RACE AND VOIR DIRE

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NACDL's 2nd Annual Seminar
"Race Matters II: The Impact of Race on Criminal Justice"
January 10-11, 2019, Millennium Biltmore Hotel, Los Angeles, CA

RACE MATTERS II

The Impact of Race on Criminal Justice

Race and Voir Dire

Race is an issue in Jury Selection in nearly every trial in America and wealth isn't an issue. The following is an excerpt concerning Bill Cosby's trial.

After multiple blacks who indicated that they could be fair were struck by the prosecution, Bill Cosby was convicted by a mostly white jury.

"Brian J. McMonagle, one of Mr. Cosby's lawyers, said that the woman was being excluded for racial reasons, noting that prosecutors had rejected a black female sales coordinator a day earlier. "We believe this is a systematic exclusion of African-Americans who answered that they could be objective," Mr. McMonagle said. Mr. Cosby came to Pittsburgh, he added, "hoping he could find a favorable, diverse jury."

"We believe it is paramount that there be a diverse jury and we believe that we cannot get a diverse jury," he said.

Eric J. Davis

Chief of the Felony Trial Division
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ERIC J. DAVIS

Eric J. Davis has been a practicing attorney since 1994 and accepted employment at the Harris County Public Defender's Office in September of 2011. There Mr. Davis serves as the Chief of the Felony Trial Division. Immediately prior to joining the Public Defender's Office, Mr. Davis was the senior member of Davis & Associates, PLLC, a law firm based in Houston, Texas. Mr. Davis graduated from Howard University with honors in 1991 and from Tulane University Law School with honors in 1994. He is also a graduate of Gerry Spence's Trial Lawyer's College where he honed his trial skills by learning from some of the best trial lawyers in the country. Following graduation, Mr. Davis was asked to join the staff of the college. He currently serves on the staff of the Trial Lawyers College and helps train lawyers from across the country. In 2016, he received the Mentor of the Year Award from the Harris County Criminal Lawyers Association for his efforts mentoring and training lawyers.

Mr. Davis started his legal career as a prosecutor in Florida. While serving as a prosecutor, Mr. Davis was selected (based on trial skill) to serve in a sex crimes unit where lawyers focused on prosecuting all types of sexual assault cases. This experience and training helped Mr. Davis develop experience in handling these types of cases. As a criminal defense attorney, he has successfully represented people accused of sex crimes, some in high-profile cases, and has obtained dismissals and "not guilty" verdicts. He has successfully defended numerous criminal cases in Federal and State Court. He has obtained "not guilty" verdicts and dismissals in all types of cases and in numerous different counties. Mr. Davis has tried over 100 cases to verdict. He has tried all types of federal and state court cases ranging from Capital Murder, to multiple defendant drug conspiracies, to misdemeanors. Moreover, Mr. Davis has defended federal criminal cases in every federal district in the State of Texas and in federal district courts in Florida, Louisiana, and Illinois.

In 2003, Mr. Davis received a commendation from the Texas State Legislature for his service as Special Counsel to the Texas State Commission on Judicial Conduct. For the Commission, Mr. Davis was lead counsel in a case that removed a judge from office who was mistreating citizens by wrongfully jailing them and addressing them in an abusive manner in court. Handling the case from beginning to end, Mr. Davis was able to obtain an order that the Judge be removed from office and that he never be allowed to hold judicial office again. The case was widely featured in several television news programs and newspaper articles.

In 2006, Mr. Davis received the "Unsung Hero Award" from the Harris County Criminal Lawyers Association. In that same year, he received the "Man of the Year Award" from the Houston Business and Professional Women's Association. Also that same year, Mr. Davis made national news and was featured in several stories printed in the Houston Chronicle for his work that exonerated a man who had been wrongfully imprisoned for over 18 years for an alleged sexual assault of a child. Although the government reported that there were no samples to test

for DNA in the case, Mr. Davis pressed forward and found the DNA that freed his client. After the client was pardoned, Mr. Davis secured financial compensation for him in excess of $450,000.00. The case was covered by local and national news outlets.

Although Mr. Davis has successfully defended many criminal cases, most notable is the successful defense of a double homicide in 2007 where the prosecutor boasted prior to trial that there was no way his client could win. With the client's approval, Mr. Davis rejected the prosecutor's 40 year plea deal, fought the case at trial, obtained a "not guilty" verdict and secured the client's freedom. Additionally, Mr. Davis' has been able to secure "not guilty" verdicts and dismissals in other murder cases as well. In 2010, prosecutors were disciplined for improperly striking all African- Americans from a jury panel in a murder case defended by Mr. Davis and Texas Southern University Law School Graduate, Jacquelyn R. Carpenter. The case made the front page of the Houston Chronicle and was reported on several television and radio news stations. Mr. Davis and Ms. Carpenter subsequently tried the case again to another all-white jury and obtained a "not guilty" verdict. Another client defended by Mr. Davis who had a Capital Murder case dismissed was featured in an article in the New York Times.

In 2011, the same year Mr. Davis joined the Public Defender's Office, Mr. Davis completed his second, successive successful representation of a client charged in a Federal Medicare Fraud Conspiracy trial by securing multiple "Not Guilty" verdicts on behalf of a doctor charged. His clients were acquitted of all of the federal charges. Both victories were in cases against prosecutors from the Federal Medicare Fraud Task Force that pulled prosecutors from around the country to try those cases. That Federal Task Force rarely lost cases. And following those cases, a Task Force Prosecutor surprisingly told Mr. Davis that Task Force Prosecutors privately referred to him as "Taskforce Kryptonite."

Mr. Davis also has experience handling appeals and post-conviction writs in both Federal and State Courts. In 2008, Mr. Davis, arguing before the United States Fifth Circuit Court of Appeals, obtained the reversal of a life sentence and conviction which was imposed by a Federal District Court in a drug conspiracy case. In 2009, Mr. Davis argued before the Thirteenth Court of Appeals in Texas and obtained the reversal of a 75 year sentence and conviction. The court ordered a new trial for the client.

As the Chief of the Felony Trial Division, Mr. Davis coordinates the Division's in-house training program and coordinates over 25 hours of CLE training for the local defense bar every year. In 2019, Mr. Davis will serve on the Planning Committee for the Texas Advanced Criminal Law Course which is the primary source of CLE to Judges, Prosecutors and Defense Lawyers throughout the State of Texas.

Additional details regarding Mr. Davis' education, admissions, and affiliations with professional associations follow.

Education

Tulane University Law School, Juris Doctorate: May 1994, *cum laude*
Howard University, Bachelor of Arts: May 1991, *magna cum laude*

Licensure and Admissions

The United States Supreme Court, admitted 2003
The United States Court of Appeals for the Fifth Circuit, admitted 2001
The United States District Court, Southern District of Texas, admitted 2000
The United States District Court, Western District of Texas, admitted 2002
The United States District Court, Eastern District of Texas, admitted 2002
The United States District Court, Northern District of Texas, admitted 2002
The United States District Court of Colorado, admitted 2007
The United States District Court, Central District of Illinois, admitted 2007
The State Bar of Texas, licensed 1997
The Florida Bar, licensed 1994

Professional Associations

State Bar of Texas
National Bar Association
The Texas Bar Foundation, Fellow
Harris County Criminal Lawyers' Association
National Criminal Defense Lawyers' Association
Texas Criminal Defense Lawyers' Association
Alumni Association of the Trial Lawyers College

Published Judicial Opinions

United States v. Harris, 566 F.3d 422 (5th Cir. 2009).
In re Thurman Bill Bartie, 138 S.W.3d 81 (Tex. App. Austin 2004).
Joshua Reynolds v. State of Texas, 371 S.W.3d 511 (Tex. App. Houston [1st Dist] 2012).

Seminars and Presentations

Staff, *Trial Lawyers College,* Actively teaching all trial skills at the Trial Lawyers College in Wyoming and at regional seminars, 2006- present.

The Texas Criminal Defense Lawyers Association CLE- Sexual Assault: Gladiators in Suits, *Cross-Examination of Child Witness: Et Tu, Brute?*, December 6-7, 2018, Fort Worth, Texas.

The Texas Criminal Defense Lawyers Association CLE- Phones, Forensics & Snitches, Oh My! , *Handling Priors- the Big One, the Little One, and all the Others*, September 13-14, 2018, Lakeway, Texas. (Tied for **Top Rated** Speaker at the entire CLE).

Criminal Law Clinic Boot Camp, Thurgood Marshall School of Law, *Brady v. Maryland and 39.14,* August 13, 2018, Houston, Texas.

National Association of Criminal Defense Lawyers CLE, Defending Idaho: Advanced Advocacy and Trial Skills Course, *Effective Voir Dire*, August 9, 2018, Boise, Idaho.

National Association of Criminal Defense Lawyers CLE, Defending Idaho: Advanced Advocacy and Trial Skills Course, *Cognitive Biases and Their Impact on the Criminal Justice System*, August 8, 2018, Boise, Idaho.

National Association of Criminal Defense Lawyers CLE, Defending Idaho: Advanced Advocacy and Trial Skills Course, *Cross Examining Emotional and Difficult Witnesses*, August 9, 2018, Boise, Idaho.

National Association of Criminal Defense Lawyers CLE –Murder, Mayhem and Malice in Miami, *Murder?!?... It's Self-Defense,* July 26-28, 2018, Miami, Florida.

Advanced Criminal Law Course 2018, Texas State Bar, *Punishment in Sexual Assault Cases*, July 23, 2018, San Antonio, Texas (Also served as a Co-Moderator, inviting and coordinating speakers, for the Sexual Assault Break-out Session).

Faculty, Wisconsin State Public Defender Trial Skills Academy 2018, *Voir Dire Lecture,* May 12-18, 2018, Fontana, Wisconsin.

National Association of Criminal Defense Lawyers CLE Advanced Skills in Sexual Assault Defense Training, *Cross- Examining Difficult Witnesses*, March 8-9, 2018, Indianapolis, Indiana.

National Association of Criminal Defense Lawyers CLE Advanced Skills in Sexual Assault Defense Training, *Voir Dire in Sexual Assault Cases*, March 8-9, 2018, Indianapolis, Indiana.

The Texas Criminal Defense Lawyers Association CLE- To Kill a Sex Crime, *Punishment: How to Get as Few Licks as Possible*, December 7-8, 2017, Austin, Texas. (Tied for **Top Rated** Speaker at the entire CLE).

2017 Annual Criminal Defense Conference of the Wisconsin State Public Defender's Office, *Voir Dire to Win Your Case*, November 17, 2017, Milwaukee, Wisconsin.

2017 Annual Criminal Defense Conference of the Wisconsin State Public Defender's Office, *Using and Cross Examining Experts*, November 17, 2017, Milwaukee, Wisconsin.

Advanced Criminal Law Course 2017, Texas State Bar, *Punishment in Sexual Assault Cases*, July 18, 2017, Houston, Texas.

National Association of Criminal Defense Lawyers CLE – The Voodoo of Voir Dire, *It's Not Just Lagniappe, It's Voir Dire on Self-Defense,* March 1-4, 2017, New Orleans, Louisiana. (**Top Rated** Speaker at the entire CLE).

The Texas Criminal Defense Lawyers Association Voir Dire – Outside The (Jury) Box CLE, *Jury Selection on Defenses*, September 8-9, 2016, Dallas, Texas. (Rated amongst the **Top 5 speakers** at the entire CLE).

Faith and Law Around the Globe, *Integrity as Defense Counsel,* April 21-26, 2016, Entabeni Safari Conservancy, South Africa.

Harris County Criminal Lawyers Association CLE on Maneuvering Search & Seizure Law, *Ethics in Contesting Searches,* March 4, 2016, Houston, Texas. (**Top Rated** Speaker at the entire CLE).

National Association of Criminal Defense Lawyers CLE -The Science of the Mind: Litigating Mental Health in Criminal Cases, *Voir Dire in Mental Health Cases*, February 17-20, 2016, Austin, Texas.

The Texas Criminal Defense Lawyers Association Nuts N' Bolts and Morton Act CLE, *Mitigation and Punishment Hearings*, January 7, 2016, Lubbock, Texas. (Rated amongst the Top 5 speakers at the CLE).

The Texas Criminal Defense Lawyers Association 28th Annual Rusty Duncan Advanced Criminal Law Course, *Mitigation and Punishment*, June 18-20, 2015, San Antonio, Texas. (Rated amongst the Top 5 speakers at the CLE).

The Texas Criminal Defense Lawyers Association Voir Dire CLE -A Taste of Voir Dire, *Voir Dire: Self-Defense and Other Defenses*, March 5-6, 2015, Houston, Texas. (**Top Rated** Speaker at the Entire CLE).

Public Defender's Office CLE on Criminal Appointments in Harris County, *Impeachment—a Nuts and Bolts Demonstration*, October 9-10, 2014, Houston, Texas. (Rated amongst the **Top 5 speakers** at the CLE).

Criminal Law Clinic Boot Camp, Thurgood Marshall School of Law, *Michael Morton Act: What does it mean in terms of practice? And, 38.23? What is it and how to get the Judge to give it to you?,* August 16-17, 2014, Houston, Texas.

Advanced Criminal Law Course 2014, Texas State Bar, *Mitigation and Punishment, Making the Best Out of a Bad Situation*, July 21-24, 2014, Houston, Texas.

The Texas Criminal Defense Lawyers Association Federal Law Seminar, Presentation and Paper on *Ethics in Federal Court,* March 6, 2014, Houston, Texas. (Rated amongst the Top 5 speakers at the CLE).

Friendship Community Bible Church, Men's Health & Criminal Justice Awareness Day, *Panel Discussion*, December 14, 2013, Sugarland, Texas.

The Harris County Institute of Forensic Science's Expert Witness Testimony Workshop & Mock Trial, *Demonstrated Cross Examination of Experts – Medical Examiner and Ballistics Expert*, November 7-8, 2013, Houston, Texas.

The Texas Criminal Defense Lawyers Association Cross Examination CLE, Presentation and Paper, *Impeaching the State's Witnesses in a Criminal Trial*, March 7, 2013, Dallas, Texas. (Rated amongst the Top 5 speakers at the CLE).

American Bar Association, National Taskforce on Stand Your Ground Laws, Southwest Regional Hearing, Testimony Regarding the Impact of Stand Your Ground Laws on the Criminal Justice System, February 8, 2013, Dallas, Texas.

The First Annual Hon. Craig Washington & Senator Rodney Ellis Criminal Law Seminar, Presentation and Paper on *Cross Examination,* February 2012, Houston, Texas.

Round-Table Discussion on Stand Your Ground Laws at South Texas College of Law, 2012, Houston, Texas.

Staff, Texas Criminal Defense Lawyers Association, CLE on *Voir Dire,* 2011, Roundtop, Texas.

Race and Voir Dire

In December of 2018 in Houston, Texas, two good trial lawyers were trying a case where self-defense was an issue. The case involved a Black man who was accused of killing a White man. It was the third time in three years they tried the case. The first jury which consisted of blacks, whites and Hispanics was hung 10 to 2 in favor of acquittal. The second jury which also consisted of blacks, whites and Hispanics was hung 11 to 1 in favor of acquittal. This third trial, with a new set of prosecutors and no black people on the jury, saw a verdict of guilty on the charge of murder. The jury deliberated under three hours before returning a verdict. Why the difference in results? Race.

Prosecutors know they have a distinct advantage when trying a black defendant to an all-white jury. As such, jury selection and the use of peremptory challenges is wrought with the danger of racial manipulation. A recent study of trials in Caddo Parish, Louisiana, revealed that potential jurors who were black were much more likely to be struck from juries than non-blacks. In Caddo Parish, an area known for its many death sentences, prosecutors used peremptory strikes against 46% of black jurors, but only 15% of other jurors, according to a study by Reprieve Australia.[1] That study showed evidence of systematic discrimination in the jury selection process that appeared virtually unchecked. The results were consistent with findings from Alabama, North Carolina, and other parts of Louisiana.

[1] U. Noye, "Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's office," (Reprieve Australia, August, 2015).

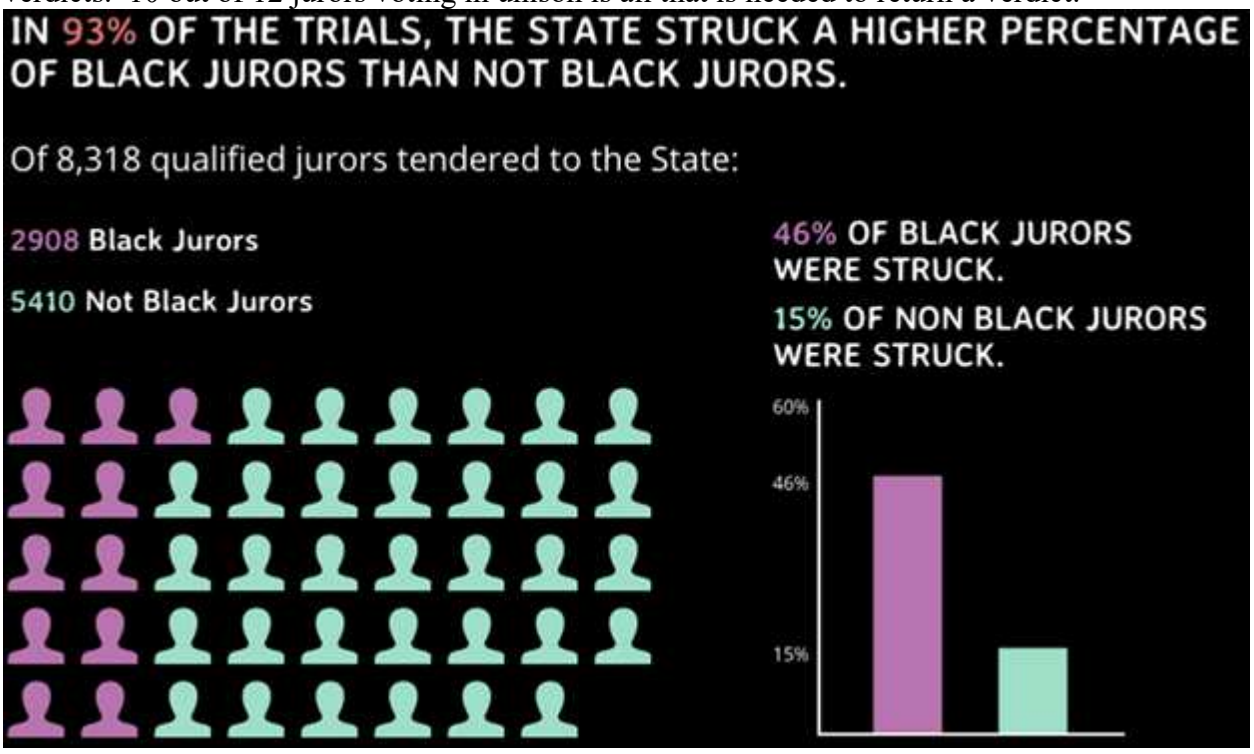
In an Alabama study, prosecutors used peremptory strikes to remove 82% of eligible black potential jurors from trials in which the death penalty was imposed. A study of death penalty cases in North Carolina found that prosecutors struck 53% of black potential jurors but only 26% of others.[2]

The racial composition of the juries in Caddo Parrish appeared to make a difference in the ultimate outcome of the cases. The study found that *no* defendants were acquitted by juries with 2 or fewer black jurors, but 19% were acquitted when 5 or more jurors were black.[3]

Given that the prosecutor's chances of winning go up with nondiverse juries, it is easy to see why prosecutors take this short cut. The availability of this short cut through peremptory challenges, makes the threat of discrimination during jury selection more real. In *Batson v. Kentucky*, legendary U.S. Supreme Court Justice Thurgood Marshall noted that "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system."[4] Justice

[2] Death Penalty Information Center, *Studies: Racial Bias in Jury Selection*. https://deathpenaltyinfo.org/node/6224.

[3] Id. It should be noted that Louisiana, unlike most other states, does not require unanimous verdicts. 10 out of 12 jurors voting in unison is all that is needed to return a verdict.



[4] *Batson v. Kentucky*, 476 U.S. 79, 107(1986).

Marshall thought the danger was so great that banning peremptory challenges from the process was the only way to safeguard defendants from discrimination.

Although the U.S. Supreme Court has yet to take a position as strong as Justice Marshall's, it has reversed multiple cases where peremptory challenges were exercised in a discriminatory manner. In fact, in recent years, the Supreme Court has taken an aggressive stand and has rendered multiple favorable decisions on *Batson* issues. Thus, *Batson* challenges are still a viable tool that lawyers can use to combat discrimination in the jury selection process. This paper will discuss properly making a *Batson* Challenge and the law surrounding it. And given that race appears to make a difference in the jury selection process, this paper will discuss methods of conducting voir dire on race.

Batson Challenges

Unlike challenges for cause, which are normally based on logical reasons why potential jurors are biased, prejudiced, or unqualified to serve in a particular case; peremptory challenges are often inspired by hunches, improper considerations, intuition, or "shots in the dark."[5] And as advocates, lawyers use peremptory challenges not to select an impartial jury, but to select a jury that will be partial to their client's cases. This happening simultaneously on both opposing sides further hampers the process. In 1997, two law professors affiliated with Pepperdine Law School identified five main problems surrounding the use of peremptory challenges.[6] They assert:

> First, attorneys who exercise peremptory challenges aim to select a jury that is biased in favor of their client. This motive hinders, rather than advances, the guarantee of a trial by an impartial jury. Second, the exercise of peremptory challenges is largely based on the attorney's biases and prejudices toward persons of a particular race, religion, gender, age, educational background, socioeconomic status, and other associations. Such exercise has led to discrimination against classes of potential jurors, which may profoundly affect both parties' ability to obtain a trial by an impartial jury. Although the U.S. Supreme Court

[5] *See* MICHAEL J. SAKS & REID HASTIE, SOCIAL PSYCHOLOGY IN COURT 55 (1978).
[6] See Carol A. Chase & Colleen P. Graffy, *A Challenge for Cause Against Peremptory Challenges in Criminal Proceedings*, Loyola of Los Angeles International and Comparative Law Journal (1997).

> has issued rulings in the past decade to curb the use of peremptory challenges as an instrument of racial or gender discrimination, those rulings have not had their anticipated effect. The third main problem with peremptory challenges is that their availability has led to extensive and intrusive voir dire examination of potential jurors, and thus, increased the duration of jury trials. Fourth, the use of challenges has raised the cost of jury trials due to the use of expensive jury "experts" who assist attorneys in identifying jurors most likely to favor one side or the other. Finally, the mere existence of peremptory challenges permits the courts to avoid deciding whether a juror is truly biased or prejudiced because the attorney may still exercise a peremptory challenge if the judge denies a challenge for cause.[7]

Making Batson Challenges

Batson v. Kentucky provides a three-step process for adjudicating claims of discriminatory use of peremptory challenges. "First, a defendant must make a prima facie showing that a preemptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination."[8] The third step turns on factual findings made by the lower courts.

Prima Facie *Case*

Establishing a prima facie case of purposeful discrimination, involves first identifying that a stricken juror is a member of a protected cognizable group. Then, the party raising the challenge needs to show that this fact, along with any other relevant circumstances, creates an inference that the opposing party has used a peremptory challenge – or multiple challenges – to strike potential jurors on the basis of their membership in that group. Such a prima facie case can be made by offering a wide variety of evidence, so long as the totality of the facts gives rise to the inference of discriminatory purpose. One common method of doing so is articulating **a comparative analysis** of the panel demonstrating there was a pattern of striking a disproportionate number of members of the cognizable protected group.[9] For example, in *Dewberry v. State*, 776 S.W.2d 589 (Tex. Crim. App. 1989),

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[7] *Id*.
[8] *Snyder* v. *Louisiana*, 552 U. S. 472, 477 (2008) (internal quotation marks and brackets omitted).
[9] *Miller L v. Cockrell*, 537 U.S. 322, 331 (2003).

the prosecutor striking five out of six black venire members was held to constitute a prima facie case. Similarly, in *Salazar v. State*, 795 S.W.2d 187 (Tex. Crim. App. 1990), the Court found exercising one strike against the only Hispanic venire member constituted a prima facie case. Another method of establishing a prima facie case is by showing that there was **racially disparate questioning** during the voir dire process.[10] In *Miller-El v. Cockrell,* the U.S. Supreme Court overturned the conviction of a black defendant, ruling unconstitutional the prosecutorial peremptories that removed 10 of 11 black prospective jurors during jury selection and citing as evidence of racial discrimination the disparate questions asked of white and black members of the jury pool.[11]

Lawyers looking to make Batson Challenges and to preserve the appellate record must make sure that the entire voir dire process is recorded by the court reporter. It would be nearly impossible to litigate on appeal a prima facie case based on disparate questioning if that questioning was not recorded.[12] Whether or not voir dire examination itself was recorded, the movant must make a record of the Batson challenge in some fashion. This can be done by describing on the record the overall makeup of the jury panel and specifying those members, by juror number or name, who were struck by peremptory challenges and members of a cognizable group. *See Williams v. Woodford*, 384 F.3d 567, 584 (9th Cir. 2004). Counsel should state how many members of cognizable groups were on the overall panel, including which cognizable groups they were members of, as well as the number of jurors who were struck via peremptory challenge that were members of those cognizable groups.

Batson encourages the trial judge to consider the defending party's pattern of strikes because it may strongly support the inference of a discriminatory intent. But the pattern is not definitive. Because the judge must consider any relevant circumstances, the party making the challenge should refer to any aspect of the voir dire that supports the inference of a discriminatory intent, including, for example, that the opposing counsel targeted a certain racial group in asking questions pertaining to cause and hardship. It could also include *not* asking questions of jurors in the non-targeted racial group. Although the defending party has a burden to provide a race-neutral explanation for the strike, the burden to prove discriminatory intent "rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curium.) Counsel should request an examination of the prosecutor's notes once the Batson Challenge is made. And if it contains any

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[10] *See Holloway v. Horn*, 355 F.3d 707, 722 (3rd Cir. 2004).

[11] *Miller Ll*, 537 U.S. at 331.

[12] Theoretically, if the voir dire is not recorded, a lawyer could ask the trial court to take judicial notice of the questioning that had taken place during voir dire. This would force the defendant to rely on the trial judge's recollection as opposed to a contemporaneous record.

helpful information, counsel should state the helpful information on the record and should request that a copy be made part of the record.

*Filing a **Pretrial** Batson Motion*

In a recent case, *Foster v. Chatman*, 578 US ___ (2016), where the Supreme Court reversed a death sentence on a *Batson* violation, the defense attorneys anticipated the prosecution striking black prospective jurors on the basis of race. So, prior to trial, they filed a motion to prevent the practice pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), stating: "1. [Foster] is an indigent eighteen year old black person accused of the capital murder of an elderly white lady, and the State is seeking the death penalty. 2. The District Attorney's office in this County and his staff have over a long period of time excluded members of the black race from being allowed to serve on juries with a black Defendant and a white victim. . .. 3. It is anticipated that the District Attorney's office will attempt to continue its long pattern of racial discrimination in the exercise of its peremptory challenges. At a pretrial hearing, the parties and the court agreed to defer the Batson motion until after the striking of the jury."[13] Counsel litigating Batson issues should consider filing a Batson Motion Pretrial. If anything, the motion will put the prosecutor and court on notice that the Defense fully intends to raise *Batson* and combat discrimination. Conversely, it might tip your hand to the prosecution if your goal is to plant error in the case. The motion itself will probably do nothing to preserve the issue for appeal.

Conducting *Voir Dire* on Race

People don't like to talk about race, especially in public. And getting some people to talk about race in a room full of strangers like the setting for voir dire is difficult. Lawyers are people too and have the same difficulty talking about race. Yet it's evident that in many criminal cases, even cases where race is a direct issue, lawyers do their clients a disservice by refusing to talk about the issue. In America, some think that Race is always an issue in the criminal justice system…. an issue in every case. The problem is that lawyers are often afraid of being accused of "playing the race card." Feelings against political correctness and "playing the race card," have silenced challenges to discrimination. Even after cops are routinely acquitted when they kill a black man, the "Black Lives Matter" slogan is met with "All Lives

[13] U. S Supreme Court Brief of Petitioner Timothy Tyrone Foster, p. 4.

Matter." Many view this as nothing more than an attempt to silence protest of discrimination. No greater place is there the silencing of challenges against discrimination and classism than in the criminal justice system. Our current political climate reveals that there are intrinsically negative attitudes towards certain groups. In the time we have allotted for voir dire, we cannot change these attitudes. A better use of our time allotted for voir dire is trying to find out what people's attitudes are. In this section, I plan to present several different approaches to voir dire on race.[14]

*Self-**Disclosure***

My primary approach to formulating Voir Dire Questions is self-disclosure. I basically explore what are my fears about the case, formulate questions based on those fears and then share them with the jury. My approach is the same with the issue of race. This approach for me might look like this:

> Jesse Jackson tells the story about one night when he was walking down the streets of Chicago and got nervous when he heard footsteps approaching him from behind. Beginning to prepare himself for the worse, he quickly turned and was relieved when he saw that it was three young white males running in his direction instead of three young black males. He made note of this feeling and immediately felt ashamed. Jessie Jackson isn't alone in this feeling. In my neighborhood, there's a park across the street. There are no benches, or swings in the park. There aren't even any artificial lights in the park at night…. just trees and hills. People come to see the park because Beyoncé' grew up in my neighborhood and worked out in the park. One evening I was driving home and I saw a young black man step out from the darkness of the park. Feeling suspicion, I stopped him and asked him what he was doing in the park so late. He told me, I'm from out of town and I wanted to see Beyoncé's park before my flight tonight. I too felt embarrassed. Even me a criminal defense lawyer had these feelings.

(One might share their own personal story similar to the one recounted by Jessie Jackson… and disclose how they felt), And then follow up with:

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[14] It is a mistake to assume that, all other things being equal, a non-white juror is a better defense juror in a criminal case than a white juror.

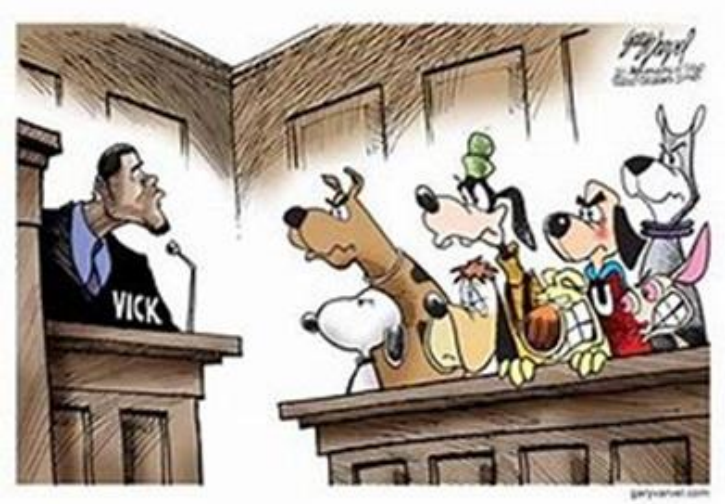
I am sure we all have heard the saying that you should not judge a book by its cover…. What does that mean? Many of us at some point have probably done that….and many of us probably have been judged by a cover – either because you are old, or young, fat, bald, a bleach blonde, have facial hair, drive a motorcycle, etc. What is the risk to an innocent man if jurors rely on judging based on a surface characteristic like skin color rather than looking to the evidence?

Backing *into the Issue*

A method suggested by Helen Simotas, an assistant Public Defender in our office's Mental Health Division, calls for one to start of in the general and then narrow the focus on race. Her method suggests opening with a question like "What kind of jury do you think my client should have?" And then see where people go with it. After some discussion, you she would then say "He's entitled to a jury of his peers…. What do you think that may look like?" And then further if race doesn't come up start with, "Do you think a jury of all females would be a jury of his peers? All males? All whites? Blacks? How does it make you feel when I ask these questions? How do you think my client feels? Do you think it would make a difference if he had an all-white jury panel?"[15]

The goal is to start with the general concept of a fair trial and then narrow it to the issue of race. If some jurors aren't comfortable with the issue of race, Helen suggests making the issue more about a fair trial.

[15] Michael Vick certainly wouldn't get a fair trial with these characters on his jury.



*All **Alone***

I have heard a story about a talk from Joe Johnson of Topeka, KS. It was told to me that Johnson, who is African American, tells the following story to mostly white venire panels:

> Let's say you visit New York one day. While you are there, you ask a hotel concierge where is the best place to listen to some live jazz. Without hesitation, the concierge recommends a jazz club in Harlem. 'It's the best,' he says. "Now as a white person you've only heard about Harlem but you're thinking this could be fun. So, you dress up and you go to the jazz club and have a great time. Maybe you have too great a time, because while you're there you get into an argument with someone and it ends up with you getting arrested.
>
> The next morning you are brought to court and when you get there, you immediately notice that the judge is black. Most of the court staff and lawyers are black. The prosecutor is also black.
>
> You look across the courtroom and you see 12 black jurors — waiting to decide your fate. As a non-black person ... please raise your hand if you might be a little worried about getting a fair trial in that situation.
>
> *Looks at people raising their hands and asks*
>
> "Why??"

Upon first hearing this question, one cannot deny the brilliance of the question. It asks the jurors to place themselves in the potential role of the defendant. Moreover, it is also a fairly disarming way to discuss race.

*The Tyrone **Moncriffe** Method*

A great lawyer who tries a lot of cases at high level and who has been trying them for a long time name Tyrone Moncriffe shared his approach to Voir Dire on race with me. Tyrone is an African American and typically tries the most serious cases and wins. Here's his approach to voir dire on the topic:

Ladies and Gentleman, when I first started practicing law, a prosecutor told me something I never forgot, he said he was trained to eliminate all of the black people off the jury if the defendant was black, his reasoning was simple, white people could not identify with his world and was more than likely to vote guilty even if the evidence was minimal. So, he would prefer an all-white jury or no more than one black because he felt the whites would bully the one black juror. As you see Mr. Smith is a black man, there are 65 jurors in this room, will all of the black jurors raised their hands for me, notice there are only 7 black jurors, some people feel that there is nothing wrong with an all-white jury, some people feel an all-white jury could never be fair with a black defendant, raise your hand if.....(after exploring this as much as possible, I tell the panel) that it is against the law for people to be struck because of their race, we have a right to have a hearing on that issue and challenge the state if that happens, who believes we should have that right ? (Note - the state will leave a few blacks on the panel following this Voir Dire so it is important that they understand the power of their independence with insulation questions). "Mrs. Smith if you were on the jury and you felt the defendant was innocent but 11 other jurors disagreed with you, do you know that you do not have to change you vote to please them? You could send a note to the judge and say I have made up my mind and will never change, this honorably judge will encourage you to stick with your vote and not let the others bully you, could you promise this judge that you would do that if it came to this?

Its All About the ***Prosecution***

I have a trial coming up in January 2019 that is a retrial following a hung jury where I believe the prosecutor is going to strike all of the minorities from the jury. I believe this because there were some peremptory strikes in the previous trial that were questionable and the state's responses to our *Batson* Challenges were questionable too. Moreover, the prosecutor just won a case where an all-white jury was seated. So, I am preparing for that aspect of the case.

I am thinking about asking a question in Voir Dire that would go something like....

> I've been practicing criminal law for 24 years now. And I started my career as a prosecutor. And in that job, I learned that some people think race makes a difference. I remember losing a trial where we had a black defendant and 5 black jurors on the jury. Following that loss, a senior prosecutor who had been watching the trial came into my office and told me that I lost the case because we had too many black people on the jury. I was surprised and startled by these comments. So, I have seen situations where all of the minorities have been eliminated from the jury by the Prosecution because they think race matters. I heard discussions like this and have been in debates like this in my experience. Some people think an all-white jury will have no impact, while others feel it will make it more difficult for an accused person to be judged fairly. What do you think? Why?" Then later ask, "If the jury does end up being all white, how will you make sure the case is decided only on the evidence?"

The goal of the question is to encourage the prosecution not to use their strikes discriminatorily. And the idea is to alert the jury to the possibility that the prosecution might attempt to discriminate in this case.

Scaled Questions

Scaled-response questions are questions that have a predefined answer list with options that are incrementally related to each other with the purpose of measuring the intensity to which a respondent feels toward or about something. For example, a grocer may want to ask its customers how they rate the taste of a Suopermarket's brand of tomato soup; the scaled-response list might be on a scale of 1 to 7, where 1 means they do not like the taste at all, and 7 means they completely love the taste. Scaled questions can be based on any number of responses, but are often 5, 7 or 10 point scales. They can also gauge feelings on issues. Typically the questions are asked individually of every member of the panel. This format can encourage more of the prospective jurors to express themselves, thereby expanding the pool of persons who can be asked follow up questions on an individual basis. Here's how one might conduct voir dire on race using scaled questions:

> I would like you to answer the following question(s) by picking one of three answers, True, partly true, or false. Here are the questions: Racism by whites against (insert race/ethnicity of the defendant) is a thing of the past? True, partly true or false. (The lawyer will then go to each prospective juror seeking an individual answer). There is more racial prejudice today than there was 30 years ago? True, partly true or false. (The lawyer will again go to each prospective juror seeking an individual answer). (Insert race/ethnicity of victim/defendant/plaintiff) commit more violent crimes than whites. True, partly true or false. (The lawyer will again go to each prospective juror seeking an individual answer). Blacks use more illegal drugs than whites. True, partly true or false. (The lawyer will again go to each prospective juror seeking an individual answer).

Using scaled questions, you can ask just about anything in a non threatening manner. You can also get every person on the panel to answer these questions. The only draw back is that people are often not honest and it can be tough to gauge their sincerity without individualize discussion.

Conclusion

It is my hope that this material is helpful to you and your clients. Attached are several interesting resources on the issue that may prove helpful. If you need any assistance, feel free to contact me. My email is eric.davis@pdo.hctx.net. The work we do is important. And as Thurgood Marshall once said, "I wish I could say that racism and prejudice were only distant memories. We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust…We must dissent because America can do better, because America has no choice but to do better."

Race and Jury Selection

Psychological Perspectives on the Peremptory Challenge Debate

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The legal system is a domain of potential relevance for psychologists, whether in the capacity of expert witness or citizen juror. In this article, the authors apply a psychological framework to legal debate surrounding the impact of race on the process of jury selection. More specifically, the authors consider race and the peremptory challenge, the procedure by which attorneys may remove prospective jurors without explanation. This debate is addressed from a psychological perspective by (a) examining traditional justifications for the practice of the peremptory challenge, (b) reviewing research regarding the influence of race on social judgment, (c) considering empirical investigations that examine directly race and peremptory challenge use, and (d) assessing current jury selection procedures intended to curtail racial discrimination. These analyses converge to suggest that the discretionary nature of the peremptory challenge renders it precisely the type of judgment most likely to be biased by race. The need for additional psychological investigation of race and jury selection is emphasized, and specific avenues for such research are identified.

Keywords: jury selection, peremptory challenge, influence of race, stereotyping, bias reduction

From ubiquitous media coverage of each so-called trial of the century to the growing popularity of research at the intersection of psychology and law, it is clear that the U.S. legal system is an institution with a unique ability to capture the attention of the average American—layperson and psychologist alike. Perhaps this fascination stems from the knowledge that at any time, anyone could be thrust into a real-life legal drama as juror or witness, plaintiff or defendant, even consultant or expert witness. As such, all Americans have a vested interest in the machinations of the courtroom, and this participatory system emphasizes objectives such as perceived legitimacy and representativeness. However, the recent U.S. Supreme Court ruling in *Miller-El v. Dretke* (2005; see also *Snyder v. Louisiana*, 2008) serves as a reminder that one of the largest and most recurring obstacles to these efforts to ensure fairness in the courtroom is the potentially biasing influence of race on judgment, a topic quite familiar to the contemporary psychologist.

Miller-El (2005) marks but a recent episode in the Supreme Court's decades-long struggle to curb the influence of race on the process of jury selection. Although judges and scholars have also addressed problems regarding the racial representativeness of those reporting to jury duty (see Cohn & Sherwood, 1999; Ellis & Diamond, 2003), much of the controversy surrounding race and jury selection focuses specifically on attorneys' manipulation of jury composition through use of the *peremptory challenge*, the practice by which a fixed number of prospective jurors can be excused without evidence of their partiality. At the heart of this debate is how to reconcile the historically discretionary nature of the peremptory challenge with the efforts to protect the rights of defendants to be tried by a jury of their peers and the rights of citizens of all races to serve as jurors. In *Miller-El* (2005), the Court overturned the conviction of a Black defendant, ruling unconstitutional the prosecutorial peremptories that removed 10 of 11 Black prospective jurors during jury selection and citing as evidence of racial discrimination the disparate questions asked of White and Black members of the jury pool. The Court found that the prosecutor's explanations for challenging some Black jurors were equally applicable to White jurors who were not challenged, indicating disparate treatment on the basis of race.

The impact and historical significance of *Miller-El* (2005) have since been assessed in several law review articles (e.g., El-Mallawany, 2006; Hitchcock, 2006; Jackson, 2006). Psychologists also have unique contributions to offer this discourse, as has been the case with other legal debates over the past half century. Here we refer to the use of basic research to adjudicate difficult issues—from the Clarks' studies in *Brown v. Board of Education* (1954) to more recent American Psychological Association amicus curiae briefs regarding capital punishment (*Atkins v. Virginia*, 2002; *Roper v. Simmons*, 2005)—as well as empirical assessment of procedural issues such as jury size (Davis, Kerr, Atkin, Holt, & Meek, 1975; Kerr & MacCoun, 1985), death qualification (Cowan, Thompson, & Ellsworth, 1984; Haney, 1984), and judicial instructions (Diamond, 1993; Lieberman & Sales, 1997). Indeed, ques-

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Samuel R. Sommers was supported by a Tufts University Faculty Research Award. We thank Nalini Ambady, David Baldus, Phoebe Ellsworth, and Mary Rose for their helpful comments regarding this article.

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Vol. 63, No. 6, 527–539 DOI: 10.1037/0003-066X.63.6.527

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tions central to the race and jury selection controversy have barely begun to be addressed empirically: To what extent does race influence jury selection judgments? Through what psychological processes? How easy is it to identify the impact of race on any particular peremptory challenge? Absent data on these and other important issues, it is premature to offer concrete policy recommendations, but clearly psychological theory and findings regarding racial stereotyping and bias can inform this ongoing debate. Moreover, this controversy provides an instructive case study for psychologists with more basic interests in race, person perception, and social judgment.

In the first section of this article, we review the history of the peremptory challenge, examine its interaction with race, and assess from a psychological perspective traditional justifications for the practice. We then examine the psychological literature on race and social judgment, assessing the extent to which race likely influences peremptory use, as well as the difficulty inherent in identifying such influence. Next, we consider the few empirical investigations that have examined directly the relationship between race and peremptory challenge use. Finally, we evaluate the viability of current safeguards against the influence of race during jury selection and consider options for their improvement. Throughout the article, we identify avenues for future research that will allow psychologists to offer more substantive and specific contributions to this debate.

The Story of the Peremptory Challenge

Background and Assumptions

During jury selection, there are two routes through which litigants seek removal of prospective jurors. In a successful *challenge for cause*, the judge is persuaded that a juror will not be impartial and, thus, removes this individual from the jury panel. Such challenges are unlimited in number, but judges are typically hesitant to accept them absent clear evidence of a fixed opinion that would preclude impartiality (Babcock, 1975; Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, 2001; Hans & Vidmar, 1982). The second option—often pursued after a failed challenge for cause—is to use one of a limited number of peremptory challenges (sometimes referred to simply as *peremptories*), by which a prospective juror is excused without justification. Peremptories enjoy a long legal history, although they are not guaranteed by the U.S. Constitution (Alschuler, 1989; Broderick, 1992). The most common argument in support of the practice is that it allows attorneys to remove jurors whom they believe but cannot prove to be biased. As such, peremptories are presumed to create fair juries and reassure litigants that they have a say as to who judges them (*Batson v. Kentucky*, 1986; Hans & Vidmar, 1982). Babcock (1975) noted two additional benefits: preventing the unpleasantness of articulating concerns about juror bias and enabling attorneys to remove jurors who have been alienated by probing questions during jury selection, or *voir dire*.

Rarely have these alleged benefits been examined empirically (Broderick, 1992). Do peremptories improve jury impartiality? The number of peremptories allowed varies by state and type of case, yet no published analyses compare jury selection outcomes across courthouses, perhaps because of difficulties in operationalizing impartiality. More testable is the assumption that attorneys can accurately and consistently deduce a juror's verdict predisposition—not to mention an inability to remain impartial—during voir dire. But few empirical studies support that proposition: "An attorney's ability to predict appears limited by a very low ceiling of precision" (Hastie, 1991, p. 712; see also Finkelstein & Levin, 1997; Johnson & Haney, 1994; Zeisel & Diamond, 1978). Data suggest that attorneys sometimes focus voir dire questions on indoctrination as opposed to bias identification (Hastie, 1991), leaving them ill-prepared to use peremptories. Moreover, jurors frequently conceal information during voir dire and are unable to assess their own impartiality (Kerr, Kramer, Carroll, & Alfini, 1991; Seltzer, Venuiti, & Lopes, 1991). In sum, although some attorneys may be better than others at identifying biased jurors—and some biases may be easier to identify than others—data provide little evidence of a reliable link between peremptory use and impartial juries. Some analyses even indicate that voir dire produces juries with attitudes no different from the attitudes of a group of 12 randomly selected individuals (e.g., Johnson & Haney, 1994).

Other purported benefits of the peremptory challenge have also received scant empirical attention. Does the peremptory challenge provide a safeguard for attorneys who wish to avoid empanelling jurors irritated by aggressive questioning? This proposition seems plausible, although Rose's (2003) interviews with jurors indicate that many do not take personally either the questions they are

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asked during voir dire or the experience of being excused from a jury. Do peremptories increase the perceived fairness of the system? General surveys could address this question directly, but such studies have not been conducted. Relevant findings are reported by MacCoun and Tyler (1988), who found that laypeople prefer juries to judges and prefer 12-person juries to 6-person juries, in large part because of the greater community representativeness associated with larger juries. Combined with the finding that peremptory challenge use often creates less representative juries (see Baldus et al., 2001), this result provides indirect evidence that peremptories do not bolster the legitimacy of the legal system and can, in some cases, even undermine it. Overall, although the arguments in favor of peremptory challenges carry intuitive appeal, they remain largely unexamined and, on some counts, inconsistent with empirical data.

Peremptories and Race

That the peremptory challenge might not live up to its reputation for improving jury impartiality and system legitimacy is not as problematic as the allegation that the practice also enables racial discrimination during jury selection. Indeed, the peremptory controversy centers on race, although other criticisms include, for example, that the practice contributes to making voir dire a cumbersome and inefficient process. Regarding the ostensible advantages of peremptories, these benefits seem even less likely to be realized when challenges are based on race. First, race-based peremptories do not lead to more impartial juries. To the contrary, both legal rulings and empirical data suggest that diverse jury compositions can reduce bias and encourage more thorough deliberations (*Peters v. Kiff*, 1972; Sommers, 2006). Concerning legitimacy, juries that are not racially representative of their communities tend to elicit skepticism rather than confidence in the system (Ellis & Diamond, 2003; Hans & Vidmar, 1982). And with regard to other advantages suggested by Babcock (1975), she has acknowledged that they are not applicable when peremptories are based on race (Babcock, 1993).

The Supreme Court has addressed the issue of race and peremptories several times. As far back as in the 19th century, the Court ruled against statutes excluding members of particular racial groups from jury duty (*Neal v. Delaware*, 1880; *Strauder v. West Virginia*, 1879) while separately affirming the importance of peremptories in jury selection (*Lewis v. U.S.*, 1892; *Pointer v. U.S.*, 1894). The first case in which race and peremptory use intersected was *Swain v. Alabama* (1965). The appeal of Robert Swain, a Black man convicted of murder and sentenced to death by an all-White jury, was based on the exclusion of all six Black prospective jurors by prosecutorial peremptories. The Court ruled that these challenges were constitutional, as it should be presumed that attorneys have legitimate reason for peremptories in any given case and, in the wake of unnecessary restrictions, "the challenge, pro tanto, would no longer be peremptory" (*Swain*, 1965, p. 222). The majority conceded that more systematic efforts to exclude members of a racial group from jury service across several trials would constitute a violation of equal protection rights, but demonstrating that such bias had occurred proved to be impossible. In denying Swain's appeal, for instance, the Court majority was not swayed by the fact that no Black individual had ever survived voir dire to serve as juror on a criminal or civil jury in Talladega County, a region with a Black population of 26%.

Twenty years later, the Court's ruling in *Batson v. Kentucky* (1986) eased this unattainable standard, marking a significant change in thinking since *Swain* (1965). With this ruling, the Court majority served notice that the prevention of racial discrimination now trumped the historical sanctity of the peremptory challenge. Per *Batson*, a defense attorney simply has to make a reasonable argument that race influenced prosecutorial peremptory use in the case at hand—not systematically across cases—before the burden shifts to the prosecution to prove otherwise. *Batson* was a landmark ruling in that for the first time, attorneys could be asked to justify peremptories. This first meaningful restriction on the peremptory challenge has since been extended to defense attorneys (*Georgia v. McCollum*, 1992), civil trials (*Edmonson v. Leesville Concrete Co.*, 1991), and trials in which the defendant and juror are not of the same race (*Powers v. Ohio*, 1991). The *Batson* ruling was also noteworthy in that it singled out race as a characteristic on which peremptories could not be based. Subsequent defendants have appealed on the grounds that peremptories were used to target jurors of other demographics, but the Court generally has upheld only those appeals based on gender (*J. E. B. v. Alabama*, 1994).

As monumental as it was, *Batson* (1986) left many questions unanswered, most notably how exactly judges are supposed to evaluate the legitimacy of peremptories. Some subsequent decisions have rendered it more difficult

to show that a peremptory challenge is based on race, such as the ruling that to comply with *Batson*, an attorney must simply provide any race-neutral justification and not necessarily one that is "persuasive or even plausible" (*Purkett v. Elem*, 1995, p. 768). Other rulings, such as *Miller-El* (2005), suggest criteria for evaluating peremptory challenge justifications, but there remains no clear standard by which judges are to make this determination. Consistent with such ambiguity, archival analysis indicates that *Batson* and its progeny have had little effect on actual peremptory challenge use or jury racial composition (Baldus et al., 2001). Consider, for example, pre-Hurricane Katrina Jefferson Parish, Louisiana, where, despite a Black population of 23% according to the 2000 census, only 4% of jurors in post-*Batson* capital murder trials have been Black (Liptak, 2007). Of course, race-based peremptory use is not the only explanation for data such as these: Large numbers of racial minority group members are eliminated from jury service before even reaching the courthouse because of racial and socioeconomic disparities in jury summons refusals, undeliverable jury summonses, and financial hardships that preclude jury service (see Ellis & Diamond, 2003). Still, the continuing problem of nonrepresentative juries in the wake of *Batson* have led some to resurrect the call to eliminate peremptories found in Justice Thurgood Marshall's concurring opinion: "Eliminating the shameful practice of racial discrimination in the selection of juries . . . can be accomplished only by eliminating peremptory challenges entirely" (*Batson*, 1986, pp. 102–103).

Clearly, many issues surrounding race and jury selection remain unresolved, and we believe that psychologists are uniquely equipped to inform this ongoing debate. For example, rulings from *Swain* (1965) through *Miller-El* (2005) imply that race affects peremptory challenge use in some cases, but what does the psychological literature on race and social judgment suggest regarding the pervasiveness and nature of this influence? If race impacts peremptory challenge use, what is the likelihood that self-reported justifications for such challenges will reveal this influence? That is, to what extent are attorneys unaware of the influence of race on their judgment, and, even when they are aware of it, how easy is it for them to come up with race-neutral justifications? These are issues to which we now turn our attention.

Race and Social Judgment

Influence of Social Category Information

It is well documented that social category information such as race can have profound effects on judgment (for a review, see Fiske, 1998). The impact of race has been demonstrated in countless settings: medical diagnoses (e.g., LaVeist, Arthur, Morgan, Plantholt, & Rubinstein, 2003), *Diagnostic and Statistical Manual of Mental Disorders* evaluations (e.g., Neighbors, Trierweiler, Ford, & Muroff, 2003), ratings of professors (e.g., Vescio & Biernat, 1999), assessments of students (e.g., Staiger, 2004), perceptions of political candidates (e.g., Sigelman, Sigelman, Walkosz, & Nitz, 1995), and evaluations of job applicants (e.g., Bertrand & Mullainathan, 2004), to name a few. Researchers have also examined the effects of race on legal judgment, with much of this work focusing on the influence of a defendant's race on jurors (see Sommers, 2007). Findings from these varied domains suggest not only that the influence of race on perception and judgment is pervasive but also that it is often automatic (Devine, 1989; Fiske & Neuberg, 1990) and very quick (see Eberhardt, 2005; Ito & Urland, 2003).

Through what processes does race affect social judgment? Two common answers in the psychological literature involve cognition (i.e., stereotypes) and motivation or affect (i.e., prejudice), explanations that are not mutually exclusive. In examining these possibilities in the domain of jury selection, it is important to consider how they interact with attorneys' primary goal of empanelling a favorable jury that increases their likelihood of winning the case. After all, although explicit purposes of voir dire include empanelling an impartial and representative jury, the U.S. legal system is adversarial by nature. In practice, attorneys' chief objective in this process is to select jurors whom they believe will be sympathetic to their side of the case (Hans & Vidmar, 1982).

Although we know of no direct empirical assessment of the relationship, ample theoretical and anecdotal evidence suggests that attorneys' stereotypes regarding jurors of different races contribute to the impact of race on jury selection. As Fiske (1998) described, people tend to rapidly categorize others on salient dimensions such as race. This categorization is often accompanied by stereotypic associations that affect perception and judgment, and such stereotype activation is not always conscious. Colloquial use of the word *stereotypes* connotes exaggerated and negatively valenced beliefs about an outgroup, but stereotypes need not be negative—or inaccurate—to influence judgment. Simply believing that members of a group are likely to possess certain characteristics or attitudes is typically sufficient to affect judgment and bring about confirmatory information search processes (Darley & Gross, 1983; Snyder & Swann, 1978).

There is little reason to suspect that legal judgments are immune from this influence of category-based beliefs. Stereotypes are particularly likely to affect judgments that are based on limited information, made under cognitive load, and hurried by time pressure (e.g., Kruglanski & Freund, 1983; Kunda, Davies, Adams, & Spencer, 2002; van Knippenberg, Dijksterhuis, & Vermeulen, 1999), all apt descriptions of typical voir dire. Indeed, jury selection guides, training manuals, and other sources of jury folklore include countless strategies based on explicit stereotypes: Defense attorneys should seek female jurors unless the defendant is an attractive woman; poor jurors are good for the defense in a civil case because they are uncomfortable with large sums of money; civil plaintiffs should avoid jurors with professions based on precision, such as bank tellers or accountants (Fulero & Penrod, 1990; Olczak, Kaplan, & Penrod, 1991). In the pursuit of a favorable jury, there appears to exist among attorneys a "time-honored stratagem of selecting jurors by way of superstition, ste-

reotypes, body language, implicit theories of attitude and personality" (Kovera, Dickinson, & Cutler, 2002, p. 165) as well as other "seat-of-the-pants" intuitions (Broderick, 1992, p. 410).

It is clear that comparable juror stereotypes exist for race (Page, 2005). Many jury selection manuals include explicit instructions to consider race. Justice Breyer's opinion in *Miller-El* (2005) summarized some of these racial stereotypes, ranging from the general belief that Black jurors are sympathetic toward civil plaintiffs to point-based strategies by which value is allocated to prospective jurors on the basis of race. Baldus et al. (2001) provided another example, describing a training video for prosecutors that cited race in describing "good" and "bad" jurors. Such juror stereotypes may also exert influence through nonconscious processes. To the extent that attorneys have been exposed to or have developed their own racial stereotypes relevant to juror performance—Blacks are skeptical of police; Whites are forgiving of corporate malfeasance—no conscious effort may be necessary for these stereotypes to influence voir dire evaluations.

A provocative issue in considering juror stereotypes is that some of these assumptions about race may be accurate. Research suggests, for instance, that Black jurors are often more lenient toward Black defendants than are White jurors (see T. W. Brewer, 2004; Mitchell, Haw, Pfeifer, & Meissner, 2005; Sommers, 2007). One might therefore argue that it is rational for attorneys to consider race given their desire to select a sympathetic jury. However, whereas juror stereotypes tend to be global—Black jurors will not convict Black defendants—research suggests that actual effects by juror race are more context dependent. For example, when trial evidence is strong, non-White jurors are often more punitive toward ingroup versus outgroup defendants (Kerr, Hymes, Anderson, & Weathers, 1995; Taylor & Hosch, 2004). Moreover, to the extent that between-race differences in juror tendencies derive from variability in experience and ideology (e.g., Cowan et al., 1984), attorneys may be better served assessing these directly instead of relying on race as a proxy. Of course, from a practical standpoint, these issues are moot, as the Supreme Court has deemed race-based peremptories unconstitutional regardless of the accuracy underlying them.

What about affective or motivational processes? Does racial prejudice among attorneys predict race-based peremptory challenge use? To answer this question, we first propose that the race-related stereotypes that influence jury selection are likely not the same stereotypes that psychologists typically associate with racial prejudice, such as those regarding lack of intelligence, morality, or humanity. Rather, research on juror folklore implies that the influence of race on jury selection often derives from attorneys' domain-specific beliefs about the tendencies of jurors of different races: Blacks are acquittal prone; racial minority jurors are lenient toward same-race defendants. To our knowledge, however, no studies have examined the link between attorney endorsement of race-related juror stereotypes and peremptory challenge use during jury selection, and the precise nature of this relationship remains speculative.

More generally, psychological research has demonstrated that prejudice often leads decision makers to judge less favorably and allocate fewer resources to particular outgroups (for a review, see M. B. Brewer & Brown, 1998). In contemporary America, such preferences may not be as overt as they were in previous eras (e.g., Dovidio & Gaertner, 1998; Kinder & Sears, 1981), but they are not uncommon. At the same time, affect and attitudes toward outgroup members—like stereotypic beliefs—are not always negative. Laypeople feel greater warmth toward certain racial groups than others (Fiske, Cuddy, Glick, & Xu, 2002), and the perceived acceptability of prejudice also varies by target group (Crandall, Eshelman, & O'Brien, 2002). Indeed, an emerging body of research suggests that outgroup membership can sometimes have positive effects on perceivers' judgments (e.g., Barden, Maddux, Petty, & Brewer, 2004; Wittenbrink, Judd, & Park, 2001). For example, some Whites process persuasive arguments more systematically when conveyed by a Black source (Petty, Fleming, & White, 1999; White & Harkins, 1994) or about a Black target (Sargent & Bradfield, 2004), findings attributed to motivations to avoid prejudice. In the context of jury selection, however, no research has examined whether such prejudice-related affect or motivation—in either conscious or nonconscious form—impacts judgments, despite the testability of these relationships.

One could argue that such race-related motivations are unlikely to gain traction in attorneys' jury selection judgments unless they also facilitate the effort to empanel a favorable jury. As with any walk of life, certainly there are attorneys who harbor animosity toward particular racial groups, but does such sentiment affect peremptory challenge use? Consider, for example, archival data indicating that prosecuting and defense attorneys are often mirror opposites in their use of peremptory challenges (e.g., Turner, Lovell, Young, & Denny, 1986): In cases with Black defendants, prosecutors tend to challenge Black prospective jurors and defense attorneys tend to challenge White prospective jurors. The most parsimonious and intuitive explanation for this finding would not be that prosecutors harbor anti-Black prejudice—and thereby seek to deprive Black citizens of their rights to serve as jurors—whereas defense attorneys hold comparable antipathy toward Whites. More plausible is an account that focuses on stereotypes concerning which jurors are likely to be favorable to each side of the case. To the extent that prejudice does impact peremptory challenge use, it seems likely that these effects are less overt, such as leading attorneys to perceive less rapport with certain jurors during voir dire or predicting a tendency to view outgroup jurors as homogeneous. Of course, these are empirical questions.

In sum, our review of the psychological research has illustrated that race has pervasive effects on judgments across domains. Such influence seems particularly likely to occur in a jury selection process that provides decision makers with a limited amount of individuating information about jurors and actually champions the use of category-

based assumptions. However, researchers have not examined directly the link between attorneys' race-related juror stereotypes and their jury selection tendencies, nor has research explored the relationship between attorney prejudice and peremptory challenge use. The specific psychological mechanisms by which race impacts jury selection therefore remain uncertain, as does the extent to which such influence is based on conscious versus nonconscious processes.

Identifying the Influence of Race

Basic research not only indicates that the influence of race on social judgment is widespread and occurs through multiple processes but also that this influence is difficult to identify in any one instance (see Norton, Sommers, Vandello, & Darley, 2006). Particularly problematic are attempts to assess such influence using self-report data, as courts do in the wake of *Batson* (1986). One limitation of self-report data is the potential for the effects of race to occur outside conscious awareness, as detailed above. If a decision maker is not aware of the impact of race on a decision, he or she obviously cannot cite race as being an influential factor. Complicating matters further is people's well-documented tendency to offer compelling explanations for behavior even when they are unaware of the factors that were influential (Nisbett & Wilson, 1977; Shafir, Simonson, & Tversky, 1993). To the extent that race affects judgment in an implicit, nonconscious manner, efforts to identify this influence via self-report are at best uninformative and at worst misleading (Page, 2005).

However, even if some attorneys consciously consider race, it is unlikely that their self-reports will capture this influence (Crosby, Bromley, & Saxe, 1980). Laypeople often exhibit motivations to avoid prejudice (e.g., Dovidio & Gaertner, 1998; Dunton & Fazio, 1997; Plant & Devine, 1998; Sommers & Norton, 2006), and many Whites resist admitting that they have even noticed race during social interaction (Norton, Sommers, Apfelbaum, Pura, & Ariely, 2006), much less that race has affected their judgment. Even if most attorneys are not particularly susceptible to such normative concerns in the courtroom, the explicit prohibition in *Batson* (1986) constitutes an even stronger constraint against admitting to the influence of race. It is therefore highly unlikely that many attorneys will cite race in justifying peremptories, even if they are aware of its influence.

How do decision makers explain judgments without admitting to the influence of race? Research suggests that people are remarkably facile at generating neutral explanations to justify biased judgments (Norton, Vandello, & Darley, 2004). In one series of studies in which race was manipulated, Norton et al. (2004) presented White participants with information about two college applicants, one of whom was Black and one of whom was White. When asked whom they would admit, participants overwhelmingly selected the Black applicant, evidencing a desire to appear unbiased. In explaining their decisions, though, participants rarely cited race. Rather, when the Black applicant had a higher grade point average, participants rated grades as the most important factor for admission. When the Black applicant had lower grades but more Advanced Placement classes than the White applicant, the number of advanced classes was deemed more important. Norton et al. (2004; Norton, Sommers, Vandello, & Darley, 2006) suggested that the ease of generating such neutral explanations impedes identification of the influence of race on judgments, a conclusion with legal implications for not only jury selection but also sentencing, employment discrimination cases, and other decisions involving subjective criteria and even a modicum of discretion.

Given these limitations of self-report, psychologists tend to rely on other means of assessing the influence of race. One option is to examine judgment across scenarios. In jury selection, one could examine the racial composition of an attorney's previous juries. Admittedly, though, courts often focus on the narrower question of, Is there evidence of racial bias in this particular case? (see *McCleskey v. Kemp*, 1987; *Swain*, 1965). Another strategy is to present multiple individuals with the same scenario in which the race of the principals is varied (e.g., Norton et al., 2004; Sommers & Ellsworth, 2000). Such manipulation cannot be used during actual voir dire, but as *Miller-El* (2005) suggests, disparate treatment by race can be deduced from inconsistencies in peremptory challenge use. Psychologists have also begun to turn in greater numbers to subtle, nonreactive measures of decision makers' racial attitudes (e.g., Fazio, Jackson, Dunton, & Williams, 1995), as well as assessment of implicit attitudes (e.g., Greenwald, Nosek, & Banaji, 2003). However, these are measures with which courts remain largely unfamiliar and uncomfortable (Krieger, 2004) and about which psychologists continue to debate (e.g., Banaji, Nosek, & Greenwald, 2004; Karpinski & Hilton, 2001). In sum, whereas psychologists use a multitude of methods to examine the effects of race—some of which could be used in the courtroom, some of which are less feasible for such use—the legal system relies exclusively on self-report, a problematic strategy given the unreliability and inaccuracy of such reports.

Investigations of Race and Peremptory Use

Archival Data

To this point, our review suggests two conclusions: (a) A prospective juror's race likely influences peremptory challenge use in many instances and (b) this influence is unlikely to be captured via self-report measures. Archival analyses support both propositions. First, Rose (1999) observed jury selection for 13 trials in North Carolina, all but one of which involved a Black defendant. Overall, Black prospective jurors were no more likely than White prospective jurors to be challenged, but, as alluded to above, race had different effects on prosecution and defense attorneys: Although 71% of Black juror challenges were made by prosecutors, 81% of White juror challenges were made by the defense. This asymmetry implies an expectation that White jurors are more pro-prosecution or at least are relatively less sympathetic to Black defendants than are Black

jurors. Similar findings have been reported for post-*Batson* jury selections in other jurisdictions (Baldus et al., 2001; McGonigle, Becka, LaFleur, & Wyatt, 2005).

Second, archival data also indicate that regardless of its actual influence on jury selection judgments, attorneys are unlikely to cite race when asked to justify peremptory use. Even before *Batson* (1986), in interviews at a federal district court in Illinois regarding more than 100 peremptories, attorneys provided a race-related explanation for only 8 peremptory challenges (Diamond, Ellis, & Schmidt, 1997). Of course, it is possible that race actually did not influence the vast majority of these judgments. But more recently, Melilli (1996) examined close to 3,000 instances in which attorneys alleged that their counterpart's peremptory challenge use violated *Batson*; most involved a prosecutor removing a Black prospective juror. On only 55 occasions—just 1.8% of the time—did an attorney forced to justify a peremptory challenge admit that race had been influential.

Just as noteworthy is that the vast majority of attorneys' race-neutral justifications are accepted by judges as legitimate. Melilli (1996) reported that attorneys required to justify a peremptory challenge successfully convinced the trial judge that the challenge was legitimate more than 80% of the time, whereas Raphael and Ungvarsky (1993) offered the similar conclusion that "only a small percentage of the neutral explanations for peremptory strikes were rejected" (p. 235). Thus, attorneys appear capable of generating a wide array of neutral justifications for race-based peremptory challenges—including age, marital status, occupation, socioeconomic status, previous involvement with the criminal justice system, jury experience, and demeanor—leaving judges with little choice but to accept their explanations (Raphael & Ungvarsky, 1993). Taken together, these analyses of real cases support the conclusion that race-related juror stereotypes are likely influential during jury selection, even while attorney self-reports suggest otherwise.

Experimental Studies

Although archival analyses converge on findings consistent with psychological theory, they do not offer definitive conclusions regarding race and peremptory use. As courts have been quick to point out, correlational studies cannot provide conclusive evidence of causality (e.g., *McCleskey v. Kemp*, 1987). Furthermore, archival analyses cannot rule out the possibility—as improbable as it may be—that in each one of the instances when attorneys failed to cite race as being influential, they did so because the judgments were truly race neutral. A skeptic could assert that juror race simply happened to be confounded with the nonracial factors that were actually influential in these instances. Only through an experimental design can researchers address claims such as this one by testing simultaneously the influence of race on jury selection judgments and the relative unlikelihood that attorney self-reports will provide evidence of this influence.

We conducted such an experimental investigation using three participant samples: college students, law students, and trial attorneys (Sommers & Norton, 2007). Participants were presented with a criminal trial summary with a Black defendant and instructed to assume the role of prosecutor. They were told that they had one peremptory challenge remaining and were asked which of two prospective jurors they would challenge. The two jurors exhibited different characteristics that pretesting indicated would concern the prosecution: Juror A was a journalist who had written about police misconduct; Juror B had little background in science or math and stated that he believed people often manipulate statistics such as those used to evaluate the results of forensic lab analysis. We varied the race of the prospective jurors such that in one condition, photographs revealed Juror A to be Black and Juror B to be White, whereas in the other condition, Juror A was White and Juror B was Black.

As expected, prospective jurors were significantly more likely to be challenged when Black than when White. This difference was evident across all three samples and was strongest among our sample of attorneys. We also asked participants to justify their decision to the judge, and we coded these open-ended responses. As predicted, very few participants cited race as a factor. That is, self-report measures did not reflect the significant influence of race on peremptory challenge use. Instead, consistent with the predictions of Norton et al. (2004; Norton, Sommers, Vandello, & Darley, 2006), participants focused their justifications on race-neutral characteristics that bolstered their decision. When Juror A was Black, participants were likely to cite as their chief influence his familiarity with police misconduct. When Juror B was Black, participants were likely to identify his skepticism about statistics as their primary concern. These differences emerged even though the content of the juror profiles was constant across conditions. Thus, even though participants were more likely to challenge Black prospective jurors, their explanations for this tendency were both plausible and race neutral.

In an extension of these findings, gender—another social category that is both salient and prohibited from influencing jury selection (*J. E. B. v. Alabama*, 1994)—had similar effects. In response to a trial summary with a female defendant, participants were more likely to challenge a female juror than a male juror, although these decisions were typically justified in gender-neutral terms (Norton, Sommers, & Brauner, 2007). More troublingly, instructions emphasizing the prohibition against considering gender did not ameliorate the effect, suggesting that reminding attorneys of restrictions on peremptory challenge use would not curtail the impact of proscribed category information. In addition, judgments in this study were not predicted by participants' gender-related ideologies or scores on measures of sexism, providing support for the conclusion that jury selection judgments are driven more by beliefs about juror tendencies than by attorney prejudice.

Taken together, recent experimental data demonstrate the influence of race on jury selection judgments as well as the limitations of self-report measures for capturing this influence. However, these findings are few in number,

leaving unexamined a range of empirical questions. As mentioned above, to the extent that race-based peremptories are driven by juror stereotypes, what is the exact nature of these beliefs? In a trial with a White defendant, would prosecutors continue to avoid Black jurors or would they actually show a preference for non-White jurors? Are expectations related to race and gender unique to these social categories or indicative of a more general stereotype that jurors are lenient toward fellow ingroup members? Furthermore, how often do race-based challenges occur during jury selection relative to peremptories based on more general concerns about impartiality? These are all issues worthy of future examination.

Policy Questions

Evaluating Current Procedures

The *Batson* (1986) ruling led to current practices designed to prevent the influence of race on peremptory use: When a reasonable argument is made that an opposing attorney has based a challenge on race, that attorney must convince the judge otherwise. Our review suggests that it is naive to believe that this procedure is sufficient to identify and prevent race-based peremptories. It is far too easy to generate plausible, race-neutral justifications that leave judges no choice but to accept them (Raphael & Ungvarsky, 1993). Consider some of the successful justifications catalogued by Melilli (1996). On 28 occasions, attorneys persuaded a judge that a peremptory challenge was based on a juror's experience as a crime victim; in 15 cases, attorneys cited that a juror had never been a crime victim. Prospective jurors were dismissed for being too eager to serve as well as too eager to avoid jury service, for being childless as well as for having children, for timidity as well as for assertiveness. On its own, any one of these justifications would be reasonable; viewed in the aggregate, they demonstrate that the range of available justifications is so broad as to render compliance with *Batson* almost a formality.

One of the only meaningful uses for these self-reported justifications may be thorough scrutiny of the explanation for each peremptory. The *Miller-El* (2005) opinion provides an example of such careful analysis for the questioning of Billy Jean Fields, a Black prospective juror challenged by the prosecution. Fields expressed support for capital punishment, explaining that he believes the government acts on God's behalf when carrying out the death penalty. When asked to justify his challenge of Fields, the prosecutor voiced concern about the prospective juror's religious attitudes and death penalty beliefs, and, in particular, "the comment that any person could be rehabilitated if they find God" (*Miller-El*, 2005, p. 240). Not only did this explanation mischaracterize Fields's statement, but it was also inconsistent with the fact that several Whites who were not challenged revealed precisely this type of ambivalent attitude toward capital punishment and rehabilitation.

But even if time and resources permitted such parsing of voir dire in every trial, the overall utility of this strategy is unclear. Not all explanations permit the type of analysis carried out in *Miller-El* (2005). What if the prosecutor had claimed that he excluded Fields because of poor eye contact? Moreover, Justice Clarence Thomas's dissenting opinion raises the possibility that the challenge of Mr. Fields was more ambiguous than appears at first. Using other excerpts from the same voir dire, Thomas argued that Fields was, in many respects, an undesirable juror. Thomas also referred to other factors—such as the point during the voir dire at which each juror was questioned—as race-neutral considerations that could have been influential. If the *Miller-El* opinions offer a firm conclusion, it may be that peremptories are based on such subjective criteria that it is almost impossible to pin down the factors that influence any one challenge.

In sum, theoretical and empirical analyses suggest that the peremptory challenge is a practice ripe with the potential for the influence of race. Stereotypes based on a wide range of juror characteristics guide peremptory challenge use, and there is no reason to believe that race is an exception. Indeed, the peremptory challenge, by its inherently discretionary nature, is precisely the type of judgment most likely to be biased by race. This conclusion is problematic from a constitutional perspective, but it has other repercussions as well. For one, racially imbalanced juries undermine confidence in system legitimacy (Ellis & Diamond, 2003; Hans & Vidmar, 1982): It is difficult to imagine Black defendants in Talladega County in 1965 or in Jefferson Parish today having faith that they will be tried by a jury of their peers. Furthermore, research on group processes suggests that heterogeneity predicts performance benefits on tasks such as those required of juries (Hoffman & Maier, 1961; Phillips, Mannix, Neale, & Gruenfeld, 2004; Sommers, 2006). That racially homogeneous juries sometimes demonstrate less optimal decision-making processes than do heterogeneous juries is yet another potential downside to race-based peremptories.

Considering the Future

What, then, is to be done about racial discrimination during jury selection? What will be the fate of the peremptory challenge? Some have joined Thurgood Marshall's call for its elimination, arguing that the practice is irreconcilable with the effort to prevent disparate treatment by race (e.g., Broderick, 1992; Marder, 1995; Melilli, 1996; *Miller-El*, 2005, Breyer's concurring opinion, p. 264). Would the elimination—or at least a reduction in number—of peremptories curb the influence of race on jury selection? At first blush, the extensive literature on race and social judgment suggests an affirmative answer. The discretionary nature of peremptories renders them susceptible to the nonconscious influence of race; peremptories also remain the easiest route by which attorneys can intentionally manipulate jury racial composition. Eliminating or reducing in number peremptory challenges would therefore seem likely to decrease the influence of race on jury selection and increase jury representativeness, a conclusion supported by Baldus et al.'s (2001) mathematical modeling of over 300 murder trials in Philadelphia.

However, the issue is complicated. We have focused our analysis of the peremptory challenge on the influence

of race because the most frequent, contentious, and psychologically relevant debate on this issue also focuses on race. But although the Supreme Court has placed an emphasis on preventing racial bias and achieving racially representative juries, another overarching objective of jury selection—from the perspective of the system—is the creation of impartial juries. The question of how best to achieve this goal of impartiality is also amenable to psychological investigation, as voir dire is an exercise in applied person perception. But it is clear that the balance between protecting against attorney racial bias and against more general forms of juror bias is delicate, and tipping it too far in the direction of racial concerns risks undermining the pursuit of impartial juries.

Eliminating peremptories would, for example, handcuff litigants who suspect that a prospective juror is not impartial yet are unable to convince the judge of this. That said, we also note that there is scant empirical evidence that attorneys are consistently able to identify biased jurors during voir dire. Moreover, analyses and anecdotes indicate that attorneys typically use their peremptories to target jurors perceived to be unsympathetic to their side of the case, which is not in keeping with the ideal of assembling a truly impartial jury. In many instances, the end result of this process is nevertheless a balanced jury, as both sides will have identified and challenged their least sympathetic jurors. But in other cases, such as when the two attorneys are not equally matched in their ability to weed out unsympathetic jurors, the adversarial nature of the system will not promote impartiality. Allowing but a handful of peremptories per case—according to the Bureau of Justice Statistics (2004), the current state average is just over 12 for each side in a capital trial and over 7 for criminal trials in which the defendant does not face life in prison—could constitute a compromise serving the objectives of both impartial juries and prevention of racial bias.

Another complication is that eliminating peremptories might not end the influence of race on jury selection. First, challenges for cause in some cases—capital murder trials, for example—have the side effect of disproportionately excusing jurors of particular racial groups (e.g., Cowan et al., 1984). Second, attorneys might still be able to use challenges for cause to influence jury racial composition. Many have suggested that a reduction in number of peremptories must be accompanied by expanded voir dire of individual jurors and loosening of standards for granting challenges for cause (see Council for Court Excellence, District of Columbia Jury Project, 1998; Diamond et al., 1997; Marder, 1995). Without peremptories in their toolbox, attorneys might dig deeper during voir dire questioning of jurors of certain racial groups in the hope of uncovering a basis for a successful challenge for cause. Although for-cause challenges do not present as direct and unregulated a route for race-based exclusion as do peremptories, they still may contribute to the influence of race on jury selection, particularly if judges become less conservative in evaluating them. Experimental, field, and archival methods could be used to assess these possibilities.

In light of the legal system's reliance on precedent and tradition, we believe it is unlikely that the peremptory challenge will meet its end anytime in the near future, despite its potential to facilitate the very racial bias the Supreme Court wishes to avoid. Are there modifications to existing procedure that would curb the influence of race? Psychologists can play an important role in answering this question, and we call on our fellow researchers to consider the ways in which we can contribute to this discussion. In an effort to begin this process, we devote the remainder of this article to applying the general psychological literature on amelioration of racial bias to the specific domain of the courtroom. That is, we identify situational variables and procedures that have been found to moderate the general effects of race on social judgment, and we consider whether their implementation in a jury selection context is feasible. Given the paucity of existing data regarding judgment processes during jury selection, our analysis does not include formal policy recommendations but rather is intended to generate new ideas and identify areas of future investigation.

Consciousness raising. One strategy psychologists have identified to combat the influence of race on judgment is raising consciousness regarding implicit stereotypes (see Blair, 2001; Greenwald & Banaji, 1995). In future studies, psychologists could investigate whether drawing attention to the subtle, automatic effects of race decreases attorneys' use of race-based peremptories. We wonder, though, whether mere awareness of these issues would be influential in this domain. We have found that an explicit reminder of the prohibition against considering gender does not curtail the effects of gender on mock attorney judgments (Norton et al., 2007). Moreover, we presume that many attorneys intentionally consider race in selecting a jury. Consciousness raising seems unlikely to be effective in an adversarial system with clear incentives for winning and when it comes to stereotypes perceived to be accurate. This conclusion should be tested empirically, but absent more severe sanctions for violating *Batson* (1986), it is difficult to imagine motivating attorneys to self-correct for the influence of race during jury selection.

Category masking. Another bias reduction strategy entails rendering decision makers blind to a target's category membership (see Kang & Banaji, 2006). Research on orchestras, for example, demonstrates that female musicians are more likely to be hired when they audition behind a screen, effectively concealing their gender (Goldin & Rouse, 2000). Regarding jury selection, much of the information obtained during voir dire—legal experiences, demographics, educational and occupational history, attitudes about the case—could be assessed via written questionnaire. Until recently, this procedure has been used almost exclusively in high-profile cases (Diamond et al., 1997), but more extensive use of questionnaires—perhaps even in conjunction with a subsequent, limited, face-to-face voir dire—could allow for category masking during jury selection. Future research could assess the accuracy of such questionnaire data compared with

verbal voir dire responses, keeping in mind, of course, that the latter are hardly without limitations of their own.

Increasing available information. Questionnaires could also generate more diagnostic information on which to base peremptories, as would giving attorneys greater latitude in voir dire questioning. The dubious utility of voir dire for identifying biased jurors derives, in large part, from the brief and superficial nature of the process (Council for Court Excellence, District of Columbia Jury Project, 1998; Kovera et al., 2002). Practical constraints restrict the number of questions posed to each juror, leaving attorneys with little basis for evaluation besides superficial characteristics. Stereotypes are particularly influential in precisely this type of situation, when a decision maker is under time pressure and deprived of individuating information (Kruglanski & Freund, 1983; Sherman, Stroessner, Conrey, & Azam, 2005). Thus, it may be that "the way to reduce the use of these hunches and stereotypes is to provide the attorneys with better information" (Diamond et al., 1997, p. 93) and, perhaps, more time to review it. Notably, such options stand in stark contrast to recent efforts to streamline jury selection by limiting or even eliminating attorney-directed voir dire (see Babcock, 1975; Diamond et al., 1997).

Prejudgment ratings. Another possibility identified by psychological research would be to require attorneys to articulate before voir dire the juror characteristics they prefer for their case. Although bias reduction through assessment of prejudgment preferences has met with mixed empirical support (Norton et al., 2004; Uhlmann & Cohen, 2005), in jury selection, it would at least permit more meaningful scrutiny of peremptory challenge use. For example, a prosecutor with a stated goal of finding jurors sympathetic to police would have difficulty justifying the challenge of a Black juror married to a police officer or the failure to challenge a White juror with negative police attitudes. Alternatively, attorneys could rate or rank prospective jurors after reading their questionnaire responses but before a subsequent voir dire. The effects of such procedures could be assessed by researchers, and although they may depart from traditional conceptualizations of the peremptory challenge by requiring attorneys to reveal strategy and articulate stereotypes, *Batson* (1986) already introduced drastic changes to this landscape 20 years ago. Because attorneys are now asked to justify some peremptories, it does not seem terribly problematic to require them to do so earlier rather than later in the voir dire process.

Affirmative jury selection. Yet an entirely different option would be to shift focus away from efforts to prevent biased peremptory use and to focus instead on promoting the selection of diverse juries. For starters, oversampling of racial minorities for jury duty summonses—as well as other related strategies—could address some of the racial disparities that emerge in jury pool composition before voir dire even begins (e.g., Cohn & Sherwood, 1999). With regard to jury selection itself, precedent exists for affirmative policies designed to ensure racial minority representation on empanelled juries. Into the 19th century, in the United States as well as England, defendants from racial or ethnic groups at high risk for juror prejudice were sometimes tried by special "split juries," on which at least half of the jurors were guaranteed to be from the same minority group as the defendant; as recently as the 1990s, grand juries in Hennepin County, Minnesota, were created so as to be proportionally representative of their surrounding community (see Ellis & Diamond, 2003; Fukurai & Davies, 1997; Ramirez, 1994). Clearly, practices such as these face potential practical as well as legal obstacles, but it is worth bearing in mind that although psychologists have touted category masking as one potential remedy for biased judgments, they have also cited affirmative strategies as an alternative worthy of consideration (e.g., Greenwald & Banaji, 1995; Kang & Banaji, 2006).

Random selection. Of course, a surefire way to prevent race from influencing jury selection would be to adopt a procedure endemic to much psychological research: random selection. Indeed, random juries would be more representative of their communities (Baldus et al., 2001) and, in many instances, would not vary significantly from those produced by voir dire (Johnson & Haney, 1994). Doing away with voir dire is hardly realistic, however. Such a change would prevent any chance of identifying prospective jurors who cannot remain impartial and would strip litigants of any control over who sits on their jury. As such, it is safe to say that random selection remains the province of the research psychologist and is not a feasible strategy in the legal domain.

Conclusions

The theory and empirical findings reviewed herein converge on the conclusion that the peremptory challenge, by its very nature, is fertile ground for the influence of race on jury selection. Current safeguards against such influence are untenable: Even when attorneys are aware of the impact of race, they are unlikely to admit it, and even when judges scrutinize peremptory justifications for evidence of discrimination, they are unlikely to find it. The procedures adopted in the wake of *Batson* (1986) essentially inform attorneys, "Use any stereotypes you like in jury selection, but be sure to ignore race and gender." Unfortunately, this sounds like the instruction for an experiment on failed thought suppression rather than a directive likely to prevent the impact of race on jury selection. Assuming that the goal of curbing the effect of race on jury selection is not to be abandoned, our review suggests that modifications to current procedures are required.

However, we also propose that the contributions of psychology to this debate should transcend this conclusion. There remain many aspects of jury selection about which too little is known: If some attorneys make better use of voir dire than do others, what are the situational and personality factors that predict such success? To what extent does confirmation bias affect voir dire? More relevant to our focus on race, what is the precise nature of stereotypes regarding juror race? Do attorneys' assumptions reflect specific beliefs about jurors of different races or more general expectations regarding ingroup leniency? To what

extent is race influential through nonconscious processes as opposed to intentional trial strategy? Empirical answers to these and other questions would illuminate the processes underlying jury selection, impact the development of policy recommendations, and deepen the understanding of how race impacts person perception and social judgment in the real world.

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REPRIEVE.
AUSTRALIA

Blackstrikes

A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's office

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August 2015

Blackstrikes[1]: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's office

Abstract

While selecting juries in criminal trials the prosecutor may use a limited number of discretionary "peremptory challenges" to strike prospective jurors from the panel. Data was collected from more than 300 felony jury trials prosecuted by the Caddo Parish District Attorney's office, Louisiana between 2003 and 2012. The rate at which prosecutors used their challenges to strike jurors was examined against the race of the jurors struck or accepted. Prosecutors chose to strike black prospective jurors at three times the rate of not blacks, a finding which is statistically significant.

Background

In 2007, in *State v. Coleman*[2], the Louisiana Supreme Court held that prosecutors from the Caddo Parish District Attorney's office had violated the Equal Protection Clause of the Constitution by striking a black prospective juror on account of his race:

> "the prosecutor clearly and unmistakably indicated that the decision to strike Miller was motivated by this prospective juror's race"(*Coleman* at 516).

Caddo has a very racialized history. It is home to the last capital of the confederacy and was at one time home to the highest number of extra-judicial killings of black residents - lynchings - in the South. Until November 2011, the national confederate flag flew at the entrance to the Caddo District Courthouse.

Against this backdrop, this study was designed to identify and document the disproportionate rate at which prosecutors from the Caddo Parish District Attorney's office strike black prospective jurors and not black prospective jurors and the effect of this pattern on the makeup of juries in Caddo parish.[3]

Mechanics of jury selection

The mechanics of jury selection can be categorized into four stages - eligibility, summons, qualification and selection – which are summarized below.

[1] The term "Black Strikes" describes the use by prosecutors of peremptory challenges to strike black prospective jurors from service at a greater rate than they strike not blacks. It is a play on the phrase "back strikes", a legitimate use of peremptory challenges during jury selection used to control the overall make up of the jury panel.

[2] 2006-0518 (La. 11/02/07); 970 So. 2d 511

[3] The original Blackstrikes study was conducted in 2004 and documented the racially disproportionate use of peremptory challenges by prosecutors in Jefferson Parish, Louisiana. See the report at http://www.blackstrikes.com/resources/report/black_strikes_report_september_2003.pdf

1. Eligibility

Jury selection begins with the Parish Jury Commission's creation of a list of the parish who may be eligible for jury service. During the period of this study, the list was compiled using voter registration data supplied by the Secretary of State. This list forms the jury pool from which prospective jurors may be selected.

2. Summons

In anticipation of the need for jurors to serve on particular court dates, the Jury Commissioners select a list of names from the pool using a method intended to achieve a random selection. Those persons are then sent a summons to attend for jury service. The volume and frequency of issuing summonses depends on the number of jury trials – criminal and civil – that are listed before the court. Caddo Parish issues between 500 and 600 summonses for up to 6 trials scheduled for a two-week trial period.

A jury summons is accompanied by a short juror questionnaire that contains a section in which the recipient may request to be excused from service or answer questions that indicate that he or she is not qualified to serve.

Venirepersons, upon return of their questionnaire and assuming they are not disqualified from service, are assigned to a date upon which they are to attend court for jury service

3. Qualification

Once at court, groups of venirepersons will be sent to particular courtrooms to participate in jury selection for individual cases. The jury coordinator selects this smaller group from the available venirepersons using a method intended to achieve a random selection.

Once at court, jurors participate in voir dire, a process by which the judge, prosecutor and defense counsel each ask questions to determine: whether each venireperson is qualified to serve as juror under Louisiana law; whether there exists any legal reason why the venireperson should be excluded from service on that particular jury based upon a challenge for cause; and, whether either party might wish to exercise a peremptory challenge to exclude the venireperson from service on that particular jury.

During or at the completion of voir dire of a group of venirepersons the court on its own motion or at the urging of one of the parties may exclude a juror for good cause or as a result of the particular hardship that jury service at that time may cause the venireperson. The most common reasons to challenge for cause are because the prospective juror could not be impartial or would not be willing to consider the evidence or render a verdict in the manner the law prescribes.[4]

Jurors who are not excluded by the court for hardship or good cause form the qualified venire from which the final jury is selected.

[4] La. C. Crim. P. Art. 797, 798

In Louisiana juries are be made up of twelve persons in capital cases and in cases in which the penalty is necessarily hard labor and six persons in cases in which the punishment may be hard labor or confinement without hard labor for more than six months.

4. Selection

The names of the venirepersons who form the qualified petit jury venire are then tendered to the defense and prosecution for selection of the jury that will serve in the case.

Each party has the right to exercise a limited number of peremptory challenges to exclude otherwise qualified jurors from service in that trial without the need to show a legal cause for the exclusion. Each side has twelve peremptory challenges in a case with a twelve person jury or six peremptory challenges in a case with a six person jury. [5]

In Caddo Parish, the prosecution and defense attorneys simultaneously submit "strike sheets" to the judge listing the jurors against whom they exercise their peremptory challenges.

No reason is given for the exercise of the challenge; the juror is simply dismissed from the panel. This process occurs without the participation of the prospective jurors and they are not advised of whose decision it was to remove them from the panel.

The process continues until both the State and the Defense have accepted a complete jury or run out of peremptory challenges and frequently requires several rounds of peremptory challenges. Even where both parties initially accepted a venire person, at any time before the full jury is assembled and sworn, a party may still exercise a peremptory challenge against that venire person. This process is known as "back striking" and is intended to allow attorneys to make the decision to peremptorily challenge an individual juror in the light of the balance of the whole jury.

The court will then usually undertake a similar process to select alternate jurors, who will sit through the trial and take part in the verdict in the event that a juror becomes unavailable during the trial. The court will often grant the State and the Defense a single peremptory challenge per alternate juror to assist in the selection process.

While ordinarily no reason need be given for the exercise of a peremptory challenge, a peremptory challenge cannot be motivated by the race or gender of the venireperson. As no reason is given for the peremptory challenge this prohibition is particularly difficult to enforce. However, where a pattern of racially (or gender) disproportionate challenges or some other evidence is offered to make out a *prima facie* case that challenges are being made based on race (or gender) then reasons must be offered. The reasons offered must be race neutral but need not be persuasive or show good cause for having exercised the challenge. The judge must then decide whether it has been proven by a preponderance of the evidence that the peremptory challenge was motivated by the race (or gender) of the venireperson.

[5] La. C. Crim. P. Art. 799

The process of attacking a peremptory challenge on the basis of race is known as a *Batson* challenge, referring the United States Supreme Court case of *Batson v. Kentucky*, 476 U.S. 79 (1986).

Gathering the data

To commence the study, the criminal Clerk's Office was approached to provide a list of all criminal jury trials held between January 2003 and December 2012. The Office provided a list of 476 trials identified by case number and sometimes also by the defendant's last name.

The record for all trials were not able to be examined as the files were either sealed[6] or unable to be located and/or accessed by the Clerk's Office. Some additional trial records did not provide sufficient data for analysis as jury selection was not complete due to the defendant pleading guilty or the court declaring a mistrial during jury selection. A further group of trial records could not be used in the study because the information identifying either the prospective juror or selection outcome was unclear or incomplete.

Ultimately, data from 332 trials and the selection outcomes for over 8,000 otherwise qualified prospective jurors were included in this study.

The court records for the cases, along with the voter registration roll, were examined to extract relevant data including: the name, race, gender and selection outcome[7] for each prospective juror; the name, race and gender of the defendant; jury pool date, trial date and trial outcome; and the names of the judge, prosecutors(s) and defense attorney(s). Specifically, prospective juror information was gathered as follows:

- the name of each prospective juror using official minute entries from jury selection, voir dire transcripts, official jury selection charts prepared by minute clerks, other juror lists included in the trial record;
- the race and gender of each prospective juror using sources in the trial record including minute entries, voir dire transcripts and jury selection charts, compared with publicly available data in the Secretary of State's voter registration list; and
- the selection outcome using the minute entries from jury selection, voir dire transcripts, the trial court's official jury charts, and peremptory challenge forms submitted by each attorney.

Defendant information was gathered as follows:

- the name of the defendant(s) using official minute entries, bill of information/indictment and voir dire transcript; and

[6] The clerk's office advised that 65 records were sealed as they concerned sex offenses and contained victim information.

[7] The jury selection outcome describes whether a qualified prospective juror was accepted to serve or struck peremptorily by either side and if struck, which party exercised the peremptory strike.

- the race and gender of the defendant(s) using official minute entries.

Trial information was gathered as follows:

- the names of the judge and State and Defense attorneys using the official minute entries from the jury pool date and jury selection charts;
- the jury pool date from the official minute entries, voir dire transcript and jury selection charts;
- the trial date from the official minute entries and voir dire transcript; and
- the trial outcome from the official minute entries, verdict sheet and voir dire transcript.

The raw data was almost exclusively accessed on location in the parish courthouse. Caddo Parish court records were largely available and complete and the record of jury selection consistently entered. Official minute entries in some cases were accessed from the Clerk of Court's online portal but most were obtained by reviewing the files and requesting hard copies of relevant court documents selected from the file.

Coding the data

Race categories

Race categories for prospective jurors and defendants that were used by the Clerk's Office and the Secretary of State have been adopted by this study. They include:

- Black (B),
- White (W),
- Hispanic (H),
- American Indian (AI),
- Indian (I), and
- Other (O).

For the purposes of analysis, race categories have been aggregated into two groups: Black (B) and Not Black (W, H, AI, I and O), as this study inquires only into whether District Attorneys are more likely to strike Black prospective jurors than Not Black prospective jurors.

Jury selection categories

Selection outcomes of qualified jurors were coded as follows:[8]

- those peremptorily struck by the State (SP),
- those peremptorily struck by both the State and the Defense (PJ)
- those peremptorily struck by the Defense (DP)
- those accepted by both parties for jury service (J)
- those accepted by both parties for service as alternate jurors (A),

These outcomes were grouped into one of two categories: those accepted by the State for service (J, A and DP); and those struck by the State from service (SP and PJ).

This coding reflects the decision making stage for the State's attorneys: when faced with the possibility of having a particular qualified juror on the jury did they accept that juror or use a peremptory challenge to exclude them?

Results of the Study

The dataset

The 2010 census recorded the population of Caddo Parish as 47.2% black and an adult black population of 44.2%.

The dataset consists of 332 criminal jury trials held between January 2003 and December 2012.

Of the 332 trials, 277 (83%) involved a black defendant.

Of the juries, 224 were 12 person juries and 108 were 6 person juries.

The juries were distributed across the time period as follows:

Year of trial	Number of trials
2003	25
2004	27
2005	35
2006	43
2007	41
2008	25
2009	38

[8] Selection outcomes for those challenged for cause or unused in selecting the ultimate jury were also recorded.

Year of trial	Number of trials
2010	30
2011	40
2012	28

There were 8,318 qualified jurors tendered to the State for peremptory challenge or acceptance. Of the 8,318 tendered jurors, 35% were black and 65% were not black.

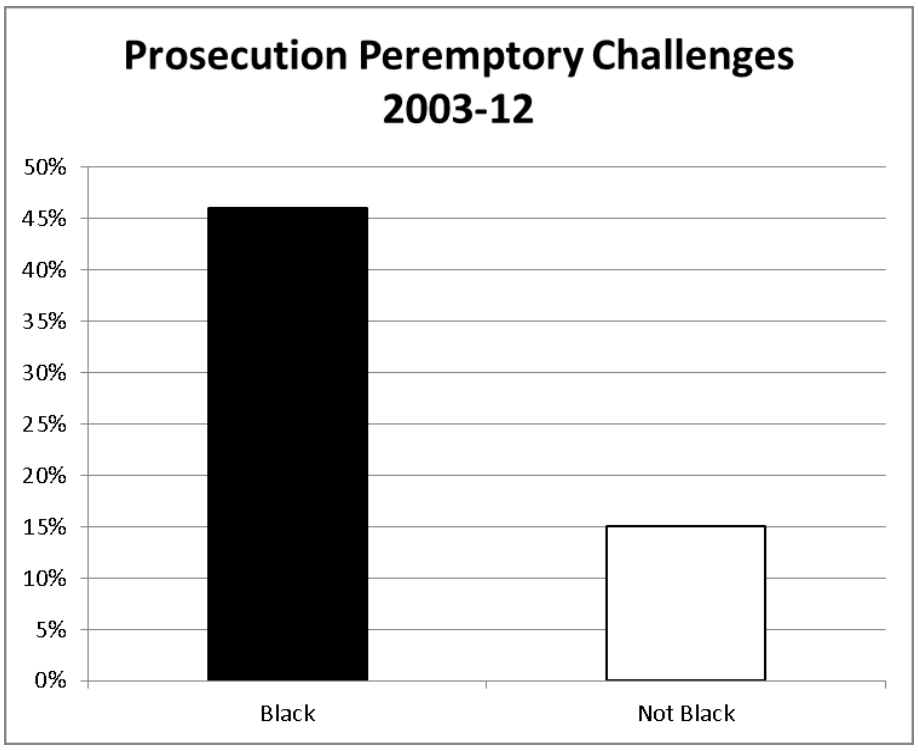
Overall pattern of prosecution peremptory challenges

The number of jurors accepted or struck by the state is as follows:

Race	Accepted	Struck	TOTAL
Black	1570 (54%)	1338 (46%)	2908
Not Black	4580 (85%)	830 (15%)	5410
TOTAL	6150	2168	8318

What this table shows is that when presented with an otherwise qualified black juror, the State exercised its discretion to peremptorily strike that juror 46% of the time. By comparison, when presented with an otherwise qualified juror who was not black, the state exercised its discretion to peremptorily strike the juror 15% of the time.

This disparity is shown in the following chart:



In short, over the course of a ten year period, Caddo parish prosecutors exercised peremptory challenges against black prospective jurors at more than three times the rate at which they exercised peremptory challenges against white prospective jurors.

A statistical analysis of this disparity in strikes rates shows that the difference is extremely statistically significant ($p<.0001$).[9] That is, the chance that the disparity is unrelated to the race of prospective jurors is less than one-in-ten thousand.

In 93% of trials, prosecutors struck black prospective jurors at a higher rate than not black jurors. By comparison, prosecutors struck not black prospective jurors at a higher rate than black jurors in 6% of trials. And in 1% of trials, there was no difference in the rate prosecutors struck black and not black prospective jurors.

Individual patterns of prosecution peremptory challenges

The size of the data set allowed the identification of strike rates for individual prosecutors. In some cases, more than one prosecutor participated in jury selection and for the purposes of this analysis, jury selection outcomes were attributed to each prosecutor. Data is only reported for those prosecutors who were found to have prosecuted more than 20 trials in the data available for this study.

The results for the individual prosecutors are listed in the table below, in descending order based upon the rate at which they challenged black more than not black prospective jurors:

[9] Chi-Square or Fisher's Exact Test

Prosecutor	Percentage of Black jurors challenged	Percentage of Not Black jurors challenged	Blackstrike Rate	Trials Studied
Barber, Brian H	41%	8%	5.0	22
Brown, Jason	51%	11%	4.5	53
Kervin, Damon	53%	12%	4.4	31
Thompson, Dhu	51%	16%	3.2	49
Hall, Lea	47%	15%	3.2	48
Cox, Dale	38%	14%	2.7	22
Prudhomme, Geya	48%	18%	2.7	30
O'Callaghan, Brady	47%	19%	2.5	47
Langford, Ben	40%	17%	2.4	26
Edwards, William J	43%	21%	2.1	25
Smith, Kodie	37%	19%	2.0	24
Midboe, Sarah	37%	20%	1.8	24

Racial makeup of juries

The study of 332 trials also allowed observations to be made of the racial makeup of criminal juries sitting in Caddo Parish over a ten year period.

Assuming that the race of a prospective juror does not influence jury selection, in Caddo Parish that has a 44.2% black adult population one would expect an average of 5.3 black jurors per twelve person jury. In the 224 such juries included in the study, an average of 3.86 jurors per jury were black.

Again assuming no racial effect in jury selection, one would expect juries with 2 or fewer black members to occur in only 10.1% of trials.[10] In Caddo, 22% of trials have 2 or fewer black jurors.

The presence of two or fewer black members of the jury is particularly important in Louisiana which allows majority verdicts upon the vote of ten out of twelve jurors. In theory, a jury with two or fewer black jurors could return a verdict without regard to the votes of the black jurors. Indeed, an historical

[10] This estimate was generated by using a Poisson distribution to model expected jury racial makeup given the parishes overall demographic.

case has been made that majority verdicts were introduced in Louisiana in 1898 with the intent of undermining the value of black votes on juries.

Racial makeup of juries and trial outcomes

Of the 224 twelve person juries studied, 200 returned a verdict (guilty as charged, guilty of a lesser offense or acquittal). The remaining juries did not return a verdict due to mistrial or a change of plea during the course of the trial.

In this study, the rate of acquittal appears to increase with the number of black jurors. Not one defendant was acquitted in a trial where there were two or fewer black jurors. The acquittal rate in the 49 trials where the number of black jurors was three or more, was 12 %.

In trials with five or more black jurors, defendants are acquitted 19% of the time. This is the average acquittal rate in jury trials in the State of Texas over the last four years. This is also the average number of black jurors (five) that, given Caddo's adult black population, to be expected in each trial.

Conclusions

This data reveals that in 332 trials over a ten year period, when presented with a prospective black juror, prosecutors from the Caddo Parish District Attorney's Office exercised their discretion to peremptorily strike that black juror 46% of the time. By comparison, when presented with a prospective juror who is not black, prosecutors exercised their discretion 15% of the time.

That is, prosecutors are more than three times as likely to strike black than not black prospective jurors.

A statistical analysis of this disparity shows that the difference is significant. Some individual prosecutors struck black prospective jurors at rates of 4.5 and 5 times the rate they struck those who are not black.

While a disparity in the rate of strikes between prospective jurors who are black and not black may be subject to innocent explanation, the consistently high blackstrikes rate across 332 trials over ten years indicates otherwise. In the absence of evidence to the contrary, the pattern disclosed in this study strongly suggests that race has played a role in the exercise of peremptory challenges by the Caddo Parish District Attorney's office.

No. 14-8349

In The
Supreme Court of the United States

TIMOTHY TYRONE FOSTER,

Petitioner,

v.

BRUCE CHATMAN, WARDEN,

Respondent.

On Writ Of Certiorari To The Superior Court Of Butts County, Georgia

BRIEF OF PETITIONER

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CAPITAL CASE
QUESTION PRESENTED

Timothy Tyrone Foster, a black defendant, was charged with killing an elderly white woman, Queen Madge White. The prosecutor struck all four black prospective jurors and argued for a death sentence to "deter other people out there in the projects." At trial and on direct appeal, Georgia's courts denied Foster's claim of race discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986).

During state habeas corpus proceedings, Foster obtained the prosecution's notes from jury selection, which were previously withheld. The notes reveal that the prosecution (1) marked the names of the black prospective jurors with a "B" and highlighted them in green on four copies of the venire list; (2) circled the word "BLACK" next to the "Race" question on five juror questionnaires; (3) identified three black prospective jurors as "B#1," "B#2," and "B#3"; (4) ranked the black prospective jurors against each other in case "it comes down to having to pick one of the black jurors"; and (5) gave explanations for its strikes that were contradicted by its notes. The Georgia courts again declined to find a *Batson* violation.

The question presented is this:

> Did the Georgia courts err in failing to recognize race discrimination under *Batson* in the extraordinary circumstances of this death penalty case?

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STATUTES AND CONSTITUTIONAL PROVISIONS

ORDERS AND OPINIONS BELOW

The order of the Supreme Court of Georgia denying Foster's application for a certificate of probable cause to appeal from the denial of habeas relief is unreported and appears in the Joint Appendix (J.A.) at 246. The order of the Superior Court of Butts County, Georgia, denying habeas relief is unreported and appears at J.A. 172-245. The decision of the Supreme Court of Georgia affirming Foster's conviction and death sentence on direct appeal, *Foster v. State*, 374 S.E.2d 188 (Ga. 1988), appears at J.A. 145-67. The order of the Superior Court of Floyd County, Georgia, denying Foster's motion for new trial is unreported and appears at J.A. 131-44. The section of the transcript from the Superior Court of Floyd County, Georgia, in which the court denied Foster's pretrial objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), appears at J.A. 36-60.

STATEMENT OF JURISDICTION

The Superior Court of Butts County, Georgia, denied Foster's application for habeas corpus relief on December 9, 2013. J.A. 172-245. The Supreme Court of Georgia denied Foster's application for a certificate of probable cause to appeal on November 3, 2014. J.A. 246. Foster's petition for a writ of certiorari was filed in this Court on January 30, 2015, and granted on May 26, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (2012).

RELEVANT CONSTITUTIONAL PROVISIONS

This case involves the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It also involves the Sixth Amendment to the United States Constitution, which provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

STATEMENT OF THE CASE

Timothy Tyrone Foster, an eighteen-year-old African-American, was charged in 1986 with killing Queen Madge White, an elderly white woman, in Rome, Georgia. At Foster's capital trial the following year, the prosecutors used four of their nine peremptory strikes to remove all four black prospective jurors, resulting in an all-white jury to try this racially charged case. They claimed that the strikes were not based on race, asserting eight to twelve "race-neutral" reasons for each. The lead prosecutor later urged the jury to impose a death sentence to "deter other people out there in the projects." T.T. 2505.[1]

[1] "J.A." refers to the Joint Appendix. "T.R." refers to the clerk's record from Foster's 1987 trial. "T.T." refers to the transcript from Foster's 1987 trial. "P.T." with a date in parentheses refers

(Continued on following page)

Ninety percent of the families living in the local housing projects were black.

Despite maintaining that race was "not a factor" in its jury selection strategy, J.A. 41, the prosecution had focused extensively on the race of prospective jurors in preparing for jury selection. Its notes, which Foster obtained years after the trial and presented in state habeas corpus proceedings, include lists in which the black prospective jurors were marked with a "B" and highlighted in green, notations identifying black prospective jurors as "B#1," "B#2," and "B#3," notations that ranked the black prospective jurors against each other in case the prosecution had to accept a black juror, and a strike list in which the five black panelists qualified to serve were the first five names in the "Definite NOs" column, meaning they were slated for definite strikes. Some of the notes directly contradict the prosecution's "race-neutral" explanations for its strikes and its representations to the trial court.

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to the transcript of a pretrial or post-trial hearing on the specified date. "J.Q." refers to a juror questionnaire from Foster's 1987 trial. (The questionnaires comprise two separate volumes of the clerk's record; they appear in order of juror number.) "H.R." refers to the clerk's record from Foster's habeas corpus case. "H.T." refers to the transcript and exhibits from Foster's 2006 habeas corpus hearing.

A. Pretrial Motion Under *Batson*

Foster's defense attorneys expected the prosecution to strike black prospective jurors on the basis of race. Prior to trial, they filed a motion to prevent the practice pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), stating:

> 1. [Foster] is an indigent eighteen year old black person accused of the capital murder of an elderly white lady, and the State is seeking the death penalty.
>
> 2. The District Attorney's office in this County and his staff have over a long period of time excluded members of the black race from being allowed to serve on juries with a black Defendant and a white victim. . . .
>
> 3. It is anticipated that the District Attorney's office will attempt to continue its long pattern of racial discrimination in the exercise of its peremptory challenges.

J.A. 17-18. At a pretrial hearing, the parties and the court agreed to defer the *Batson* motion until after the striking of the jury. P.T. 83-85 (Feb. 5, 1987).

B. Jury Selection

During the week of April 20, 1987, ninety-five prospective jurors were either questioned by the court

or summarily excused.[2] Ten of the ninety-five were black.

The court instructed all of the prospective jurors on the panel to fill out questionnaires, T.T. 20-22, and then conducted individually sequestered voir dire, T.T. 182-1322. It gave both parties the opportunity to question each prospective juror about a broad range of issues, including pretrial publicity, religion, occupation, and mitigation. T.T. 182-1322.

After questioning and challenges for cause, forty-two prospective jurors were designated for the striking of the jury, with the prosecution allotted ten peremptory strikes and the defense twenty, as provided by Georgia law at the time.[3] Five of the forty-two were black. However, on the morning of jury selection, Shirley Powell, one of the five black prospective jurors, was excused for cause and replaced with a white woman. T.T. 1326-29. That left four black prospective jurors: Eddie Hood, Evelyn Hardge, Mary Turner, and Marilyn Garrett. The prosecution

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[2] This number does not include those prospective jurors who did not report or those who were never reached by the trial court because their juror numbers on the venire list were higher than 133 – the number of the final panelist questioned by the trial court. T.T. 1310-22.

[3] *See* Ga. Code. Ann. § 15-12-165 (1985) (current version at § 15-12-165 (LexisNexis through 2014 Reg. Sess.)).

struck all four to obtain an all-white jury. J.A. 22-31, 38-40.[4]

After the striking of the jury, the trial court addressed the defense's *Batson* objection, stating, "Let's take care of the black jurors first." J.A. 37. In response, Stephen Lanier, the district attorney and lead prosecutor, began by explaining that his general approach was to discriminate against women, not black people: "Women have a tendency in a case of this nature where the death penalty is being sought – they have serious reservations, time conflicts or whatever it may be, but that is what I look at when I am trying a death penalty case. . . ." J.A. 42. He later said that "eighty percent" of his strikes were against women and that "three of the four blacks were women." J.A. 57.

Lanier then addressed Eddie Hood, stating: "He was exactly what I was looking for in terms of the age, between forty and fifty, good employment and married. The only thing that I was concerned about, and I will state it for the record. He has an eighteen year old son which is about the same year old as the defendant." J.A. 44. Even though the age of Hood's son was "the only thing" he was concerned about, Lanier gave at least eight more reasons for striking

[4] The prosecution used nine of its ten peremptory strikes in striking the jury; it had saved its tenth strike for the final juror in the qualified pool, but she was not reached until the selection of alternates. J.A. 31-32.

Hood, including that Hood had a son with a misdemeanor conviction from five years earlier, J.A. 44-45, he did not make enough eye contact during voir dire, J.A. 46, and he "asked to be off the jury," J.A. 45. Lanier also said Hood might oppose the death penalty because he belonged to the Church of Christ, J.A. 46, although Hood had said he was not opposed to the death penalty and was willing to impose it, T.T. 269-70, 274, 278.[5] The prosecution had not questioned Hood about any of its purported reasons for striking him. T.T. 274-78. Lanier then said, "All I have to do is have a race neutral reason, and all of these reasons that I have given the Court are racially neutral." J.A. 48.

Although Lanier had not yet addressed the other three black prospective jurors, the trial court denied the *Batson* motion and was prepared to move on to other things: "Well, the Court overrules the motion, and finds that Batson has been met." J.A. 49. However, Lanier stated that he wanted to "perfect the record" by giving reasons for the other three strikes. J.A. 49. Referring to his notes at times, he went on to proffer more than thirty reasons for the strikes of

[5] Lanier also said that he struck Hood because he had food poisoning during voir dire, J.A. 45-46, his wife worked at Northwest Regional Hospital, J.A. 45, the defense did not ask him enough questions about certain issues, J.A. 47, and his brother was formerly a consultant with law enforcement toward people involved in drugs, J.A. 46.

Evelyn Hardge, Mary Turner, and Marilyn Garrett. J.A. 49-57.

Lanier said that Garrett had the "most potential." J.A. 55. In a brief filed after trial, he made clear that he considered Garrett to have "the most potential to choose from *out of the four remaining blacks* in the 42 panel venire." T.R. 438 (emphasis added). The opportunity to strike Garrett came about, he said, because he had planned to strike another black venire member, Shirley Powell, but she was excused for cause on the morning of jury selection. T.R. 438-39. Lanier said that he would have accepted Garrett "except for this one thing, her association and involvement in Head Start," which "deals with low income, underprivileged children," and "her age being so close to the defendant." J.A. 56. Garrett was thirty-four; Foster was nineteen. J.Q. #86 at 1; T.R. 588. The prosecutors later labeled Garrett a "social worker" with Head Start and said they "wanted to stay away from any social worker." J.A. 103. But Garrett was not a social worker; she was a teacher's aide. J.Q. #86 at 2. Lanier then asserted at least seven other reasons for striking Garrett, including that she was a woman, J.A. 57, she appeared nervous, J.A. 55, and she "didn't ask off" the jury, J.A. 56 (even though one reason asserted for the strike of Hood was that he "asked to be off the jury," J.A. 45).[6] As with Hood, the

[6] Lanier also said he struck Garrett because she was divorced, J.A. 56; she said "yeah" to the court four times, J.A. 55; the defense did not ask her about certain issues, J.A. 56; and she

(Continued on following page)

prosecution had not asked Garrett about any of these issues in voir dire. T.T. 952-53.

With respect to the strike of Turner, Lanier gave at least twelve reasons, including that Turner was not candid on her questionnaire and in statements to the court. J.A. 51-54. The prosecution had not asked Turner about any of the supposed inaccuracies in her statements. T.T. 595-98. Lanier also stated that Turner was "hostile to the Court and counsel," J.A. 52, and confused and hesitant about certain questions, J.A. 53. As for Hardge, Lanier gave at least nine reasons for striking her, including that she was "confused" and "irrational." J.A. 51. Lanier asserted that all four black prospective jurors were some combination of confused, J.A. 46, incoherent, J.A. 51, hostile, J.A. 52, disrespectful, J.A. 55, and nervous, J.A. 55, and that three of the four did not make sufficient eye contact, J.A. 46, 53, 55. After Lanier stated the reasons for each strike, the trial court promply upheld them and found no *Batson* violation. J.A. 51, 55, 58.

C. Trial

With an all-white jury selected, the prosecution presented its evidence. White, a retired schoolteacher, T.T. 1603, was killed by strangulation, T.T. 2053, during a burglary of her home in which a large air

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indicated that she was not familiar with the victim's neighborhood, but Lanier thought she was, J.A. 55-56.

conditioner and other items were taken, T.T. 1675-98. Foster was arrested after his girlfriend informed the police that he was involved in the crime and had given her several items taken from White's home. T.T. 1710-12. Upon interrogation, Foster gave two statements in which he acknowledged entering the home and participating in the crime. T.T. 1726-71. He was found guilty on all three counts – murder, burglary, and theft by taking. T.T. 2444-45.

The issue of penalty was sharply contested. There were questions about how many people were involved in the crime and the precise role of Foster,[7] who is intellectually limited.[8] The circumstances of Foster's life also weighed against a death sentence. In addition to his intellectual deficits, Foster was young

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[7] Defense counsel stated to the jury, "I think a lot of you find it hard to believe that Tim was there alone." T.T. 2347-48. The prosecution's investigator later testified in the habeas proceedings: "No one can carry an air conditioner as big as he had that he took out that window to get into that lady's house, and carried it home. He couldn't have done it by himself." H.T. 216. The investigator believed that Foster's father was involved in the crime. H.T. 216-17.

[8] Dr. Douglas Laipple, a psychiatrist, testified at trial that Foster was in the borderline range for intellectual disability. T.T. 2232. Subsequent to trial, Foster presented sufficient evidence of intellectual limitations to warrant a separate trial to determine whether he was ineligible for the death penalty under Georgia's law prohibiting the execution of people with intellectual disability. H.R. 132-33. Although Foster had received IQ scores ranging from 58 to 80 throughout his life, the jury found that he failed to meet his burden of proving intellectual disability. *See Foster v. State*, 525 S.E.2d 78, 79 (Ga. 2000).

and the product of parents who introduced him to drugs at an early age and showed little concern for him. T.T. 2185-86, 2234. When defense counsel met with Foster's parents to discuss mitigation and the possibility that Foster could receive a death sentence, Foster's father refused to cooperate, saying he "could always make another child." H.T. 38.

District Attorney Lanier argued at the penalty phase that the jury should impose a death sentence in part to "deter other people out there in the projects." T.T. 2505. At the time, thirty-two of the thirty-four units in the local housing projects were occupied by black families. T.R. 551. The jury sentenced Foster to death. T.T. 2547-51.

D. Post-trial Litigation

After the death sentence was imposed, Foster's counsel renewed their *Batson* objections in a motion for new trial. T.R. 375-421. They also filed a motion for discovery of the prosecution's notes from jury selection. J.A. 61-65. They argued that because "the State use[d] part of its notes to justify its exclusion of black jurors in this case," the notes "should be available to this Court and other Courts which examine[ ] the intent of the State." J.A. 62-63. The trial court denied the motion for discovery. J.A. 66-68.

Lanier filed a response to Foster's motion for new trial asserting even more reasons for his strikes of the black prospective jurors than he asserted at the *Batson* hearing. T.R. 424-45. For example, he claimed

he had struck Marilyn Garrett in part because her cousin had been arrested on drug charges. T.R. 424; J.A. 105. However, he had stated after the death verdict was returned that he did not learn about Garrett's cousin until after jury selection. P.T. 8-9 (May 1, 1987).[9]

At the hearing on Foster's motion for new trial, Lanier stated that he wanted "to voluntarily take the stand" to provide further explanation of his reasons for the strikes, J.A. 78, but he added, "I just would like, if I take the stand, I would like for defense counsel to be put on notice that I don't want him to have access to my file," J.A. 79. After receiving assurances from the trial court that the defense could not gain access to his file, Lanier testified. He reiterated several of his reasons, offered new ones, J.A. 79-113, and stated that he struck Garrett because she was a social worker, J.A. 95, 102-03. The trial court later issued a written order denying the motion for new trial and stating that the prosecution did not violate *Batson*. J.A. 131-44.

Foster appealed his conviction and death sentence to the Georgia Supreme Court, arguing in part that the trial court erred in overruling his *Batson* objection and denying his motion for discovery of the

[9] Although this separately paginated transcript states the date as April 20, 1987, which was the first day of the trial, it also states that it reflects a "hearing held at the bench after the trial of the case and sentencing phase." The sentencing phase concluded on May 1, 1987. T.T. 2547.

prosecution's notes from jury selection. The Georgia Supreme Court affirmed, holding that the trial court did not err in finding that the strikes were "sufficiently neutral and legitimate." J.A. 152.[10] The court also held that Foster was not entitled to the prosecution's notes. J.A. 152.

E. Habeas Corpus Proceedings

In 1989, Foster filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. H.R. 5-24. The following year, the case was remanded to the Superior Court of Floyd County for a trial on whether Foster was ineligible for the death penalty under Georgia's intellectual disability exclusion. H.R. 132-33. After a Floyd County jury returned a verdict in 1999 finding that Foster did not meet the definition of intellectual disability in the trial court's instructions,[11] the habeas case resumed in Butts County.

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[10] The Georgia Supreme Court upheld the strike of Marilyn Garrett based on two of the reasons asserted – that she was a social worker, and that her cousin had been arrested on drug charges. J.A. 151. But Garrett was not a social worker, J.Q. #86 at 2, and Lanier did not know about her cousin's drug issue until after jury selection, P.T. 8-9 (May 1, 1987).

[11] *See Foster v. State*, 525 S.E.2d 78, 79 (Ga. 2000). During the intellectual disability trial proceedings, which included a pretrial appeal to the Georgia Supreme Court, *Zant v. Foster*, 406 S.E.2d 74 (Ga. 1991), the remainder of Foster's habeas petition was held in abeyance. J.A. 173.

In 2006, Foster's habeas counsel obtained the prosecution's jury selection notes from the 1987 capital trial pursuant to a request under the Georgia Open Records Act.[12] The notes include the following evidence, which Foster presented at a 2006 habeas hearing in support of his *Batson* challenge:

First, the prosecution's file includes four different copies of the venire list of prospective jurors with the names of the black prospective jurors marked with a "B" and highlighted in green. J.A. 253-76.[13] Each of the four lists includes a key in the top-right corner of the first page indicating that "[Green highlighting] Represents Blacks." J.A. 253, 259, 265, 271.[14] The following is the first page of one of the four lists, which shows black prospective jurors (9) Eddie Hood, (15) Louise Wilson, (19) Corrie Hines, (22) Evelyn Hardge, and (28) Bobbie Johnson marked with a "B" and highlighted in green:

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[12] *See* Ga. Code Ann. §§ 50-18-70 to -77 (2002).

[13] The prosecution's investigator confirmed that the four lists are "four different versions of the same document, that is, they had different handwritten notations on them." H.T. 202. The lists were circulated around the district attorney's office so that various staff members, including "[s]ecretaries, investigators, [and] district attorneys" could make notes on them. H.T. 219; *see also* H.T. 190-91.

[14] The lists also include yellow highlighting for venire members with "prior case" experience. J.A. 253-76.

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represents prior case

REPORT NO JUR100-01
REPORT DATE: 01/21/87
JUDGE: ROBERT G WALTHER

FLOYD COUNTY SUPERIOR COURT
TRAVERSE JURY
JURORS REQUESTED: 130

SD NO: 53 PAGE
APRIL 20, 1987
TIME: 9:30 A.M.

001. DEMPSEY NEAL BARRY
[redacted]
ROME GA 30161

002. HARPER BONNIE oper. Deseta Beauty Shop Note She is Ronnie Duck's Great Aunt
[redacted]
ROME GA 30161

003. LANIER SARAH Elaine Clk. Belk's
[redacted]
ROME GA 30161

004. RATLIFF WILEY KELVIN works at Revco Pharmacist
[redacted]
ROME GA 30161

005. HACKETT MARY A hush. V. Pres. Valley Vend see attached sheet
[redacted]
ROME GA 30161

~~006. CECIL KIP ALAN WM~~ off
[redacted]
SILVER CREEK GA 30173

007. BEYSIEGEL MARY ELLEN Co. Dept. family & child. Services
[redacted]
ROME GA 30161

008. CAGLE RICKEY J Fireman City of Rome see attached sheet
[redacted]
ROME GA 30161

B 009. HOOD EDDIE Age 47 hlpr. Ga. kraft see attached sheet
[redacted]
ROME GA 30161

010. NICHOLSON JOYCE M tchr. Elm st. Elem. Sch.
[redacted]
ROME GA 30161

011. MCGINNIS NONA ADLINE Retired
[redacted]
ROME GA 30161

~~012. CLEMENTS J TERRY~~ off
[redacted]
ROME GA 30161

013. HOELZER MARGARET D husb. Podiatrist on Bod. st.
[redacted]
ROME GA 30161

014. STANSELL MARY H husb. works for Power Co.
[redacted]
ROME GA 30161

B Age 68 Retired owns her home
015. WILSON LOUISE see attached sheet
[redacted]
ROME GA 30161

husb. is Superv. Triplett Sales Inc.
016. BARBOGELLO MAUREEN B
[redacted]
ROME GA 30161

017. CARR ANNA W Retired
[redacted]
ROME GA 30161

018. BING PATRICIA A OK
[redacted]
CAVE SPRINGS GA 30124

B Age 65 Retired owns his home
019. HINES CORRIE LEE see attached shee
[redacted]
ROME GA 30161

020. EVANS MYRTLE FRANCES
[redacted]
ARMUCHEE GA 30105

021. BLACK DOROTHY M
[redacted]
ROME GA 30161

B. Age 69 Retired her & her husb. own their hom
022. HARDGE EVELYN
[redacted]
ROME GA 30161

023. COULTAS ANNE B Works for Security Berry College
[redacted]
ROME GA 30161

husband is officer w/ GA. State Bank
024. HOBGOOD LOU ELLA
[redacted]
ROME GA 30161

025. DEDEURWAERDER VICTOR Retired owns his.
[redacted]
ROME GA 30161

~~026. STANLEY RUBY BARNES~~ off
[redacted]
ROME GA 30161

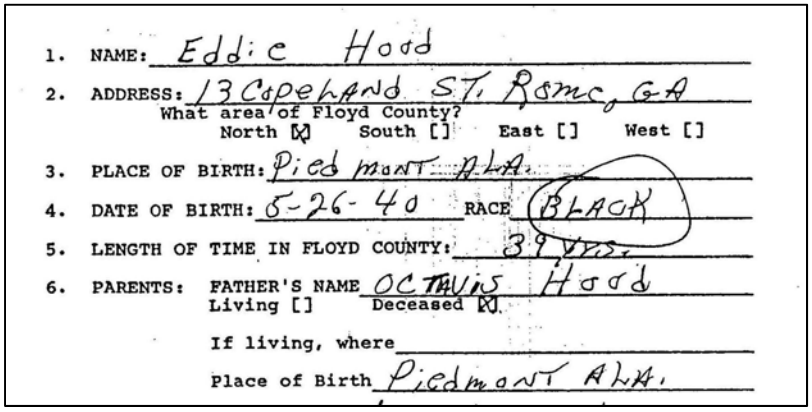
She is related to Mrs Hubbard neighbor of Mrs White
027. HOUSE CHARLOTTE S
[redacted] husb. w/ Ga. Powe
ROME GA 30161

B Age 56
028. JOHNSON BOBBIE JEAN
[redacted]
ROME GA 30161

903

J.A. 253.

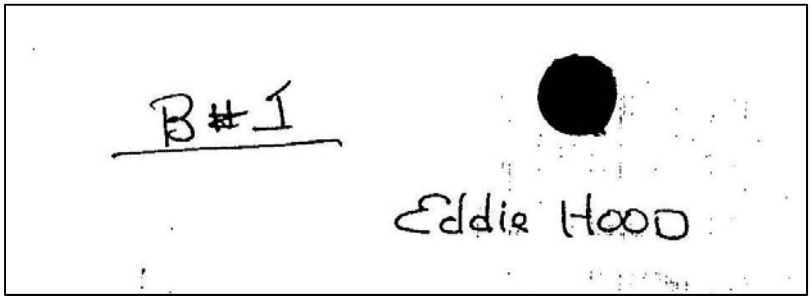
Second, the word "BLACK" next to the "Race" question was circled on the juror questionnaires of five black prospective jurors. J.A. 311, 317, 323, 329, 334. For example:



1. NAME: Eddie Hood
2. ADDRESS: 13 Copeland ST. Rome, GA
   What area of Floyd County?
   North [X] South [ ] East [ ] West [ ]
3. PLACE OF BIRTH: Piedmont Ala.
4. DATE OF BIRTH: 5-26-40 RACE BLACK
5. LENGTH OF TIME IN FLOYD COUNTY: 39 yrs.
6. PARENTS: FATHER'S NAME Octavis Hood
   Living [ ] Deceased [X]
   If living, where
   Place of Birth Piedmont Ala.

J.A. 329.

Third, the prosecution identified black prospective jurors Eddie Hood, Louise Wilson, and Corrie Hines as "B#1," "B#2," and "B#3," respectively, in its notes. J.A. 295-97. For example, Eddie Hood was identified as follows:



J.A. 295.

Fourth, the notes reveal that the prosecution compared the black prospective jurors against each other in case it had to accept one of them. A note about Evelyn Hardge states, "Might be the [b]est one to put on [j]ury." J.A. 294. A draft affidavit from the prosecution's investigator relates his view that "if it comes down to having to pick one of the black jurors, [Marilyn] Garrett, might be okay." J.A. 345.[15]

Fifth, the prosecution's strike lists prioritize the striking of black prospective jurors and contradict the representations made by Lanier to the trial court with regard to his strike of Marilyn Garrett. Lanier claimed in his post-trial pleading that his team "had, in [its] jury notes, listed [Marilyn Garrett] as questionable," T.R. 438, and only decided to strike her after Shirley Powell was excused for cause, T.R. 439. However, Garrett was included on the prosecution's list of "Definite NOs," which was created *before* Powell, who was also on the list, was excused:

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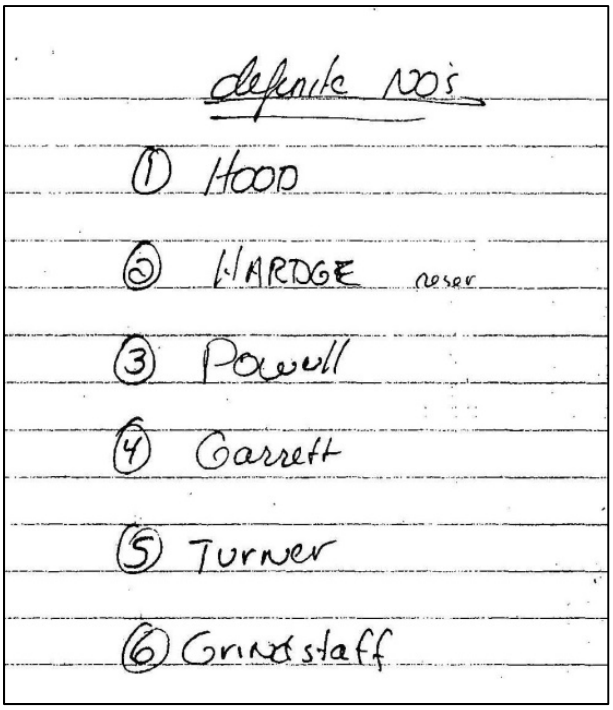
[15] The investigator discussed ten black prospective jurors in his draft affidavit. J.A. 343-47. When District Attorney Lanier submitted the final version of the affidavit to the trial court in response to Foster's motion for new trial, it discussed only three of the ten, and the sentences referring to the race of Garrett and the other black prospective jurors had been deleted. *Compare* J.A. 343-47 (draft affidavit) *with* T.R. 555-57 (affidavit filed with trial court).



J.A. 301. The first five names on the "Definite NOs" list are the five black prospective jurors who were on the panel when the list was made. The same page includes a "Questionables" list including the names of six white prospective jurors from the final pool, four of whom were struck by Lanier. J.A. 301. The lists of "Definite NOs" and "Questionables" correspond precisely to the strikes Lanier ultimately made.[16]

[16] The prosecution struck the four black prospective jurors on the list of "Definite NOs," J.A. 22, 23, 26, 29, and the one white prospective juror on the list, Bobbie Grindstaff, when she was called as a possible alternate, J.A. 33. The prosecution struck George McMahon, who was listed second under "Questionables" but with an arrow pointing to the "Definite

(Continued on following page)

They also are consistent with the three other juror lists from the prosecution's file in which the jurors to be struck were marked "N" for "No." J.A. 287-90, 299-300, 348-49.[17]

In response to Foster's evidence at the habeas hearing, Georgia presented affidavits from Lanier and Douglas Pullen, the other prosecutor. J.A. 168-71. Lanier and Pullen stated that they did not make the marks on the four highlighted venire lists or instruct others to do so, but they did not address the other information from their file. J.A. 168-71.

The state habeas court denied relief. J.A. 192-96. It explained the *Batson* framework and stated that it would "reach[ ] step three again on the basis of the new evidence presented in [the state habeas] proceedings." J.A. 193. It addressed two categories of notes from the prosecution's file: the highlighted copies of

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NOs." J.A. 27, 301. It also struck the prospective jurors listed first (Lou Ella Hobgood), third (Anna Jo Gale), and fifth (Mary Hackett) on the list of "Questionables," J.A. 22, 23, 27, 301, as well as one prospective juror (James Bevels) from its "Alternates" list who was added to the final pool on the morning the jury was struck, J.A. 30, 301.

[17] Georgia objected to the admission of any evidence regarding Foster's *Batson* claim on the ground that the claim had been raised and addressed on direct appeal. H.R. 1156. However, state law permits habeas petitioners to raise issues previously decided where there is new evidence that was not "reasonably available" at the time of the prior proceeding. *Gibson v. Head*, 646 S.E.2d 257, 260 (Ga. 2007). The state habeas court overruled Georgia's objection and admitted a certified copy of the documents described above. H.T. 19-20.

the venire list and two lists of qualified jurors that identified the race of each prospective juror. J.A. 193. With respect to the highlighted lists, the court noted that the lists had been circulated to "10 to 12 different individuals" in the office of the district attorney "to help pick a fair jury, especially given that this was a death penalty case." J.A. 195. The court did not address any of the other lists or notes.

The court expressly relied on the *Batson* rulings from Foster's trial and direct appeal. J.A. 193, 196. It stated that "both the trial court and the Georgia Supreme Court conducted lengthy examinations of [Foster's] initial *Batson* claims and found no error," and the highlighted lists and other material in the file did not "override this previous consideration." J.A. 193. The court concluded, "[Foster's] renewed *Batson* claim is without merit." J.A. 196.[18]

Foster filed an application for a certificate of probable cause to appeal in the Georgia Supreme Court, which was denied on November 3, 2014. J.A. 246. This Court granted certiorari on May 26, 2015,

[18] Although the state habeas court referenced res judicata because Foster's *Batson* claim had been raised and addressed on direct appeal, it made clear that it was conducting a step three analysis under *Batson* in light of the new evidence and that if Foster had prevailed, he would have overcome any res judicata bar. J.A. 192-96. Thus, the res judicata issue was determined entirely by the constitutional *Batson* analysis.

to evaluate Foster's claim of race discrimination under *Batson*.

SUMMARY OF THE ARGUMENT

The evidence of racial motive by the prosecution in this racially charged capital case is extensive and undeniable. The prosecutor struck all four black citizens who were in the venire from which the jury was selected. The exclusion of these citizens was not the product of "happenstance,"[19] but the result of the prosecution's identification of them as black and its determination to keep them off the jury.

The names of the black citizens were marked with a "B" and highlighted in green on four lists of the entire venire that were circulated among staff members in the prosecution's office. J.A. 253-76; H.T. 190-91, 219. The race of black citizens was circled on the prosecution's juror questionnaires, J.A. 311, 317, 323, 329, 334, and three black citizens were labeled "B#1," "B#2," and "B#3," J.A. 295-97. The black citizens were compared to each other in case "it comes down to having to pick one of the black jurors." J.A. 345.

[19] *See Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005) (describing the prosecution's disproportionate use of strikes against black prospective jurors and observing that "[h]appenstance is unlikely to produce this disparity") (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003)).

After voir dire and challenges for cause, five black citizens remained in the venire. Their names were the first five of six names on the prosecution's list of "Definite NOs," J.A. 301 – prospective jurors who were definitely to be struck – showing that the prosecution's highest priority was striking black venire members. One of the five, Shirley Powell, was removed for cause shortly before jury selection. T.T. 1326-29. The prosecution struck the remaining four: Eddie Hood, Evelyn Hardge, Mary Turner, and Marilyn Garrett. J.A. 22-31.

In response to Foster's objection pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), the prosecutors piled on eight to twelve reasons for each strike. J.A. 41-57. They even advanced new reasons for the strikes at the hearing on Foster's motion for new trial, which was six months after jury selection and the verdicts in the case. J.A. 79-115. Some of the reasons were incredible; others were contradicted by the record or the prosecution's own notes; and many applied to white prospective jurors the prosecution accepted.[20]

For example, District Attorney Lanier said he struck Marilyn Garrett because she was affiliated with Head Start and "her age being so close to the

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[20] *See Miller-El v. Dretke*, 545 U.S. at 241 ("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.").

defendant." J.A. 56. Garrett was thirty-four and Foster was nineteen. J.Q. #86 at 1; T.R. 588. The prosecution accepted eight white prospective jurors who were thirty-five or under, including a white man who was just two years older than Foster and served on the jury. With respect to Head Start, the prosecutors labeled Garrett a "social worker," J.A. 95, and said they "wanted to stay away from any social worker," J.A. 102-03. But Garrett was not a social worker; she was a teacher's aide. J.Q. #86 at 2. The prosecution accepted every white teacher and teacher's aide in the venire.

The prosecutors said their only concern with Eddie Hood, who was identified as "B#1," was that he had an eighteen-year-old son. J.A. 44. However, the final jury included two white jurors who had sons in the same age range, as well as the juror noted above who was two years older than Foster. The prosecutors also said one of Hood's three sons had been convicted of misdemeanor theft – "basically the same thing that this defendant is charged with." J.A. 45. But it was hardly the same charge. Hood's son received a suspended sentence for stealing hubcaps from a car in a mall parking lot five years earlier. T.R. 446. Foster was facing the death penalty for murder and other crimes.

At the motion for new trial hearing, the prosecutors changed their main reason for striking Hood, stating that "the bottom line" for the strike was Hood's affiliation with the Church of Christ. J.A. 110-11. Even though Hood said repeatedly that he was

not opposed to the death penalty and could impose it, T.T. 269-70, 274, 278, Lanier told the trial court at the *Batson* hearing that he struck Hood because the church "definitely takes a stand against the death penalty." J.A. 46. This was contradicted by the prosecution's notes, which said the church "doesn't take a stand on [the] Death Penalty," leaving the issue "for each individual member." J.A. 302. The notes also said: "*NO*. NO *Black* Church." J.A. 302 (emphasis in original). The prosecutors did not ask Hood if he knew whether his church had a position on the death penalty and, if so, whether he followed it. T.T. 274-78. Similarly, they did not ask other black citizens about the reasons they gave for striking them, even though in many instances doing so would have established whether their supposed concerns were valid.[21]

Taken together, the evidence clearly establishes purposeful discrimination by the prosecution in securing an all-white jury that would respond to its plea "to deter other people out there in the projects," T.T. 2505, by imposing a death sentence on Foster, a black youth from the projects, T.T. 2212.

The Georgia habeas court, which issued the decision under review, failed to consider "all relevant

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[21] *See Miller-El v. Dretke*, 545 U.S. at 246 ("'[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.'") (quoting *Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000)).

circumstances" as *Batson* requires because it relied upon and deferred to the rulings from Foster's trial and direct appeal proceedings even though those rulings were made without the prosecution's jury lists and notes. J.A. 192-96. Under a proper *Batson* analysis, the totality of the evidence establishes a constitutional violation.

ARGUMENT

THE PROSECUTION, DISPLAYING A "MIND TO DISCRIMINATE," OBTAINED AN ALL-WHITE JURY BY STRIKING BLACK PROSPECTIVE JURORS ON THE BASIS OF RACE.

Because peremptory strikes "constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate,'" *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)), this Court has established a three-step process for addressing claims of race discrimination in this context. The defendant first must make a prima facie showing of discrimination. *Snyder v. Louisiana*, 552 U.S. 472, 476 (2008). If that showing is made, the prosecution must offer race-neutral explanations for the strikes in question. *Id.* at 476-77. Finally, at step three, the court must determine whether the defendant has established purposeful discrimination. *Id.* at 477. At step three, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Id.* at 478. The *Batson* issue in this case hinges on step three –

whether Foster has established purposeful discrimination in light of all relevant circumstances.

I. The Prosecution Exhibited Discriminatory Intent When Evaluating the Prospective Jurors.

The prosecution's venire lists and notes reveal a sharp focus on the race of the prospective jurors and a determination to prevent black citizens from serving on the jury. When combined with the prosecution's total exclusion of black prospective jurors through peremptory strikes, the notes and records establish that the prosecution was motivated by discriminatory intent.

The names of the black prospective jurors were marked with a "B" and highlighted in green on four separate copies of the list of the entire venire. J.A. 253-76.[22] This required using a green highlighter to go through each list as evidenced by the differences in the highlighting on the different copies. The race-coded lists were circulated throughout the entire district attorney's office for the notations of secretaries, investigators, and assistant district attorneys,

[22] *See Adkins v. Warden*, 710 F.3d 1241, 1256 (11th Cir. 2013) ("[O]ur conclusion that the state struck Mr. Morris for racial reasons is buttressed as well by the fact that the prosecution explicitly noted the race of every black veniremember (and only black veniremembers) on its jury list in preparation for voir dire. . . .").

H.T. 190-91, 219,[23] showing a culture and comfort level with circulating jury lists coded by race throughout the office.[24]

Beyond the highlighted lists, the race of five black prospective jurors was circled on the prosecution's juror questionnaires. J.A. 311, 317, 323, 329, 334. The first three black prospective jurors in the pool – Eddie Hood, Louise Wilson, and Corrie Hines – were marked as "B#1," "B#2," and "B#3," with notes about each. J.A. 295-97.

A separate list contained notes on seven black prospective jurors, J.A. 293-94, and included the notation that Evelyn Hardge "[m]ight be the [b]est one to put on [j]ury," J.A. 294. No white prospective jurors were included on the list. The prosecutor's investigator expressed the view that "[i]f it comes down to having to pick one of the black jurors, Ms. Garrett, might be okay." J.A. 345.

However, the prosecution did not accept any black citizens for jury service. All of the black prospective jurors were on the "Definite NOs" list – the four who were ultimately struck and Shirley Powell,

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[23] The highlighted lists were created prior to voir dire, as reflected by the fact that they included information on prospective jurors who did not report to court as well as prospective jurors who were quickly excused for cause. J.A. 253-76.

[24] *See Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003) (relying on "the culture of the District Attorney's Office" as a factor indicating discrimination).

who was excused for cause on the morning of jury selection. J.A. 301. Moreover, the names of the five black prospective jurors were the first five names on the "Definite NOs" list. Only one white person appeared on the "Definite NOs" list – a woman the prosecutors unsuccessfully challenged for cause because they believed she was "definitely against the death penalty." J.A. 87; T.T. 1152.

Thus, the prosecution's intention was to strike every black prospective juror, and that took priority over any strikes of white prospective jurors.

II. The Prosecution's Purported Reasons for the Strikes of the Black Prospective Jurors Are Not Credible in Light of the Evidence of Discriminatory Intent and the Prosecution's Misrepresentations to the Trial Court.

The prosecutors piled reason upon reason for their strikes of the black venire members, undermining their credibility in the process.[25] They exaggerated

[25] *See McGlohon v. State*, 492 S.E.2d 715, 717 (Ga. App. 1997) (finding discrimination in jury selection in part because the striking party "proffered a 'laundry list' of reasons for almost every strike"); *see also Smith v. Chrysler Corp.*, 155 F.3d 799, 809 (6th Cir. 1998) (observing in an employment discrimination case that an employer's "strategy of simply tossing out a number of reasons to support its employment action in the hope that one of them will 'stick' could easily backfire" if " 'the multiple grounds offered . . . are so intertwined, or . . . fishy and

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facts to make the black panelists seem problematic, gave reasons that also applied to white prospective jurors,[26] and contradicted themselves and their own notes. They asserted two reasons lifted verbatim from a case in which a *Batson* challenge was denied.[27] They even continued to give new reasons after the trial was over.[28] Significantly, they had not asked questions in voir dire about the reasons they later gave for the strikes.[29] Because *Batson* is not "a mere exercise in

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suspicious'" (quoting *Russell v. Acme-Evans Co.*, 51 F.3d 64, 70 (7th Cir. 1995))).

[26] *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (explaining that if a proffered reason for the strike of a black prospective juror applies just as well to a white prospective juror who was accepted, that is evidence of discrimination); *see also Snyder v. Louisiana*, 552 U.S. 472, 483-84 (2008) (comparing a black panelist who was struck with white panelists who were accepted and finding discrimination).

[27] *Compare* T.R. 424 ("[Eddie Hood] avoided eye contact with the prosecutor. As a personal preference, eye contact is highly valued as a jury selection technique."), *with United States v. Cartlidge*, 808 F.2d 1064, 1071 (5th Cir. 1987) ("She avoided eye contact with the prosecutor. As a personal preference, eye contact is highly valued as a jury selection technique."); *compare also* T.T. 425 (stating that Marilyn Garrett "appeared to have a low income occupation"), *with Cartlidge*, 808 F.2d at 1071 (stating that a black prospective juror "appeared to have a low income occupation"). *Cartlidge* was decided four months before Foster's trial and was cited by Lanier in the trial court. J.A. 117.

[28] These reasons "reek[ ] of afterthought." *Miller-El v. Dretke*, 545 U.S. at 246.

[29] *See Miller-El v. Dretke*, 545 U.S. at 246 (recognizing that a prosecutor's failure to ask questions about a purported reason for a strike suggests that the reason is a pretext for discrimination).

thinking up any rational basis"[30] and a "pretextual reason bears on the plausibility of other reasons given,"[31] the prosecutors' stated reasons are not credible in light of the totality of the circumstances.

A. Marilyn Garrett

Marilyn Garrett was a stable, lifelong member of the Floyd County community. She went to grade school and high school in Floyd County in the 1950s and 1960s and was raising her two children there at the time of Foster's 1987 trial. J.Q. #86 at 1, 3. At thirty-four years old, she had two jobs – one in manufacturing, which she had held for nine years, and a second as a teacher's aide, which she had held for three years. J.Q. #86 at 1-2. She attended church every Sunday and sang in the choir. J.Q. #86 at 2, 5. She stated clearly that she was willing to impose the death penalty. T.T. 951.

Lanier represented to the trial court that he had not intended to strike Garrett and decided to strike her only after he learned that he would not need to use a strike on another black prospective juror, Shirley Powell, who was excused for cause on the

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[30] *Miller-El v. Dretke*, 545 U.S. at 252.

[31] *Harris v. Hardy*, 680 F.3d 942, 960 (7th Cir. 2012). As the United States Court of Appeals for the Seventh Circuit observed, "The implausibility of [one] rationale is reinforced by the pretextual significance of the other justifications offered for the strike[.]" *Id.* at 958.

morning the jury was struck. T.R. 438-39. The prosecution's notes reveal that this was not true. Although the prosecution's investigator thought that if it came down to accepting a black juror, Garrett "might be okay,"[32] Garrett was listed as a "Definite NO," J.A. 301, and was marked with an "N" for "N[o]" on all three of the prosecution's other strike lists, J.A. 287-90, 299-300, 348-49. All four lists were made before Powell was excused and correspond precisely to the strikes Lanier ultimately made.[33]

Lanier also provided an elaborate explanation of his purported thought process following the excusal of Powell, none of which was true. He stated initially that Garrett had the "most potential," J.A. 55, later clarifying in his response to Foster's motion for new trial that he meant "the most potential to choose from out of the four remaining blacks in the 42 panel venire," T.R. 438. He claimed that "the State had to choose between [white prospective] Juror [Arlene] Blackmon or Juror Garrett, the only two questionable jurors the State had left on the list." T.R. 439. He then went on to compare Garrett and Blackmon. T.R. 439-41. But again, Garrett was on the "Definite NOs" list, not the "Questionables" list. J.A. 301. Moreover,

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[32] J.A. 345. In the final version of the affidavit submitted to the trial court, this statement and another statement about Garrett's strength as a prospective juror relative to other black prospective jurors had been deleted. T.R. 556.

[33] *See supra* note 16 (explaining that the lists correspond with Lanier's strikes).

the "Questionables" list makes clear that the prosecution's final decisions were between Blackmon and two other white prospective jurors.[34] The final decisions had nothing to do with Garrett.

Lanier said that he would have accepted Garrett "except for this one thing, her association and involvement in Head Start," which "deals with low income, underprivileged children," and "her age being so close to the defendant." J.A. 56.[35] Garrett was thirty-four and Foster was nineteen. J.Q. #86 at 1; T.R. 588.[36] Lanier accepted eight white prospective jurors who were thirty-five or under, two of whom served on the jury.[37] Don Huffman, one of the two who served, was twenty-one – just two years older than

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[34] The "Questionables" list states: "Hatch or Blackmon" and "Hackett Blackmon." J.A. 301. The prosecution ultimately struck Hackett, J.A. 22, and accepted Blackmon and Hatch, J.A. 29, 31.

[35] When Lanier said this was the "one thing" that kept him from accepting Garrett, he had already given six other reasons for striking her. J.A. 55-56.

[36] *See Adkins v. Warden*, 710 F.3d 1241, 1257 (11th Cir. 2013) (finding the prosecutor's age explanation pretextual where the struck jurors were not actually close in age to the defendant).

[37] *See* J.Q. #4 at 1 (Ratliff, 24); J.Q. #10 at 1 (Nicholson, 35); J.Q. #23 at 1 (Coultas, 36); J.Q. #48 at 1 (Hammond, 26); J.Q. #70 at 1 (Horner, 32); J.Q. #71 at 1 (Fincher, 34); J.Q. #92 at 1 (Floyd, 21); J.Q. #106 at 1 (Huffman, 21). Nicholson, 35, and Huffman, 21, served on the jury. J.A. 34-35. The others were struck by defense counsel.

Foster and thirteen years younger than Garrett. J.Q. #106 at 1.

With respect to her involvement with underprivileged children, Garrett worked with Head Start as a teacher's aide. J.Q. #86 at 2. Lanier claimed to want jurors who were "teachers [and] those associated with teachers" because the victim was a retired school teacher. T.R. 427. Accordingly, he accepted every white teacher and teacher's aide in the qualified pool, all of whom were women, without asking them any questions about the children with whom they worked.[38]

Garrett, a teacher's aide, had the same job in the same school district as Martha Duncan, a white juror Lanier said he accepted *because* she was a teacher's aide. T.R. 430. The questionnaires of Garrett and Duncan are practically identical:

Garrett

[Occupation]: Rome City Schools Head Start – Teachers aide

[38] *See* J.Q. #10 at 2 (Nicholson); J.Q. #18 at 2 (Bing); J.Q. #88 at 2 (Duncan); J.Q. #114 at 2 (Berry); *see also* T.T. 288-91 (prosecution's voir dire of Nicholson); T.T. 335-40 (prosecution's voir dire of Bing); T.T. 961-63 (prosecution's voir dire of Duncan); T.T. 1346-47 (prosecution's voir dire of Berry). Nicholson, Bing, and Duncan served on the jury. J.A. 34-35. Berry was in the alternate pool and was struck by the defense. J.A. 33.

> [Position and duties]: Teachers Aide – help teacher as needed with 20 children

J.Q. #86 at 2.

> *Duncan*
>
> [Occupation]: teacher's Aide – North Heights [a Rome City School] Kindergarden [sic]
>
> [Position and duties]: teacher's Aide. I help the teacher with the children.

J.Q. #88 at 2. Without any follow-up in voir dire, there was no meaningful way to distinguish between Garrett and Duncan on the basis of their jobs. Yet Garrett was struck, and Duncan served on the jury.[39]

At the motion for new trial hearing, the prosecutors for the first time called Garrett a "social worker," J.A. 95, 102-03, and said that they "wanted to stay away from any social worker," J.A. 103. But Garrett was not a social worker. She was a teacher's aide, just like Duncan.[40] Moreover, Duncan had a son Foster's age – a factor that was supposedly a key reason

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[39] *See Miller-El v. Dretke*, 545 U.S. at 241, 246 (holding that the failure to ask questions and the acceptance of similarly situated white panelists are evidence of pretext and discrimination).

[40] *See Conner v. State*, 327 P.3d 503, 510 (Nev. 2014) ("A race-neutral explanation that is belied by the record is evidence of purposeful discrimination."); *Addison v. State*, 962 N.E.2d 1202, 1215 (Ind. 2012) ("[M]ischaracterization of [a juror's] voir dire testimony is troubling and undermines the State's proffered race-neutral reason for the strike.").

Lanier struck Eddie Hood, J.A. 44, who had been identified as "B#1."

Lanier made it clear that Garrett's affiliation with Head Start and her age were the reasons he struck her – not the many other reasons he gave. J.A. 56. Regardless, the other reasons fall far short of showing that the strike was not the product of discriminatory intent.

Both Garrett and Duncan, the other teacher's aide, answered questions from the trial court by stating that they were not familiar with the neighborhood in North Rome where the victim lived. T.T. 950-51, 959. Lanier said he struck Garrett because he believed she was in fact familiar with the area since she went to high school nearby. Yet he accepted Duncan, who lived in the area. In explaining his strike of Garrett, Lanier said:

> [Garrett] said she was not familiar with the North Rome area, and unfortunately, in her questionnaire, she grew up – she went to Main Elementary or Main School, which is again two blocks from where this crime happened. She said – and yet she drives by the North Rome area every day from Morton Bend Road when she goes to work.

J.A. 55-56. Remarkably, even though Duncan also said that she lacked familiarity with the neighborhood in which the victim lived, T.T. 959, Lanier claimed he accepted her *because* she lived "less than a half mile from the murder scene and [the school at

which she worked was] located less than 250 yards [away]," T.R. 430. Lanier could have asked either juror about their familiarity with the area, but he did not.[41]

Even though Lanier professed that Garrett had good potential and that he would have accepted her but for her job with Head Start, he described her as showing "complete disrespect for the Court" and being "[n]ot a very strong juror." J.A. 55. He said:

> I looked at her, and she would not look at the Court during the voir dire, kept looking at the ground. . . . Her answers were very short, if the Court will recall. . . . Said yeah to the Court on four occasions. Shows a complete disrespect for the Court and its authority. She appeared very shaky, very nervous. Her voice quivered. Not a very strong juror.

J.A. 55. Lanier could not have actually believed those things and still viewed Garrett as a good potential juror whom he almost accepted, as he represented to the trial court. Moreover, Lanier's representation that Garrett said "yeah" to the trial court is contradicted by the transcript, which shows that she answered "yes" to the trial court's questions on three occasions

[41] If asked, Garrett would have explained – as she did in a post-trial affidavit – that she went to Main High School from 1964 through 1966 because it was the only black school in the county; she was bused there from twenty miles away. T.R. 420.

and did not say "yeah" to the trial court a single time. T.T. 950-52.[42]

The trial court did not make any findings about Garrett's demeanor. J.A. 58, 60, 141-43. As a result, Lanier's assertions are all that support his demeanor-based reasons, and such reasons are susceptible to abuse.[43] This is particularly relevant since Lanier claimed to have problems with the demeanor of all four black prospective jurors, whom he described as "bewildered," J.A. 51, "hostile," J.A. 52, "defensive," J.A. 53, "nervous," J.A. 55, and "impudent," J.A. 55. He also claimed that three of the four – Garrett, Eddie Hood, and Mary Turner – had problems with eye contact. J.A. 46, 53, 55. With Hood, Lanier lifted his explanation verbatim from a reported case, saying that Hood "avoided eye contact with the prosecutor" and that "as a personal preference, eye contact is

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[42] This was not a matter of imprecise transcription. The transcript reflects that numerous white prospective jurors answered "yeah" to questions on voir dire. *See*, *e.g.*, T.T. 960, 970 (Martha Duncan); T.T. 529, 532 (Billy Graves); T.T. 941, 946 (Arlene Blackmon).

[43] *See, e.g.*, *Harris v. Hardy*, 680 F.3d 942, 965 (7th Cir. 2012) ("Demeanor-based explanations for a strike are particularly susceptible to serving as pretexts for discrimination."); *Brown v. Kelly*, 973 F.2d 116, 121 (2d Cir. 1992) ("[B]ecause such after-the-fact rationalizations are susceptible to abuse, a prosecutor's reason for discharge bottomed on demeanor evidence deserves particularly careful scrutiny."); *United States v. Sherrills*, 929 F.2d 393, 395 (8th Cir. 1991) ("Determining who is and is not attentive requires subjective judgments that are particularly susceptible to the kind of abuse prohibited by *Batson*.").

highly valued as a jury selection technique." T.R. 424.[44]

Lanier also claimed to be concerned that Garrett "didn't ask off" the jury despite her two jobs and two children. J.A. 56. But among the many reasons he gave for striking Eddie Hood ("B#1") was that Hood "asked to be off the jury" because of his other commitments. J.A. 45. The fact that Lanier used both "ask[ing] off" and not "ask[ing] off" as reasons for his strikes of black prospective jurors suggests that the reasons were pretextual.

Adding even more reasons, Lanier mentioned that Garrett was divorced, J.A. 56, but he accepted three of the four white prospective jurors who were divorced.[45] He also said he struck Garrett because defense counsel did not ask her any questions about insanity, J.A. 56, but they did,[46] or alcohol, J.A. 56,

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[44] *See United States v. Cartlidge*, 808 F.2d 1064, 1071 (5th Cir. 1987) ("She avoided eye contact with the prosecutor. As a personal preference, eye contact is highly valued as a jury selection technique.").

[45] The final pool of forty-two prospective jurors included four people other than Garrett who were divorced: Anne Coultas, James Cochran, George McMahon, and Leslie Hatch. J.Q. #23 at 2; J.Q. #33 at 2; J.Q. #45 at 2; J.Q. #107 at 2. Lanier struck McMahon, J.A. 27, and accepted the other three, who were struck by the defense, J.A. 23, 24, 31.

[46] Defense counsel asked Garrett, "How do you feel about the use of the insanity defense?" T.T. 955; "[H]ave you ever had any feelings on the insanity defense or thought a lot about it or read anything?" T.T. 955; and "Do you believe in the concept of mental illness?" T.T. 955.

but they did.[47] He added that defense counsel did not ask Garrett many questions about publicity, but they asked her several questions about publicity and learned that she knew little about the case.[48]

Lanier also said he struck Garrett because she was a woman, J.A. 56, asserting that he used "eighty percent" of his strikes on women, J.A. 57.[49] Not including alternates, he used six of his nine strikes on women, J.A. 22-31, but even that number is inflated because three of the seven women he struck were the black women. He struck three white women and two white men, J.A. 22-31 – a disparity that pales in comparison to his pattern of strikes against black people. The final jury included five women. J.A. 34-35.

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[47] The defense asked, "Have you ever known anyone with a drug or alcohol problem?" T.T. 955; "[H]ave you ever consumed alcoholic beverages?" T.T. 956; and "Are you against the use of alcohol now?" T.T. 956.

[48] *See* T.T. 956-57 ("Q: I believe you said that you only read the Sunday paper of the Rome News Tribune, so you haven't read a whole lot about this case, have you? A: No. Q: Have you heard anything on the radio? A: Some. Q: What have you heard on the radio about Tim? A: I heard that he was arrested for the crime. Q: What have you heard about Ms. White on the radio? A: That she was a retired teacher. Q: Have you heard anything in your community about this case? A: No.").

[49] This Court later recognized that "[b]ecause gender and race are overlapping categories, gender can be used as a pretext for racial discrimination." *J.E.B. v. Alabama*, 511 U.S. 127, 145 (1994).

Even after the trial, Lanier continued to pile on additional reasons for his strike of Garrett, asserting that she "appeared to have a low income occupation." T.R. 425. But Garrett worked two jobs, J.Q. #86 at 2, one of which was the same job as white juror Martha Duncan, as explained above. Lanier also stated in the post-trial proceedings that he struck Garrett because she said she did not know anyone with a drug problem even though her cousin had been arrested for drug possession. J.A. 105; T.R. 425. But Lanier had said earlier, after the death verdict was returned, that he did not learn about Garrett's cousin's drug issue until after jury selection.[50]

B. Eddie Hood

Like Marilyn Garrett, Eddie Hood was a long-time resident of Floyd County. He moved there as a child and had lived there for thirty-nine years. J.Q. #9 at 1. He was married with four adult children, and he had worked in the same job in a pulp mill for seventeen years. J.Q. #9 at 2-3. He also worked part-time painting houses. J.Q. #9 at 5.

The prosecution was fixated on Hood's race from the outset, noting a "B" beside his name on the venire

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[50] *See* P.T. 8-9 (May 1, 1987) ("It has come to our attention *since the trial of this case* that Angela Garrett whom the Metro Drug Task Force has just arrested for cocaine, who is a teacher at a school and has been subsequently dismissed from school because of the drug problem.") (emphasis added).

list and highlighting him in green, J.A. 253, 259, 265, 271, identifying him as "B#1," J.A. 295, and circling his race on his juror questionnaire, J.A. 329. It also singled him out in voir dire. The prosecutors encouraged seven of the first eight prospective jurors they questioned to give acceptable answers about pretrial publicity by prefacing their questions with some variation of this statement: "What we are just looking for is what you know so that you can be a fair and impartial juror and base your verdict solely on what you hear in the courtroom." T.T. 190.[51] However, they omitted any such preface for Hood, the only black prospective juror in the first eight. T.T. 274-78. They then questioned Hood aggressively about exposure to pretrial publicity despite his consistent responses that he knew little about the case. T.T. 276-77. This type of differential treatment is evidence of discrimination.[52]

Lanier said that "[t]he only thing that [he] was concerned about" with Hood was that he "has an eighteen year old son which is about the same year old as the defendant." J.A. 44. However, the final jury included two white jurors who had sons close in age

[51] *See also* T.T. 218-19 (Ratliff); T.T. 244 (Hackett); T.T. 290 (Nicholson); T.T. 314 (Barbogello); T.T. 339 (Bing); T.T. 364 (Evans).

[52] *See Miller-El v. Dretke*, 545 U.S. at 255-56 (recognizing contrasting voir dire questions as evidence of discrimination).

to Foster,[53] as well as Don Huffman, a white juror who himself was just two years older than Foster. J.Q. #106 at 1. When Hood was asked if the defendant's age would be a factor to him in sentencing, he answered, "None whatsoever," T.T. 280, whereas white juror Billy Graves, who had three teenage sons, said "[p]robably so" in response to the same question, T.T. 527. Yet the prosecution struck Hood and accepted Graves, who served on the jury.

Lanier also said that one of Hood's three sons had been convicted of theft – "basically the same thing that this defendant is charged with." J.A. 45. But Hood's son had been given a suspended sentence for stealing hubcaps from a car in a mall parking lot five years earlier, T.R. 446; Foster was charged with murder and other crimes and was facing the death penalty.

By the time of the motion for new trial hearing, Lanier had changed his main reason for striking Hood, declaring that "the bottom line on Eddie Hood is the Church of Christ affiliation." J.A. 110-11. Hood had indicated repeatedly that he could impose the death penalty. T.T. 269, 270, 274, 278. Nevertheless, at the initial *Batson* hearing, Lanier said, "[I]t is my experience that the Church of Christ definitely takes

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[53] Lanier accepted Martha Duncan, the teacher's aide, even though she had sons who were twenty and twenty-five. J.Q. #88 at 3. He also accepted Billy Graves, whose sons were thirteen, fifteen, and seventeen. J.Q. #31 at 3.

a stand against the death penalty." J.A. 46. At the motion for new trial hearing, Lanier said that his knowledge of the church came from Douglas Pullen, the assistant prosecutor. J.A. 101. Pullen stated at the hearing that a lay minister from a "majority black" Church of Christ in Columbus had warned him to be cautious with members of his faith, although he had never said that there was "any tenet of [the Church of Christ] that involved the death penalty." J.A. 114. Pullen also said that in his experience, members of the Church of Christ usually were disqualified because of their opposition to the death penalty. J.A. 114. Hood had expressed no such opposition.

Pullen's representation about the church's position is consistent with the prosecution's notes, which say under the heading "Church of Christ" that the church "doesn't take a stand on [the] Death Penalty" and the issue is "left for each individual member," J.A. 302. But underneath that is written, "*NO*. NO *Black* Church." J.A. 302 (emphasis in original). These notes suggest that the prosecutors did not have a problem with the Church of Christ because it had a position on the death penalty. They had a problem with the Church of Christ because it was a "*Black* Church." J.A. 302.

Of course, the prosecutors could have asked Hood if he knew his church's position on the death penalty and, if so, whether he agreed with it. Their failure to inquire may have been because Hood stated *five times* during voir dire that he was not opposed to the death

penalty and that he could impose it.[54] So instead of questioning Hood about his church and its position, the prosecutors simply asserted that he might be opposed to the death penalty, despite all evidence to the contrary, based on his religious affiliation.[55] At the same time, they accepted Arlene Blackmon, who was Catholic, J.Q. #106 at 2, even though they believed that Catholics would have reservations about imposing the death penalty, J.A. 83-86.

To suggest that his concerns about the Church of Christ were justified, Lanier stated repeatedly that three white prospective jurors who were members of the Church of Christ – Vonda Waters, Gertrude Green, and Thelma Terry – had been struck for cause

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[54] *See* T.T. 269 ("[Court]: Are you opposed to or against the death penalty? A: I am not opposed to it. Q: If the facts and circumstances warrant the death penalty, are you prepared to vote for the death penalty? A: Yes."); T.T. 270 ("[Court]: [A]re you prepared to vote for the death penalty? Now you said yes to that. A: All right. Q: Are you still saying yes? A: Uh-huh."); T.T. 274 ("[Court]: If the evidence warrants the death penalty, could you vote for the death penalty? A: Yes. I could vote for the death penalty."); T.T. 278 ("[Pullen]: And if the facts and circumstances warranted, you could vote to impose the death penalty? A: Yes.").

[55] If the prosecution had asked Hood about his church's view on the death penalty, he would have said the following, as he did in a post-trial affidavit: "To my knowledge, my church does not take a stand against capital punishment. I answered the Court's questions on my views of capital punishment as honestly as I could, and there is nothing in my religious beliefs that would prevent me from giving the death penalty." T.R. 421.

due to their opposition to the death penalty. J.A. 46.[56] This was false. Waters was excused because she was five-and-a-half months pregnant; she was never questioned during voir dire. T.T. 893. Green was excused by joint motion after she said she could vote for the death penalty but could not vote for life imprisonment. T.T. 729-30. Terry was excused because she had already formed an opinion about Foster's guilt. T.T. 557-58.

Lanier also said that Hood "appeared to be confused and slow in responding to questions concerning his views on the death penalty." T.R. 434. However, as previously noted, Hood was unequivocal in his willingness to impose death. He showed some confusion when answering questions about life imprisonment, T.T. 269-74, but his confusion was no different than that shown by many white members of the panel, including Don Huffman, T.T. 1100-01, who served on the jury, J.A. 35. The trial court acknowledged that its death qualification questions were confusing, stating: "I think these questions should be reworded. I haven't had a juror yet that understood

[56] *See also* T.R. 435 ("Church of Christ affiliates are reluctant to return a verdict of death. This fact is substantiated by Church of Christ jurors Terry (#35), Green (#53) and Waters (#78) being excused for cause due to feeling against the death penalty."); J.A. 114 ("[T]hree out of four jurors who professed to be members of the Church of Christ, went off for Witherspoon or Witherspoon/Witt reasons.").

what that meant." T.T. 994.[57] In its order on the motion for new trial, the trial court reiterated that Hood's "particular confusion about the death penalty questions was not unusual." J.A. 138. In sum, Lanier sought to exploit an ambiguous question that confused virtually all of the jurors to suggest that Hood opposed the death penalty, even though Hood expressed no reservations about imposing it.

Yet another reason offered for the strike of Hood was that he had been hospitalized for food poisoning during voir dire. J.A. 45-46. Because of that, Lanier argued, "I was not sure of his medical – or health capability." J.A. 46. But on the Friday before the jury was struck, the trial court was told that Hood had recovered and was "out painting" a house. T.T. 1303. The court responded: "I believe that would qualify him physically to be here Monday at 9:30. If he can paint a house, he can sit in the jury box." T.T. 1303.[58]

Lanier also expressed concern that Hood's wife worked at Northwest Regional Hospital, where she was a supervisor in food services. J.Q. #9 at 2. Lanier said that the hospital "deals a lot with mentally disturbed, mentally ill people. . . . [T]hey intend [sic] to be more sympathetic and are for the underdog."

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[57] The trial court made other similar comments throughout voir dire. *See*, *e.g.*, T.T. 1052, 1101-02.

[58] In its order on Foster's motion for new trial, the trial court observed that Hood "seemed well on the day of jury selection." T.R. 568.

J.A. 45. But Lanier expressed no such concern about Arlene Blackmon, a white woman who had worked at the same hospital in food services and housekeeping and served on the jury. J.Q. #83 at 2; T.T. 939. The prosecution asked Blackmon about her work at the hospital in voir dire, T.T. 939,[59] but it did not ask Hood about his wife's work, T.T. 274-79.

Adding more reasons, Lanier said that he struck Hood because "the defense did not ask him a lot of questions," such as questions about insanity, the age of the defendant, and pretrial publicity. J.A. 47. But the defense did ask Hood about those subjects, and Hood gave clear answers.[60] Lanier also said that the defense did not ask Hood about his membership in any social or fraternal organizations. J.A. 47. However, Hood had written on his questionnaire that he did not belong to any social or fraternal organizations,

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[59] *See* T.T. 939 ("[Pullen]: I noticed that you had formerly worked at the Regional Hospital. Do you have any particular training, education or interest in psychiatry, psychology or mental health or anything of that nature? A: No, sir. Q: What did you do when you were at the hospital? A: When I first started there, I was in the kitchen, and after that I was in housekeeping.").

[60] *See* T.T. 280 ("Q: Do you have a feeling about the insanity defense? A: Do I have any opinion about that? I have not formed an opinion on that."); T.T. 280 ("Q: Is age a factor to you in trying to determine whether or not a defendant should receive a life sentence or a death sentence? A: None whatsoever."); T.T. 281 ("Q: Okay. The publicity that you have heard, has that publicity affected your ability to sit as a juror in this case and be fair and impartial to the defendant? A: No, it has no effect on me.").

J.Q. #9 at 4, and, as Lanier must have observed, the defense did not ask *a single prospective juror* about social or fraternal organizations.

Lanier said that it "concerned [him] . . . that [Hood] had a relative who did counsel people involving drugs," because intoxication was "the primary defense in this case." J.A. 46. But Hood, when asked if any member of his family was involved in law enforcement, said, "I have a brother who was involved with the law enforcement some years ago as a – sort of a consultant toward people involved in drugs." T.T. 279. That statement revealed very little about what Hood's brother actually did, and Hood added, "I don't know anything about the nature of his work." T.T. 279.[61]

By Lanier's purported criteria, white venire members Martha Duncan, Arlene Blackmon, and Don Huffman were prime candidates for prosecution strikes. Duncan was a teacher's aide in the Rome City Schools and had a son close in age to Foster. J.Q. #88 at 2-3. Blackmon was Catholic, J.Q. #106 at 2, a religion the prosecutors connected to reservations about the death penalty, J.A. 83-85, 91, and she used

[61] Lanier also said he struck Hood because Hood "asked to be off the jury." J.A. 45. But as explained in the discussion of Garrett, Lanier said he struck Garrett because she "didn't ask off" the jury. J.A. 56. In addition, Lanier said that Hood made "no eye contact," J.A. 46; this issue is discussed in the section on Garrett since Lanier claimed that Garrett, Hood, and Turner all had problems with eye contact.

to work at Northwest Regional Hospital, J.Q. #83 at 2. And Huffman was just two years older than Foster, J.Q. #106 at 1, and was confused by the death qualification questions, T.T. 1100-01. Yet all three of those prospective jurors were accepted and served, and Garrett and Hood were struck.

Lanier's strikes "correlate with no fact as well as they correlate with race." *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005). Even if some of the stated reasons, "when examined in isolation, appear to have some validity," the totality of the circumstances renders it "obvious that these explanations were merely pretext for the State's exercise of its peremptory strikes for racially discriminatory reasons." *State v. McFadden*, 191 S.W.3d 648, 657 (Mo. 2006).

As this Court has recognized, there is a unique opportunity for racial prejudice to operate in a capital case involving an interracial crime "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing." *Turner v. Murray*, 476 U.S. 28, 35 (1986). After Lanier struck all four black prospective jurors, he urged the jury to impose a death sentence to "deter other people out there in the projects," T.T. 2505, which were ninety percent black, T.R. 551. That argument simply would not have been made if the jury was racially diverse. But Lanier ensured that he would have an all-white jury, and Foster, a black youth from the projects, was sentenced to death.

Race discrimination in the selection of jurors "offends the dignity of persons and the integrity of the courts." *Powers v. Ohio*, 499 U.S. 400, 402 (1991). "A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character." *Id*. at 413-14. In addition, this type of discrimination "casts doubt on the integrity of the judicial process" and places the fairness of a criminal proceeding in doubt. *Rose v. Mitchell*, 443 U.S. 545, 556 (1979). It is not only unconstitutional but unseemly that black citizens who were called to do their civic duty in this case were thoroughly disrespected by the prosecution and reduced to "B"s and "Definite NOs."

III. The State Habeas Court's Decision Is Not Entitled to Deference.

The order of the state habeas court does not warrant deference because it relies upon the rulings of the trial court and the Georgia Supreme Court, J.A. 193, 196, even though neither of those courts had considered the prosecution's venire lists and notes, which made the discrimination in this case abundantly clear. The state habeas court, in conducting its own step three analysis under *Batson*,[62] failed completely to recognize the racial motivations revealed by the prosecution's notes, characterizing them as nothing

[62] As the court stated, it "reach[ed] step three [of *Batson*] again on the basis of the new evidence." J.A. 193.

more than the "highlighting of the names of black jurors and the notation of their race" in concluding that they did not "override" the prior rulings. J.A. 193. The state habeas court found nothing wrong with circulating race-coded jury lists to "secretaries, investigators and other assistant district attorneys" – "10 to 12 different individuals." J.A. 195. It did not evaluate any of the stated reasons in light of the new evidence. It did not address how the strike lists undermine the prosecutors' credibility. And remarkably, it relied on the affidavit of the prosecution's investigator as evidence of non-discrimination even though the original draft of the affidavit had ranked the black prospective jurors against each other in case "it comes down to having to pick one of the black jurors." J.A. 345.

Because the state habeas court deferred to prior decisions that were based on just a fraction of the evidence that was ultimately presented, it failed to give meaningful consideration to "all relevant circumstances" as *Batson* requires. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting *Batson v. Kentucky*, 476 U.S. 79, 96 (1986)).[63]

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[63] In addition, the rationale for applying the deferential standard of clear error on *Batson* issues is not present in this case. In a typical case, the trial court is best positioned to observe the prosecutors and jurors and evaluate the evidence of discrimination firsthand. *See Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality opinion); *id.* at 372 (O'Connor, J., joined by Scalia, J., concurring in judgment). In this case, however, the habeas court was not involved in the selection of

(Continued on following page)

Even if granted some level of deference, the state habeas court's decision rejecting Foster's *Batson* claim must be reversed. The evidence of race discrimination in this case is overwhelming, such that this Court should be "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Snyder v. Louisiana*, 552 U.S. 472, 474 (2008) (reversing conviction pursuant to *Batson* under the clear error standard).

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the jury at trial and considered the *Batson* claim nineteen years after trial. *See Holder v. Welborn*, 60 F.3d 383, 388 (7th Cir. 1995) ("[The] rationale given by the Supreme Court for the use of the clearly erroneous standard is inapplicable to the circumstances in this case, where a magistrate conducted the *Batson* hearing more than eight years subsequent to the voir dire proceeding.").

CONCLUSION

For the foregoing reasons, Petitioner Foster respectfully requests that this Court reverse the decision of the Superior Court of Butts County, Georgia.

Respectfully submitted,

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