DISCRIMINATION DUING JURY SELECTION: *BATSON* AND BEYOND

By Kevin Heade - Central Arizona National Lawyers Guild

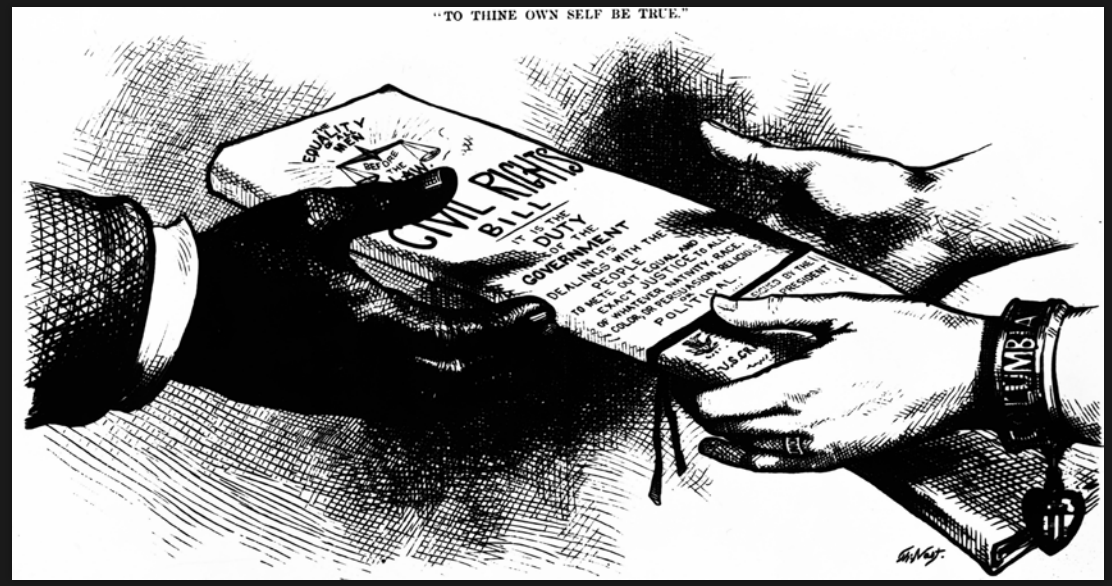
14th Amendment

- July 09, 1868
- No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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.
- U.S. Const. amend. XIV, Section 1.

Civil Rights Act of 1875

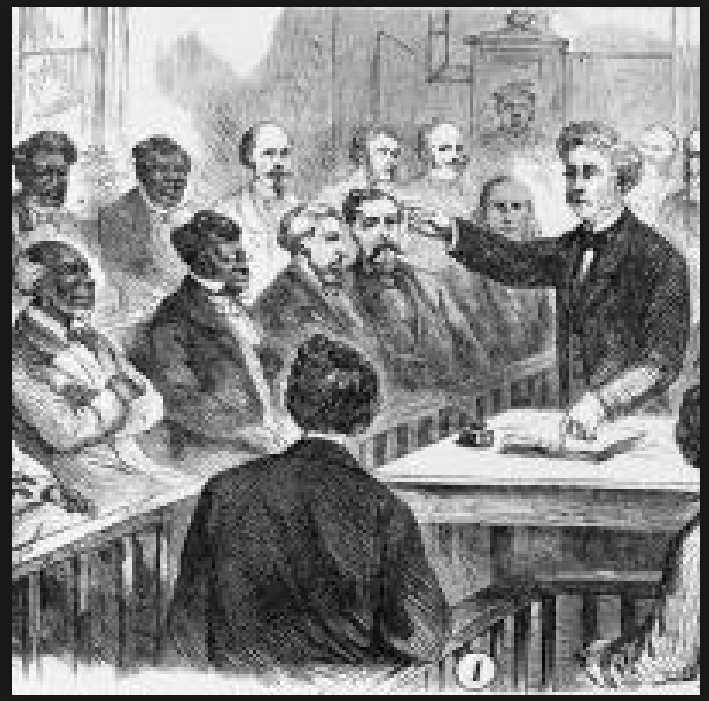
- § 243. Exclusion of jurors on account of race or color
- No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.
- CREDIT(S)
- (June 25, 1948, c. 645, 62 Stat. 696.)

- 18 U.S.C.A. § 243 (West)



Strauder v. State of W. Virginia, 100 U.S. 303 (1879),

- "The very idea of a jury is a body of men composed of the peers or equals of the person whose rights" 100 U.S. at 308
- WV statute limiting jury pool to white men deprived petitioner of equal protection.
- Did not strike down the statute; but held that Civil Rights Act of 1866 provided authorized remedy via removal to federal court,



Strauder v. State of W. Virginia, 100 U.S. 303 (1879),

- We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. 100 U.S. at 309

Neal v. State of Delaware, 103 U.S. 370, 397, 26 L. Ed. 567 (1880)

- The showing thus made, including, as it did, the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned as a juror in the courts of the State,—although its colored population exceeded twenty thousand in 1870, and in 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand,—presented a prima facie case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the State court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the State; and the refusal of the State court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States.

- Neal v. State of Delaware, 103 U.S. 370, 397, 26 L. Ed. 567 (1880)

- We think that this evidence failed to rebut the strong prima facie case which defendant had made. That showing as to the long-continued exclusion of negroes from jury service, and as to the many negroes qualified for that service, could not be met by mere generalities. If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as in adequate justification for the complete exclusion of negroes from jury service, the constitutional provision—adopted with special reference to their protection—would be but a vain and illusory requirement.

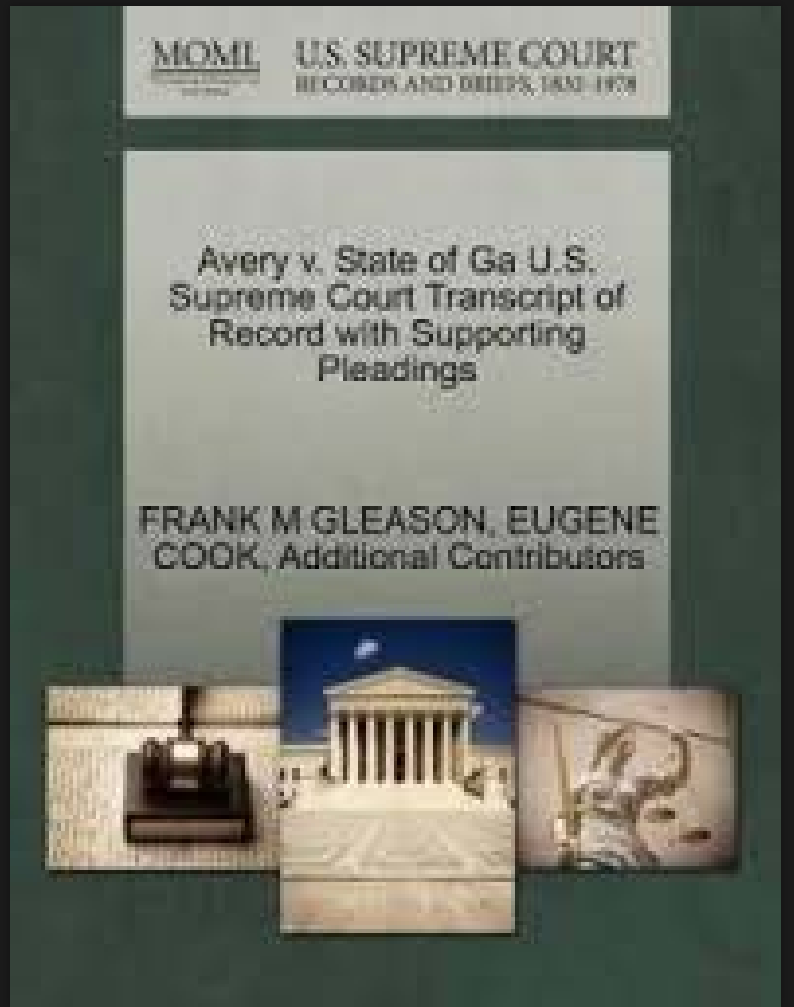
- Norris v. State of Alabama, 294 U.S. 587, 598, 55 S. Ct. 579, 584, 79 L. Ed. 1074 (1935)

- It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it4 but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles. The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. **The Fourteenth Amendment requires that equal protection to all must be given—not merely promised**.

- Smith v. State of Texas, 311 U.S. 128, 130, 61 S. Ct. 164, 165, 85 L. Ed. 84 (1940)

- If there is a ‘vacuum’ it is one which the state must fill, by moving in with sufficient evidence to dispel the prima facie case of discrimination. We have held before,5 and the Georgia Supreme Court, itself, recently followed these *563 decisions,6 that when a prima facie case of discrimination is presented, the burden falls, forthwith, upon the state to overcome it. T

- Avery v. State of Ga., 345 U.S. 559, 562–63, 73 S. Ct. 891, 893, 97 L. Ed. 1244 (1953)



- The indictment alleged that he, being a judge of the county court of Pittsylvania County of that State, and an officer charged by law with the selection of jurors to serve in the circuit and county courts of said county in the year 1878, did then and there exclude and fail to select as grand and petit jurors certain citizens of said county of Pittsylvania, of African race and black color, said citizens possessing all other qualifications prescribed by law, and being by him excluded from the jury lists made out by him as such judge, on account of their race, color, and previous condition of servitude, and for no other reason, against the peace and dignity of the United States, and against the form of the statute of the United States in such case made and provided.

- Ex parte Commonwealth of Virginia, 100 U.S. 339, 340, 25 L. Ed. 676 (1879)

- Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them. **If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.**

- Smith v. State of Texas, 311 U.S. 128, 132, 61 S. Ct. 164, 166, 85 L. Ed. 84 (1940)

A Klansman Joins the Court: The Appointment of Hugo L. Black

Swain v. Alabama, 380 U.S. 202 (1965)

- But purposeful discrimination may not be assumed or merely asserted.

- Panel challenge and Peremptory strike challenge
- Swain v. Alabama, 380 U.S. 202, 205, 85 S. Ct. 824, 827, 13 L. Ed. 2d 759 (1965), overruled by Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)

Swain v. Alabama, 380 U.S. 202 (1965)

- With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change *222 in the nature and **837 operation of the challenge. **The challenge, pro tanto, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.**

- Swain v. Alabama, 380 U.S. 202, 221–22, 85 S. Ct. 824, 836–37, 13 L. Ed. 2d 759 (1965), overruled by Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)

Swain v. Alabama, 380 U.S. 202 (1965)

- The peremptory challenge has very old credentials. In all trials for felonies at common law,
- The system of struck juries also has its roots in ancient common-law heritage.

Swain v. Alabama, 380 U.S. 202, 217, 85 S. Ct. 824, 834, 13 L. Ed. 2d 759 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)

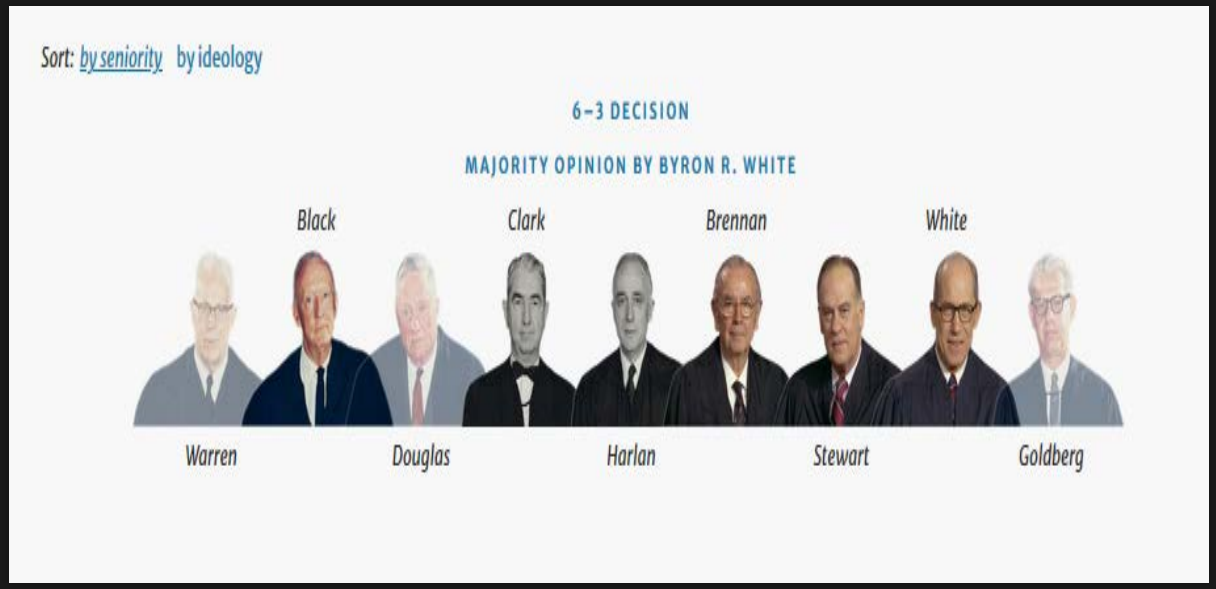
Swain v. Alabama, 380 U.S. 202 (1965)

- If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify.
- 23 We need pursue this matter no further, however, for even if a State's systematic striking of Negroes in the selection of petit juries raises a prima facie case under the Fourteenth Amendment, we think it is readily apparent that the record in this case is not sufficient to demonstrate that the rule has been violated by the peremptory system as it operates in Talladega County.
- Swain v. Alabama, 380 U.S. 202, 224, 85 S. Ct. 824, 838, 13 L. Ed. 2d 759 (1965), overruled by Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)

Swain v. Alabama, 380 U.S. 202 (1965)

- There is no evidence, however, of what the prosecution did or did not do on its own account in any cases other than the one at bar.31 In one instance the prosecution offered the defendant an all-Negro jury but the defendant in that case did not want a jury with any Negro members.

- Swain v. Alabama, 380 U.S. 202, 225, 85 S. Ct. 824, 838, 13 L. Ed. 2d 759 (1965), overruled by Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)



Justice Goldberg dissent
Swain v. Alabama, 380 U.S. 202 (1965)

- Alabama here does not deny that Negroes as a race are excluded from serving on juries in Talladega County. The State seeks to justify this admitted exclusion of Negroes from jury service by contending that the fact that no Negro has ever served on a petit jury in Talladega County has resulted from use of the jury-striking system, which is a form of peremptory challenge.

- Swain v. Alabama, 380 U.S. 202, 233, 85 S. Ct. 824, 843, 13 L. Ed. 2d 759 (1965), overruled by Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (Goldberg, J. dissenting)

Batson v. Kentucky, 380 U.S. 79 (1986)

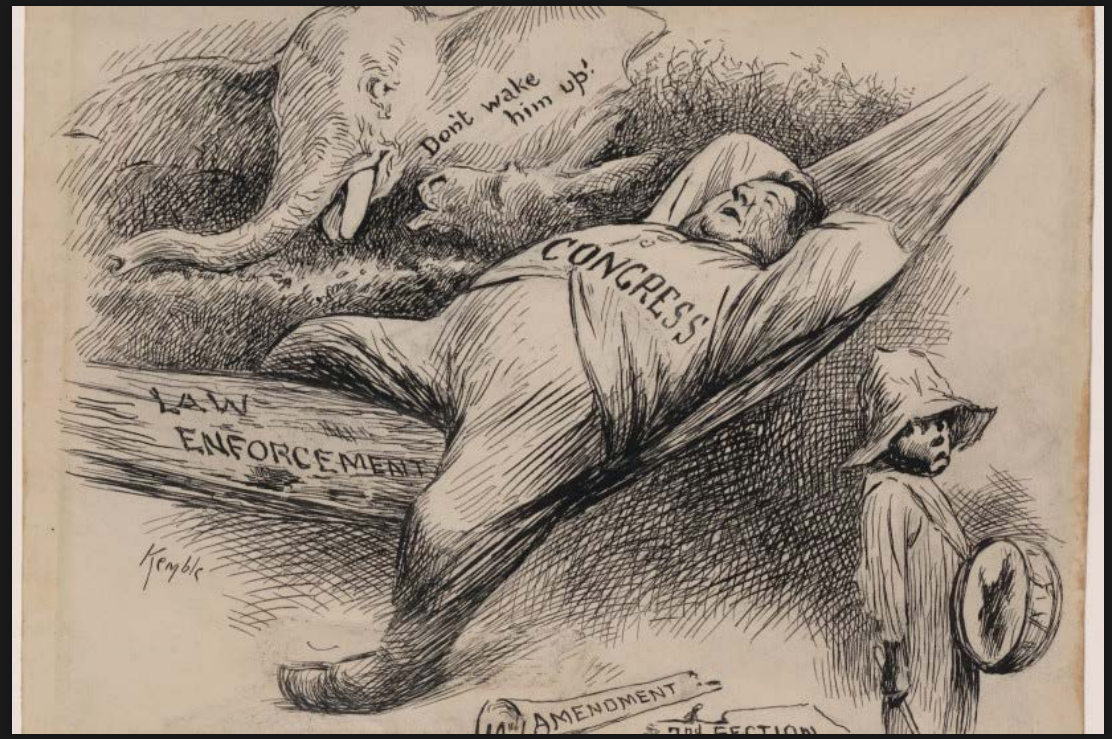
- POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. WHITE and MARSHALL, JJ., filed concurring opinions, post, p. ---. STEVENS, J., filed a concurring opinion, in which BRENNAN, J., joined, post, p. ---. O'CONNOR, J., filed a concurring opinion, post, p. ---. BURGER, C.J., filed a dissenting opinion, in which REHNQUIST, J., joined, post, p. ---. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C.J., joined, post, p. ---.

- Batson v. Kentucky, 476 U.S. 79, 81, 106 S. Ct. 1712, 1714, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)

Batson v. Kentucky, 380 U.S. 79 (1986)

- A number of lower courts following the teaching of Swain reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause.16 Since this interpretation of Swain has placed on defendants a crippling burden of proof,17 prosecutors' peremptory challenges are now largely immune from constitutional scrutiny. For reasons that follow, **we reject this evidentiary formulation as inconsistent with standards that have been developed since Swain for assessing a prima facie case under the Equal Protection Clause.**

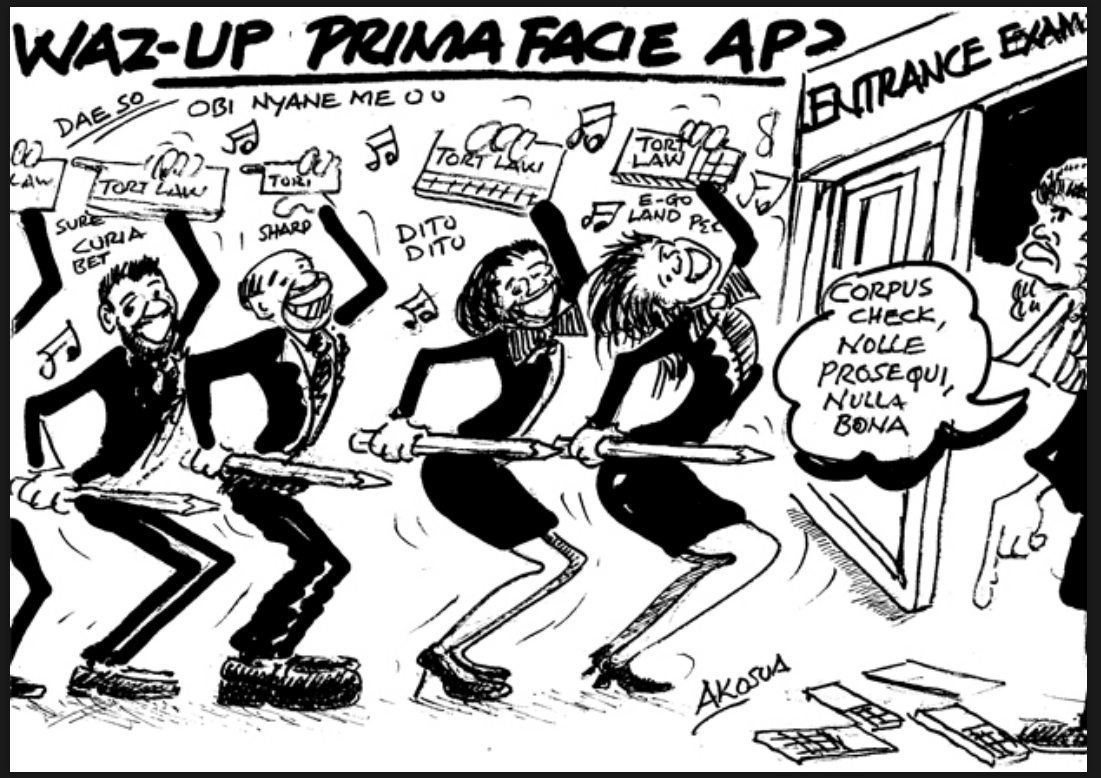
- Batson v. Kentucky, 476 U.S. 79, 92–93, 106 S. Ct. 1712, 1720–21, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)



Batson v. Kentucky, 380 U.S. 79 (1986)

- The showing necessary to establish a prima facie case of purposeful discrimination in selection of the venire may be discerned in this Court's decisions. E.g., Castaneda v. Partida, 430 U.S. 482, 494-495, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977); Alexander v. Louisiana, supra, 405 U.S., at 631-632, 92 S.Ct., at 1225-1226. The defendant initially must show that he is a member of a racial group capable of being singled out for differential treatment. Castaneda v. Partida, supra, 430 U.S., at 494, 97 S.Ct., at 1280. In combination with that evidence, a defendant may then make a prima facie case by proving that in the particular jurisdiction members of his race have not been summoned for jury service over an extended period of time. Id., at 494, 97 S.Ct., at 1280. Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the "result bespeaks discrimination." *95 Hernandez v. Texas, 347 U.S., at 482, 74 S.Ct., at 672-73; see Arlington Heights v. Metropolitan Housing Development Corp., supra, 429 U.S., at 266, 97 S.Ct., at 564.

- Batson v. Kentucky, 476 U.S. 79, 94–95, 106 S. Ct. 1712, 1722, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)



Batson v. Kentucky, 380 U.S. 79 (1986)

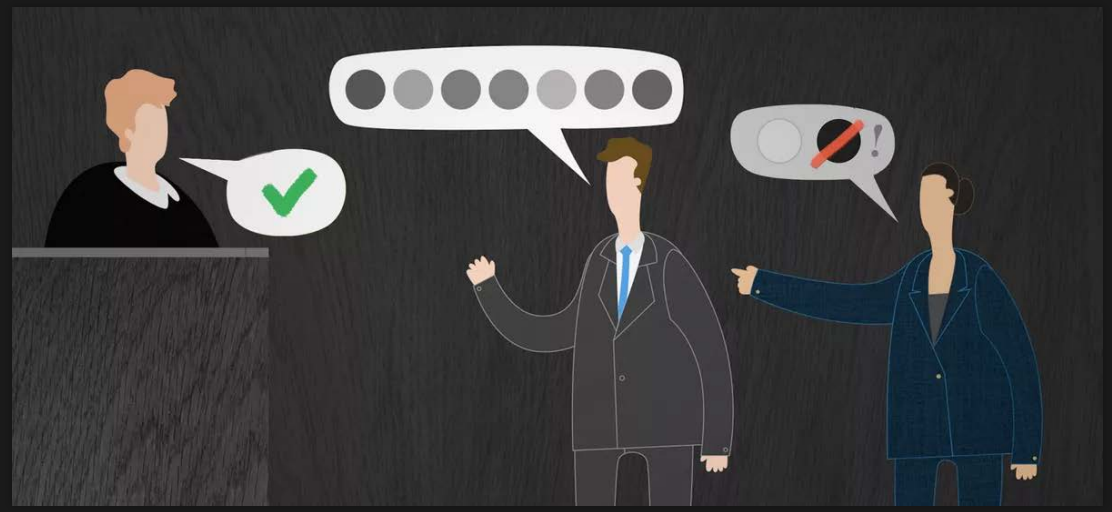
- Since the ultimate issue is whether the State has discriminated in selecting the defendant's venire, however, the defendant may establish a prima facie case “in other ways than by evidence of long-continued unexplained absence” of members of his race “from many panels.”

- Batson v. Kentucky, 476 U.S. 79, 95, 106 S. Ct. 1712, 1722, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)

Batson v. Kentucky, 380 U.S. 79 (1986)

- Thus, since the decision in Swain, this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case.

- Batson v. Kentucky, 476 U.S. 79, 95, 106 S. Ct. 1712, 1722, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)



Batson v. Kentucky, 380 U.S. 79 (1986)

- In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a “pattern” of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

- Batson v. Kentucky, 476 U.S. 79, 96–97, 106 S. Ct. 1712, 1723, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)

Batson v. Kentucky, 380 U.S. 79 (1986)

- Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.

- Batson v. Kentucky, 476 U.S. 79, 97, 106 S. Ct. 1712, 1723, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)

Batson v. Kentucky, 380 U.S. 79 (1986)

- **The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions**, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by **1724 denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." Alexander v. Louisiana, 405 U.S., at 632, 92 S.Ct., at 1226**. If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement."** Norris v. Alabama, supra, 294 U.S. at 598, 55 S.Ct., at 583-84. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.20 The trial court then will have the duty to determine if the defendant has established purposeful discrimination.21

- Batson v. Kentucky, 476 U.S. 79, 97–98, 106 S. Ct. 1712, 1723–24, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)

Batson v. Kentucky, 380 U.S. 79 (1986)

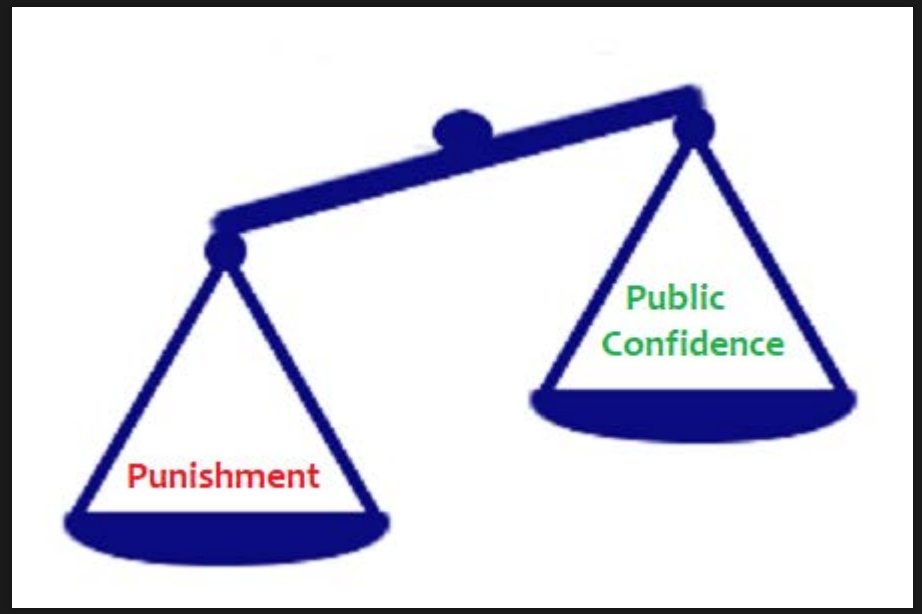
- The trial court then will have the duty to determine if the defendant has established purposeful discrimination.21

- Batson v. Kentucky, 476 U.S. 79, 98, 106 S. Ct. 1712, 1724, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)

Batson v. Kentucky, 380 U.S. 79 (1986)

- The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

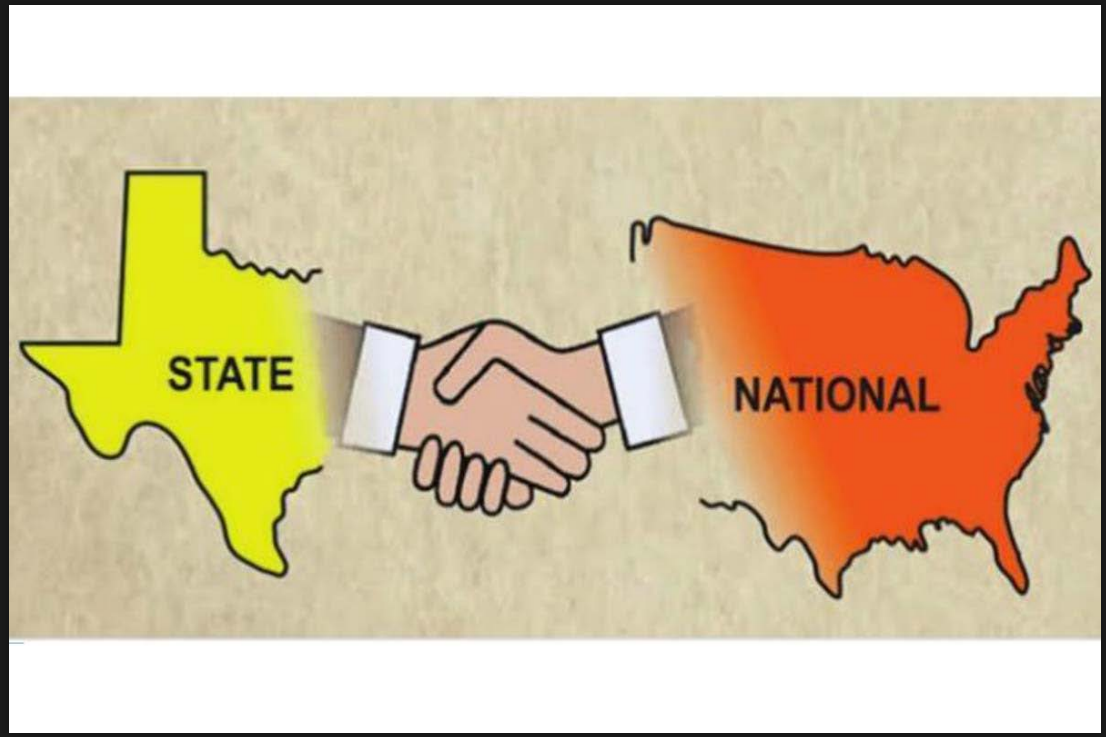
- Batson v. Kentucky, 476 U.S. 79, 87, 106 S. Ct. 1712, 1718, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)



Batson v. Kentucky, 380 U.S. 79 (1986)

- We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.24

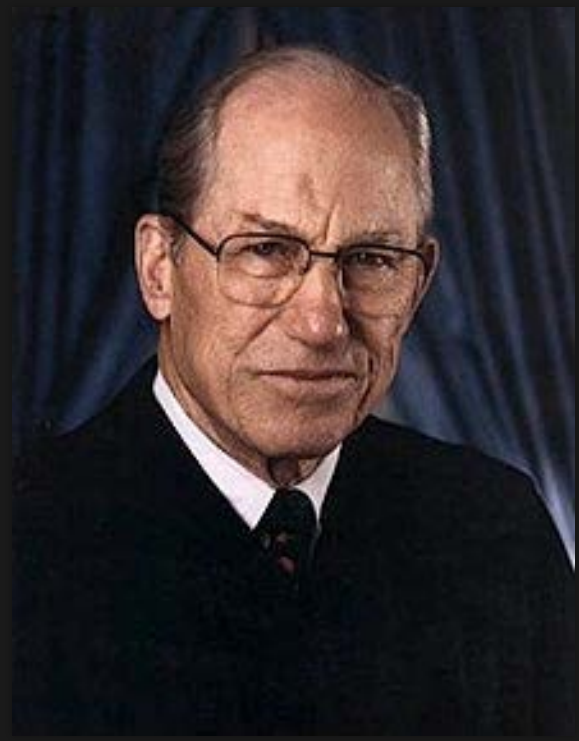
- Batson v. Kentucky, 476 U.S. 79, 99, 106 S. Ct. 1712, 1724–25, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)



Justice White concurring

- Much litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid. But I agree with the Court that the time has come to rule as it has, and I join its opinion and judgment.

- Batson v. Kentucky, 476 U.S. 79, 102, 106 S. Ct. 1712, 1726, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)



Justice Marshall Concurring

- A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is “sullen,” or “distant,” a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.

- Batson v. Kentucky, 476 U.S. 79, 106, 106 S. Ct. 1712, 1728, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)

Justice Marshall Concurring

- The 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.

- Some authors have suggested that the courts should ban prosecutors' peremptories entirely, but should zealously guard the defendant's peremptory as “essential to the fairness of trial by jury,”

- Batson v. Kentucky, 476 U.S. 79, 107, 106 S. Ct. 1712, 1728, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)

Chief Justice Burger dissent

- Equal Protection issue not raised
- Limited to race (why not expand to sex?)
- Efficacy of procedure questioned

Chief Justice Burger dissent

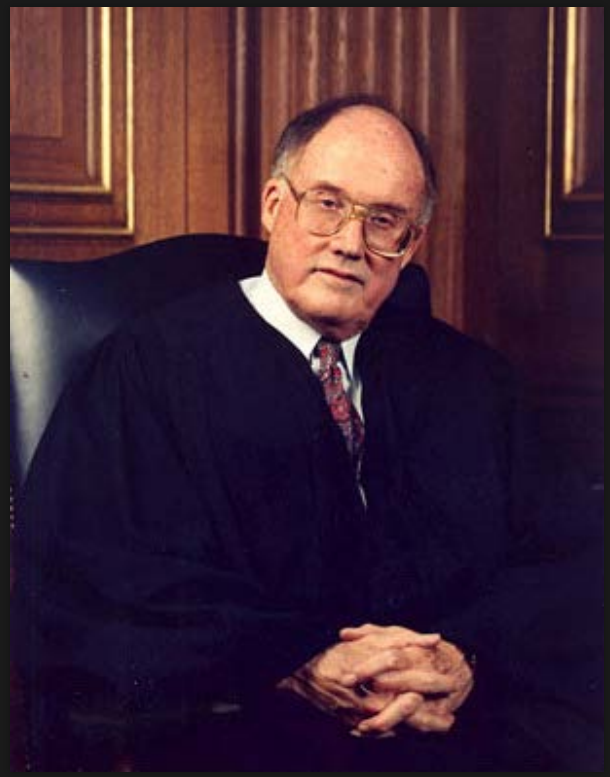
- Confronted with the dilemma it created, the Court today attempts to decree a middle ground. To rebut a prima facie case, the Court requires a "neutral explanation" for the challenge, but is at pains to "emphasize" that the "explanation need not rise to the level justifying exercise of a challenge for cause." Ante, at 1723. I am at a loss to discern the governing principles here. A "clear and reasonably specific" explanation of "legitimate reasons" for exercising the challenge will be difficult to distinguish from a challenge for cause. Anything *128 short of a challenge for cause may well be seen as an "arbitrary and capricious" challenge, to use Blackstone's characterization of the peremptor

- Batson v. Kentucky, 476 U.S. 79, 127–28, 106 S. Ct. 1712, 1739, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)

Justice Rehnquist dissent

- In my view, there is simply nothing "unequal" about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving hispanic defendants, Asians in cases involving Asian defendants, and so on.

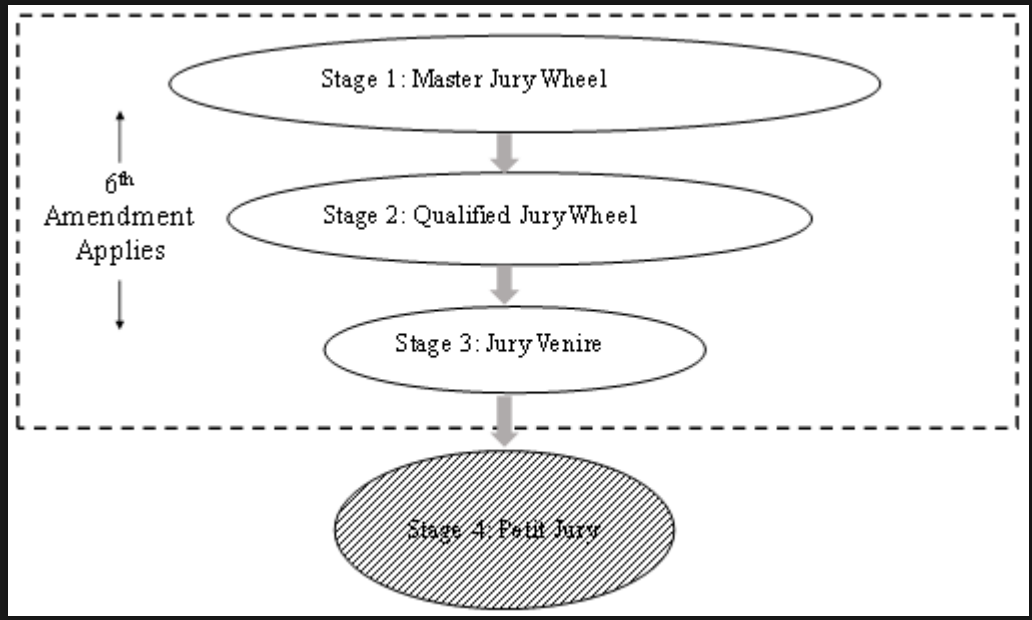
- Batson v. Kentucky, 476 U.S. 79, 137–38, 106 S. Ct. 1712, 1744–45, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)



6th Amendment Fair Cross-Section Holland v. Illinois, 493 U.S. 474 (1990)

- For reasons that are not immediately apparent, petitioner expressly disavows the argument that a white defendant has standing to raise an equal protection challenge, based on our decision in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), to a prosecutor's racially motivated peremptory strikes of Afro–American venirepersons.

- Holland v. Illinois, 493 U.S. 474, 490, 110 S. Ct. 803, 812–13, 107 L. Ed. 2d 905 (1990) (Marshall, J., dissenting)



Powers v. Ohio, 499 U.S. 400 (1991)

- KENNEDY, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, STEVENS, O'CONNOR, and SOUTER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., joined, post, p. 1374.

- Powers v. Ohio, 499 U.S. 400, 401, 111 S. Ct. 1364, 1365, 113 L. Ed. 2d 411 (1991)

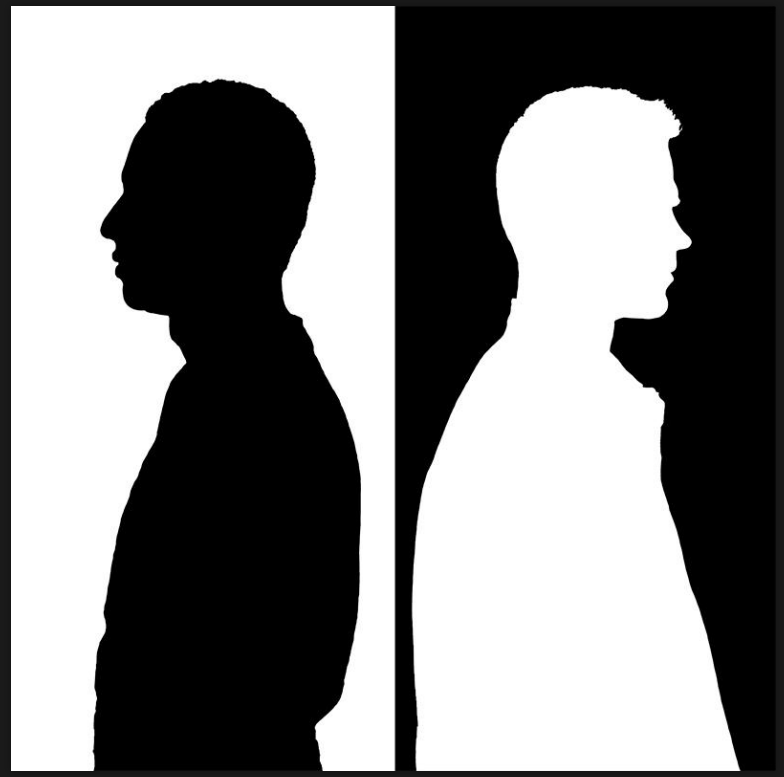
- And, over 150 years ago, Alexis de Tocqueville remarked:
- *407 “[T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society.
- . . . . .
- “... The jury ... invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.
- . . . . .
- “I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.” 1 Democracy in America 334-337 (Schocken 1st ed. 1961).

- Powers v. Ohio, 499 U.S. 400, 406–07, 111 S. Ct. 1364, 1368, 113 L. Ed. 2d 411 (1991)

Powers v. Ohio, 499 U.S. 400 (1991)

- Both the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom.

- Powers v. Ohio, 499 U.S. 400, 413, 111 S. Ct. 1364, 1372, 113 L. Ed. 2d 411 (1991)



Powers v. Ohio, 499 U.S. 400 (1991)

- Discrimination in the jury selection process is the subject of a federal criminal prohibition, and has been since Congress enacted the Civil Rights Act of 1875. The prohibition has been codified at 18 U.S.C. § 243, which provides:

- "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000."

- Powers v. Ohio, 499 U.S. 400, 408, 111 S. Ct. 1364, 1369, 113 L. Ed. 2d 411 (1991)

Powers and 3rd party standing

- 1.) The litigant must have suffered an “injury in fact,” thus giving him or her a “sufficiently concrete interest” in the outcome of the issue in dispute,
- 2.) the litigant must have a close relation to the third party
- 3.) there must exist some hindrance to the third party's ability to protect his or her own interests.

- Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 1370–71, 113 L. Ed. 2d 411 (1991)

Justice Scalia dissent (w/ CJ Rehnquist)

- Thus, both before and after Batson, and right down to the release of today's opinion, our jurisprudence contained neither a case holding, nor even a dictum suggesting, that a defendant could raise an equal-protection challenge based upon the exclusion of a juror of another race; and our opinions contained a vast body of clear statement to the contrary.

- Powers v. Ohio, 499 U.S. 400, 422, 111 S. Ct. 1364, 1377, 113 L. Ed. 2d 411 (1991)

Justice Scalia dissent (w/ CJ Rehnquist)

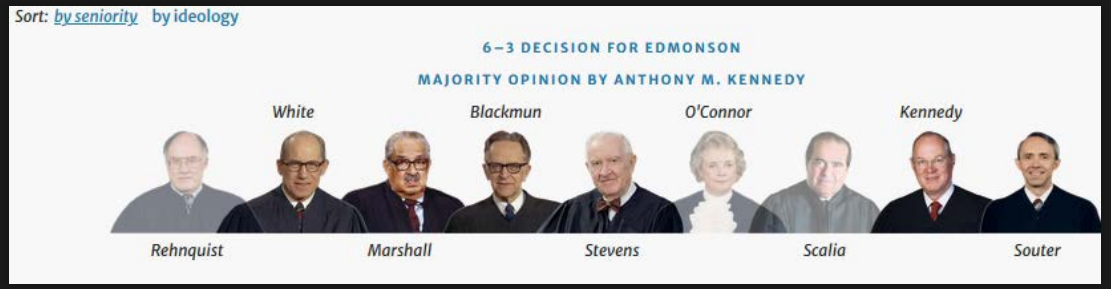
- To affirm that the Equal Protection Clause applies to strikes of individual jurors is effectively to abolish the peremptory challenge.

- Powers v. Ohio, 499 U.S. 400, 425, 111 S. Ct. 1364, 1378, 113 L. Ed. 2d 411 (1991)

Edmonson v. Leesville Concrete, Co., Inc. 500 U.S. 614 (1991)

- KENNEDY, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, STEVENS, and SOUTER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C.J., and SCALIA, J., joined, post, p. 2089. SCALIA, J., filed a dissenting opinion, post, p. 2095.

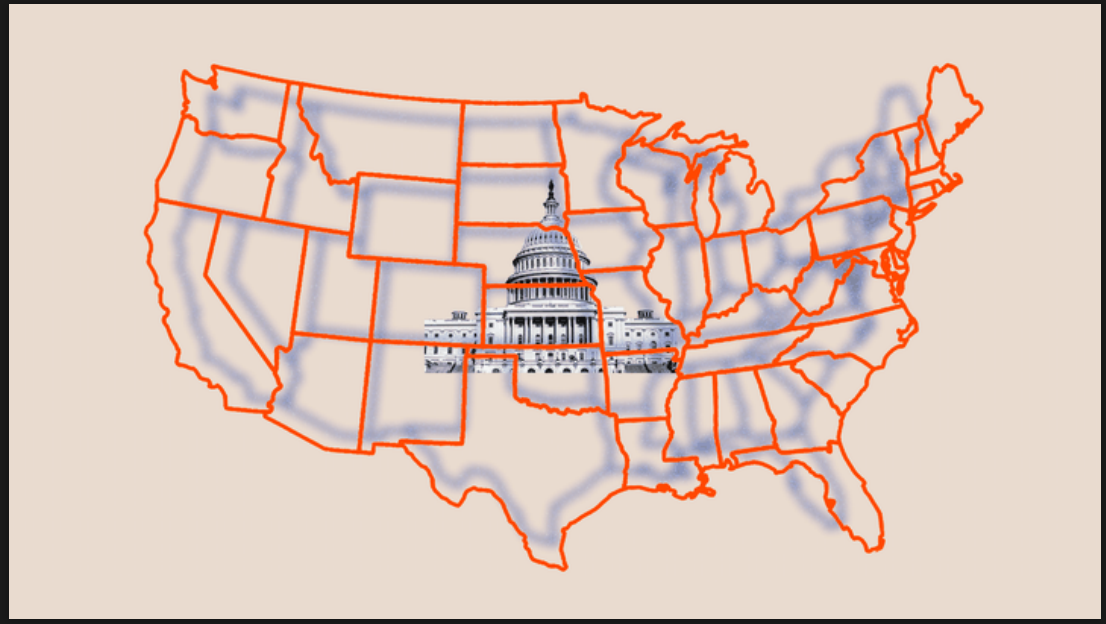
- Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 615, 111 S. Ct. 2077, 2080, 114 L. Ed. 2d 660 (1991)



Edmonson v. Leesville Concrete, Co., Inc. 500 U.S. 614 (1991)

- Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed **to state action.** Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972). Thus, the legality of the exclusion at issue here turns on the extent to which a litigant in a civil case may be subject to the Constitution's restrictions.

- Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 619, 111 S. Ct. 2077, 2082, 114 L. Ed. 2d 660 (1991)



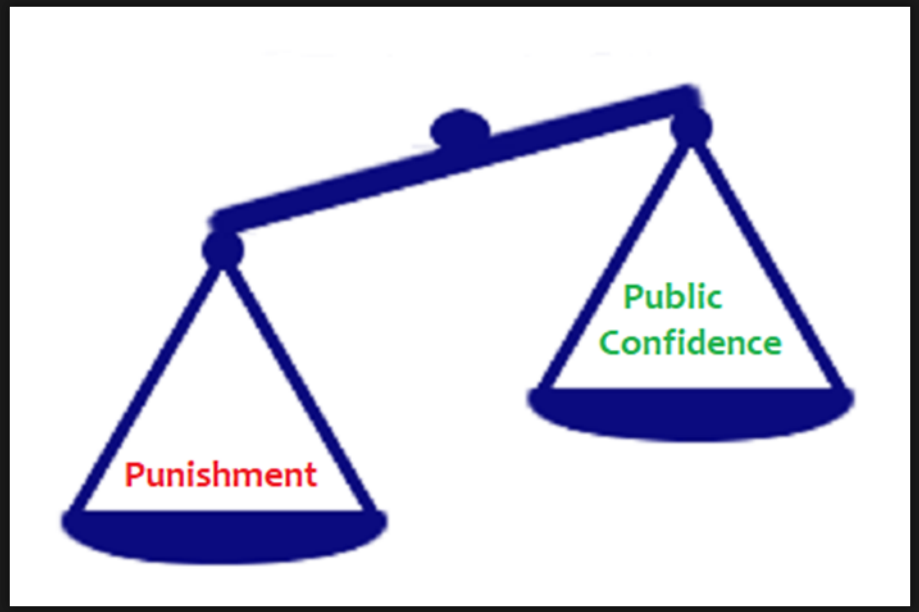
Edmonson v. Leesville Concrete, Co., Inc. 500 U.S. 614 (1991)

- 1.) Do peremptory strikes arise from the exericsie of a right or privilege having its source in state authority?
- 2.) Is private party a state actor?
  - the extent to which the actor relies on governmental assistance and benefits,
  - whether the actor is performing a traditional governmental function
  - and whether the injury caused is aggravated in a unique way by the incidents of governmental authority,

Edmonson v. Leesville Concrete, Co., Inc. 500 U.S. 614 (1991)

- As we noted in Powers, the jury system performs the critical governmental functions of guarding the rights of litigants and "ensur[ing] continued acceptance of the laws by all of the people."

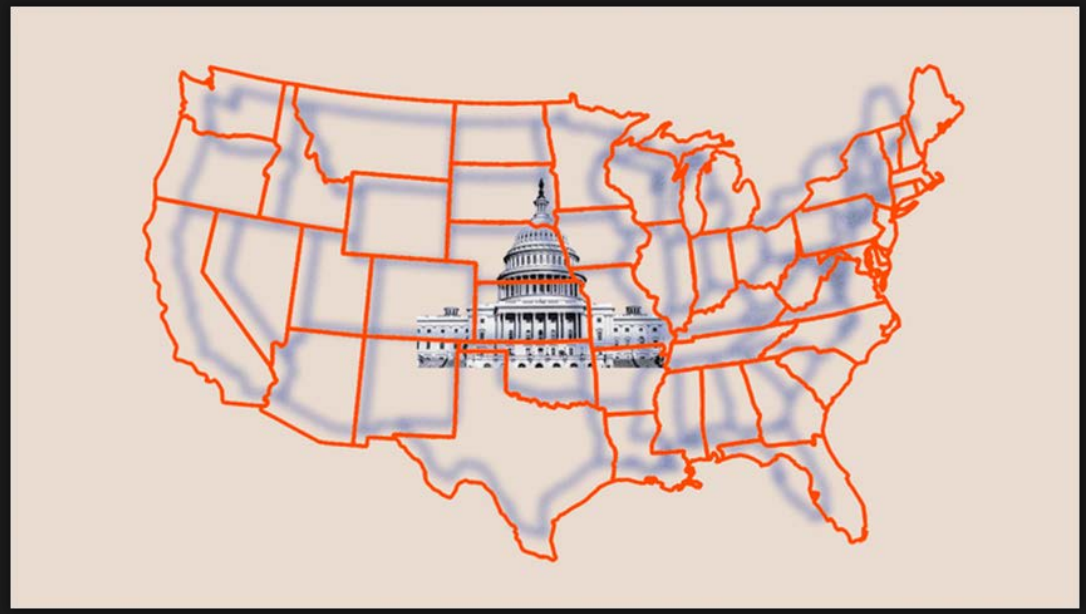
- Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 624, 111 S. Ct. 2077, 2085, 114 L. Ed. 2d 660 (1991)



Edmonson v. Leesville Concrete, Co., Inc. 500 U.S. 614 (1991)

- In the ordinary context of civil litigation in which the government is not a party, an adversarial relation does not exist between the government and a private litigant. In the jury-selection process, the government and private litigants work for the same end.

- Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 627, 111 S. Ct. 2077, 2086, 114 L. Ed. 2d 660 (1991)



O’Connor J., dissent

- Racism is a terrible thing. It is irrational, destructive, and mean. Arbitrary discrimination based on race is particularly abhorrent when manifest in a courtroom, a forum established by the government for the resolution of disputes through “quiet rationality.” See ante, at 2088. But not every opprobrious and inequitable act is a constitutional violation.

- Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 643–44, 111 S. Ct. 2077, 2095, 114 L. Ed. 2d 660 (1991)

Scalia, J., dissenting

- The concrete benefits of the Court's newly discovered constitutional rule are problematic. It will not necessarily be a net help rather than hindrance to minority litigants in obtaining racially diverse juries. In criminal cases, Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), already prevents the prosecution from using race-based strikes. The effect of today's decision (which logically must apply to criminal prosecutions) will be to prevent the defendant from doing so—so that the minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible. To be sure, it is ordinarily more difficult to prove race-based strikes of white jurors, but defense counsel can generally be relied upon to do what we say the Constitution requires. So in criminal cases, today's decision represents a net loss to the minority litigant.

- Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 644, 111 S. Ct. 2077, 2095, 114 L. Ed. 2d 660 (1991)

Hernandez v. New York, 500 U.S. 352 (1991) (plurality opinion).

- KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C.J., and WHITE and SOUTER, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, post, p. 1873. BLACKMUN, J., filed a dissenting opinion, post, p. 1875. **1864 STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, post, p. 1875.

- Hernandez v. New York, 500 U.S. 352, 354, 111 S. Ct. 1859, 1863–64, 114 L. Ed. 2d 395 (1991)

Hernandez v. New York, 500 U.S. 352 (1991) (plurality opinion).

- “Your honor, my reason for rejecting the-these two jurors-I'm not certain as to whether they're Hispanics. I didn't notice how many Hispanics had been called to the panel, but my reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter.”

- Hernandez v. New York, 500 U.S. 352, 356, 111 S. Ct. 1859, 1864, 114 L. Ed. 2d 395 (1991)

Hernandez v. New York, 500 U.S. 352 (1991) (plurality opinion).

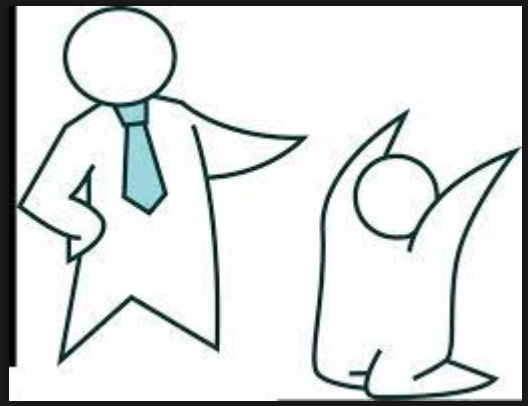
- If we deemed the prosecutor's reason for striking these jurors a racial classification on its face, it would follow that a trial judge could not excuse for cause a juror whose hesitation convinced the judge of the juror's inability to accept the official translation of foreign-language testimony. **If the explanation is not race neutral for the prosecutor, it is no more so for the trial judge.** While the reason offered by the prosecutor for a peremptory strike need not rise to the level of a *363 challenge for cause, Batson, 476 U.S., at 97, 106 S.Ct., at 1723, the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character.

- Hernandez v. New York, 500 U.S. 352, 362–63, 111 S. Ct. 1859, 1868, 114 L. Ed. 2d 395 (1991)

Hernandez v. New York, 500 U.S. 352 (1991) (plurality opinion).

- The trial judge in this case chose to believe the prosecutor's race-neutral explanation for striking the two jurors in question, rejecting petitioner's assertion that the reasons were pretextual. In Batson, we explained that the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal:

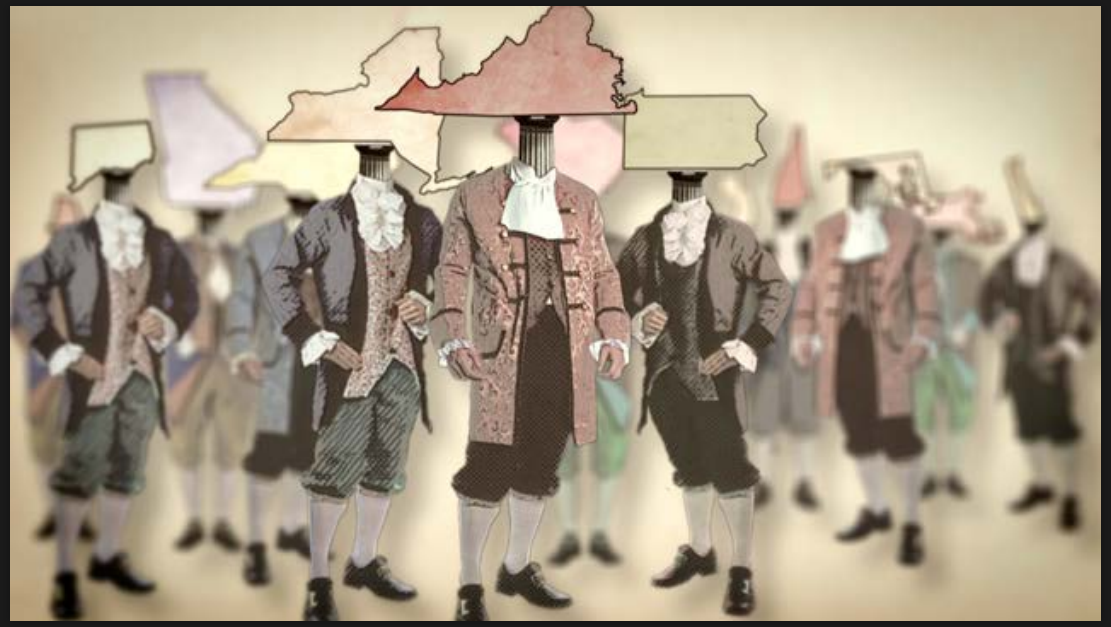
- Hernandez v. New York, 500 U.S. 352, 364, 111 S. Ct. 1859, 1868, 114 L. Ed. 2d 395 (1991)



Hernandez v. New York, 500 U.S. 352 (1991) (plurality opinion).

- In the case before us, we decline to overturn the state trial court's finding on the issue of discriminatory intent unless convinced that its determination was clearly erroneous. It "would pervert the concept of federalism," Bose Corp., supra, 466 U.S., at 499, 104 S.Ct., at 1959, to conduct a more searching review of findings made in state trial court than we conduct with respect to federal district court findings

- Hernandez v. New York, 500 U.S. 352, 369, 111 S. Ct. 1859, 1871, 114 L. Ed. 2d 395 (1991)



O’Connor, J., concurring

- **Disproportionate effect may, of course, constitute evidence of intentional discrimination.** The trial court may, because of such effect, disbelieve the prosecutor and find that the asserted justification is merely a pretext for intentional race-based discrimination. See Batson, supra, 476 U.S., at 93, 106 S.Ct., at 1721. **But if, as in this case, the trial court believes the prosecutor's nonracial justification, and that finding is not clearly erroneous, that is the end of the matter.**

- Hernandez v. New York, 500 U.S. 352, 375, 111 S. Ct. 1859, 1875, 114 L. Ed. 2d 395 (1991)

Stevens, J., dissenting (w/Marshall and Blackmun)

- An avowed justification that has a significant disproportionate impact will rarely qualify as a legitimate, race-neutral reason sufficient to rebut the prima facie case because **disparate impact is itself evidence of discriminatory purpose.**

- Hernandez v. New York, 500 U.S. 352, 376, 111 S. Ct. 1859, 1875, 114 L. Ed. 2d 395 (1991)

Stevens, J., dissenting (w/Marshall and Blackmun)

- The prosecutor's explanation was insufficient for three reasons. **First, the justification would inevitably result in a disproportionate** disqualification of Spanish-speaking venirepersons. An explanation that is "race neutral" on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice. Second, the prosecutor's concern could easily have been accommodated by less drastic means. **As is the practice in many jurisdictions, the jury could have been instructed that the official translation alone is evidence; bilingual jurors could have been instructed to bring to the attention of the judge any disagreements they might have with the translation so that any disputes could be resolved by the court**. See, e.g., United States v. Perez, 658 F.2d 654, 662-663 (CA9 1981).2 **Third, if the prosecutor's concern was valid and substantiated by the record, it would have supported a challenge for cause.** The fact that the prosecutor did not make any such challenge, see App. 9, should disqualify him from advancing the concern as a justification for a peremptory challenge.

- Hernandez v. New York, 500 U.S. 352, 379, 111 S. Ct. 1859, 1877, 114 L. Ed. 2d 395 (1991)

Georgia v. McCollum, 505 U.S. 42 (1992)

- BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, STEVENS, KENNEDY, and SOUTER, JJ., joined. REHNQUIST, C.J., filed a concurring opinion post, p. 2359. THOMAS, J., filed an opinion concurring in the judgment post, p. 2359. O'CONNOR, J., post, p. 2361, and SCALIA, J., post, p. 2364, filed dissenting opinions.

- Georgia v. McCollum, 505 U.S. 42, 43, 112 S. Ct. 2348, 2351, 120 L. Ed. 2d 33 (1992)

- The fact that a defendant's use of discriminatory peremptory challenges harms the jurors and the community does not end our equal protection inquiry. Racial discrimination, although repugnant in all contexts, violates the Constitution only when it is attributable to state action.

- Georgia v. McCollum, 505 U.S. 42, 50, 112 S. Ct. 2348, 2354, 120 L. Ed. 2d 33 (1992)

- Chief Justice REHNQUIST, concurring.
- I was in dissent in Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), and continue to believe that case to have been wrongly decided.

- Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 2359, 120 L. Ed. 2d 33 (1992)

- Justice THOMAS, concurring in the judgment.
- As a matter of first impression, I think that I would have shared the view of the dissenting opinions: A criminal defendant's use of peremptory strikes cannot violate the Fourteenth Amendment because it does not involve state action.

- Georgia v. McCollum, 505 U.S. 42, 60, 112 S. Ct. 2348, 2359, 120 L. Ed. 2d 33 (1992)

- Second, our departure from Strauder has taken us down a slope of inquiry that had no clear stopping point. Today, we decide only that white defendants may not strike black veniremen on the basis of race. Eventually, we will have to decide whether black defendants may strike white veniremen.2 See, e.g., **2361 State v. Carr, 261 Ga. 845, 413 S.E.2d 192 (1992). Next will come the question whether defendants may exercise peremptories on the basis of sex. See, e.g., United States v. De Gross, 960 F.2d 1433 (CA9 1992). The consequences for defendants of our decision and of these future cases remain to be seen. But whatever the benefits were that this Court perceived in a criminal defendant's having members of his class on the jury, see Strauder, 100 U.S., at 309–310, they have evaporated.

- Georgia v. McCollum, 505 U.S. 42, 62, 112 S. Ct. 2348, 2360–61, 120 L. Ed. 2d 33 (1992)

- The Court reaches the remarkable conclusion that criminal defendants being prosecuted by the State act on behalf of their adversary when they exercise peremptory challenges during jury selection. The Court purports merely to follow *63 precedents, but our cases do not compel this perverse result. To the contrary, our decisions specifically establish that criminal defendants and their lawyers are not government actors when they perform traditional trial functions.

- Georgia v. McCollum, 505 U.S. 42, 62–63, 112 S. Ct. 2348, 2361, 120 L. Ed. 2d 33 (1992)

Scalia, J. dissenting

- I agree with the Court that its judgment follows logically from Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). For the reasons given in the Edmonson dissents, however, I think that case was wrongly decided. Barely a year later, we witness its reduction to the terminally absurd: *70 A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state.

- Georgia v. McCollum, 505 U.S. 42, 69–70, 112 S. Ct. 2348, 2364, 120 L. Ed. 2d 33 (1992)

- Today's decision gives the lie once again to the belief that an activist, “evolutionary” constitutional jurisprudence always evolves in the direction of greater individual rights. In the interest of promoting the supposedly greater good of race relations in the society as a whole (make no mistake that that is what underlies all of this), we use the Constitution to destroy the ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair. I dissent.

- Georgia v. McCollum, 505 U.S. 42, 70, 112 S. Ct. 2348, 2365, 120 L. Ed. 2d 33 (1992)

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994)

- BLACKMUN, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. O'CONNOR, J., filed a concurring opinion, post, p. 1430. KENNEDY, J., filed an opinion concurring in the judgment, post, p. 1433. REHNQUIST, C.J., filed a dissenting opinion, post, p. 1434. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and THOMAS, J., joined, post, p. 1436.

- J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 1421, 128 L. Ed. 2d 89 (1994)

- Discrimination on the basis of gender in the exercise of peremptory challenges is a relatively recent phenomenon. Gender-based peremptory strikes were hardly practicable during most of our country's existence, since, until the 20th century, women were completely excluded from jury service.

- J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 131, 114 S. Ct. 1419, 1422, 128 L. Ed. 2d 89 (1994)

- In 1975, the Court finally repudiated the reasoning of Hoyt and struck down, under the Sixth Amendment, an affirmative registration statute nearly identical to the one at issue in Hoyt. See Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).5 We explained: “Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.” Id., at 530, 95 S.Ct., at 697.

- J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 134, 114 S. Ct. 1419, 1424, 128 L. Ed. 2d 89 (1994)

- Taylor relied on Sixth Amendment principles, but the opinion's approach is consistent with the heightened equal protection scrutiny afforded gender-based classifications. Since Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), this Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of "archaic and overbroad" generalizations about gender, see Schlesinger v. Ballard, 419 U.S. 498, 506–507, 95 S.Ct. 572, 576–577, 42 L.Ed.2d 610 (1975), or based on "outdated misconceptions **1425 concerning the role of females in the home rather than in the 'marketplace and world of ideas.' " Craig v. Boren, 429 U.S. 190, 198–199, 97 S.Ct. 451, 457–458, 50 L.Ed.2d 397 (1976). See also Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441, 105 S.Ct. 3249, 3255, 87 L.Ed.2d 313 (1985) (differential treatment of the sexes "very likely reflect[s] outmoded notions of the relative capabilities of men and women").
- J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 135, 114 S. Ct. 1419, 1424–25, 128 L. Ed. 2d 89 (1994)

- When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women. Because these stereotypes have wreaked injustice in so many other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection “invites cynicism respecting the jury's neutrality and its obligation to adhere to the law.” Powers v. Ohio, 499 U.S., at 412, 111 S.Ct., at 1371. The potential for cynicism is particularly acute in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity. Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the “deck has been stacked” in favor of one side. See id., at 413, 111 S.Ct., at 1372 (“The verdict will not be accepted or understood [as fair] if the jury is chosen by unlawful means at the outset”).

- J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 140, 114 S. Ct. 1419, 1427, 128 L. Ed. 2d 89 (1994)

O’Connor concurrence

- For this same reason, today's decision further erodes the role of the peremptory challenge.

- J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 147, 114 S. Ct. 1419, 1431, 128 L. Ed. 2d 89 (1994)

- These concerns reinforce my conviction that today's decision should be limited to a prohibition on the government's use of gender-based peremptory challenges.

- J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 150, 114 S. Ct. 1419, 1432, 128 L. Ed. 2d 89 (1994)

Kennedy, J., concurring

- The importance of individual rights to our analysis prompts a further observation concerning what I conceive to be the intended effect of today's decision. We do not prohibit racial and gender bias in jury selection only to encourage it in jury deliberations. Once seated, a juror should not give free rein to some racial or gender bias of his or her own. The jury system is a kind of compact by which power is transferred from the judge to jury, the jury in turn deciding the case in accord with the instructions defining the relevant issues for consideration. The wise limitation on the authority of courts to inquire into the reasons underlying a jury's verdict does not mean that a jury ought to disregard the court's instructions. A juror who allows racial or gender bias to influence assessment of the case breaches the compact and renounces his or her oath.
- In this regard, it is important to recognize that a juror sits not as a representative of a racial or sexual group but as an *154 individual citizen. Nothing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice.

- J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 153–54, 114 S. Ct. 1419, 1434, 128 L. Ed. 2d 89 (1994)

Chief Justice Rehnquist dissenting

- The two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely “stereotyping” to say that these differences may produce a difference in outlook which is brought to the jury room. Accordingly, use of peremptory challenges on the basis of sex is generally not the sort of derogatory and invidious act which peremptory challenges directed at black jurors may be.

- J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 156, 114 S. Ct. 1419, 1435, 128 L. Ed. 2d 89 (1994)

Scalia, J. (w/ Thomas and Rehnquisy)

- And make no mistake about it: there really is no substitute for the peremptory. Voir dire (though it can be expected to expand as a consequence of today's decision) cannot fill the gap. The biases that go along with group characteristics **1439 tend to be biases that the juror himself does not perceive, so that it is no use asking about them. It is fruitless to inquire of a male juror whether he harbors any subliminal prejudice in favor of unwed fathers.
- And damage has been done, secondarily, to the entire justice system, which will bear the burden of the expanded quest for "reasoned peremptories" that the Court demands. The extension of Batson to sex, and almost certainly beyond, cf. Batson, 476 U.S., at 124, 106 S.Ct., at 1737 (Burger, C.J., dissenting), will provide the basis for extensive collateral litigation, which especially the criminal defendant (who litigates full time and cost free) can be expected to pursue.

- J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 162, 114 S. Ct. 1419, 1438–39, 128 L. Ed. 2d 89 (1994)

Purkett v. Elem, 514 U.S. 765 (1995) (per curiam)

- -pre-AEDPA habeas case

- What it means by a “legitimate reason” is not a reason that makes sense, but a reason that does not deny equal protection. See *Hernandez, supra,* at 359, 111 S.Ct., at 1866; cf. *Burdine, supra,* at 255, 101 S.Ct., at 1094 (“The explanation provided must be legally sufficient to justify a judgment for the defendant”).
- 3 The prosecutor's proffered explanation in this case-that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard-is race neutral and satisfies the prosecution's step two burden of articulating a nondiscriminatory reason for the strike. “The wearing of beards is not a characteristic that is peculiar to any race.” *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 190, n. 3 (CA3 1980). And neither is the growing of long, unkempt hair. Thus, the inquiry properly proceeded to step three, where the state court found that the prosecutor was not motivated by discriminatory intent.
- *Purkett v. Elem*, 514 U.S. 765, 769, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d 834 (1995)

Steven, J., dissenting (w/ Breyer)

- Today, without argument, the Court replaces the Batson standard with the surprising announcement that any neutral explanation, no matter how "implausible or fantastic," ante, at 1771, even if it is "silly or superstitious," ibid., is sufficient to rebut a prima facie case of discrimination. A trial court must accept that neutral explanation unless a separate "step three" inquiry leads to the conclusion that the peremptory challenge was racially motivated. The Court does not attempt to explain why a statement that "the juror had a beard," or "the juror's last name began with the letter 'S' " should satisfy step two, though a statement that "I had a hunch" should not.

- Purkett v. Elem, 514 U.S. 765, 775, 115 S. Ct. 1769, 1774, 131 L. Ed. 2d 834 (1995)

Miller-El v. Dretke, 545 U.S. 765 (2005)

- -AEDPA habeas like Thayler v Haynes and Rice v. Collins

- SOUTER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, *post,* p. 2340. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post,* p. 2344.

  Miller-El v. Dretke, 545 U.S. 231, 235, 125 S. Ct. 2317, 2322, 162 L. Ed. 2d 196 (2005)

- Thus we presume the Texas court's factual findings to be sound unless Miller–El rebuts the "presumption of correctness by clear and convincing evidence." § 2254(e)(1). The standard is demanding but not insatiable; as we said the last time this case was here, "[d]eference does not by definition preclude relief." Miller–El v. Cockrell, 537 U.S., at 340, 123 S.Ct. 1029.

- Miller-El v. Dretke, 545 U.S. 231, 240, 125 S. Ct. 2317, 2325, 162 L. Ed. 2d 196 (2005)

- -disparate impact 1 of 20 African American jurors seated ; 10 struck
- Disparate questioning
- Broader practices: shuffling the venire
- Manipulative questioning
- Historical practices
  - Agency Manual
  - Historic pattern

Justice Breyer, concurring

- Justice Goldberg, dissenting in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), wrote, “Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.” Id., at 244, 85 S.Ct. 824; see also Batson, 476 U.S., at 107, 106 S.Ct. 1712 (Marshall, J., concurring) (same); Edmonson, 500 U.S., at 630, 111 S.Ct. 2077 (opinion for the Court by KENNEDY, J.) (“[I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution”). This case suggests the need to confront that choice. In light of the considerations I have mentioned, I believe it necessary to reconsider Batson's test and the peremptory challenge system as a whole. With that qualification, I join the Court's opinion.

- Miller-El v. Dretke, 545 U.S. 231, 273, 125 S. Ct. 2317, 2344, 162 L. Ed. 2d 196 (2005)

Johnson v. California, 545 U.S. 162 (2005)

- -inference of discrimination sufficient to meet prima facie burden of 1st step.
- STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, *post,* p. 2419. THOMAS, J., filed a dissenting opinion, *post,* p. 2419.

- The question before us is whether Batson permits California to require at step one that “the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias.” 30 Cal.4th, at 1318, 1 Cal.Rptr.3d 1, 71 P.3d, at 280. Although we recognize that States do have flexibility in formulating appropriate procedures to comply with Batson, we conclude that California's “more likely than not” standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case.

- Johnson v. California, 545 U.S. 162, 168, 125 S. Ct. 2410, 2416, 162 L. Ed. 2d 129 (2005)

Thomas, J., dissent

- California's procedure falls comfortably within its broad discretion to craft its own rules of criminal procedure, and I therefore respectfully dissent.

- Johnson v. California, 545 U.S. 162, 174, 125 S. Ct. 2410, 2419, 162 L. Ed. 2d 129 (2005)

Snyder v. Louisiana, 552 U.S. 472 (2008)

- ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, post, pp. 1212 – 1215.

- Snyder v. Louisiana, 552 U.S. 472, 128 S. Ct. 1203, 1206, 170 L. Ed. 2d 175 (2008)

- **In other circumstances, we have held that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative.** See Hunter v. Underwood, 471 U.S. 222, 228, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985). We have not previously applied this rule in a Batson case, and we need not decide here whether that standard governs in this context. For present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution. **And in light of the circumstances here—including absence of anything in the record showing that the trial judge credited the claim that Mr. Brooks was nervous,** the prosecution's description of both of its proffered explanations as "main concern[s]," App. 444, and the adverse inference noted above—the record does not show that the prosecution would have pre-emptively challenged Mr. Brooks based on his nervousness alone. See Hunter, supra, at 228, 105 S.Ct. 1916. ***486 Nor is there any realistic possibility that this subtle question of causation could be profitably explored further on remand at this late dat**e, more than a decade after petitioner's trial.

- Snyder v. Louisiana, 552 U.S. 472, 485–86, 128 S. Ct. 1203, 1212, 170 L. Ed. 2d 175 (2008)

Thomas, J., dissenting

- The Court second-guesses the trial court's determinations in this case merely because the judge did not clarify which of the prosecutor's neutral bases for striking Mr. Brooks was dispositive. But we have never suggested that a reviewing court should defer to a trial court's resolution of a Batson challenge only if the trial court made specific findings with respect to each of the prosecutor's proffered race-neutral reasons.

- Snyder v. Louisiana, 552 U.S. 472, 487, 128 S. Ct. 1203, 1213, 170 L. Ed. 2d 175 (2008)

Foster v. Chatman, 136 S. Ct. 1737 (2016)

- ROBERTS, C.J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment. THOMAS, J., filed a dissenting opinion.

- Foster v. Chatman, 136 S. Ct. 1737, 1742, 195 L. Ed. 2d 1 (2016)

- The “Constitution forbids striking even a single prospective juror for a discriminatory purpose.” Snyder v. Louisiana, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (internal quotation marks omitted). Our decision in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, provides a three-step process for determining when a strike is discriminatory:
- “First, a defendant must make a prima facie showing that a peremptory 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.” Snyder, 552 U.S., at 476–477, 128 S.Ct. 1203 (internal quotation marks and brackets omitted).

- Foster v. Chatman, 136 S. Ct. 1737, 1747, 195 L. Ed. 2d 1 (2016)

- The state habeas court was cognizant of those limitations, but nevertheless admitted the file into evidence, reserving “a determination as to what weight the Court is going to put on any of [them]” in light of the objections urged by the State. 1 Record 20.
- 1112 We agree with that approach. Despite questions about the background of particular notes, we cannot accept the State's invitation to blind ourselves to their existence. We have “made it clear that in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted.” Snyder, 552 U.S., at 478, 128 S.Ct. 1203. As we have said in a related context, “[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial ... evidence of intent as may be available.” Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). At a minimum, we are comfortable that all documents in the file were authored by someone in the district attorney's office. Any uncertainties concerning the documents are pertinent only as potential limits on their probative value.

- Foster v. Chatman, 136 S. Ct. 1737, 1748, 195 L. Ed. 2d 1 (2016)

- In short, contrary to the prosecution's submissions, the State's resolve to strike Garrett was never in doubt. See also App. 290 (“N” appears next to Garrett's name on juror list); id., at 300 (same).
- The State attempts to explain away the contradiction between the “definite NO's” list and Lanier's statements to the trial court as an example of a prosecutor merely “misspeak[ing].”
- Foster v. Chatman, 136 S. Ct. 1737, 1750, 195 L. Ed. 2d 1 (2016)

- An “N” appeared next to each of the black prospective jurors' names on the jury venire list. See, e.g., id., at 253. An “N” was also noted next to the name of each black prospective juror on the list of the 42 qualified prospective jurors; each of those names also appeared on the “definite NO's” list. See id., 299–301. And a draft affidavit from the prosecution's investigator stated his view that “[i]f it comes down to having to pick one of the black jurors, [Marilyn] Garrett, might be okay.” Id., at 345 (emphasis added); see also ibid. (recommending Garrett “if we had to pick a black juror” (emphasis added)). Such references are inconsistent with attempts to “actively see[k]” a black juror.
- The State's new argument today does not dissuade us from the conclusion that its prosecutors were motivated in substantial part by race when they struck Garrett and Hood from the jury 30 years ago. Two peremptory strikes on the basis of race are two more than the Constitution allows.

- Foster v. Chatman, 136 S. Ct. 1737, 1755, 195 L. Ed. 2d 1 (2016)

Flowers v. Mississippi, 139 S. Ct. 2228 (2019)

- KAVANAUGH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a concurring opinion. THOMAS, J., filed a dissenting opinion, in which GORSUCH, J., joined as to Parts I, II, and III.

- Flowers v. Mississippi, 139 S. Ct. 2228, 204 L. Ed. 2d 638 (2019)

- -6 trials
- 1st 3 reversed by Mississippi Supreme Court
  - -prosecutorial misconduct, Batson, prosecutorial misconduct.
  - 2 hung juries
  - 6th trial goes to SCOTUS on appeal.

- At the sixth trial, which we consider here, 26 prospective jurors—6 black and 20 white—were presented to potentially serve on the jury. The State exercised a total of six peremptory strikes, and it used five of the six against black prospective jurors, leaving one black juror to sit on the jury.

- Flowers v. Mississippi, 139 S. Ct. 2228, 2237, 204 L. Ed. 2d 638 (2019)

- Batson’s legacy
- 1.) Defendants not required to show historical practice of discrimination
- 2.) Cannot strike jurors on belief that members of same race as defendant will be biased.
- 3.) Equal discrimination isn’t equal protection.
- 4.) Defendant’s can’t discriminate to balance out prosecution discrimination.

“Vigorous” application?

- tatistical evidence about the prosecutor’s use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- • evidence of a prosecutor’s disparate questioning and investigation of black and white prospective jurors in the case;
- • side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- • a prosecutor’s misrepresentations of the record when defending the strikes during the Batson hearing;
- • relevant history of the State’s peremptory strikes in past cases; or
- • other relevant circumstances that bear upon the issue of racial discrimination.

- Flowers v. Mississippi, 139 S. Ct. 2228, 2243, 204 L. Ed. 2d 638 (2019)

3rd Step is Mandatory.

- The trial court **must** consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties. The trial judge's assessment *2244 of the prosecutor's credibility is often important. The Court has explained that "the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge." Snyder, 552 U.S. at 477, 128 S.Ct. 1203 (quotation altered).

- Flowers v. Mississippi, 139 S. Ct. 2228, 2243–44, 204 L. Ed. 2d 638 (2019)

Deference to trial court

- Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." Batson, 476 U.S. at 98, n. 21, 106 S.Ct. 1712.

- Flowers v. Mississippi, 139 S. Ct. 2228, 2244, 204 L. Ed. 2d 638 (2019)

- Four categories of evidence loom large in assessing the Batson issue in Flowers' case: (1) the history from Flowers' six trials, (2) the prosecutor's striking of five of six black prospective jurors at the sixth trial, (3) the prosecutor's dramatically disparate questioning of black and white prospective jurors at the sixth trial, and (4) the prosecutor's proffered reasons for striking one black juror (Carolyn Wright) while allowing other similarly situated white jurors to serve on the jury at the sixth trial.

- Flowers v. Mississippi, 139 S. Ct. 2228, 2244, 204 L. Ed. 2d 638 (2019)

Alito concurrence

- But this is not an ordinary case, and the jury selection process cannot be analyzed as if it were. In light of all that had gone before, it was risky for the case to be tried once again by the same prosecutor in Montgomery County.

- Flowers v. Mississippi, 139 S. Ct. 2228, 2252, 204 L. Ed. 2d 638 (2019)

Thomas dissent (w/Gorsuch I,II, III)

- I. Nothing new in the law here or in Foster, why the first remand and the current grant?
- II. Under Batson, the trial court must decide whether, “in light of the parties’ submissions,” “the defendant has shown purposeful discrimination.” Snyder v. Louisiana, 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (
- III. Doesn’t see history of discrimination over all the trials.
- IV. Dissents from standing formula,

- In sum, as other Members of this Court have recognized, Batson charted the course for eliminating peremptory strikes. See, e.g., Rice v. Collins, 546 U.S. 333, 344, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) (BREYER, J., concurring); Batson, supra, at 107–108, 106 S.Ct. 1712 (Marshall, J., concurring). Although those Justices welcomed the prospect, I do not. T

- Flowers v. Mississippi, 139 S. Ct. 2228, 2274, 204 L. Ed. 2d 638 (2019)

- I remain “certain that black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes.” McCollum, supra, at 60, 112 S.Ct. 2348 (opinion of THOMAS, J.).

- Flowers v. Mississippi, 139 S. Ct. 2228, 2274, 204 L. Ed. 2d 638 (2019)

Arizona Cases

State v. Porter, 460 P.3d 1276 (App. 2020) (PFR pending).

- **Chief Judge Peter B. Swann delivered the opinion of the Court, in which Judge Kenton D. Jones joined. Presiding Judge Paul J. McMurdie dissented.**
- **The step-three analysis necessarily is gestalt**. See Flowers, 139 S.Ct. at 2251 (emphasizing that Batson-violation decision was not based on any one fact alone, but on "all of the relevant facts and circumstances taken together")

- State v. Porter, 248 Ariz. 392, 397, ¶ 14, 460 P.3d 1276, 1281 (App. 2020)

- The Batson framework contemplates meaningful appellate review, not blind assent.

- State v. Porter, 248 Ariz. 392, 397, ¶ 16, 460 P.3d 1276, 1281 (App. 2020)

- Following the logic of Snyder, we hold today that when confronted with a pattern of strikes against minority jurors, the trial court must determine expressly that the racially disproportionate impact of the pattern is justified by genuine, not pretextual, race-neutral reasons. We recognize that this holding, though consistent with precedent, is more granular than this court's past Batson decisions. But to hold otherwise would be to transform deference to willful blindness. And though in Canez our state supreme court accepted an implicit step-three analysis for a Batson challenge when the state struck five of seven Hispanic panelists in a capital case, Canez predated Snyder and did not present a situation in which all prospective jurors of the same race as the defendant were stricken. See 202 Ariz. at 145–47, ¶¶ 16–28, 42 P.3d at 576–78. We therefore do not read Canez—or the similar unpublished decisions cited by the dissent, see infra ¶ 39—as controlling in this case.

- State v. Porter, 248 Ariz. 392, 399, ¶ 20, 460 P.3d 1276, 1283 (App. 2020)

Judge Mcmurdie dissent

- he Supreme Court itself has since confirmed that it did not intend Snyder to establish a definitive rule regarding the findings a trial judge must make when reviewing a demeanor-based explanation. Thaler v. Haynes, 559 U.S. 43, 47–49, 130 S.Ct. 1171, 175 L.Ed.2d 1003 (2010) (per curiam). In Haynes, the Court rejected the argument that Snyder established such a rule, explaining that "in light of the particular circumstances of the case, we held that the peremptory challenge could not be sustained on the demeanor-based ground, which might not have figured in the trial judge's unexplained ruling." Id. at 49, 130 S.Ct. 1171

- State v. Porter, 248 Ariz. 392, 403, ¶ 38, 460 P.3d 1276, 1287 (App. 2020)

- Arizona has continued to apply the Batson framework with little reevaluation or alteration. I believe the time has come for us to discuss reformulating our structure to meaningfully further Batson's purpose, but such a review cannot be accomplished in an appeal. See Holmes, 221 A.3d at 407, 434 (finding it necessary to "uphold under existing law the trial court's finding that the prosecutor had not acted with purposeful discrimination in exercising a peremptory challenge," but also to take the opportunity to convene a working group to "study the problem and resolve it via the state's rule-making process"). A rule change petition was recently submitted advocating for our supreme court to adopt a new procedural rule governing jury selection modeled after Washington General Rule 37. Central Arizona National Lawyers Guild, R-20-009 Petition to Amend the Rules of the Supreme Court by Adopting a New Rule: Rule 24 – Jury Selection, https://www.azcourts.gov/Rules-Forum/aft/1081 **1291 *407 (last visited Mar. 25, 2020)

- State v. Porter, 248 Ariz. 392, 406–07, ¶ 47, 460 P.3d 1276, 1290–91 (App. 2020)

State v. Gentry, 247 Ariz. 381 (App. 2019)

- The state provided multiple facially-neutral reasons for its peremptory strike of Juror No. 28, none of which were purposefully discriminatory based on the juror's race or gender. There is no indication the underlying reason for the strike was that the juror would identify with defendant because they were both African-American, but because of the similarities between her husband's family and employment history. Contrary to defendant's contention, the state's explanation, which was not inherently or purposefully discriminatory, did not taint the proceedings. Id. at ¶¶ 11-12. The trial court did not clearly err by concluding the state's strike did not violate Batson.

- State v. Gentry, 247 Ariz. 381, 385, ¶ 12, 449 P.3d 707, 711 (App. 2019), review denied (Jan. 7, 2020), cert. denied, 207 L. Ed. 2d 148 (May 26, 2020)

- "He has the exact same background as the defendant" –prosecutor referring to juror's husband.

State v. Urrea, 244 Airz. 443 (2018)

- the narrow issue here is whether the trial court's remedy of restoring the impermissibly excluded jurors to their prior places on the venire and forfeiting the State's peremptory challenges was sufficient, as the State asserts, or whether the trial court should have declared a mistrial and **156 *446 begun jury selection anew with a different venire, as Urrea urges.

- State v. Urrea, 244 Ariz. 443, 445–46, ¶ 10, 421 P.3d 153, 155–56 (2018)

- We reiterate that Batson made clear that the two remedies it described, mistrial or restoration, were constitutionally adequate. The touchstone of a **minimally adequate remedy** is to place the defendant in the position he or she would have occupied absent discrimination. We are satisfied that the remedy here was not an abuse of the trial court's considerable discretion.

- State v. Urrea, 244 Ariz. 443, 447, ¶ 20, 421 P.3d 153, 157 (2018)

State v. Lucas, 199 Ariz. 366 (App. 2001)

- We find that counsel's non-neutral reason for striking the only African American panel member-that he was a southern male-tainted the entire jury proceedings, requiring reversal in this case. “Once a discriminatory reason has been uncovered-either inherent or pretextual-this reason taints” any other neutral reason for the strike. Payton, 495 S.E.2d at 210. Regardless of how many other nondiscriminatory factors are considered, any consideration of a discriminatory factor directly conflicts with the purpose of Batson and taints the entire jury selection process. Id.; State v. Haigler, 334 S.C. 623, 515 S.E.2d 88, 92 (1999)

- State v. Lucas, 199 Ariz. 366, 369, ¶ 11, 18 P.3d 160, 163 (App. 2001)

- In contrast to our decision here, some courts have applied a “dual motivation” analysis to similar factual situations. Under the dual motivation approach, once the opponent of a strike has established a prima facie case of discrimination, the proponent of the strike has the opportunity to show that the strike would have been exercised even without the discriminatory motive.

- State v. Lucas, 199 Ariz. 366, 369, ¶ 12, 18 P.3d 160, 163 (App. 2001)

State v. Paleo, 200 Ariz. 42 (2001).

- -waiver of peremptories, without more, insufficient to meet burden of first step.
- **B. Waiver Plus**
- 9 ¶ 10 While waiver, without more, is insufficient, it could be a relevant circumstance in establishing a prima facie case of discrimination, because those " 'of a mind to discriminate,' " *id.,* at 96, 106 S.Ct. at 1723 (quoting *Avery v. Georgia,* 345 U.S. 559, 562, 73 S.Ct. 891, 892, 97 L.Ed. 1244 (1953)), could manipulate the rules to prevent the seating of minority jurors. Waiver, accompanied by something more, could support a prima facie case in various circumstances, for example: (1) when discriminatory statements are made by a waiving party; (2) when a pattern of strikes removing a specific group is shown and waiver results in removal of other members of that group; or (3) where waiver bears on use, *see, e.g., Ford v. Norris,* 67 F.3d 162, 169 (8th Cir.1995)("[F]ailure to apply a stated reason for striking [minority] jurors to similarly situated [non-minority] jurors may evince a pretext for excluding jurors **38 *45 solely on the basis of race.").
- *State v. Paleo*, 200 Ariz. 42, 44–45, ¶¶ 9-10, 22 P.3d 35, 37–38 (2001)

Lopez v. Farmers Ins. Co. of Arizona, 177 Ariz. 371 (1993)

- We find that the trial court erred in its determination that Batson did not apply to civil cases and point simply to Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), a case which we recognize was decided after the instant appeal was filed.

- Lopez v. Farmers Ins. Co. of Arizona, 177 Ariz. 371, 375, 868 P.2d 954, 958 (App. 1993)

State ex rel. Romley v. Superior Court In & For County of Maricopa, 181 Ariz. 271 (App. 1993)

- Our adherence to requiring an initial showing of discrimination reflects our recognition of the importance of peremptory challenges in the jury selection process. Although the right to exercise peremptory challenges is not protected by either the federal or the state constitution, such challenges have long been viewed as one means to assure the selection of a qualified and unbiased jury

- State ex rel. Romley v. Superior Court In & For County of Maricopa, 181 Ariz. 271, 274, 889 P.2d 629, 632 (App. 1995)

Kleinshmidt concurrence

- thiis need for a prima facie showing sets too high a hurdle to the eradication of discrimination, were I free to do so I would decline jurisdiction in this case and allow trial judges to proceed as did the judge here.

- State ex rel. Romley v. Superior Court In & For County of Maricopa, 181 Ariz. 271, 275, 889 P.2d 629, 633 (App. 1995)

Judge Kleinshmidt concurring

- Were I free to do so, I would adopt a different rule. I think that when any party to any action exercises a peremptory challenge to remove a member of a cognizable group from the venire, or excludes a member of such a group by failing to use its peremptory challenges, that party should be required to explain the reason for its actions.

- State v. Jordan, 171 Ariz. 62, 67, 828 P.2d 786, 791 (App. 1992) (Klieinshmidt concurring

State v. Anaya, 170 Ariz. 436 (App. 1991)

- Batson applied to co-defendants.
- In reliance upon *Batson, Powers,* and *Edmonson,* we hold that the trial court should have required co-defendant Morris to offer a racially neutral explanation for his peremptory challenges of the two black venirepersons. Although it may not be possible for the trial court to reconstruct the reasons why the two challenges in question were exercised, we remand this matter for the purpose of attempting to do so.
- In so ruling, we are mindful of the concerns voiced by some members of the Supreme Court that *Batson* and its progeny are signalling the end of peremptory challenges, because every peremptory challenge is exercised based upon irrelevant characteristics.
- *State v. Anaya*, 170 Ariz. 436, 441, 825 P.2d 961, 966 (App. 1991)

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CALIFORNIA

California lawmakers approve bills to address racism in criminal charges and jury selection

Assemblywoman Shirley Weber (D-San Diego), shown in 2018, proposed a bill to limit the removal of prospective jurors without cause. (Rich Pedroncelli / Associated Press)

CORONAVIRUS AND PANDEMIC

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Unconscious Bias

Purposeful Discrimination or Discriminatory Impact?

Washington General Rule 37

- Only objection required (no prima facie burden)
- Objective Observer test: an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors

- Limited to race or ethnicity

- g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:
- (i) the number and types of Questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to Question the prospective juror about the alleged concern or the types of Questions asked about it;
- (ii) whether the party exercising the peremptory challenge asked significantly more Questions or different Questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;
- (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;
- (iv) whether a reason might be disproportionately associated with a race or ethnicity; and
- (v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

- GR 37

- (h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge;
- (i) having prior contact with law enforcement officers;
- (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
- (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
- (iv) living in a high-crime neighborhood;
- (v) having a child outside of marriage;
- (vi) receiving state benefits; and
- (vii) not being a native English speaker.

- Reliance on Conduct:
- If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner.

  GR 37

California Assembly Bill 3070

- (e) A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:
- (1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.
- (2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.
- (3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.
- (4) A prospective juror's neighborhood.
- (5) Having a child outside of marriage.
- (6) Receiving state benefits.
- (7) Not being a native English speaker.
- (8) The ability to speak another language.
- (9) Dress, attire, or personal appearance.
- (10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).
- (11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.
- (12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).
- (13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.

- (a) A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

- The denial of an objection made under this section shall be reviewed by the appellate court de novo, with the trial court's express factual findings reviewed for substantial evidence. The appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given under subdivision (c) and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court. Should the appellate court determine that the objection was erroneously denied, that error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

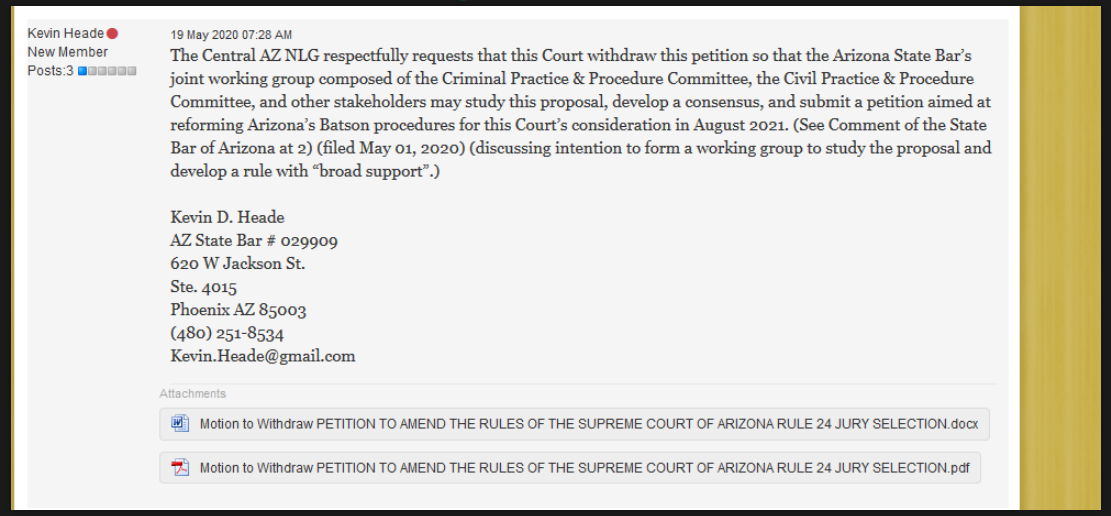
- Specifically, the First Circuit pointed to Snyder v. Louisiana, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008), a case in which the United States Supreme Court "made it clear that in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted." Sanchez V, 753 F.3d at 299, quoting Snyder, supra at 478, 128 S.Ct. 1203.

  Commonwealth v. Sanchez, SJC-12778, 2020 WL 4981562, at *3 (Mass. Aug. 25, 2020)

- In Arizona, Batson has been extended to protect against discriminatory jury selection practices “based upon religious membership or affiliation.” State v. Purcell, 199 Ariz. 319, 326, ¶ 25 (App. 2001). But in a similar case, the Arizona Supreme Court concluded that a prosecutor's exercise of a peremptory strike to remove a pastor based on a concern that “pastors are forgiving” was a neutral reason that, coupled with other bases for removal, “more than satisfie[d] Batson.” State v. Martinez, 196 Ariz. 451, 456, ¶¶ 15–17 (2000) (analogizing pastors to social workers and concluding “there would [be] no question about the validity of [a] strike” to exclude a social worker as too “forgiving”).
- ¶11 Applying Martinez here, the State did not strike Juror No. 14 because she is Christian. Instead, the State struck the juror, in part, because she is a pastor and, by occupation, may be predisposed to extend forgiveness or absolution.
- The superior court did not clearly err by finding the State's peremptory strike did not violate Batson.

- STATE OF ARIZONA, Appellee, v. JAYDA AILEEN FORTUNE, Appellant., 1 CA-CR 19-0635, 2020 WL 5200959, at *2 (App. Sept. 1, 2020)

ARIZONA STATE BAR WORKING GROUP



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The Central AZ NLG respectfully requests that this Court withdraw this petition so that the Arizona State Bar's joint working group composed of the Criminal Practice & Procedure Committee, the Civil Practice & Procedure Committee, and other stakeholders may study this proposal, develop a consensus, and submit a petition aimed at reforming Arizona's Batson procedures for this Court's consideration in August 2021. (See Comment of the State Bar of Arizona at 2) (filed May 01, 2020) (discussing intention to form a working group to study the proposal and develop a rule with "broad support".)

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Attachments

Motion to Withdraw PETITION TO AMEND THE RULES OF THE SUPREME COURT OF ARIZONA RULE 24 JURY SELECTION.docx

Motion to Withdraw PETITION TO AMEND THE RULES OF THE SUPREME COURT OF ARIZONA RULE 24 JURY SELECTION.pdf

- While waiver, without more, is insufficient, it could be a relevant circumstance in establishing a prima facie case of discrimination, because those " 'of a mind to discriminate,' " id., at 96, 106 S.Ct. at 1723 (quoting Avery v. Georgia, 345 U.S. 559, 562, 73 S.Ct. 891, 892, 97 L.Ed. 1244 (1953)), could manipulate the rules to prevent the seating of minority jurors. Waiver, accompanied by something more, could support a prima facie case in various circumstances, for example: (1) when discriminatory statements are made by a waiving party; (2) when a pattern of strikes removing a specific group is shown and waiver results in removal of other members of that group; or (3) where waiver bears on use, see, e.g., Ford v. Norris, 67 F.3d 162, 169 (8th Cir.1995)("[F]ailure to apply a stated reason for striking [minority] jurors to similarly situated [non-minority] jurors may evince a pretext for excluding jurors **38 *45 solely on the basis of race."). Indeed, in some cases waiver of peremptory strikes will support the alleged discriminator's defense to the prima facie case, where waiver results in the seating of minority jurors. See, e.g., Bousquet v. State, 59 Ark.App. 54, 953 S.W.2d 894, 899 (1997) (stating that leaving minority members on the jury by waiving peremptory challenges is "cogent evidence indicating the absence of discriminatory motivation" in striking of other minority jurors).
- 10 ¶ 11 Under Batson, the party alleging discrimination must present a prima facie case and bears the burden of persuasion. Peremptory challenges are a matter of discretion for each party and may be used, or not, for any non-discriminatory reason. Simply stating that a party did not use all of the allotted peremptory strikes does not establish a prima facie case of discrimination, even if minority jurors will not make the final list. Something beyond just waiver is required. Evidence of a discriminatory purpose driving the waiver must be presented to establish a prima facie case.
- State v. Paleo, 200 Ariz. 42, 44–45, ¶¶ 10-11, 22 P.3d 35, 37–38 (2001)

- The trial court's summary denial of Defendant's Batson challenge precludes appellate review. The trial court was tasked with considering the evidence and determining whether the challenged strike of prospective juror Smith "was motivated in substantial part by discriminatory intent" on the part of the State. Id. at 353, 841 S.E.2d at 499 (citation and internal quotation marks omitted). Without specific findings of fact, this Court cannot establish on review that the trial court "appropriately considered all of the evidence necessary to determine whether [Defendant] proved purposeful discrimination with respect to the State's peremptory challenge[ ]" of Smith. Id. at 356, 841 S.E.2d at 501.
- Moreover, the trial court's ruling was deficient in that it "did not explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges[.]" Id. at 358, 841 S.E.2d at 502; see also id. ("[T]here is nothing new about requiring a court to consider all of the evidence before it when determining whether to sustain or overrule a Batson challenge.").
- Pursuant to Hobbs, the trial court therefore erred in failing to make the requisite findings of fact and conclusions of law addressing the evidence presented by counsel. See id. at 360, 841 S.E.2d at 503-04 (remanding to the trial court with instructions "to conduct a Batson hearing ... [and] to make findings of fact and conclusions of law"); State v. Williams, 343 N.C. 345, 359, 471 S.E.2d 379, 386 (1996)

- State v. Hood, COA19-736, 2020 WL 5153867, at *6 (N.C. Ct. App. Sept. 1, 2020)