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I. Facts

Timothy Lanier Allen ("Allen"), an African-American, was tried for first-degree murder for the killing of a white police officer. At trial, the prosecution used eleven of thirteen peremptory challenges against African-American venire members who were otherwise qualified. The jury, composed of six African-Americans and six Caucasians, found Allen guilty of first-degree murder and sentenced him to death.[1]

At the sentencing phase, the court instructed the jury "that [it] should 'unanimously' find from the evidence whether one or more mitigating circumstances were present."[2] The jury unanimously found three mitigating circumstances, but it also found that those mitigators did not outweigh the aggravating circumstances; therefore, the jury recommended the death penalty.[3] After the verdict, the court polled each juror by re-reading the jury instructions requiring unanimity and by asking each juror to affirm the jury's answers.[4] The jurors affirmed the death penalty recommendation and the court imposed the death sentence.[5]

Allen appealed to the Supreme Court of North Carolina ("North Carolina court"), which found no error in either phase of the trial.[6] The United States Supreme Court vacated Allen's death sentence pursuant to *McKoy v. North Carolina*[7] and remanded to the North Carolina court because it held that a capital murder jury instruction that requires unanimity in finding mitigating circumstances is unconstitutional.[8] On remand, the North Carolina court found that

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1. Allen v. Lee, 319 F.3d 645, 647 (4th Cir. 2003). The jury at the trial initially was composed of seven African-Americans, one of whom was later dismissed for cause. *Id.*

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. 494 U.S. 433 (1990).

8. *Allen*, 319 F.3d at 647-48 (citing McKoy v. North Carolina, 494 U.S. 433, 435 (1990) (holding that capital murder jury instruction that requires unanimity to find mitigating circumstances is unconstitutional because it prevents sentencer from considering all mitigating evidence)).

the unanimity error was harmless beyond a reasonable doubt and reinstated Allen's death sentence.[9] The Supreme Court denied certiorari.[10]

Allen filed a habeas petition and a motion under Rule 59(e) of the Federal Rules of Civil Procedure in federal district court.[11] The court granted summary judgment for the State on the habeas petition, denied Allen's Rule 59(e) motion, and granted a certificate of appealability on six claims.[12] Allen appealed to the United States Court of Appeals for the Fourth Circuit and alleged, inter alia, that: (1) the short-form indictment was unconstitutional; (2) the State used its peremptory challenges in a racially discriminatory manner; and (3) the jury poll did not cure the harms caused by the unconstitutional jury instruction.[13]

II. Holding

The Fourth Circuit found that: (1) the short-form indictment was constitutional;[14] (2) the North Carolina court's analysis of the peremptory challenges violated clearly established federal law;[15] and (3) the jury poll did not cure the unconstitutional instruction.[16] The judgment of the district court was affirmed in part, reversed in part, vacated, and remanded.[17]

III. Analysis

A. Short-Form Indictment

Allen argued that the short-form indictment did not allege each element of the crime, nor did it allege any aggravating circumstance that supported the death sentence.[18] The district court denied a certificate of appealability on this issue.[19]

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9. *Id.* at 648.

10. *Id.*

11. *Id.*; *see* FED. R. CIV. P. 59(e) (providing that "any motion to alter or amend a judgment shall be filed no later than 10 days after entry of judgment").

12. *Allen*, 319 F.3d at 648.

13. *Id.* Allen appealed three of the claims that received a certificate of appealability and one claim that was denied a certificate. *Id.* One of the former claims raised a *Brady v. Maryland* issue which will not be further discussed in this note. *Id.* at 649. *See generally* Brady v. Maryland, 373 U.S. 83 (1963) (holding that prosecution violates defendant's due process rights when it fails to disclose to defendant, prior to trial, evidence favorable to accused).

14. *Allen*, 319 F.3d at 649.

15. *Id.* at 656.

16. *Id.* at 657.

17. *Id.* at 658. One Circuit Judge dissented in the opinion. *Id.*

18. *Id.* at 648. Allen argued that the defects made the murder conviction and death sentence invalid under *Jones v. United States* and *Apprendi v. New Jersey*. *Id.* *See generally* Jones v. United States, 526 U.S. 227 (1999) (finding that federal carjacking statute defined elements for distinct offenses at sentencing phase); Apprendi v. New Jersey, 530 U.S. 466 (2000) (finding that state's proscribed sentencing factor acted as functional equivalent of element of greater offense and increased sentence beyond maximum sentence).

19. *Allen*, 319 F.3d at 649.

The Fourth Circuit first was required to decide whether Allen made a "substantial showing of the denial of a constitutional right" before it could proceed to the merits of his claim.[20] According to the Fourth Circuit, Allen's short-form indictment did not present "a substantial constitutional question upon which reasonable jurists could disagree."[21] The Fourth Circuit denied a certificate of appealability on the issue and dismissed the claim.[22]

B. *Racially-Motivated Peremptory Challenges*

Allen argued that the prosecution's use of its peremptory challenges violated his Sixth and Fourteenth Amendment rights under *Batson v. Kentucky*[23] because the prosecution used eleven of thirteen peremptory challenges on otherwise qualified African-American potential jurors.[24] The district court granted Allen a certificate of appealability on this issue, which meant that Allen had "already made 'a substantial showing of the denial of a constitutional right' " for purposes of the Fourth Circuit's review.[25] Thus, the Fourth Circuit could proceed directly to the substance of Allen's *Batson* claim and grant habeas corpus relief if it found that the North Carolina court reached a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[26]

1. *Preservation of* Batson *Claim*

The Fourth Circuit addressed first whether Allen properly preserved his *Batson* objection.[27] Before trial, Allen filed a pretrial motion that focused "on the

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20. *Id.* at 648-49 (quoting 28 U.S.C. § 2253(c)(2) (2000) (stating when certificate of appealability may issue)).

21. *Id.*; *see* Hartman v. Lee, 283 F.3d 190, 199 (4th Cir. 2002) (concluding that North Carolina's short-form indictment was neither contrary to nor unreasonable application of federal law). For a complete discussion and analysis of *Hartman* and the use of short-form indictments in Virginia, see generally Janice L. Kopec, Case Note, 15 CAP. DEF. J. 197 (2002) (analyzing Hartman v. Lee, 283 F.3d 190 (4th Cir. 2002)).

22. *Allen*, 319 F.3d at 649. The Fourth Circuit's analysis is the proper way to deal with this issue. *See generally* Miller-El v. Cockrell, 123 S. Ct. 1029 (2003) (clarifying procedure for determining whether to grant certificate of appealability).

23. 476 U.S. 79 (1986).

24. *Allen*, 319 F.3d at 649-50; *see* Batson v. Kentucky, 476 U.S. 79, 97 (1986) (stating that prosecution has burden of showing neutral reason for excluding juror if defendant makes prima facie showing of exclusion by race).

25. *Allen*, 319 F.3d at 649 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

26. *See* 28 U.S.C. § 2254(d)(1) (2000) (stating that writ of habeas corpus pursuant to state court decision can only be granted if state court decision was contrary to or unreasonable application of clearly established federal law; part of AEDPA).

27. *Allen*, 319 F.3d at 650.

State's history of excluding black jurors."[28] At the time, *Swain v. Alabama*[29] governed; that case required the defendant to show that the prosecutor systematically used peremptory challenges to strike African-American potential jurors over a period of time.[30] The trial court denied Allen's motion because, pursuant to *Swain*, Allen had asked the trial court to consider the prosecution's use of peremptory challenges "over time" instead of in the specific case before the court.[31]

The Fourth Circuit compared Allen's case with the Supreme Court's holding in *Ford v. Georgia*[32] and decisions in other circuits involving the preservation of *Batson* claims.[33] The Fourth Circuit found that, in those cases, *Batson* claims were waived only when the defendant failed to make *any* challenge under *Batson* or *Swain*.[34] The court focused particularly on Justice Souter's statement in *Ford*:

> Because *Batson* did not change the nature of the violation recognized in *Swain*, but merely the quantum of proof necessary to substantiate a particular claim, it follows that a defendant alleging a violation of equal protection of the law under *Swain* necessarily states an equal protection violation subject to proof under the *Batson* standard of circumstantial evidence as well.[35]

In the Fourth Circuit's opinion, the language in Allen's pretrial motion properly raised an objection under *Swain*.[36] The court emphasized that defendants are not required to seek the best remedy, but need only to provide the trial court with the opportunity to correct the constitutional violation before jury selection is com-

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28. *Id.*

29. 380 U.S. 202 (1965).

30. Swain v. Alabama, 380 U.S. 202, 227 (1965). Allen's trial took place before the Supreme Court decided *Batson*. *Allen*, 319 F.3d at 650.

31. *Allen*, 319 F.3d at 650.

32. 498 U.S. 411 (1991).

33. *Allen*, 319 F.3d at 650; *see* Ford v. Georgia, 498 U.S. 411, 420 (1991) (finding that pretrial "Motion to Restrict Racial Use of Peremptory Challenges" was sufficient to preserve *Batson* issue even though it did not cite any legal authority).

34. *Allen*, 319 F.3d at 651; *see also* McCrory v. Henderson, 82 F.3d 1243, 1249 (2d Cir. 1996) (holding that defendant's failure to object to prosecution's discriminatory use of peremptory challenges before conclusion of jury selection waives *Batson* objection); Cochran v. Herring, 43 F.3d 1404, 1409 n.7 (11th Cir. 1995) (stating that *Swain* objections properly made in pretrial motions are considered timely *Batson* objections); Wilkerson v. Collins, 950 F.2d 1054, 1062-63 (5th Cir. 1992) (finding that defendant who failed to object to prosecution's peremptory challenges at any point during trial could not raise *Batson* objection on appeal).

35. *Allen*, 319 F.3d at 650-51 (quoting *Ford*, 498 U.S. at 420).

36. *Id.* at 652. Allen suggested a remedy in which he would receive additional peremptory challenges. *Id.* The Fourth Circuit suggested that the better remedy would have been to "directly prohibit the prosecution from using its peremptories in a racially discriminatory manner." *Id.* The court stated, however, that the remedy sought was irrelevant to the issue of whether Allen properly raised a *Swain* objection. *Id.*

plete in order to preserve a *Batson* claim.[37] Allen's pretrial objection, therefore, sufficiently preserved his *Batson* claim.[38]

2. *The* Batson *Claim*

The Fourth Circuit then considered the substance of Allen's *Batson* claim.[39] The Fourth Circuit stated that courts conducting *Batson* hearings must determine whether the defendant can make a prima facie showing of discrimination in the prosecutor's use of peremptory challenges.[40] If the defendant makes a prima facie showing, the burden shifts to the prosecution to provide a neutral explanation for excluding the juror or jurors at issue.[41]

The Fourth Circuit found that the North Carolina court improperly denied Allen's claim because it did not consider any of Allen's evidence of discrimination.[42] The North Carolina court instead relied only on the fact that a majority of the seated jury consisted of African-Americans.[43] The Fourth Circuit determined that "[i]n relying on the ratio of black jurors seated to black jurors tendered, the North Carolina Supreme Court has turned the *Batson* analysis on its head."[44] The Fourth Circuit stated that it is appropriate to consider evidence of who was seated on the jury, but that courts should also focus on the excluded members of the venire in conducting a *Batson* analysis.[45]

The Fourth Circuit analyzed Allen's evidence of discrimination and found it compelling.[46] Of the venire, 57.5% were Caucasian, 36.3% were African-American, and 6% were of another race.[47] The Fourth Circuit compared these statistics with the fact that 84.6% of the prosecution's peremptory challenges were used to exclude African-Americans and found that this disparity was relevant evidence.[48] The court also found that other circumstantial evidence existed on the record to support a finding that the prosecution used race as a

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 652-53. The Fourth Circuit stated:

> [A] court must first determine whether a defendant can show that: (1) the defendant is a member of a cognizable racial group; (2) the prosecutor used the challenges to remove members of the defendant's race from the venire; and (3) other facts and circumstances surrounding the proceeding raise an inference that the prosecutor discriminated in his or her use of peremptory challenges.

Id. (citing Keel v. French, 162 F.3d 263, 271 (4th Cir. 1998)).

41. *Allen*, 319 F.3d at 353; *Batson*, 476 U.S. at 97.

42. *Allen*, 319 F.3d at 353.

43. *Id.* (citing State v. Allen, 372 S.E.2d 855, 862 (N.C. 1988)).

44. *Id.* at 655.

45. *Id.* at 653.

46. *Id.*

47. *Allen*, 319 F.3d at 653 (citing Joint Appendix at 57).

48. *Id.*

basis for striking some jurors.[49] In particular, the court focused on a Caucasian woman who stated that she "had known defense counsel 'through the years as he was growing up' " and who could have been sympathetic to the testimony of Allen's mother.[50] The court compared the prosecution's decision to keep this juror with the prosecution's decision to strike an African-American woman who stated that she knew one of the defense attorneys, but that they were not friends or acquaintances.[51] In the Fourth Circuit's opinion, this comparison and the African-American woman's pro-death penalty views made the decision to keep the Caucasian juror "particularly suspect."[52]

The Fourth Circuit emphasized that "a racially biased use of a peremptory challenge against even a single potential juror violates *Batson*."[53] Although the State argued that the jury was 58% African-American and that it left seven African-Americans on the jury without using all of its peremptory challenges, the Fourth Circuit dismissed the evidence as showing only that "race may not have been a determinative factor *every* time an African American juror was called to the jury box."[54]

The Fourth Circuit considered the North Carolina court's juror-counting test improper because the prosecution has only limited ability to control the composition of the jury.[55] Instead, the Fourth Circuit stated that the most direct evidence for evaluating a *Batson* challenge is found in the excluded juror(s) because the prosecution possesses total control over the decision of whom to exclude.[56] The Fourth Circuit held that the North Carolina court's test contradicted clearly established federal law as determined by the Supreme Court in *Batson*.[57] As a result, the Fourth Circuit remanded the case to the district court and instructed it either to hold a hearing on the *Batson* claim or to return the case

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49. *Id.*

50. *Id.* This juror had read newspaper accounts of the shooting and pretrial activity and was a mother and grandmother. *Id.* The Fourth Circuit stated that the possibility existed that this juror could have been influenced "by her experiences as a mother and grandmother, her exposure to media accounts of the shooting, as well as the likelihood that she would trust a defense lawyer whom she had known well since his childhood." *Id.*

51. *Id.* at 653-54. This juror stated that she knew defense counsel only in that she knew that he worked in the area and that she had seen him at the store. *Id.* The Fourth Circuit stated that it was unlikely that the prosecution was concerned about this relationship because it was a "tenuous and casual connection," as opposed to the Caucasian juror's long-term relationship with defense counsel. *Id.* at 654.

52. *Id.* at 653.

53. *Allen*, 319 F.3d at 654.

54. *Id.* (emphasis in original); *see Batson*, 476 U.S. at 95 (stating that single invidiously discriminatory act by Government is not immunized by absence of discrimination in making other comparable decisions).

55. *Allen*, 319 F.3d at 656.

56. *Id.*

57. *Id.*; *see* § 2254(d).

to the state trial court on a conditional writ of habeas corpus.[58] The Fourth Circuit instructed that whichever court would conduct the *Batson* hearing must consider the facts and circumstances of the challenges to the eleven African-American jurors along with any other relevant evidence.[59]

C. The Jury Poll

The district court granted a certificate of appealability to Allen's claim that the jury poll did not cure the unconstitutional jury instruction.[60] The Fourth Circuit found that the jury poll "neither instructed the jury nor amended an instruction," and that the poll showed only that each juror followed the unconstitutional instructions in sentencing Allen to death.[61] The court stated that the poll, by itself, could not possibly cure the error.[62] The Fourth Circuit stated that poll responses that are designed to cure a constitutional error must determine whether each juror considered a mitigating circumstance in reaching his or her sentencing decision.[63] As a result, the Fourth Circuit vacated Allen's death sentence and remanded the case to the district court "with instructions to issue a writ of habeas corpus releasing Allen from his sentence of death" unless North Carolina conducts re-sentencing proceedings within a reasonable time.[64]

IV. Application in Virginia

The Fourth Circuit's decision lays out a clear framework for the *Batson/Swain* objection. It is important to recognize that procedural default occurs only when the defense completely fails to assert a claim of discriminatory peremptory challenges by the prosecution before the jury is empaneled. Defense counsel need not argue the most appropriate remedy; the focus must be primarily on the *timing* of the objection.[65]

This decision allows defense attorneys more easily to raise *Batson* claims. If there is any suspicion of a racially discriminatory intent in the prosecution's peremptory challenge, defense counsel may object immediately without trying to determine what the best remedy is. Defense counsel should emphasize that the court must examine the reasons for excluding the *excluded* juror and not merely

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58. *Allen*, 319 F.3d at 656.

59. *Id.*

60. *Id.* at 657. The district court rejected Allen's claim that the North Carolina court erred in finding that the jury poll cured the unconstitutional instruction. *Id.* The district court, however, granted a certificate of appealability on the issue. *Id.*

61. *Id.*

62. *Id.* The Fourth Circuit added that *McKoy* had yet to be decided at the time of Allen's trial and thus that the jury poll was not designed to cure the unconstitutional instruction. *Id.* at 658.

63. *Id.*

64. *Allen*, 319 F.3d at 658.

65. *See id.* at 651-52 (stating that remedy sought is irrelevant when *Swain* issue is properly raised to trial court).

the composition of the actual jury. Defense counsel also can force the court to compare seated and excluded jurors, presumably to rebut the prosecution's race-neutral reason. Furthermore, statistical and circumstantial evidence will suffice to raise a proper *Batson* claim. Defense counsel must continue to be aware, however, that a prima facie case must still be met before shifting the burden on the prosecutor to show a nondiscriminatory reason for the peremptory challenge.[66]

V. Conclusion

Allen shows that *Batson* challenges will not easily be denied on procedural default grounds. Defense counsel is given considerable leeway to raise such concerns both to the trial court and to an appellate court. Perhaps more importantly, writs of habeas corpus will be granted if a state court fails to conduct the proper *Batson* analysis.

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66. *See id.* at 652-53 (stating procedures trial court must follow for *Batson* hearing); *Batson*, 476 U.S. at 97.