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person who so conspires to commit an offense which is punishable by death shall be guilty of a Class 3 felony."

[9] Va. Code Ann. § 18.2-256 stipulates that conspiracy to commit any offense defined in Chapter 7, Article 1, which includes § 18.2-248, is punishable to no greater extent than the maximum punishment prescribed for the offense. The maximum for a violation of § 18.2-248 is life imprisonment. *See supra* Statutory Structure.

[10] Va. Code Ann. § 18.2-18 (1991). Murder for hire is excepted from the rule.

[11] Va. Code Ann. § 18.2-31(2) (1991) stipulates that, "the willful, deliberate, and premeditated killing of any person by another for hire," is capital murder. Section 18.2-18 allows hirors to be charged with and convicted of capital murder.

[12] 1990 Journals of the Senate of Virginia 1069 (1990).

[13] 1990 Journal of the House of Delegates of the Commonwealth of Virginia 1635 (1990).

[14] *Id.* at 1965-66.

OPPOSING PEREMPTORY CHALLENGES UNDER *BATSON*

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Introduction

Since the ratification of the fourteenth amendment to the United States Constitution in 1868, the United States Supreme Court has addressed purposeful racial discrimination in the selection of jurors. For example, in *Strauder v. West Virginia*,[1] the Court invalidated a state statute which mandated that only white men could serve as jurors. More recently, the Court stated, "[t]he Constitution requires . . . that we look beyond the face of the statute defining juror qualifications and also consider **challenged selection practices** to afford `protection against action of the State through its administrative officers in effecting the prohibited discrimination.'"[2] In *Swain v. Alabama*,[3] the Court held that the equal protection clause of the fourteenth amendment could be violated if the State's exercise of peremptory challenges excluded members of the defendant's race.

In *Swain*, "[t]he Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control and the constitutional prohibition on exclusion of persons from jury service on account of race."[4] "To preserve the peremptory nature of the prosecutor's challenge, the Court in *Swain* declined to scrutinize his actions in a particular case by relying on a presumption that he properly exercised the State's challenges."[5] To overcome this presumption, the Court held that a defendant could construct a prima facie case by showing "evidence that a prosecutor **'in case after case**, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries.'"[6] Although the prosecutor in *Swain* used peremptory challenges to strike all six eligible blacks on the jury venire, resulting in an all white jury, the Court held that the defendant "offered no proof of the circumstances under which prosecutors were responsible for striking black jurors **beyond the facts of his own case.**"[7]

In *Batson v. Kentucky*,[8] the Court reaffirmed that purposeful discrimination based on race in the selection of jurors violates the Equal Protection Clause. In addition, the Court stated, "prosecutors' peremptory challenges are now largely immune from constitutional scrutiny" due to the "evidentiary formulation" under *Swain* which "reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause."[9] Therefore, the Court held, "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.**"[10] The Court stated that the defendant

> first must show that he is a member of cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant **is entitled to rely** on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant **must show** that these facts and any other relèvant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.[11]

In evaluating the defendant's case, "the trial court should consider all relevant circumstances" such as a "pattern of strikes" or "the prosecutor's questions or statements during *voir dire* and in exercising his challenges."[12]

Once the trial judge determines that the defendant has made a prima facie case, the burden of proof then shifts to the prosecutor to "articulate a neutral explanation related to the particular case to be tried."[13] The Court stated that the prosecutor cannot rebut the defendant's prima facie case "by stating merely that he challenged jurors of the defendant's race on the assumption-or his intuitive judgement-that they would be partial to the defendant because of their shared race," nor "merely by denying that he had discriminatory motive" or that he acted in good faith.[14] "[T]he prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges."[15] But, the Court stated, "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause."[16] Once the prosecutor articulates a neutral reason for a disputed peremptory challenge, the trial court judge then must determine whether or not the peremptory challenge was discriminatory.

The trial court's determination "is a finding of fact" which "a reviewing court ordinarily should give . . . great deference."[17] The Court also stated, "[i]n light of the variety of jury selection practices followed in our state and federal courts, we make no attempt to instruct these courts how best to implement our holding" and, as to remedies, it stated, "we express no view on whether it is more appropriate in a particular case . . . for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire."[18] Thus, the Court gave trial judges wide latitude in the application of the *Batson* rule to find purposeful discrimination in peremptory challenges.

It is also important that the *Batson* Court noted that purposeful discrimination in the selection of jurors not only deprives the defendant

of his sixth amendment right to a fair and impartial jury and his fourteenth amendment right to equal protection of the laws, but also "unconstitutionally discriminate[s] against the juror," and "undermine[s] public confidence in the fairness of our system of justice."[19] In this context, in *Holland v. Illinois*,[20] where a white defendant objected to the prosecutor's use of peremptory challenges to strike two jurors from the venire who were black, the Court held that the white defendant had standing to assert a sixth amendment claim for a *venire* comprised of a fair cross section of the community. Although the Court held that the constitutional guarantee to a fair and impartial jury would be undermined if the defendant were allowed to assert this claim to peremptory challenges in the choosing of the *petit jury*, the Court stated that a defendant who was not the same race as jurors who were peremptorily struck based upon race could have standing for a fourteenth amendment equal protection claim because "a juror dismissed because of race . . . possess[es] little incentive or resources to set in motion the arduous process needed to vindicate his own rights."[21] In *Powers v. Ohio*,[22] where a white defendant objected to the prosecutor's use of peremptory challenges to strike seven black jurors from the venire, the Court affirmed the point made in *Holland* and held, "race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges." Such a defendant can assert third-party standing as a juror because

> "the litigant . . . suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant [] [has] a close relation to the third party; and there [] exist[s] some hinderance to the third party's ability to protect his or her own interest."[23]

In reaching this conclusion, the Court again gave the trial courts much deference on how to implement this holding.

I. *Batson* in Virginia and the Fourth Circuit

A. Race Neutral Reasons

In *Batson*, the United States Supreme Court stated more about what the prosecution's reasons for using peremptory strikes to regularly remove members of a cognizable racial group could not be than what they could be. The Court held that the prosecution cannot state as a reason that a juror of the same race as the defendant would be prejudiced in favor of the defendant.[24] Nor can the prosecution simply reaffirm that race did not come into play in using peremptory strikes.[25] Therefore, courts following Batson have been left with only a negative definition of what are proper reasons with which the prosecution may rebut a defendant's prima facie showing of purposeful discrimination. Absent a showing that the prosecution's reasons meet one of the negative *Batson* standards, the courts surveyed in this article have generally allowed any reason the prosecution may choose to offer as sufficient under *Batson*.

A survey of cases from the Virginia Supreme Court, the Virginia Courts of Appeals and the United States Court of Appeals for the Fourth Circuit has revealed that almost any reason, so long as it is clearly stated, will be found to meet the Batson standard.

1. Unemployment

In *United States v. Harrell*,[26] the United States Court of Appeals for the Fourth Circuit clearly stated its position that the prosecution may provide a juror's unemployment as a reason for peremptorily striking that juror.[27] In *Harrell*, the defendant, who was black, had been convicted of armed robbery of a bank. The defendant made a prima facie showing that the prosecution had used its peremptory strikes to remove blacks from the jury. In response, the prosecution stated its reason for striking the black jurors which the defendant challenged was to keep unemployed persons off the jury in this case. As this was a bank robbery case, the prosecution wanted jurors who were "interested in a safe bank account."[28] The Fourth Circuit approved the prosecution's reasoning after recognizing that it had, in fact, succeeded in obtaining a jury of employed persons.[29]

2. Education

Also in *Harrell*, the Fourth Circuit stated that a juror's lack of secondary education is a valid reason for the prosecution to peremptorily strike that juror under *Batson*.[30] The court noted both the prosecution's stated effort to maintain an "educated" jury and the prosecution's success in doing so.[31] The United States Supreme Court later accepted a lack of high school education as a valid reason for the prosecution to strike a prospective juror where the defendant was being tried for theft of personal property.[32]

Recently, a lack of education has been held to be an acceptable reason for a peremptory strike under *Batson* in opinions by both the Virginia Supreme Court and Virginia Court of Appeals. The Virginia Supreme Court accepted the prosecution's efforts in a capital murder case (murder for hire) to peremptorily strike prospective jurors with lower levels of education as part of a process of elimination based on an inadequate education level.[33] In a capital murder case (murder in the commission of a rape), the Court accepted a less specific educational reason that "the venireman was lacking in knowledge of matters that would make her a competent juror."[34] Similarly, in a case involving drug-related offenses, a Virginia Court of Appeals accepted the Commonwealth's attorney's reason that a juror's low education level might limit the juror's ability to serve satisfactorily as jurors.[35]

3. Association with the Defendant

A juror's direct association with the defendant could prejudice the prosecution. Therefore, where the defendant in a mail fraud case was also an elected city official, under a *Batson* challenge the Fourth Circuit allowed the prosecution to peremptorily strike a prospective juror who could have been one of the defendant's constituents.[36] Likewise, in a case where the defendant was a United States Congressman, the prosecution's peremptory strike of a prospective juror survived a *Batson* challenge because the prospective juror lived in the Congressman's home district.[37]

Sometimes, the juror's association with the defendant may appear more tenuous and yet survive a *Batson* challenge. In two cases, the Fourth Circuit accepted the prosecution's reason that the prospective juror looked like the defendant.[38] In one of those cases, the prosecution peremptorily struck other prospective jurors for such acceptable reasons as having been seen talking to one of the defendant's associates, having a name which sounded like a government witness' name, and having been employed in an area where the defendant's drug business was known to operate.[39]

In Virginia, that a prospective juror knows the defendant was a sufficient reason to peremptorily strike the juror in a drug-related criminal case.[40] Like the Fourth Circuit, Virginia does not require such a direct association. In a first degree murder case, a Virginia Court of Appeals accepted as reasons for peremptorily striking several prospective jurors the fact that they lived near the defendant's family, lived near where the defendant was arrested and were the same age as the defendant.[41]

4. Association with the Criminal Justice System

Like a jury member who is associated with the defendant, a jury member with a criminal record may also be prejudiced against the prosecution. That the Fourth Circuit has accepted a criminal record as the prosecution's reason for peremptorily striking a juror under *Batson* is not

surprising.[42] The Virginia Supreme Court has found a prospective juror's criminal record as an acceptable peremptory strike under *Batson* as well.[43]

What may be surprising is that seemingly remote associations with the criminal justice system are sufficient reasons under *Batson* as well. In a drug-related criminal case, the Fourth Circuit has accepted the fact that a prospective juror was employed at the same place as two government witnesses as a proper reason for the prosecution to exercise a peremptory strike.[44] In a case before a Virginia Court of Appeals, that a prospective juror lived in a "high crime area" was an acceptable reason for a peremptory strike.[45] Very recently, that a prospective juror simply looked familiar to a career detective working on the case was sufficient.[46]

5. Demeanor/Attentiveness

While the prosecution may not want its jurors to have any prior association with the criminal justice system, it may require them to exhibit a level of respect for the criminal justice system. The Fourth Circuit allowed the prosecution in a bank robbery case to peremptorily strike two prospective jurors for the reason that they chatted excessively during jury selection and expressed disdain and boredom with the process.[47] In a RICO case in the United States District Court for the Eastern District of Virginia, that an elderly prospective juror seemed inattentive was also sufficient under *Batson*.[48]

A juror's lack of attentiveness is a sufficient reason for a peremptory strike in Virginia as well. In a capital murder trial, that an elderly juror might become inattentive during "the stress of trial" was a sufficient *Batson* reason for the Commonwealth's attorney to peremptorily strike him.[49] Furthermore, in Virginia, the Commonwealth's attorney may base her opinion as to the juror's respect for the criminal justice system upon the juror's appearance. In a case where the defendant was charged with first degree murder, the Commonwealth's attorney was allowed to strike one prospective juror because the juror came to the jury "dressed as if he were going to work in the shipyard," and another because the juror's "personal appearance concerned" the Commonwealth's attorney.[50]

6. Predisposition

Finally, in Virginia, a prospective juror's predisposition against the death penalty, although not rising to the level of cause, may be a sufficient reason for the Commonwealth's attorney to exercise a peremptory strike. In a case where the defendant was charged with capital murder in the commission of a rape, that the juror gave what the Commonwealth's attorney believed to be inconsistent responses regarding the juror's ability to impose the death penalty was a sufficient reason for a peremptory strike.[51]

B. Insufficient Reasons and Resulting Remedies

Apparently, the only reason which is insufficient is no reason at all. However, the remedy is a new trial when a court does find on appeal that the prosecution has not rebutted a defendant's prima facie case under *Batson*. A survey of all cases citing *Batson* in Virginia and the Fourth Circuit revealed only two cases in which the court found that, in response to a *Batson* challenge, the prosecution's stated reasons for peremptorily striking the jurors in question were insufficient.

In *United States v. Cunningham*,[52] the United States District Court for the Middle District of North Carolina held that the prosecution failed to rebut the defendant's prima facie case under *Batson* and granted a new trial.[53] In response to the defendant's *Batson* challenge, the prosecution in *Cunningham* stated that, after the passage of over two years between the trial, appeal and the present trial on remand, he could not recall what led him to excuse the jurors in question.[54] The court held that the prosecution's memory loss was no excuse for not articulating clear reasons as to why he peremptorily struck the *Batson* juror.[55] Although the defendant had served his entire sentence, and the evidence against him had been overwhelming, the court granted a new trial.[56]

In Virginia, in *Jackson v. Commonwealth*,[57] where the defendant was charged with the armed robbery of a store clerk, the Commonwealth's attorney's reasons for peremptorily striking prospective jurors were not specific enough to meet a *Batson* challenge.[58] In response to the defendant's *Batson* challenge, the Commonwealth's attorney stated that race had nothing to do with his strikes, that he was concerned about the jurors' addresses and that one juror "looked to be about the same age as the defendant."[59] The court of appeals found these reasons insufficient under *Batson* because they did not include an explanation of why these facts were significant to the case.[60] Furthermore, the court noted that the Commonwealth's attorney did not question any of the empaneled jurors as to their ages or addresses.[61] Finally, the court noted that the trial court erred in accepting the Commonwealth's attorney's reasons at face value when they demanded further inquiry.[62] Like the District Court above, the court of appeals remanded the case for a new trial with a properly selected jury.[63]

The common denominator between *Cunningham* and *Jackson* is not that the prosecution failed to give a correct reason for exercising peremptory strikes so much as it failed to give any reason. The *Batson* case requires very little of the prosecution in terms of what its reasoning must be. However, *Batson* does require that the reasons be, at least, significant to the case.[64] The prosecution in the two cases above, failed to articulate a reason related to the case.

II. *Batson* in Four of the Six States Which Use the Death Penalty Most Frequently

The six states which use the death penalty most frequently, in order from most frequent to least frequent, are as follows: Texas, Florida, Louisiana, Georgia, Virginia and Alabama.[65] The treatment *Batson* has received in four of these states is reviewed below.

A. Georgia

In Georgia, the judge's inquiry into the basis for the prosecution's reasons for exercising peremptory strikes is more thorough than is apparent from judges in Virginia and the Fourth Circuit. In a capital murder case, the Georgia Supreme Court noted in reversing and remanding for a new trial, that the prosecution's reasons must be evaluated in light of the explanations it has given for its other peremptory strikes and in light of the jurors it did not strike.[66] The court did not accept the prosecution's reason that a prospective juror was the same age as the defendant when most of the empaneled jurors were approximately the same age as the defendant.[67] Furthermore, the court did not accept the prosecution's reason that a juror was of low intelligence when the record of the juror's answers to the prosecution's voir dire did not reveal a lack of intelligence.[68] Also, the prosecution allowed two white jurors on the panel who described themselves as "a little slow" and illiterate, respectively.[69] Finally, the court could not accept the prosecution's reason that a juror had friends with drug/alcohol problems when several of the white empaneled jurors stated that they had friends with drug/alcohol problems.[70]

B. Florida

Like the Georgia Supreme Court, the Florida Supreme Court inquires thoroughly into any reason given by the prosecution to rebut a *Batson* challenge. In *State v. Slappy*,[71] the Florida Supreme Court has held that a judge cannot accept the prosecution's reasons at face value, but must weigh them as he would a disputed fact.[72] In *Slappy*, the prosecution offered "liberalism" as a reason for peremptorily striking prospective jurors without having questioned them.[73] In holding that the

prosecution could not have established any sufficient reason under *Batson* for striking the jurors without questioning them, the court outlined five factors which tend to show that the prosecution's reasons have no basis in the record: 1) alleged group bias not shown in the juror in question; 2) failure to examine the juror where neither the defendant nor the judge has questioned the juror; 3) singling out a juror for questioning designed to evoke a certain response; 4) prosecution's reason is unrelated to the facts; 5) challenge is based on reason applicable to another juror who was not challenged.[74] Finally, the court noted that its analysis recognized Justice Marshall's concurrence in *Batson* in which the justice argued that a prosecution may be biased even though it believes otherwise. That is, the prosecution may take a black juror to be sullen or inattentive when the same conduct by a white juror would not evoke such a reaction.[75]

C. Alabama

While not quite as demanding of its judges to inquire as to the prosecution's bases for its reasons, Alabama does not allow many of the reasons which are acceptable in Virginia and the Fourth Circuit in response to a *Batson* challenge. An Alabama court refused several of the prosecution's reasons which are acceptable in Virginia courts: that the juror lived in a high crime area, a poor demeanor during voir dire and inattention to the point that the juror fell asleep.[76] Also, that the juror had a negative attitude, was the same age as the defendant and had the same name as the defendant were insufficient reasons in Alabama which would be acceptable in Virginia.[77] However, an Alabama court moved closer to the Virginia standard by holding that a juror's attention to defense counsel and corresponding inattention to the prosecution was a sufficient reason to peremptorily strike that juror in the face of a *Batson* challenge.[78]

D. Texas

In Texas, the courts' position on which reasons offered by the prosecution in response to a *Batson* challenge is more like the courts' position in Virginia than in Florida or Georgia.[79] Also like Virginia, the prosecution must show how a given reason relates to the case. For instance, membership in a political group for the advancement of the rights of black persons is not a sufficient reason on its face.[80] Finally, while, as in Virginia, many reasons are acceptable under *Batson*, using race as a consideration is not.[81]

III. Recent United States Supreme Court Guidance: *Hernandez v. New York* and the Future of Batson

The United States Supreme Court affirmed the extent of its deference to the trial court's determination on *Batson* challenges. In *Hernandez v. New York*,[82] the United States Supreme Court upheld a trial court's determination that the defendant failed to prove a *Batson* claim. Here, the prosecutor was concerned with whether or not certain bilingual jurors would accept the official record English translation of spanish speaking witnesses through the interpreter or would listen to the testimony in Spanish. The prosecutor peremptorily struck two prospective jurors who he felt "from their hesitancy in their answers and their lack of eye contact that they would not be able" to "accept what the interpreter said as the final thing on what the record would be."[83] Since the prosecutor volunteered his reasons for excluding those two jurors, the defendant did not need to prove a prima facie case. Thus, *Hernandez* addresses the second step of the *Batson* test in determining whether the prosecutor's proffered reasons were race-neutral.

In regard to the prosecutor's facially race-neutral explanation, the Court stated,

> A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.[84]

In this case, the explanation of the prosecutor's peremptory challenges were based "neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals."[85]

However, the Court stated that although a prosecutor may offer a race-neutral explanation for a peremptory challenge, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, it is true, that the [classification] bears more heavily on one race than another."[86] It is important that the Court stated, "disproportionate impact does not turn the prosecutor's actions into a *per se* violation of the Equal Protection Clause" because the government actor must have "adopted the criterion with the intent of causing the impact asserted."[87] But, the trial judge may consider "disproportionate exclusion of members of a particular race . . . as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination."[88] In view of the facts that the complainants and witnesses were Latinos, that the prosecutor volunteered his reasons for peremptory challenges, and that he could not testify as to which peremptorily struck jurors were Latinos, the Court upheld the trial court's determination that the prosecutor's explanations were race-neutral and not a pretext for discrimination. The Court stated, "we decline to overturn the state trial court's finding on the issue of discriminatory intent unless convinced that its determination was **clearly erroneous**."[89]

The Court did state, "In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes .... It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."[90] In conclusion, the Court reaffirmed its hesitancy to overturn a trial court's application of the *Batson* test unless clearly erroneous but admitted that, under some circumstances, some facially race-neutral explanations are a pretext for race-based peremptory challenges. The Court also recognized that the "disparate impact" of a criterion offered for peremptory challenges could be circumstantial evidence of discriminatory intent.[91]

Conclusion

At the trial court level, defense counsel should seek to show in the context of the totality of the facts that the prosecutor's race-neutral explanation for a peremptory challenge is a pretext or, more specifically, that the prosecutor's proffered reason is really a "surrogate for race." In addition, under *Powers v. Ohio*, membership in the race of excluded jurors by the defendant is not a prerequisite to standing. Therefore, whenever a prosecutor uses peremptory challenges to strike potential jurors of a particular race, defense counsel should object and seek to determine whether these challenges were based on race. This is especially important if the case has any racial overtones or issues.

Although *Batson* applies to all cases, it may have special significance for death penalty cases. The Supreme Court has recognized that some capital murder defendants have been the victims of racial discrimination.[92] When the prosecution states its reasons for peremptorily striking the jurors in question, defense counsel must confirm that the prosecution's stated reason comports with its practice regarding other prospective jury members. It must be remembered that the prosecution's reason for exercising a peremptory strike may be insufficient under *Batson*, if the prosecution failed to strike other jurors for the same reason.[93] Defense counsel should recognize when the prosecution's stated reason for a peremptory strike appears to apply only to the struck

juror.[94] Remaining alert to possible *Batson* violations arising from the prosecution's questioning during jury selection is essential to making a successful *Batson* challenge. For a checklist of practices which could signal a *Batson* violation, see the factors outlined above in *State v. Slappy*.[95]

Although the previously cited appellate opinions seem to suggest that *Batson* challenges are rarely upheld, defense counsel should not be discouraged from raising the claim. The appellate opinions do not mention the trial courts, which may be upholding *Batson* challenges. Furthermore, the United States Supreme Court in *Hernandez* noted that some facially race-neutral explanations are a pretext for race-based peremptory challenges in certain contexts. Finally, making a *Batson* challenge can provide a tactical advantage in that it stops the trial and puts the Commonwealth on the defensive by forcing it to reveal its motives for peremptory challenges. At a minimum, something may be learned about the Commonwealth's approach to the upcoming trial. At best, an unresolved appellate issue will be created. For these, and many other reasons, *Batson* challenges are worth making.

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[1] 100 U.S. 303 (1880).

[2] *Batson v. Kentucky*, 476 U.S. 79, 88 (1986)(emphasis added)(quoting *Norris v Alabama*, 294 U.S. 587, 589 (1935)).

[3] 380 U.S. 202 (1965).

[4] *Batson*, 476 U.S. at 91 (citations omitted).

[5] *Id.* at 91 (citation omitted).

[6] *Id.* at 91-92 (emphasis added)(citation omitted)(quoting *Swain*, 380 U.S. at 223).

[7] *Id.* at 92 (emphasis added)(citation omitted).

[8] *Id.* at 79, 84.

[9] *Id.* at 92-93.

[10] *Id.* at 95 (emphasis added).

[11] *Id.* at 96 (emphasis added)(citations omitted).

[12] *Id.* at 96-97.

[13] *Id.* at 98.

[14] *Id.* at 97-98 (citations omitted).

[15] *Id.* at 98 n.20 (citation omitted).

[16] *Id.* at 97 (citation omitted).

[17] *Id.* at 98 n.21 (citations omitted).

[18] *Id.* at 100 n.24 (citations omitted).

[19] *Id.* at 87 (citations omitted).

[20] 110 S.Ct. 803 (1990).

[21] *Id.* at 812 (citation omitted).

[22] 111 S.Ct. 1364, 1373 (1991).

[23] *Powers v. Ohio*, 111 S.Ct. 1364, 1370-1371 (citations omitted).

[24] *Batson v. Kentucky*, 476 U.S. at 97.

[25] *Id.* at 98.

[26] 847 F.2d 138 (4th Cir. 1988).

[27] *United States v. Harrell*, 847 F.2d 138, 139 (4th Cir. 1988).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989).

[33] *Stockton v. Commonwealth*, 241 Va. 192, 402 S.E.2d 196, 205-206 (1991).

[34] *Spencer v. Commonwealth*, 238 Va. 295, 310, 384 S.E.2d 785, 795 (1989).

[35] *Winfield v. Commonwealth*, 12 Va.App. 446, 452, 404 S.E.2d 398, 401 (1991).

[36] *United States v. Woods*, 812 F.2d 1483, 1487 (4th Cir. 1987).

[37] *United States v. Mitchell*, 877 F.2d 294, 302 (4th Cir. 1989).

[38] *United States v. Garrison*, 849 F.2d 103, 105 (4th Cir. 1988)(bank robbery); *United States v. Tindle*, 860 F.2d 125, 128 (4th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) (drug-related criminal case where defendant claims mistaken identity).

[39] *Tindle*, 860 F.2d at 128.

[40] *Winfield v. Commonwealth*, 12 Va.App. 446, 404 S.E.2d 398, 401 (1991).

[41] *Taitano v. Commonwealth*, 4 Va.App. 342, 347, 358 S.E.2d 590, 593 (1987).

[42] *United States v. Mitchell*, 877 F.2d 294, 302 (4th Cir. 1989).

[43] *Spencer v. Commonwealth*, 238 Va. 295, 310, 384 S.E.2d 785, 795 (1989).

[44] *United States v. Tindle*, 860 F.2d 125, 128 (4th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989).

[45] *Taitano v. Commonwealth*, 4 Va.App. 342, 347, 358 S.E.2d 590, 593 (1987).

[46] *Langhorne v. Commonwealth*, No. 0305-90-2 (Va.App. Sept. 17, 1991), 409 S.E.2d 476, 482 (drug-related criminal case).

[47] *United States v. Garrison*, 849 F.2d 103, 105 (4th Cir. 1988).

[48] *United States v. Allen*, 666 F.Supp. 839, 852 (E.D.Va. 1987).

[49] *Stockton v. Commonwealth*, 241 Va. 192, 402 S.E.2d 196, 205-206 (1991).

[50] *Taitano v. Commonwealth*, 4 Va.App. 342, 347, 358 S.E.2d 590, 593 (1987).

[51] *Spencer v. Commonwealth*, 238 Va. 295, 310, 384 S.E.2d 785, 795 (1989).

[52] 713 F.Supp. 165, 170 (M.D.N.C. 1988).

[53] *United States v. Cunningham*, 713 F.Supp. 165, 170 (M.D.N.C. 1988).

[54] *Id.* at 171.

[55] *Id.*

[56] *Id.*

[57] 8 Va.App. 176, 380 S.E.2d 1 (1989).

[58] *Jackson v. Commonwealth*, 8 Va.App. 176, 380 S.E.2d 1 (1989).

[59] *Id.* at 185.

[60] *Id.* at 186.

[61] *Id.* at 186-187.

[62] *Id.* at 187.

[63] *Id.*

[64] *Batson*, 476 U.S. at 98 n.20.

[65] *See Death Row, U.S.A.*, NAACP Legal Defense and Educational Fund, Inc., April 24, 1991.

[66] *Gamble v. State*, 257 Ga. 325, 327 S.E.2d 792, 794 (1987).

[67] *Id.* at 795.

[68] *Id.* at 796.

[69] *Id.*

[70] *Id.*

[71] 522 So.2d 18, 22 (Fla. 1988).

[72] *State v. Slappy*, 522 So.2d 18, 22 (Fla. 1988).

[73] *Id.* at 23.

[74] *Id.* at 22.

[75] *Id.* at 23 (citing *Batson*, 476 U.S. at 106.)

[76] *Madison v. State*, 545 So.2d 94 (Ala.App. 1987).

[77] *Avery v. State*, 545 So.2d 123 (Ala.App. 1988).

[78] *Strong v. State*, 538 So.2d 815, (Ala.App. 1988).

[79] *Williams v. State*, 804 S.W.2d 95, 99 (Tex.Cr.App. 1991) (predisposition as to death penalty, disdain for criminal process, lack of intellectual capacity and children at home all sufficient reasons under *Batson.*); *Keeton v. State*, 749 S.W.2d 861, 865 (Tex. 1988) (prior criminal conviction and association with defendant and defendant's family sufficient reasons under *Batson.*)

[80] *Somerville v. State*, 792 S.W.2d 265 (1990).

[81] *Robinson v. State*, 756 S.W.2d 62 (Tex.Cr.App. 1988).

[82] 111 S.Ct. 1859 (1991).

[83] *Hernandez v. New York*, 111 S.Ct. 1859, 1865 n.1. (1991)

[84] *Id.* at 1866.

[85] *Id.* at 1867.

[86] *Id.* at 1868.

[87] *Id.* at 1867.

[88] *Id.* at 1868.

[89] *Id.* at 1871 (emphasis added).

[90] *Id.* at 1872-1873.

[91] *Id.* at 1867.

[92] *McCleskey v. Kemp*, 481 U.S. 279 (1987).

[93] *Gamble v. State*,257 Ga. 325, 327 S.E.2d 792, 794 (1987) (prosecution's reasons must be considered in light of explanations for its other peremptory strikes).

[94] *Jackson v. Commonwealth*, 8 Va.App. 176, 380 S.E.2d 1 (1989) (Commonwealth failed to question empaneled jurors as to their ages and addresses where age and address were his stated reasons for exercising peremptory strike).

[95] *Slappy*, 522 So.2d at 22 (Fla. 1988).