissent concluding that the vigorous analysis mandated by Miller-El II leads to the conclusion that the state exercised peremptory challenges in a purposely discriminatory manner and she further chastised the trial judge for not being engaged in the voir dire and declining to supply any reasons for his denial of the Batson objection as to Mr. Brooks.

> Considering this injection of racial issues, and the fact that the prejudicial arguments were made to an all-white jury, I believe it is only reasonable to conclude that Mr. Brooks was peremptorily challenged by the State on the basis of his race when the entirety of the facts is considered. **This is especially true in light of the fact that the trial court did not articulate its reasons for overruling the Batson challenge. While one may infer that the trial court found the State's reasons credible, this court, on appellate review, is not privy to the reasons for this credibility determination. One simply cannot tell whether it was something in the demeanor of the prosecution or in the behavior or attitude of Mr. Brooks that caused the trial court to believe the state's race neutral reasons were not pretextual.**
>
> * * *
>
> **Without the independent assessment from the trial court** verifying the accuracy of the State's generalized and conclusory characterization, the record contains no objective support for the State's demeanor-based justification. **In the absence of the trial court's independent and particularized assessment of Mr. Brook's demeanor, a reviewing court can only look to the record, which seems to indicate a lack of nervousness and**

> **uncertainty on the part of Mr. Brooks.** Consequently, the State's proffered race-neutral reasons for striking Mr. Brooks are called into question.
>
> * * *

With regard to the problematic O.J. Simpson reference, Justice Kimball wrote:

> Miller-El II directs that appellate courts cumulate all relevant items tending to point to purposeful discrimination and view them together when considering whether the trial court's determination of the existence of purposeful discrimination is clearly erroneous. The record shows that issues of racial prejudice existed at the outset of this case when defendant attempted to foreclose the possibility of the State mentioning the O.J. Simpson trial during his own trial. Defendant was tried by an all-white jury after the State used five of its peremptory strikes to challenge 100 percent of the eligible African-American panelists. In the absence of the trial court's independent and objective assessment on the record of Mr. Brooks's demeanor and attitude, the record tends to belie the prosecutor's stated race-neutral reasons for striking him. Rather than seeming uncertain and nervous, Mr. Brooks appears from a reading of the cold transcript to be engaged, forthcoming and communicative. Additionally, although the State offered the fact that Mr. Brooks might want to manipulate his deliberation to cut the trial short because of his stated concerns about missing his student teacher duties as a raceneutral reason for its strike, the State did not ask Mr. Brooks one question regarding this concern. Moreover, the State accepted without question on the issue at least two panelists who voiced similar concerns and might conceivably have the same motivation for cutting the trial short. Finally, we noted that the State injected race into the proceedings directly when it did, in fact, mention the O.J. Simpson case during its penalty phase argument over the defendant's objection.
>
> When viewed in isolation, perhaps none of the factors above would constitute enough evidence to overturn the trial court's determination in light of the great deference afforded its factual determinations. However, the totality of the evidence discussed herein, **combined with the lack of the trial court's active participation in voir dire and its failure to articulate particularized reasons for its determination that the State's proffered reasons were not pretextual, leads to the conclusion that the trial court's decision to allow the strike of Mr. Brooks**

> **was clearly erroneous.** In my view, the cumulative evidence of pretext is compelling and too powerful to conclude anything but intentional racial discrimination motivated the State's strike of Mr. Brook. Consequentially, I would reverse defendant's conviction and sentence.
>
> **EMPHASIS SUPPLIED**

In her dissent, Justice Johnson wrote:

> I would have more confidence in the fairmindedness of this jury and the jury's pronouncement of the death sentence, had the state not used its peremptory challenges to exclude every African American juror, resulting in an all white jury for this black defendant. In my view, this violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 90 l.Ed.2d69 (1986), coupled with the prosecutor's inflammatory and prejudicial comparison of this case to the O. J. Simpson trial, require that we set aside the death sentence and remand the case for resentencing * * *
> The prosecutor's discriminatory intent in excluding all African-Americans from the jury was evidenced by his reference to the O. J. Simpson trial during closing arguments.

3. State of Louisiana v. Coleman, 2006-0518 (LA. 11/2/07), 970 So.2d 511

Defendant was tried in February 2005 for the 2003 murder of retired minister Julian Brandon during a home invasion robbery. He was convicted and sentenced to death. During jury selection, the defendant had raised a Batson challenge that was denied by the trial court. The Louisiana Supreme Court examined that sole issue in addressing the conviction.

During jury selection, the defense raised a Batson challenge arguing that the prosecution has exercised six of its eight peremptory challenges at that point on African Americans. The prosecutor noted that the defendant had not offered sufficient grounds for a prima facie case of discrimination, but proceeded to offer an explanation of each strike.

The trial judge found that the defendant had failed to make a prima facie showing of discrimination, and further noted that this obviated the need to address the proffered race-neutral reasons. Nonetheless, trial court ruled further that the prosecution had offered adequate race-neutral reasons for each peremptory challenge.

Noting the rule set forth in Hernandez v. New York, 500 U.S. 352, 358-59, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), the Court found that the offering and examination of race-neutral reasons obviates the need for review of the prima facie case. The Supreme Court then focused its review on the discussion of one particular African-American male juror, Mason Miller.

In justifying his exercise of a back strike peremptory challenge on Mr. Miller, the prosecutor explained as follows:

> The State did that because it needed to check information concerning Mr. Miller based on his employment. He advised he was a captain with the fire department in Bossier City. **Mr. Miller has filed a lawsuit against the city alleging institutional discrimination. Defense counsel voir dired on the race issue.**[3] **There is a black defendant in this case. There are white victims.** He said if he was 100 percent on the evidence, the death penalty was okay. With his body language, the State believes he is way past where he self-described himself [regarding his views on the death penalty] (emphasis in original).
> State v. Coleman, 2006-0518 (La. 11/2/07, 5); 970 So.2d 511, 514

The trial court accepted the offered reason as sufficient. Then Justice Johnson, writing for the majority, subjected the explanation to close scrutiny.

The first portion of the prosecutor's reason, the involvement in a lawsuit in a neighboring parish, she rejected due to the failure to develop how this might bear on the juror's impartiality.

> However, in this case, there was no attempt by the State to explain how bias might operate from the mere existence of this lawsuit. Miller was never questioned about the impact the lawsuit would have on his ability to serve as a juror.
>
> State v. Coleman, 2006-0518 (La. 11/2/07, 6); 970 So.2d 511, 515

The Court then examined the prosecutor's next statement.

> Moreover, the prosecutor's very next statement following the mention of the "institutional discrimination" lawsuit interjected the issue of race, undercutting the acceptable "ongoing litigation" explanation and suggesting that the reasons for striking Miller were in fact race-related. The prosecutor stated: "Defense counsel voir dired on the race issue. There is a black defendant in this case. There are white victims." The prosecutor's statement explicitly places race at issue, without any attempt to explain or justify why race might be a relevant consideration in this instance.
>
> State v. Coleman, 2006-0518 (La. 11/2/07, 6); 970 So.2d 511, 515

The Court then turned to the prosecutor's description of the prospective juror's body language when discussing attitudes towards the death penalty. While acknowledging that body language by itself can be a legitimate race-neutral reason, the Court found that the interjection of race as an issue created a problem for that explanation.

> …this explanation for striking Miller, when examined in the context of the State's previous overt reference to race, cannot compensate for the specific racial

reference. **Once an inappropriate explanation invoking racial considerations is made, a subsequent, valid reason for exercising the peremptory challenge cannot purge the racial taint. (emphasis added)**… By specifically referencing the race of the defendant and the victim, the prosecutor clearly and unmistakably indicated that the decision to strike Miller was motivated by this prospective juror's race.

State v. Coleman, 2006-0518 (La. 11/2/07, 7); 970 So.2d 511, 515-16

It bears noting that rehearing was denied in the matter, 4-3. The prosecution urged that the litigation Miller was involved in was hotly contested and had received extensive media coverage in the local press, and that therefore all litigants in the criminal case were well aware of the inflammatory nature of the accusations in Miller's civil case. However, that was not made part of the record by anyone at the time the objection was made and ruled upon.

4. State of Louisiana v. Jacobs, 2009-1304 (La. 4/5/10) 32 So.3d 227

By way of background, in 1998, defendant, Lawrence Jacobs, Jr., was convicted of first degree murder and sentenced to death. On direct appeal, the Louisiana Supreme Court reversed defendant's conviction and sentence and remanded the case for a new trial.

In Jacobs I, the Louisiana Supreme Court reversed defendant's conviction because of the trial judge's erroneous denial of two of defendant's challenges for cause. The supreme court described the denial of cause challenges as "the most blatant grounds" for reversal, but also noted serious questions regarding potential Batson violations and reminded the trial court "of its unique and integral role in the dynamics of voir dire and [cautioned] it to be especially sensitive to the alleged racially discriminatory use of peremptory challenges". The Supreme Court reiterated the importance of the trial judge's role when Batson challenges are made:

> The issue of purposeful racial discrimination in the use of peremptory challenges is a matter of utmost seriousness affecting not only the trial itself, but the perceived fairness of the judicial system as a whole. The trial judge observes first-hand the demeanor of the attorneys and venirepersons, the nuances of questions asked, the racial composition of the venire, and the general atmosphere of the voir dire that simply cannot be replicated from a cold record.

Chief Justice Kimball, writing for the court, admonished the trial judge to "properly address Batson challenges when made, by ruling on whether a prima facie case of discriminatory intent has been made or by requiring race-neutral reasons for the strikes." In closing, Justice Kimball reiterated that "[i]t is essential that the trial judge not only control the proceedings, but that he guide the attorneys through the necessary steps involved in a Batson challenge, in order to ensure the integrity and fairness of jury selection process".

In 2005 the DA amended charges to second degree murder and in 2006 the second trial resulted in a unanimous guilty verdict. The State Fifth Circuit reversed and remanded for a third trial, citing the prosecution's discriminatory use of peremptory challenges.

The DA used 7 of 8 peremptory challenges to strike 6 black prospective jurors and one Hispanic prospective juror. In its review of the voir dire transcript, the State Fifth Circuit found (1) evidence of the DA's disparate questioning of black and white jurors; (2) evidence of the prosecutor's failure to conduct meaningful voir dire on matters of alleged concern and that formed the basis for its peremptory strikes; and (3) evidence of the prosecution's failure to strike white jurors who offered similar responses. The appellate court reversed the conviction and remanded for new trial. See State v. Jacobs, 07-887, 13 So.3d 677 (La. App. 5 Cir. 5/12/09).

In reversing the 5th Circuit Court of Appeal the Louisiana Supreme Court noted:

(1) the prosecutor's reason for excusing Hughes, that people kept on juries when they did not want to serve would prejudice the State, was a race neutral reason;
(2) the failure of the DA to ask these two prospective jurors about medical conditions was insignificant as he did not ask any prospective juror about medical conditions;
(3) for disparity of treatment to be present the medical conditions must be similar. These are dissimilar – diabetes is manageable whereas a muscular problem (such as Hughes' problem) is perhaps not;
(4) The DA's reason for excusing prospective juror Florence – that she had been victim of crime – was race neutral;
(5) Under the 2010 U.S. Supreme Court case, **Thaler v. Haynes**, the trial court's failure to comment on the prosecutor's demeanor-based reason (that another juror appeared to be sleeping) did not mean the peremptory challenge should automatically be rejected; and
(6) the appellate court's finding of disparate questioning (two panels with nonwhite prospective jurors, the defense claimed the prosecutor asked if the panel members knew anyone in jail but did not pose that question to panels with only white prospective jurors) is not supported by a close reading and analysis of the record.

It should be noted that Justice Weimer would have ordered the case docketed and argued. Justice Johnson dissented (as she did in **State v. Snyder**, later reversed by U.S. Supreme Court), stating:

> When a court is faced, as here, with statistical evidence that a prosecutor has used peremptory strikes to exclude 100% of the minorities from the jury, and there is evidence in the record of disparate treatment of similarly situated white and black prospective jurors, we need not accept any proffered race-neutral reasons that emphasize demeanor, (nervousness, inattentiveness, etc.). The prosecutor's discriminatory intent is evident from the record.

5. State of Louisiana v. Dorsey, 2010-0216 (La. 9/7/11), 74 So.2d 603.

In 2009, Felton Dejuan Dorsey was tried, convicted, and sentenced to death for the 2006 home invasion murder of retired fire captain Joe Prock in the First Judicial District, Caddo Parish. On direct appeal to the Louisiana Supreme Court, the defendant alleged that the district court, Judge John Mosley, had erred in his rulings on a Batson

challenge raised during jury selection. Specifically, after the challenge was raised by defense counsel, the trial court initially ordered the prosecutor to provide race neutral reasons. However, after the prosecutor made additional argument regarding the alleged prima facie case, the trial court reconsidered, withdrew the order to give reasons, and denied the challenge. The discussion by the Louisiana Supreme Court offers guidance on the first step of the Batson analysis and how courts can evaluate whether or not a *prima facie* case exists.

In examining the question of how courts should determine whether a prima facie case of discriminatory intent has been made, the Court first noted that Batson and its progeny indicate that the higher courts should

> rely upon experienced trial judges to decide whether the circumstances surrounding the prosecutor's use of peremptory challenges creates a prima facie case of discrimination. *Batson,* 476 U.S. at 97, 106 S.Ct. at 1723; *Duncan,* 99–2615 at 13, 802 So.2d at 545. Because the trial judge's findings in this context will largely turn on evaluations of credibility, a reviewing court ordinarily should give those findings great deference. 476 U.S. at 98, n. 21, 106 S.Ct. at 1724.
>
> State v. Dorsey, 2010-0216 (La. 9/7/11, 12); 74 So.3d 603, 616
>
> The Court then went on to note that the Louisiana Supreme Court has provided more particular guidance by enumerating several other factors the trial judge may consider. Such facts include, but are not limited to, a pattern of strikes by the prosecutor against members of a suspect class, statements or actions by the prosecutor that indicate the peremptory strikes were motivated by impermissible considerations, the composition of the venire and of the jury finally empaneled, and any other disparate impact upon the suspect class which is alleged to be the victim of purposeful discrimination. *Id.* (citing *State v. Collier,* 553 So.2d 815 (La.1989); *State v. Thompson,* 516
> So.2d 349 (La.1987), *cert. denied,* 488 U.S. 871, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988)). This Court has also taken into consideration whether the nature of the case presented overt racial overtones, the timing of the defendant's objection, and whether the trial judge thought the issue of purposeful discrimination was "very close." *State v. Draughn,* 05–1825, pp. 26–27 (La.1/17/07); 950 So.2d 583, 603–04.
>
> State v. Dorsey, 2010-0216 (La. 9/7/11, 13); 74 So.3d 603, 616

The Court noted that while the defense correctly pointed out that while the bare statistics supported the possible existence of a "pattern of strikes", such a pattern is only one factor. The Court noted, as it had in the past in State v. Duncan, 1999-2615 (La. 10/16/01); 802 So.2d 533, that the voir dire examination itself is an "equally significant" example of a consideration.

In Dorsey, the Court reviewed the voir dire transcript. The prosecution had asked each of the prospective jurors to rate themselves numerically regarding their views on the death penalty, and argued that all of their strike were exercised against jurors who disfavored the death penalty but were not subject to challenge for cause. After a careful review of the questioning, the Court noted

> In the present case, defendant does not cite, nor do we discern from the prosecutor's statements, questions, or comments during voir dire any inference the state exercised its peremptory challenges based on race. After reviewing the record, it is clear the state posed the same questions in the same manner to all prospective jurors, regardless of race.
>
> State v. Dorsey, 2010-0216 (La. 9/7/11, 16); 74 So.3d 603, 618

It bears remembering that all of these arguments were made regarding the existence of a prima facie case of purposeful discrimination and did not represent review of any rulings on race-neutral reasons. The Supreme Court did find race-neutral reasons manifest on the record as it examined the colloquy with each juror excused, but ultimately found that the prosecution's explanation of an alternate basis for the ***pattern*** of strikes defeated any inference of purposeful discrimination and precluded the establishment of a prima facie case. The Supreme Court also noted that the state was entitled to litigate the prima facie inquiry fully before providing its race-neutral reasons.

The Court finally noted that while the case in Dorsey did involve racial overtones, the other factors weighed against a prima facie case. The prosecutors declined to exercise peremptory strikes against black prospective jurors despite having strikes remaining to do so, and the defense raised its objection after the state had exercised 11 strikes. The court found that on the totality of those circumstances and with deference to the trial court, the defendant failed to establish a prima facie case.

6. **State v. Nelson, 2010-1724 (La. 3/13/12); 85 So.3d 21**

In Nelson/Goldman, Nelson and Goldman were co-defendants convicted of illegal use of weapons and several robbery charges. At trial, each defendant was represented by a separate attorney. The defense attorneys were allowed to confer before the simultaneous exercise of peremptory challenges to prevent duplication. After three panels of voir dire, defense counsel had excused 17 white prospective jurors and only one black prospective juror. The prosecution made a reverse-Batson challenge, alleging that the cooperative use of the strikes and the number of whites versus black excused constituted a prima facie case of discriminatory intent. Over defendants' objections, the trial court indicated that it was treating the defendants together as an entity. The trial court ultimately found after the presentation of race-neutral reasons that 9 of the challenges were exercised in violation of Batson, The trial court noted that

> The sheer numerical analysis not only makes out a prima facie case, but a compelling case. And the race neutral explanations offered do nothing to—do very little to push back on the compelling case.
>
> State v. Nelson, 2010-1724 (La. 3/13/12, 4-5); 85 So.3d 21, 26.

The court's remedy was to reseat all prospective jurors for whom the race-neutral reasons were rejected, to consider the peremptory challenges exercised by the defendants as to those jurors as waived, and to prohibit either side from exercising peremptory challenges against those jurors. The Second Circuit Court of Appeal affirmed.

The Louisiana Supreme Court declined to examine the prima facie case step of the inquiry, noting that since race-neutral reasons had been offered it was moot. Turning to the second step of the inquiry, the Court noted that in offering race-neutral reasons, "the burden in step two is merely one of production, not one of persuasion." State v. Nelson, 2010-1724 (La. 3/13/12, 15); 85 So.3d 21, 32. Only at step three of the inquiry does the inquiry focus on the persuasiveness or plausibility of the reason, not at step two.

The Supreme Court found that

> After reviewing the record, it is clear the trial court merged the steps of the *Batson* analysis which improperly shifted the burden of proof to defense counsel—the proponent of the strike. The record unquestionably demonstrates the trial court never made a finding that the race neutral reasons offered by defendants were pretextual. Although none of the proffered reasons appears to inherently violate equal protection, the court nonetheless rejected nine of them for no specific reason. In rejecting defendants' proffered race-neutral reasons, the trial court reasoned that defendants failed to rebut the State's prima facie case of discrimination, essentially finding the defendants' reasons not persuasive enough. The court erred in putting the burden of persuasion on the defendants… Batson makes clear that the burden is on the opponent of the strike to show purposeful discrimination.
>
> State v. Nelson, 2010-1724 (La. 3/13/12, 16); 85 So.3d 21, 32-33

After reversing the findings that defense counsel had violated Batson, the Supreme Court went on to address the propriety of the trial court's remedy. The Court endorsed the reseating of improperly challenged jurors as set forth by La. C.Cr.P. Art. 795. The Court then examined the propriety of deeming the improper strikes as forfeit.

> After considering the authority given to the trial court pursuant to Article 795 and reviewing relevant national jurisprudence, we hold that forfeiture is a permissible remedy within the discretion of the trial court, and consistent with *Batson* and its progeny. In *People v. Luciano,* 10 N.Y.3d 499, 860 N.Y.S.2d 452, 890 N.E.2d

214 (N.Y.2008), the court implied that requiring a litigant to forfeit improperly exercised challenges is "consistent with the *Batson* inquiry" and within the district court's "broad discretion" when necessary to punish sufficiently egregious misconduct.

State v. Nelson, 2010-1724 (La. 3/13/12, 21); 85 So.3d 21, 36

Chief Justice Johnson, writing for the Court, then turned to the propriety of prohibiting anyone from exercising peremptory challenges against the reseated jurors. The Court found that

Because Batson requires a finding of "purposeful discrimination," it necessarily requires an individualized determination of the motivation and intent of the particular party exercising the peremptory strike.

State v. Nelson, 2010-1724 (La. 3/13/12, 24); 85 So.3d 21, 38.

Because the trial court was treating the two defense attorneys as one entity, the remedy was deemed to be improper, in that each lawyer could exercise challenges on those jurors excused by the other. It bears noting that Justices Victory and Guidry, while concurring in the result regarding the Batson finding, wrote separately to point out that any discussion of the remedies was moot based on the reversal, and that the finding were therefore dicta.

7. **State v. Bender, 2013-1794 (La. 9/3/14), 152 So.3d 126.**

In Bender, the Louisiana Supreme Court reversed a Fourth Circuit Court of Appeal rule, the "Knighten rule." The Knighten rule required that the prosecutor [who] uses prior arrest records as a purported race-neutral reason in response to a *Batson* claim ... [to] provide the defense attorney with evidence of those records, if the defense attorney requests further proof of the prior arrest, and that the arrest records be furnished to the trial judge and be put on the record." 609 So.2d at 957.

State v. Bender, 2013-1794 (La. 9/3/14, 5); 152 So.3d 126, 130

The Supreme Court expressly overturned this rule, finding that forcing the prosecutor to tender the arrest records impermissibly shifted the burden of proof to the party exercising the challenge, rather than the party raising a Batson claim.

8. **State v. Williams, 16-1952 (La. 11/13/17), — So.3d — (per curiam).**

Background: The defendant, Jabari Williams, was convicted of second-degree murder and sentenced to life imprisonment. His conviction was affirmed by the Court of Appeal, and the LASC denied his application for supervisory writ. In *Williams v. Louisiana*, 579 U.S. --, 136 S.Ct. 2156 (2016), the United States Supreme Court granted D's petition for

a writ of certiorari, vacated the Court of Appeal's judgment, and remanded the case for further consideration in light of *Foster v. Chatman*, 578 U.S. --, 136 S.Ct. 1737 (2016).

During jury selection in D's trial, the parties questioned potential jurors across two panels and, following the voir dire of each panel, exercised cause and peremptory challenges. The state exercised 11 challenges (6 in the first panel, 5 in the second), all against African Americans. As to the first panel, the trial court found the prosecutor provided race-neutral reasons for each of the six jurors. In the second panel, the trial court found a prima facie showing as to two of the jurors, but not the other three, because, apparently, it considered the race neutral reasons obvious for those jurors.

The Court of Appeal again affirmed the defendant's conviction and sentence, finding "no error" in the district court's finding that the defendant "failed to make a prima facie case that the State exercised its peremptory challenges to strike the Challenged Three Jurors on the basis of race."

LASC Decision: This Court granted D's writ, remanding to the trial court to determine whether the defendant made a prima facie showing of racial discrimination as to all five individuals on the second panel. The Court noted that the record below "hinders our ability to discern a clearly defined three-step *Batson* analysis." Specifically, the Court stated: "[W]e remind the trial court that La.C.Cr.P. art. 795(C), to the extent it affords a court discretion to forego demanding race-neutral reasons from the state after it has found a prima facie showing of discrimination, does not comport with the Supreme Court's *Batson* jurisprudence."

9. **State v. Crawford, 14-2153 (La. 11/16/16), 218 So. 3d 13.**

Background: The State exercised seven peremptory challenges, five of African Americans. During jury selection, D urged that there is "a prima facie case for a Batson violation" and requested the trial court require the State to state race neutral reasons for its peremptory challenges. In response, the trial court stated, "for the record its finding in there's been a prima facie showing" by defendant of a Batson violation. The trial court then went through each of the state's peremptory challenges, articulating reasons for the state's strikes. Subsequently, the trial court concluded "there is no prima facie showing at all as to systematic exclusion on the basis of race by the State's exercise of its peremptory challenges," that is, no Batson violation occurred.

LASC Decision: The trial court's statement indicated that D made a prima facie showing. *Batson* then requires the state articulate race-neutral reasons. In this case, the trial court proceeded to offer reasons why the state exercised all seven of its peremptory challenges, rather than requiring the state to do so as requested by defense counsel. The Court held that the trial court "conflated the three steps" of *Batson*. Importantly, the Court noted that the first two steps of *Batson* may be combined when a party automatically offers race-neutral reasons in response to a *Batson* challenge. However, a "distinct" third step of weighing the proof and the race-neutral reasons is "critical." In sum, "without consistently identifying

for itself whether or not a *prima facie* case had been established at step one, and without ascertaining the prosecution's actual reasons at step two, the trial court provided insufficient assurance that, when it came to step three, the court had framed the issue such that it could sufficiently evaluate the weight and credibility to be given to the racially-neutral explanations." (internal citations omitted).

The defendant's conviction and sentence was vacated, and the matter was remanded for a new trial.

III. MISCELLANEOUS

1. **United States v. Harding, 864 F.3d 961 (8th Cir. 7/28/17):** The federal appellate court reiterated this July that any claim regarding *Batson* step one is moot once everyone moves on to steps two and three.

2. **Wilson v. Vannoy – Fed. Appx. --, 2017 WL 3978445 (5th Cir. 9/8/17).**

Background: D was convicted of first-degree murder and appealed the state court's ruling on racial discrimination in jury selection.

5th Circuit Decision: The court ultimately held that the state appellate court's decision "was neither an unreasonable application of clearly established federal law as determined by the Supreme Court nor an unreasonable determination of the facts." However, the court noted that the trial court's decision was "confusing" and "alternately seemed to find pretextual reasons for strikes by both the prosecutor and the defense counsel while at the same time denying any relief."

Johnnie Cochran on Jury Composition

> Many white people do not understand African Americans' distrust of the justice system, especially about all-white juries. What do you think would happen if the shoe were on the other foot? What would white folks think if white defendants, their sons, their fathers, their brothers were tried by all-black juries and black prosecutors, given the issue of race relations in America? Would they have confidence that a fair and just proceeding would take place? Of course they wouldn't. (Johnnie Cochran made this statement in a speech delivered at an event held on March 31, 2003, at Evergreen Baptist Church with more than 800 in attendance).

To Kill a Mockingbird, by Harper Lee

> The one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow…

Justice Scott J. Crichton
Associate Justice

Scott Crichton is serving his third year as Associate Justice of the Supreme Court of Louisiana, having qualified without opposition on August 22, 2014. His ten-year term began January 1, 2015.

Prior to his election to the Supreme Court, Scott served 24 years as a judge with the First Judicial District Court (Shreveport/Caddo Parish), presiding over 25,000 cases in both the civil and criminal divisions. By order of the Louisiana Supreme Court, Scott previously served one cycle as a judge *pro tempore* for the First Circuit Court of Appeal.

Scott is co-chair of the Louisiana Judicial College; he serves on the Supreme Court Committee on Judicial Ethics and is a frequent lecturer throughout the state on Ethics.

Scott is a past president of the Louisiana District Judges Association; a past member of the Advisory Committee to the Supreme Court on Revision of the Judicial Canons, the Louisiana Judicial College Board of Governors, the Court Rules Committee (Rules for Louisiana District Courts and Juvenile Courts, appendices and Numbering Systems for Louisiana Family and Domestic Relations Procedures), and the Criminal Best Practices Committee. He has served numerous terms as chair or co-chair of the Shreveport Bar Association Continuing Legal Education and has served on the CLE Committee of the Louisiana State Bar Association. Scott is certified by the National Judicial College in program design and has taught over one hundred CLE hours to lawyers and judges. He is also a graduate of the inaugural class of the Louisiana Judicial Leadership Institute. Since 2007, Scott has presented a PowerPoint teen consequences program, "Don't Let This Be You", to more than 20,000 teenagers/parents at various high schools, churches and community groups; he has also presented "Sexting, Texting and Beyond", for teenagers, parents, and teachers on electronic laws and related misbehavior.

Having grown up in Minden, Scott completed North Carolina Outward Bound School (1971); graduated from The Webb School in Bell Buckle, Tennessee (1972); Louisiana State University in Baton Rouge (Bachelor of Science, 1976); and Paul M. Hebert LSU Law Center (Juris Doctor, 1980). During the 1980s, he served as an assistant district attorney for Caddo Parish, maintained a civil practice, and served as an adjunct instructor of Business Law at LSU-Shreveport.

Scott is a member of St. Mark's Episcopal Church in Shreveport, where he served a three-year term on the vestry; he was recently appointed to the Board of Trustees of The Webb School and inducted into its Distinguished Alumni Society. Finally – and importantly - he proudly serves as "quarterly co-host" of a popular Sunday morning Shreveport radio program, "I Am My Faith."

Scott, age 63, and his wife, Susie, now live in Sibley, Webster Parish, and have two adult sons – both of whom are lawyers.

For a full transcript of Justice Crichton's induction ceremony held on Dec. 15, 2014, see Southern Reporter, Vol. 165 So.3d 157 to 165 So.3d 1131 (p. XIX); for a recent interview, see Louisiana Bar Journal, April/May 2017 Vol. 64 No. 6.