Tulsa Law Review

Volume 24 | Number 1

Fall 1988

Batson v. Kentucky: Two Years Later

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NOTES AND COMMENTS

BATSON v. KENTUCKY: TWO YEARS LATER

I. INTRODUCTION

Although a juror may be rejected for cause only on narrow, specific, and legally cognizable grounds, the peremptory challenge has historically allowed the removal of a juror by the defense or prosecution without the removing party having to state a reason for removal and without the removal being subject to inquiry. Though not constitutionally mandated, the peremptory challenge is recognized as one of the most important rights possessed by an accused.[1] The peremptory challenge has also been the subject of judicial scrutiny.

The decision in *Batson v. Kentucky*[2] allows a defendant to establish a prima facie case of purposeful discrimination by reference only to the facts and circumstances of the jury selection in the case in which the defendant is accused. Although the extent to which this decision will effect the jury selection process has not been ascertained, the implications of the decision undoubtedly will be significant. Some have argued that the peremptory challenge is, in effect, crippled by the *Batson* decision, but an even more convincing argument can be made that the value of the peremptory challenge will only be diminished to the extent of its use in a purposefully discriminatory manner.

Since the landmark case of *Strauder v. West Virginia*[3] in 1880, the United States Supreme Court has interpreted the equal protection clause of the United States Constitution[4] as prohibiting the state from discriminating against blacks because of their race in the context of jury selection. *Strauder* involved a state statute which prohibited blacks from serving as jurors.[5]

Swain v. Alabama[6] relied on *Strauder* and expressly held that the

1. Swain v. Alabama, 380 U.S. 202, 219 (1965).
2. 476 U.S. 79 (1986).
3. 100 U.S. 303 (1880).
4. U.S. CONST. amend. XIV, § 1.
5. *Strauder*, 100 U.S. at 305.
6. 380 U.S. 202 (1965).

peremptory challenge was subject to equal protection scrutiny in the context of petit jury selection, but the court set forth a very difficult evidentiary burden. Under the *Swain* rule, the prosecutor's conduct was not reviewable in any one given case but was subject to review only if the defendant could show a pattern of systematic discrimination by the state against members of the defendant's race in numerous cases.[7] Hence, the defendant had to overcome a nearly insurmountable obstacle to prove a violation of the equal protection clause.[8]

The holding in *Batson* created no new rights for the defendant but, instead, provided significantly more adequate protection of existing rights. The decision eased the evidentiary burden for a defendant attempting to establish an equal protection violation by allowing the defendant to make a prima facie showing of purposeful discrimination by pointing only to the prosecutor's discriminatory use of the peremptory challenge in the defendant's case alone.

The *Batson* decision should be a valuable tool in the struggle to eradicate racial discrimination from the jury selection process. Since *Strauder*, the state has been barred from employing racially discriminatory criteria in jury selection. Because the burden of proof for establishing an equal protection violation under *Swain* was so difficult to meet, prosecutors have been largely exempt from scrutiny into their exercise of peremptory challenges. The *Batson* decision will make circumvention of equal protection in the context of jury selection considerably more difficult.

Although over two years have passed since *Batson* was decided, the parameters and contours of the holding are still largely unresolved. Lower courts, struggling in their efforts to implement the decision, are reaching varied interpretations. As lower court cases come up for review, the United States Supreme Court will have the opportunity to particularize some of the *Batson* principles that it declined to address at the time of the decision.

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7. *Id.* at 227.

8. Numerous commentators have criticized *Swain*, largely because of the tremendous burden of proof placed upon a defendant trying to assert an equal protection violation with regard to the use of peremptory challenges by a prosecutor. For a sampling, see Imla, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A.L. REV. 247, 268-70 (1973); Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 282-303 (1968); Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357 (1985); Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L. J. 157 (1967); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetration of the All-White Jury*, 52 VA. L. REV. 1157 (1966).

II. STATEMENT OF THE CASE

A. *Facts*

The petitioner, James Kirkland Batson, was a black man on trial, charged with second degree burglary and receipt of stolen property.[9] After the judge had conducted voir dire examination and had excused some jurors for cause, the prosecutor proceeded to use his peremptory challenges to remove all four blacks on the venire, resulting in a jury that was composed entirely of white persons.[10]

At that point, the defense attorney moved to discharge the jury before it was sworn in, on the ground that the defendant's constitutional rights had been violated.[11] Defense counsel argued that the removal of all blacks denied the defendant equal protection of the law under the fourteenth amendment and denied him the right to a jury drawn from a cross section of the community.[12] The trial judge, commenting that peremptory challenges could be used by either party to "strike anybody they want to," denied the defense attorney's request for a hearing on the motion.[13] He further reasoned that the cross section requirement did not apply to the selection of the petit jury itself, but only to the selection of the venire from which the petit jury is selected.[14] Batson was subsequently convicted by the all-white jury on both counts.[15]

B. *Lower Court Disposition and Reasoning*

In his appeal to the Kentucky Supreme Court, Batson nearly abandoned his fourteenth amendment equal protection challenge and relied heavily on the argument that the trial court ruling violated his sixth amendment right to an impartial jury and to a jury drawn from a cross section of the community.[16] The petitioner apparently thought that arguing that he had suffered an equal protection violation would be of little benefit; that argument had been made in *Swain v. Alabama*,[17] where the

9. Batson v. Kentucky, 476 U.S. 79, 82 (1986).
10. *Id.* at 82-83.
11. *Id.* at 83.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* Only to a limited extent did Batson argue equal protection before the Kentucky State Supreme Court. On appeal to the Kentucky Supreme Court, Batson did contend that the prosecutor had engaged in a "pattern" of discriminatory challenges that established a *Swain* equal protection violation, while at the same time conceding that *Swain* foreclosed such a conclusion within the confines of a single case. *Id.* at 83-84.
17. 380 U.S. 202 (1965).

Court unequivocally held that, while there are limits on the state's exercise of peremptory challenges, a defendant may not establish an equal protection violation by relying on the actions of the prosecutor in any one particular case.[18]

The Supreme Court of Kentucky affirmed the decision of the trial court, basing its holding on *Swain*.[19] The Kentucky court explained that a systematic exclusion of a group of jurors from the venire must be shown by a defendant asserting a lack of a fair cross section.[20]

On appeal to the United States Supreme Court, Batson abandoned his equal protection argument altogether and relied exclusively on the "constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community."[21] Further, during oral argument of the case before the Supreme Court, the Court inquired of the defense attorney whether he was asking for a reconsideration of *Swain* and whether he was making an equal protection claim.[22] Batson replied that an equal protection claim was not being made and that *Swain* need be reevaluated only if the Court were to consider the respondent brief of the state.[23]

Batson also asked that the remedy fashioned by the Court, if it decided in his favor, be modeled after the remedy developed in two state court cases:[24] *People v. Wheeler*[25] and *Commonwealth v. Soares*.[26] Both of these cases were decided pursuant to each state's constitutional provision protecting the right to trial by a jury drawn from a representative cross section of the community. The remedy sought by Batson would permit exploration of a claim that the agent of the state is misusing peremptory challenges within a particular case. If the defendant's prima facie case is not successfully rebutted by the prosecutor, the result is the dismissal of the entire venire, as well as those jurors already selected.[27] If the trial court does not follow proper procedure and a defendant is convicted by a jury selected in an improper way, the conviction is set aside

18. *Id.* at 221-22.
19. *Batson*, 476 U.S. at 84.
20. *Id.*
21. *Id.* at 112 (Burger, C.J., dissenting). *See also id.* at 84 n.4; Brief for Petitioner at 5, Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84-6263).
22. *Batson*, 476 U.S. at 114 (Burger, C.J., dissenting).
23. *Id.* The state asserted that fourteenth amendment equal protection values were at issue, and not the fair cross section issue advanced by Batson. *Id.* at 84 n.4.
24. Brief for Petitioner at 26, Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84-6263).
25. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).
26. 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).
27. *Wheeler*, 22 Cal. 3d at 281-82, 583 P.2d at 765, 148 Cal. Rptr. at 906.

and a new trial granted.[28]

C. *Issue*

Despite Batson's reliance on sixth amendment analysis,[29] the Court reexamined the evidentiary burden of *Swain,* a fourteenth amendment equal protection case.[30] The issue the Court considered to be before it was whether an examination of the use of peremptory challenges in a racially discriminatory manner is reviewable in the context of defendant's own petit jury selection, under the equal protection clause of the fourteenth amendment.[31]

III. PRIOR CASE LAW

A. Strauder v. West Virginia

Strauder v. West Virginia,[32] the landmark case that sought to eradicate purposeful discrimination in the selection of the jury venire, was

28. *Id.* at 283, 583 P.2d at 766, 148 Cal. Rptr. at 907.

29. The *Swain* Court was direct and unequivocally clear in holding that "a defendant may not mount a successful equal protection challenge to the prosecution's racially discriminatory use of its peremptory challenges solely on the basis of the prosecution's acts in a single case." McCray v. Abrams, 750 F.2d 1113, 1124 (2d Cir. 1984). However a number of courts refused to extend the *Swain* holding "to immunize the use of peremptory challenges in each case from judicial scrutiny, regardless of the constitutional provision such inquiry seeks to enforce. . . . The [Supreme] Court, however, did not analyze the entire Constitution in *Swain.* . . . Therefore, *Swain* does not necessarily exempt peremptory challenges from review under the Sixth Amendment." Booker v. Jabe, 775 F.2d 762, 767 (6th Cir. 1985), *vacated sub nom.* Michigan v. Booker, 478 U.S. 1001, *aff'd on rehearing,* 801 F.2d 871 (1986), *cert. denied,* 107 S.Ct. 910 (1987). Using such reasoning, a number of courts distinguished *Swain,* which relied solely upon equal protection analysis, and have relied on either the sixth amendment of the U.S. Constitution or state constitutional provisions to allow the defendant to challenge the prosecutor's peremptory challenges based solely on the jury selection practices in his case. *See Booker, supra; McCray supra;* People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Riley v. State, 496 A.2d 997 (Del. 1985), *cert. denied,* 478 U.S. 1022 (1986); State v. Neil, 457 So. 2d 481 (Fla. 1984); Commonwealth v. Soares, 377 Mass. 461, 387 N.E. 2d 499, *cert. denied,* 444 U.S. 881 (1979); and State v. Crespin, 94 N.M. 486, 612 P.2d 716 (N.M. Ct. App. 1980). Clearly, no defendant has a right to a petit jury of any particular composition. *Batson,* 476 U.S. at 85 (citing Strauder v. West Virginia, 100 U.S. 303, 305 (1880)). However, the courts which have decided to permit defendants to challenge the state's use of peremptory challenges relying on evidence in the defendant's case alone, pursuant to sixth amendment rights, have reasoned that the prosecution must not discriminatorily exercise its challenges in a manner which defeats even the possibility that the petit jury ultimately selected might represent a fair cross section of the community. Other lower courts have interpreted *Swain* to mean that a defendant must prove systematic exclusion of blacks from the petit jury in order to constitute a Constitutional violation. *See* United States v. Childress, 715 F.2d 1313 (8th Cir. 1983) (en banc), *cert. denied,* 464 U.S. 1063 (1984); United States v. Whitfield, 715 F.2d 145 (4th Cir. 1983); United States v. Jenkins, 701 F.2d 850 (10th Cir. 1983).

30. *Batson,* 476 U.S. at 82.

31. *Id.*

32. 100 U.S. 303 (1880).

decided more than one hundred years ago—just twelve years after ratification of the fourteenth amendment to the Constitution of the United States. The *Strauder* Court interpreted the fourteenth amendment as granting not only citizenship and the corresponding privileges of citizenship to all races, but also as denying the states the power to withhold equal protection of the laws from any citizen.[33] Further, the decision stated that Congress has the legislative power to protect any rights created by the Constitution.[34]

Strauder involved a West Virginia law which declared "no colored man" was eligible for grand jury or petit jury service.[35] The Court found that such a law discriminates not only by denying a citizen the right to participate in the administration of justice as a juror, but also compels black defendants to submit to trial before a jury from which every member of his own race has been purposefully excluded on the basis of race alone.[36]

The Court struck down the statute as unconstitutional[37] and held that racial discrimination in jury selection offends the equal protection clause,[38] a holding which has been extended in subsequent cases. While the Court implied that a defendant has no "right to a grand or petit jury composed in whole or in part of persons of his own race or color,"[39] persons of the defendant's race or color may not be excluded from the jury by law solely because of their color.[40] Further, the composition of juries is an essential part of the protection that a trial by jury is intended to secure.[41] Since *Strauder* was decided, the courts have looked beyond the statutes defining juror qualification and have ruled against discriminatory implementation of facially neutral laws.[42] As the Court stated in

33. *Id.* at 309.
34. *Id.* at 310.
35. *Id.* at 304.
36. *Id.* at 308-09.
37. *Id.* at 312.
38. *Id.* at 310.
39. *Id.* at 305.
40. *Id.* at 310.
41. The Court stated that "[t]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine." *Id.* at 308.
42. *See* Sims v. Georgia, 389 U.S. 404, 407-08 (1967); Whitus v. Georgia, 385 U.S. 545, 549-50 (1967); Hernandez v. Texas, 347 U.S. 475, 478-79 (1954); Avery v. Georgia, 345 U.S. 559, 561 (1953); Norris v. Alabama, 294 U.S. 587, 589 (1935); *Ex parte* Virginia, 100 U.S. 339, 346-47 (1880). Although most of the cases have dealt largely with racial discrimination during selection of the venire, the peremptory challenge component of the jury selection process is also subject to the mandates of the equal protection clause. *Batson*, 476 U.S. at 88. The fourteenth amendment protects accused persons throughout the proceedings bringing them to justice. Hill v. Texas, 316 U.S. 400, 406 (1942).

Batson, "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure."[43]

B. Swain v. Alabama

In *Swain v. Alabama*,[44] the Court was squarely confronted with the issue of whether the discretionary use of the peremptory challenge was subject to equal protection scrutiny in the context of petit jury selection.[45] The defendant in *Swain* moved to strike the indictment and the trial jury venire, and to declare the petit jury void based on invidious discrimination in the selection of the jury.[46] The prosecution in *Swain* struck all six blacks from the petit jury with peremptory challenges.[47]

While the Supreme Court refused to hold that there is a constitutional requirement of inquiry into the prosecutor's reasons for the use of peremptory challenges in any single case,[48] it did place limits on the exercise of peremptory challenges.[49] The Court examined the function of the peremptory challenge in a pluralistic society[50] and found that there is a presumption in any given case that the prosecutor is using the peremptory challenge in a proper manner and that the evidence in any particular case is not sufficient to overcome that presumption.[51]

The Court did hold, however, that the *systematic* practice of preventing blacks on petit jury venires from serving on the petit jury was a different issue.[52] The peremptory system is insufficient justification for the systematic practice of invidious discrimination.[53] While the facts in

43. *Batson*, 476 U.S. at 85.

44. 380 U.S. 202 (1965).

45. *Id.* at 203.

46. *Id.*

47. *Id.* at 205.

48. *Id.* at 222.

49. *Id.* at 223-24.

50. *Id.* at 220, 222. The Court delved into the nature of the peremptory challenge and stated that "it is one exercised without . . . being subject to the court's control." *Id.* at 220 (citations omitted). "[T]he peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrated." *Id.* (citing Hayes v. Missouri, 120 U.S. 68, 70 (1887)). "It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." *Swain*, 380 U.S. at 220 (citation omitted). The challenge for cause, on the other hand, allows "rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality." *Id.*

51. *Id.* at 222.

52. *Id.* at 223.

53. *Id.*

an individual case would not be enough to show an equal protection violation, the result would be different if the defendant could prove a systematic pattern of discrimination; therefore, the Court held that blacks may not be "excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial."[54] The Court further stated that a prima facie case of purposeful discrimination might be made if the defendant might show that the peremptory challenge system was being perverted by the systematic removal of blacks, where the removal was not related to acceptable considerations relevant to the case being tried.[55]

The petitioner in *Swain* failed to meet the burden of production established by the Court.[56] Although the fact had been established that there had not been a black on a jury in the defendant's county for fourteen years, the Court said that the defendant's failure to lay the proper predicate by showing "when, how often, and under what circumstances" the prosecutor himself has struck the black jurors was fatal to the petitioner's case.[57]

IV. THE *BATSON* DECISION

A. *Holding*

The Court in *Batson* pointed out that, since *Swain*, Supreme Court decisions have firmly established that a defendant may make a prima facie case of purposeful racial discrimination by relying on the facts concerning the selection of the venire in the defendant's own case.[58] Further, the Court reiterated that even a single act of invidious racial discrimination may violate the equal protection clause;[59] therefore, the Court concluded that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence

54. *Id.* at 224.

55. *Id.* at 223. The Court said that an inference of purposeful discrimination would be raised if it were shown that a prosecutor

> in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries . . . .

Id.

56. *Id.* at 224.

57. *Id.* The Court reasoned that defense counsel also participate in the challenge system, and usually play a greater role in it than does the state. *Id.* at 227. Therefore, the defendant must show particularly the *prosecutor's* participation in the discrimination in order to establish a prima facie case under *Swain*. *Id.*

58. Batson v. Kentucky, 476 U.S. 79, 95 (1986).

59. *Id.*

concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."[60]

Thus, the Court in *Batson* substantially redefined the evidentiary burden placed on criminal defendants claiming an equal protection violation. In rejecting the evidentiary burden of *Swain*, the Court noted the "crippling burden"[61] that was placed on defendants pursuant to the *Swain* formulation, and recognized that under *Swain*, peremptory challenges were "largely immune from constitutional scrutiny."[62]

B. *Prima Facie Case*

The Court announced a three-prong test for determining whether the defendant has established a prima facie case of purposeful discrimination in the selection of the petit jury based solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. First, the defendant must show membership in a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove members of the defendant's own race from the venire.[63] The Court cited *Casteneda v. Partida*,[64] a 1977 Supreme Court case which explained that a race or identifiable group is "one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied."[65]

Second, the defendant may rely on the indisputable fact, that peremptory challenges are a part of the process of jury selection which allows "those to discriminate who are of a mind to discriminate."[66] The very nature of the peremptory challenge is historically exemplified by the lack of judicial control over the use of the prosecutor's peremptory challenge. Such unfettered privilege is conducive to discrimination.[67]

Finally, the burden remains on the defendant alleging discriminatory selection practices to show that the facts and any relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude veniremen from the petit jury because of their race.[68] The

60. *Id.* at 96.
61. *Id.* at 92.
62. *Id.* at 92-93.
63. *Id.* at 96.
64. 430 U.S. 482 (1977).
65. *Id.* at 494.
66. *Batson*, 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
67. *Id.* at 99.
68. *Id.* at 93. The Court directed lower courts to undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

Court stated that "[c]ircumstantial evidence of invidious intent may include proof of disproportionate impact."[69] The defendant may point to a totality of the relevant facts "[to] give[ ] rise to an inference of discriminatory purpose."[70] Discriminatory purpose on the part of the government is what gives an equal protection violation its "invidious quality."[71]

C. *Trial Court Discretion*

The Court pointed out that trial judges, who are experienced in supervising voir dire, will be in the best position to decide if the totality of the facts and circumstances creates a prima facie case of discrimination.[72] To illustrate possible circumstances that may give rise to an inference of discrimination, the Court noted that a pattern of strikes against black jurors might accomplish this.[73] Also, the method in which the prosecutor conducts voir dire examination and exercises challenges might support or refute such an inference.[74]

If the defendant does make a prima facie showing, the burden is shifted to the state to rebut it.[75] The prosecutor must "come forward with a neutral explanation" that indicates that racially neutral selection criteria and procedures have been employed in the removal of the black jurors.[76] For the prosecutor to make a general assertion that there was no discrimination or merely to claim good faith is not sufficient.[77] If this were sufficient to rebut a defendant's prima facie case, the equal protection clause "would be but a vain and illusory requirement."[78] The explanation must relate to the particular case being tried and must be a " 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges."[79]

The trial court has the duty to determine whether the defendant has established purposeful discrimination.[80] Recognizing that the findings of the trial court will turn largely on its evaluations of credibility, the Court

69. *Id.* (citing Washington v. Davis, 426 U.S. 229, 242 (1976)).
70. *Id.* at 93-94. (citing *Davis*, 426 U.S. at 239-42).
71. *Id.* at 93. (quoting *Davis*, 426 U.S. at 240).
72. *Id.* at 97.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* The Court pointed out, however, that the explanation "need not rise to the level justifying exercise of a challenge for cause." *Id.*
77. *Id.* at 98.
78. *Id.* (quoting Norris v. Alabama, 294 U.S. 587, 598 (1935)).
79. *Id.* at 98 n.20 (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).
80. *Id.* at 98.

instructed that reviewing courts should ordinarily give the findings of the trial court "great deference."[81]

D. *Values Served By the Decision*

The Court disagreed with the state's contention that the fair trial values served by peremptory challenges would be diminished by the new standard.[82] While the Court recognized that the peremptory challenge occupies an important role in trial procedure, the reality of discrimination against blacks in the jury selection process necessitates judicial review of their exercise.[83] Public respect for the criminal justice system as a whole will be heightened by enforcing the commands of equal protection and ensuring that no citizens are disqualified from serving on a jury because of their race.[84]

E. *Factual Application*

In *Batson*, the Court found that the defendant had made a timely objection to the prosecutor's removal of all blacks from the jury venire from which his petit jury was being selected.[85] The Court remanded the case to the trial court for a hearing to allow the defendant the opportunity to establish a prima facie case of purposeful discrimination.[86] If a prima facie case is shown, and the prosecution does not come forward with neutral explanations for its action, the defendant's conviction must be reversed.[87]

F. *Undecided Issues*

The Court explicitly refused to detail any particular procedures to be followed by the trial court upon a defendant's timely objection to the challenges.[88] The Court explained that state and federal trial courts would be in the best position to formulate specifically how the *Batson* holding will be implemented.[89] The Court also declined to state whether, in a given case where there is a finding of discrimination against black jurors, a trial court should discharge the entire venire and select a new

81. *Id.* at 98 n.21 (citing Anderson v. Bessemer City, 470 U.S. 564, 575-76 (1985)).
82. *Id.* at 98-99.
83. *Id.*
84. *Id.* at 99.
85. *Id.* at 100.
86. *Id.*
87. *Id.*
88. *Id.* at 99.
89. *Id.* at 99 n.24.

jury from a new venire panel, or should reinstate the improperly challenged jurors on the venire.[90]

A number of issues were expressly left unresolved in *Batson*. The Court stated in a footnote that it expressed "no view on the merits of any of petitioner's Sixth Amendment arguments,"[91] but agreed with the state's contention that *Swain* needed to be reconsidered to find a constitutional violation on the record in *Batson*.[92] Also, the Court left open the issue of whether the Constitution places any limits on the exercise of peremptory challenges by defense counsel.[93] Additionally, the Court declined to express any views on the techniques attorneys might employ when gathering information about the prospective jurors in their cases.[94]

V. SUPREME COURT DECISIONS SINCE *BATSON*

A. Allen v. Hardy

Shortly after the *Batson* decision, the Supreme Court directly addressed one facet of the retroactivity issue left unresolved by *Batson*. In *Allen v. Hardy*,[95] the Court held that the *Batson* holding "should not be applied retroactively on collateral review of convictions that became final before [the *Batson* ruling] was announced."[96] In a footnote, the Court added that it expressed no view on whether *Batson* should be applied to cases that were pending on direct appeal at the time *Batson* was decided.[97]

The Court explained that retroactivity "is appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials."[98] While the Court stated that the discriminatory use of peremptory challenges may have some bearing on the truthfinding function of a trial, the decision served multiple ends besides the accuracy function.[99] The Court therefore concluded that the *Batson* rule did not have "such a fundamental impact" on the accuracy of a trial as to compel retroactive

90. *Id.* at 99.
91. *Id.* at 84 n.4.
92. *Id.*
93. *Id.* at 89 n.12.
94. *Id.*
95. 478 U.S. 255 (1986).
96. *Id.* at 258.
97. *Id.* at 258 n.1.
98. *Id.* at 259. (quoting Solem v. Stumes, 465 U.S. 638, 643 (1984)).
99. *Id.* The *Batson* decision protects citizens against discrimination by the state and enhances public confidence in the criminal justice system. *Id.*

application.[100]

Additionally, the Court found the fact significant that prosecutors, trial judges, and appellate courts had relied on *Swain* for twenty years.[101] This reliance, inherent on the part of law enforcement officials, was deemed "compelling."[102] Further, because of past reliance on *Swain*, many prosecutors would not have kept the kind of records that would let them explain their peremptory challenges as required by *Batson*, should a defendant make a prima facie case.[103] Many retrials would result, which would be significantly hampered due to the passage of time.[104]

B. Rose v. Clark

In *Rose v. Clark*,[105] the Court clarified the point that *Batson* violations are not subject to the harmless error inquiry. No matter how strong the evidence of guilt is, a new trial may be required where the defendant establishes a *Batson* violation, because the criminal justice system protects other important values besides the accuracy of the finding of guilt or innocence.[106]

C. Griffith v. Kentucky

In *Griffith v. Kentucky*,[107] the Court fashioned a new rule and held that a new holding applicable to criminal prosecutions is to be applied retroactively to all cases, state or federal, that are either pending on direct review or not yet final.[108] This decision is particularly significant in light of the *Batson* case, because *Griffith* does away with the "clear break exception."[109]

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100. *Id.*
101. *Id.* at 260
102. *Id.*
103. *Id.*
104. *Id.* Justice Marshall's dissent effectively pointed out the unpersuasiveness of the reliance interest the majority found so significant. *Id.* at 264 (Marshall, J., dissenting). After all, *Swain* made clear that the equal protection clause is violated when prosecutors use their peremptory challenges in a discriminatory manner. *Id. Batson* merely redefines the evidentiary burden on the defendant attempting to show an equal protection violation; therefore, *Batson* more adequately protects existing rights, as opposed to creating new rights. Justice Marshall questioned whether the reliance interest on the part of law enforcement officials is legitimate, if, in fact, it exists at all. Perhaps prosecutors have been relying on the evidentiary standards of *Swain* to insulate themselves from scrutiny. *Id.*
105. 478 U.S. 570 (1986). *Rose v. Clark* is not a *Batson*-type case. However, the case uses the *Batson* violation as an example of when harmless error analysis is *not* appropriate.
106. *Id.* at 587-88 (Stevens, J., concurring). *See also id.* at 588 n.4, which quotes from Allen v. Hardy, 478 U.S. 255 (1986).
107. 479 U.S. 314, 107 S. Ct. 708 (1987).
108. *Id.* at —, 107 S. Ct. at 716.
109. *Id.* The Court recited several reasons for doing away with the clear break exception. The

Under the "clear break exception," a new constitutional rule was not given retroactive application if the new rule was a clear break with the past and overruled a precedent of the Court.[110] The Court, in *Griffith*, termed the decision "an explicit and substantial break with prior precedent."[111] Thus, the holding would seemingly have fit into the "clear break exception" and would not have been given retroactive effect. As a result of the *Griffith* holding, however, *Batson* is to be applied retroactively to all convictions still pending on direct review or not yet final.

The *Griffith* ruling does not modify the *Allen* holding. In *Griffith*, the Court did not alter its prior ruling that *Batson* was not to be given retroactive effect on convictions that had become final before *Batson* was announced.

VI. ANALYSIS

Batson produced a radical change in the evidentiary burden that a defendant must bear in order to establish a prima facie case of discrimination in the prosecutor's use of peremptory challenges. No longer must the defendant investigate the race of people tried in previous cases, and correspondingly investigate those jurors selected and not selected, the composition of the petit jury and venire, and the manner in which the prosecutor used peremptory challenges in those cases. Under *Batson*, a defendant is entitled to rely on the facts of the defendant's particular case when claiming an equal protection violation.

Although *Batson* was a radical change in the law, several issues were explicitly left undecided in the decision, and other issues were framed so vaguely as to provide little coherent guidance for reviewing courts. The *Batson* Court explicitly contemplated that the trial courts and reviewing courts would have much discretion under the new holding, being guided by the fairly general principles and standards announced.[112] In addition to the multitude of questions and inherent difficulties in implementing the guiding principles specifically announced in *Batson*, an even larger

main reason given was that the Court found that the exception treated similarly situated defendants unequally, with inequitable results. *Id.* at —, 107 S. Ct. at 715-16 . For example, under the clear break exception, the defendant whose case was chosen for review would benefit from the new constitutional ruling. If, however, the decision was not to be given retroactive effect, other defendants would be adjudicated under the old rule if their cases had been tried, but the convictions were not final or were pending on direct review.

110. *Id.* at —, 107 S. Ct. at 714.

111. *Id.* at —, 107 S. Ct. at 715. (quoting Allen v. Hardy, 478 U.S. 255, 258 (1986)).

112. Batson v. Kentucky, 476 U.S. 79, 99 (1986).

tension exists: whether *Batson* will be extended outside the equal protection analysis and further affect the peremptory challenge.

This tension is illustrated by the case of *Brown v. North Carolina*,[113] in which the Supreme Court denied certiorari. Although the case involved a death penalty exclusion in the jury selection process, several justices wrote concurring and dissenting opinions to the denial of certiorari, which shape a critical, but as yet unresolved issue.

Justice O'Connor wrote a concurring opinion in which she stated that, at least in her opinion, *Batson* was decided solely on race.[114] She wrote that racial discrimination has a very special relevance in this country, and only in the "uniquely sensitive area of race" is a prosecutor encumbered in the use of peremptory challenges.[115] Outside the area of race, she wrote, a prosecutor may exercise the peremptory challenge in any way, without giving any reason.[116]

Justice Brennan, in his dissenting opinion, which was joined by Justice Marshall, made the point unequivocally clear that, in his opinion, *Batson* has a significance much wider than racial discrimination in violation of the equal protection clause. Instead, the significance of *Batson*, he argued, is that the "broad discretion afforded prosecutors in the exercise of peremptory challenges may not be abused to accomplish *any* unconstitutional end."[117]

Because the application of the racial issue was so straightforward in the *Batson* case, the full significance of this aspect of the holding was unresolved. Batson was black, and the prosecutor had struck all of the black members of the venire. In fact, the *Batson* holding is replete only with reference specifically to the rights of black defendants and black jurors. To apply *Batson* only to blacks, however, would be a strange application of the equal protection clause. As Chief Justice Burger pointed out in his dissenting opinion in *Batson*, the Supreme Court has applied equal protection principles to numerous other identifying factors.[118] The *Batson* majority, however, did not apply the conventional

113. 479 U.S. 940, *denying cert.* to State v. Brown, 345 S.E.2d 393 (N.C. 1986). The case involved the issue of the disqualification of jurors based on their views concerning the death penalty.

114. *Brown*, 479 U.S. at 942 (O'Connor, J., concurring).

115. *Id.*

116. *Id.*

117. *Id.* at 944 (Brennan, J., dissenting).

118. *Batson v. Kentucky*, 476 U.S. 79, at 124 (1986) (Burger, C.J., dissenting). Chief Justice Burger pointed out the following possible applications of equal protection analysis to peremptory challenges: sex, Craig v. Boren, 429 U.S. 190 (1976); age, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); religious or political affiliation, Karcher v. Daggett, 462 U.S. 725, 748 (1983) (Stevens, J., concurring); mental capacity, City of Cleburne v. Cleburne Living Center, 473

equal protection framework to the issue before it. The majority limited the holding to cognizable racial groups and did not employ varying levels of scrutiny based on the challenged classification.[119] Hence, the "racial" parameters of the *Batson* decision are unclear.

Assuming that the holding is limited to race but does not encompass more than blacks, what is the burden on the defendant trying to prove membership in a cognizable racial group? Is facial appearance sufficient? Is an ethnic surname adequate proof?

Although much litigation has taken place in the wake of *Batson*, a review of reported cases which cite *Batson* reveals that many of the major "cognizable racial group" issues have not yet been considered by the lower courts. Not enough time has passed; the lower courts either have not yet been confronted with or have not yet addressed many of the ripe topics regarding the unresolved issues of the confines of the equal protection claim formulated in *Batson*. Looking at how some lower courts have handled *Batson* claims with regard to race, however, provides a picture of varied responses.

While Justices Brennan and Marshall would probably extend *Batson* principles to situations where the defendant challenges the removal of prospective minority jurors who are not of the same race as the defendant,[120] lower courts are disinclined to do so at this point. In *People v.*

U.S. 432 (1985); number of children, Dandridge v. Williams, 397 U.S. 471 (1971); living arrangements, United States Dept. of Agric. v. Moreno, 413 U.S. 528 (1973); and employment in a particular industry, Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981), or profession, Williamson v. Lee Optical, 348 U.S. 483 (1955). *Id.* For a fascinating discussion of the "racial issue," see Chew v. State, 71 Md. App. 681, 527 A.2d 332, *cert. granted*, 311 Md. 301, 534 A.2d 369 (1987). Judge Moylan points to recent Supreme Court decisions regarding the Civil Rights Act of 1866 and concludes that when *Batson* is read in conjuction with these cases, the *Batson* decision might be limitless. *Id.* at 716, 527 A.2d at 350.

119. *Batson*, 476 U.S. at 96. At least one commentator had made the assumption that *Batson* encompasses classifications such as females, which are outside the racial arena. This assumption is not only unwarranted, but also relies on cases formulated under sixth amendment fair cross section analysis and state constitutional provisions. It ignores the distinguishing fact that *Batson* was decided pursuant to fourteenth amendment equal protection analysis. Whether the *Batson* protection extends beyond race is not yet resolved. *See* Breck, *Peremptory Strikes After Batson v. Kentucky*, 74 A.B.A. J. 54, 58 (April 1, 1988).

120. Based on their opinion in Brown v. North Carolina, 479 U.S. 940 (1986) (Brennan, J., dissenting), the current members of the Court would probably approve of such an expansion of the *Batson* holding; however, they would likely opt for such an extension under a constitutional provision other than equal protection. They would arguably rely on the "spirit" of the *Batson* case for such an extension.

Treece,[121] the court held that the defendant, who was white and therefore not a member of a cognizable minority, could not challenge the exclusion of blacks from his jury.[122]

Similarly, in *People v. Zayas*,[123] a court relying on *Batson* refused to allow a Hispanic defendant to contest the removal of blacks from his jury. The lower court held that the defendant lacked standing and found that the *Batson* holding expressly requires that the defendant show he is a member of a cognizable racial group and that the prosecutor removed members of *the defendant's* race from the jury.[124] The Illinois Appellate Court refused to follow a recent Colorado Supreme Court decision, *Fields v. People*,[125] which held that a black defendant *could* challenge the exclusion of Hispanics from his jury. The Colorado decision was pursuant to the sixth amendment and the Colorado Constitution, while the defendant in *Zayas* was relying on the *Batson* equal protection analysis.[126]

The Georgia Court of Appeals refused to allow a white defendant who was represented by an attorney of Spanish ethnic origin to challenge the exclusion of blacks from the jury, holding that he lacked standing.[127] The argument that the minority status of the attorney might adversely influence the jury was not persuasive to the court.[128]

Since the language of *Batson* expressly requires that the defendant be a member of the allegedly excluded class, the *Treece*, *Zayas*, and *Heaton* decisions are merely following the literal language of the holding. Unless the Supreme Court more expansively interprets the language of *Batson*, the likelihood that lower courts will ignore the commands of *Batson* and hold to the contrary is slight. As illustrated by *Fields*, decisions pursuant to state constitutions and sixth amendment analysis may yield different results than decisions formulated under *Batson*.

The burden of proof the defendant must assume to prove the existence of a cognizable racial group is a predictive factor in whether the defendant will be found to be a member of the group. For example, in reviewing cases employing the *Batson* equal protection analysis, lower

121. 159 Ill. App. 3d 397, 511 N.E.2d 1361 (1987).
122. *Id.* at 409, 511 N.E.2d at 1368.
123. 159 Ill. App. 3d 554, 510 N.E.2d 1125 (1987).
124. *Id.* at 560, 510 N.E.2d at 1129.
125. 732 P.2d 1145 (Colo. 1987).
126. *Zayas*, 159 Ill. App. 3d at 559, 510 N.E.2d at 1129.
127. Heaton v. State, 180 Ga. App. 718, 719, 350 S.E.2d 480, 482 (1986).
128. *Id.*

courts have found that Indians[129] and Hispanics[130] may be included under the *Batson* umbrella, but Italian Americans may not. This result arguably is more owing to the standard of proof required for making a prima facie case than to the distinguishing racial factors.

In a Tenth Circuit Court of Appeals case, *United States v. Chalan*,[131] an American Indian defendant successfully objected to the removal of Indian members of the venire, and the court remanded the case to the trial court for a *Batson* hearing. The opinion contained no discussion of the factors upon which the court might have relied to conclude that the defendant was a member of a cognizable racial group or how the race of the prospective jurors was determined. Also significant is the fact that the court did not seem to question that the *Batson* decision would encompass American Indians as well as blacks.

The Supreme Court of Nebraska permitted defense counsel to state on the record that both the defendant and the removed venireman were Mexican-Americans and found this sufficient to meet the first prong of the *Batson* test, where the prosecutor did not contest these allegations.[132] The court did not discuss what the defense would need to do to prove its case had the state contested the statements. Again, the court did not question whether the *Batson* holding encompassed more than blacks; the court assumed that *Batson* encompassed Mexican-Americans.

When proof of membership in a cognizable racial group is limited to the surname, the holdings vary. Thus, the Wyoming Supreme Court said that, while the fact was undisputed that the defendant, a Mexican-American, was a member of a cognizable racial group, the only evidence that tended to show that the excluded members of defendant's jury were also of his racial group was the fact that they had Spanish surnames.[133] The court did not find this to be adequate proof.[134] The New Mexico Court of Appeals, however, did not require the defendant to do more than state that the jurors with Spanish surnames were excluded. The court accepted the fact that the defendant had a Spanish surname and that the removed jurors also had Spanish surnames and found a prima facie case of discrimination without requiring a greater showing of cognizability.[135]

129. United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987).
130. State v. Alvarado, 226 Neb. 195, 410 N.W.2d 118 (1987).
131. 812 F.2d 1302 (10th Cir. 1987).
132. *Alvarado*, 226 Neb. at 199-200, 410 N.W.2d at 121-22.
133. Bueno-Hernandez v. State, 724 P.2d 1132 (Wyo. 1986), *cert. denied*, 107 S.Ct. 1353 (1987).
134. *Id.* at 1135.
135. State v. Sandoval, 105 N.M. 696, 699, 736 P.2d 501, 504 (1987).

However, in *United States v. Sgro*,[136] the First Circuit Court of Appeals refused to accept the defendant's conclusory allegation that he was "Italian American" and that the government had violated the *Batson* holding by striking the only two jurors with Italian surnames. The court held that the defendant did not meet the first prong of *Batson* (cognizability) and thus failed to make a prima facie case.[137]

Even if the defendant had established that the two jurors *were* Italian Americans by evidence beyond their last name, the court was not prepared to find that the designated class "Italian Americans" met the the test without more proof. It would have required the defendant to demonstrate that the group Italian Americans was defined and limited by some clearly identifiable factor, that a common thread of attitudes, ideas, or experiences exists in the group, and that a community of interest exists among the group's members.[138]

The cases reported so far do not thoroughly analyze the *Batson* cognizability requirement, either as to how expansive the term "racial group" is or as to what must be demonstrated in any case to prove its existence (with the exception of the First Circuit, to a limited extent). That the results are inconsistent, though, is already clear.

In another First Circuit case, the court reaffirmed its previous holding that "young adults do not constitute a 'cognizable group' for the purpose of an Equal Protection challenge to the composition of a petit jury."[139] The court had made that ruling previously, but the appellant asked that the issue be reconsidered under a *Batson* challenge. The First Circuit, not surprisingly, found that the *Batson* holding should not be extended to young adults.[140]

Finally, the Eleventh Circuit Court of Appeals held that, while blacks as a class clearly qualify under the "cognizable racial group" requirement, the more restricted category of "Black males" does not.[141] The defendant, relying on *Batson*, unsuccessfully argued that black males were unconstitutionally excluded from his jury.[142]

136. 816 F.2d 30 (1st Cir. 1987), *cert. denied*, 108 S.Ct. 1021 (1988).

137. *Id.* at 33.

138. *Id. See* Duren v. Missouri, 439 U.S. 357, 364 (1979); Barber v. Ponte, 772 F.2d 982, 997 (1st Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1050 (1986).

139. United States v. Cresta, 825 F.2d 538, 545 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 2033 (1988).

140. *Id.*

141. United States v. Dennis, 804 F.2d 1208 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1973 (1987).

142. *Id.* at 1209-10.

The Supreme Court's refusal in *Batson* to "formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges"[143] has already resulted in unequitable results for both the defendant and the state. The early *Batson* progeny are complicated by the fact that the trial courts were employing the *Swain* standard in cases to which ultimately *Batson* was retroactively applied. Consequently, an adequate record of the proceedings often was not made, and, in many cases, the reasons why the trial court overruled a defendant's motion to quash the jury or motion for a mistrial is unclear.

Ascertaining the trial court's findings is often critical, especially in view of the fact that the Supreme Court instructed that the findings of the trial court are to be given great deference. When the finding of the trial court, if any, is unclear, the deference given to the trial court may be entirely inappropriate. This is particularly true when the defendant is erroneously deprived of the opportunity to pursue a *Batson* claim. A sampling of reported cases demonstrates this point. The following cases merely illustrate how the implementation of *Batson* varies in the context of appellate review.

In *State v. Moore*,[144] the prosecution exercised six of its peremptory challenges to exclude blacks, leaving only one black, who was the first to be seated, on the jury, and a second black whom defense counsel eventually excluded. The black defendant moved for a mistrial and argued that the prosecution had engaged in the discriminatory use of peremptory challenges. The prosecution made a general denial of racial motivation and noted that the first juror selected was a black male.[145]

The defendant appealed the decision of the trial court not to declare a mistrial, but the reviewing court affirmed, stating that the defendant did not make a prima facie showing of purposeful racial discrimination.[146] This despite the fact that the trial occurred before *Batson* was decided. The trial court, therefore, could not have employed *Batson* standards.

The reviewing court, while referring to *Batson*, based its finding of no prima facie case on the fact that the state had accepted two black

143. Batson v. Kentucky, 476 U.S. 79, 99 (1986).

144. 490 So. 2d 556 (La. Ct. App. 1986).

145. *Id.* at 558.

146. *Id.* The *Moore* court did not decide whether it would apply *Batson* retroactively (*Griffith* had not yet been decided). Instead it held that the defendant had not made a prima facie case under either *Swain* or *Batson*. *Id.*

jurors, despite the fact it had rejected six.[147] The action of the reviewing court is erroneous for several reasons. First, since the trial court did not find that the defendant had failed to establish a prima facie *Batson* violation (as evidenced by the fact *Batson* had not yet been decided when trial took place), the trial court's decision was not entitled to the great deference envisioned by the *Batson* court. Second, the reviewing court was in no position to evaluate the prosecutor's reasons. In fact, there were no reasons articulated other than a general denial, which is clearly insufficient. The only other evidence the reviewing court had before it was the fact that the state had retained two black jurors, including the one challenged by the defense.[148] The reliance of the reviewing court on the fact that the prosecutor did not exclude all blacks is clearly misplaced. The *Batson* holding makes clear that "the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown."[149]

Further, the reviewing court in *Moore* was in no position to undertake a sensitive inquiry into the circumstances surrounding the removals, as required by *Batson*. No adequate record was before it which established what intent the prosecutor might have had in striking the blacks. For instance, were whites that were similarly situated as the blacks also removed?

The reviewing court should have remanded the case to the trial court for a *Batson* hearing. If the defendant made a prima facie case and the prosecutor could not provide adequate justification for dismissal of the black members, the conviction should be reversed and a new trial granted. If the defendant failed to make a prima facie case under *Batson*, or if the prosectuor successfully rebutted such a showing if made, then the conviction should stand. Instead, the court deprived the defendant of the opportunity to try to make a *Batson* case.

A better-reasoned decision under a similar set of facts appears in *Miller v. State*.[150] There, the defendant protested the prosecutor's use of peremptory challenges in removing members of the defendant's own

147. *Id.*
148. *Id.*
149. United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986). The Eleventh Circuit was correctly interpreting the Court's language in *Batson* which said, " 'A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.' " *Batson*, 476 U.S. at 95 (quoting Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 n.14 (1977)).
150. 733 S.W.2d 287 (Tex. Ct. App. 1987).

race. The defendant moved for a new trial and was denied by the trial court following a hearing on the motion.[151]

The reviewing court found that the hearing that had been provided the defendant was not a *Batson* hearing, and the record before it did not establish whether the trial court determined that a prima facie case was not made, or whether it overruled the motion for another reason. Therefore, the reviewing court remanded the case to the trial court, directing it to make a legal determination whether the defendant established a prima facie case of racial discrimination.[152]

State v. Sandoval[153] is another case where the record was unclear as to whether the defendant had established a prima facie case, but the ruling resulted in an arguably unfair result. The Hispanic defendant objected that the state had removed the only two Hispanics from the jury. The defendant merely referred to *Batson* and stated that two members with Spanish surnames had been removed.[154] The judge asked for the state to reply, and the state asserted that the strikes were not racially related. At that point the judge overruled defendant's motion for a mistrial.[155] The judge admittedly was not familiar with the *Batson* decision.[156]

While this was clearly a factual situation that should have been remanded for a *Batson* hearing, the reviewing court decided instead that the defendant had established a prima facie case which the prosecutor could not rebut with his general denial. Such a response will unquestionably not suffice,[157] but the facts in *Sandoval* clearly indicate that the trial court had not determined that the defendant had made a prima facie case. Despite the fact that the prosecutor replied to the court's inquiry, if no prima facie case had been established, the prosecutor had no duty to explain his peremptory challenge.[158]

Since the trial judge was not familiar with *Batson*, the conversation was obviously not a *Batson* hearing. Nevertheless, the New Mexico Court of Appeals found that the defendant had made a prima facie case

151. *Id.* at 289.
152. *Id.* at 289-90.
153. 105 N.M. 696, 736 P.2d 501 (1987).
154. *Id.* at 699, 736 P.2d at 504.
155. *Id.*
156. *Id.*
157. The *Batson* decision states that "[t]he State cannot meet this burden on mere general assertions that its officials did not discriminate . . . ." *Batson*, 476 U.S. at 94.
158. Once a prima facie showing is made, the state has the burden of coming forward with a neutral explanation for its challenge of black jurors. *Id.* at 95.

that the prosecutor failed to rebut.[159] The possibility that the prosecutor did have sufficiently neutral reasons which he was not afforded an opportunity to furnish was real; however, the court reversed the conviction and awarded a new trial to the defendant.[160]

While the possibility exists that lower courts might encounter difficulties and inconsistencies implementing new Supreme Court constitutional rulings, particularly those that overrule prior precedent, the lower courts should be guided by the *Batson* decision and should not second guess the trial court when findings are ambiguous. If possible, the reviewing court should remand the case to the trial court for a legal determination pursuant to a *Batson* hearing in circumstances where the defendant has made a timely objection in a *Batson* situation. Reviewing courts should avoid cutting off a *Batson* claim where the trial court has not determined whether a prima facie case was made. Likewise, a reviewing court should not be too hasty to conclude that the prosecutor's explanation is insufficient where the fact is not clear that the state was made aware that the burden had shifted to it to rebut the inference of purposeful discrimination. As trial courts become more familiar with *Batson*, they will in turn make legal findings that will facilitate appellate review.

Since the reviewing court must give great deference to the determination of the trial court as to whether the prosecutor rebutted the defendant's prima facie showing,[161] the *Batson* holding could be rendered impotent if trial courts do not scrutinize the proffered "benign" explanation with care. Once the defendant has established a prima facie case of purposeful discrimination, the trial court must evaluate the reasons the prosecutor articulates. The Supreme Court stated that the proffered explanation must relate to the particular case being tried, and it must be a clear and specific explanation of legitimate reasons for exercising the challenge.[162] However, this determination is a finding of fact and is subject to review on procedural grounds only, unless the reviewing court determines the finding of the trial court to be clearly erroneous.[163]

Lower courts differ dramatically as to what makes an explanation sufficiently neutral to rebut a defendant's prima facie showing, and reviewing courts also differ as to the extent to which they will evaluate the

159. *Sandoval*, 105 N.M. at 700, 736 P.2d at 505.
160. *Id.*
161. *Batson*, 476 U.S. at 98 n.21.
162. *Id.* at 98 n.20.
163. *Id.* at 98 n.21.

trial court's finding. For example, in *Evans v. State*,[164] the Georgia Court of Appeals reviewed a trial court's determination that the state had successfully rebutted the defendant's prima facie case, and held that the trial court was not clearly erroneous for accepting the prosecutor's reasons as legitimate. In *Evans* the state claimed to have struck three black veniremen because they were unemployed and four others because "they did not appear to be particularly interested in or responsive to the selection process."[165] As to the former reason, there was no court discussion as to whether non-blacks had been struck due to their employment status. As for the latter, imagining a more murky explanation is difficult. Similarly, reasons such as facial expressions and posture have been upheld as sufficiently neutral in other cases.[166]

Explanations such as these are subject to abuse, are unpersuasive, and are highly suspect. Subjective reasons, such as poor posture, should not be allowed to suffice or else *Batson* would be crippled. Trial courts should demand more, and the deference a reviewing court gives to the trial court should be limited to the extent that the trial court fails to require the kind of explanations envisioned by the *Batson* Court.

In a Georgia Supreme Court case, *Gamble v. State*,[167] the court reversed a trial court holding as clearly erroneous despite the fact that the state offered multiple reasons for striking several black veniremen. For example, the state attempted to rebut the defendant's prima facie case by stating that it had struck one man because of low intelligence, membership in the Masonic lodge, and membership in a church that was pastored by a minister who was a friend of the prosecutor.[168] As to another black that was struck, the state claimed that he was uncooperative and that the prosecutor could not get information from him.[169]

The reviewing court evaluated the explanations in light of all the circumstances and found them to be unconvincing.[170] For instance, the court found the low intelligence explanation to be unfounded, especially in light of the fact that two white jurors accepted by the prosectuion could be just as convincingly questioned regarding their intelligence

164. 183 Ga. App. 436, 359 S.E.2d 174 (1987).

165. *Id.* at 440, 359 S.E.2d at 178.

166. *See* Chambers v. State, 724 S.W.2d 440, 442 (Tex. Ct. App. 1987) (The court also found explanations of "fringe religion member," "body english," "age," "marital status," "handwriting," and "name association" to be sufficiently neutral.).

167. 257 Ga. 325, 357 S.E.2d 792 (1987).

168. *Id.* at 328, 357 S.E.2d at 795.

169. *Id.*

170. *Id.* at 329, 357 S.E.2d at 796.

level.[171] Furthermore, the court could find no reason why Masonic membership was related to the case. With regard to the other juror who was labelled uncooperative, the voir dire record revealed that no questions were asked of the juror. The court held that the trial court's determination that the prosecutor successfully rebutted the prima facie *Batson* case was clearly erroneous.[172]

The facts of *Gamble* illustrate a few important factors to employ in analyzing the prosecution's rebuttal. For example, as the Georgia Supreme Court stated, "[t]he persuasiveness of a proffered explanation may be magnified or diminished by the persuasiveness of companion explanations, and by the strength of the prima facie case."[173] In *Gamble*, the prosecution had used *all* its challenges to remove *all* blacks, so the defendant's prima facie case was strong, although the court said it was not so strong that it could not be rebutted. In addition, the particular circumstances of the case being tried must be viewed in light of the offered explanation, as well as the court's own knowledge of trial strategy. The explanations articulated by the prosecution must be consistent. For instance, rejecting a black juror is highly suspect if based on facts about the black juror, which also apply to a similarly situated white juror who was accepted.

Since the *Batson* decision gives wide discretion to the trial court, particularized findings and statements of reason must be required when the prosecutor attempts to rebut a prima facie case. If the Supreme Court is eventually forced to articulate a more stringent standard for evaluating the prosecution's neutral explanations, such a result will not be surprising. This is particularly likely if defendants are being deprived of their equal protection rights by faulty applications of the *Batson* holding.

VII. CONCLUSION

Batson v. Kentucky radically altered the evidentiary burden for a defendant attempting to make a prima facie case of racial discrimination in the context of the prosecution's use of peremptory challenges in the defendant's own petit jury selection. The scope of the holding is as yet undertermined in numerous areas, and whether the spirit of the *Batson*

171. *Id.*
172. *Id.* at 330, 357 S.E.2d at 796.
173. *Id.* at 327 357 S.E.2d at 795.

decision will extend outside the specific fact situation of *Batson* is uncertain. Eventually the Supreme Court will have to confront some of these areas as it reviews the implementation of the *Batson* decision by lower courts. Until then, the area is ripe for litigation, and inconsistency will likely continue to reign.

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