***Johnson v. California* (2005) 125 S.Ct 2410**

Jay Shawn JOHNSON, Petitioner,

v.

CALIFORNIA.

No. 04-6964.

Argued April 18, 2005.

Syllabus *

Petitioner Johnson, a black man, was convicted in a California state court of assaulting and murdering a white child. During jury selection, a number of prospective jurors were removed for cause until 43 eligible jurors remained, three of whom were black. The prosecutor used 3 of his 12 peremptory challenges to remove the prospective black jurors, resulting in an all-white jury. Defense counsel objected to those strikes on the ground that they were unconstitutionally based on race. The trial judge did not ask the prosecutor to explain his strikes, but instead simply found that petitioner had failed to establish a prima facie case of purposeful discrimination under the governing state precedent, *People v. Wheeler*, which required a showing of a strong likelihood that the exercise of peremptory challenges was based on group bias. The judge explained that, although the case was close, his review of the record convinced him that the prosecutor's strikes could be justified by race-neutral reasons. The California Court of Appeal set aside the conviction, but the State Supreme Court reinstated it, stressing that *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, permits state courts to establish the standards used to evaluate the sufficiency of prima facie cases of purposeful discrimination in jury selection. Reviewing *Batson*, *Wheeler*, and their progeny, the court concluded that *Wheeler's* "strong likelihood" standard is entirely consistent with *Batson*. Under *Batson*, the court held, a state court may require the objector to present not merely enough evidence to permit an inference that discrimination has occurred, but sufficiently strong evidence to establish that the challenges, if not explained, were more likely than not based on race. Applying that standard, the court acknowledged that the exclusion of all three black prospective jurors looked suspicious, but deferred to the trial judge's ruling.

Held: California's "more likely than not" standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case of purposeful discrimination in jury selection. This narrow but important issue concerns the scope of the first of three steps *Batson* enumerated: (1) Once the defendant has made out a prima facie case and (2) the State has satisfied its burden to offer permissible race-neutral justifications for the strikes, *e.g.*, 476 U.S., at 94, 106 S.Ct. 1712, then (3) the trial court must decide whether the defendant has proved purposeful racial discrimination, *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834. *Batson* does not permit California to require at step one that the objector show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias. The *Batson* Court held that a prima facie case can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives "rise to an inference of discriminatory purpose." 476 U.S., at 94, 106 S.Ct. 1712. The Court explained that to establish a prima facie case, the defendant must show that his membership in a cognizable racial group, the prosecutor's exercise of peremptory challenges to remove members of that group, the indisputable fact that such challenges permit those inclined to discriminate to do so, and any other relevant circumstances raise an inference that the prosecutor excluded venire members on account of race. *Id.*, at 96, 106 S.Ct. 1712. The Court assumed that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the peremptory challenge was improperly motivated. The Court did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies *Batson's* first step requirements by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. The facts of this case illustrate that California's standard is at odds with the prima facie inquiry mandated by *Batson*. The permissible inferences of discrimination, which caused the trial judge to comment that the case was close and the California Supreme Court to acknowledge that it was suspicious that all three black prospective jurors were removed, were sufficient to establish a prima facie case. Pp. 2418–2419.

Reversed and remanded.

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. THOMAS, J., filed a dissenting opinion.

Stephen B. Bedrick, Oakland, CA, for Petitioner.

Seth K. Schalit, San Francisco, CA, for Respondent.

Stephen B. Bedrick, Oakland, CA, Eric Schnapper, Seattle, WA, for Petitioner.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General, Laurence K. Sullivan, Supervising Deputy Attorney General, Seth K. Schalit, Supervising Deputy Attorney General, San Francisco, CA, for Respondent.

For U.S. Supreme Court briefs, see:

2005 WL 282136 (Pet.Brief)

2005 WL 585218 (Resp.Brief)

2005 WL 769838 (Reply.Brief)

Justice STEVENS delivered the opinion of the Court.

[1] The Supreme Court of California and the United States Court of Appeals for the Ninth Circuit have provided conflicting answers to the following question: "Whether to establish a *prima facie* case under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the objector must show that it is more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias?" Pet. for Cert. i. Because both of those courts regularly review the validity of convictions obtained in California criminal trials, respondent, the State of California, agreed to petitioner's request that we grant certiorari and resolve the conflict. We agree with the Ninth Circuit that the question presented

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

must be *answered* in the negative, and accordingly reverse the judgment of the California Supreme Court.

I

Petitioner Jay Shawn Johnson, a black male, was convicted in a California trial court of second-degree murder and assault on a white 19-month-old child, resulting in death. During jury selection, a number of prospective jurors were removed for cause until 43 eligible jurors remained, 8 of whom were black. The prosecutor used 8 of his 12 peremptory challenges to remove the black prospective jurors. The resulting jury, including alternates, was all white.

After the prosecutor exercised the second of his three peremptory challenges against the prospective black jurors, defense counsel objected on the ground that the challenge was unconstitutionally based on race under both the California and United States Constitutions. *People v. Johnson*, 30 Cal.4th 1302, 1307, 1 Cal. Rptr.3d 1, 71 P.3d 270, 272–273 (2003).[1] Defense counsel alleged that the prosecutor "had no apparent reason to challenge this prospective juror 'other than [her] racial identity.'" *Ibid.* (alteration in original). The trial judge did not ask the prosecutor to explain the rationale for his strikes. Instead, the judge simply found that petitioner had failed to establish a prima facie case under the governing state precedent, *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978), reasoning "'that there's not been shown a *strong likelihood* that the exercise of the peremptory challenges were based upon a group rather than an individual basis,'" 30 Cal.4th, at 1307, 1 Cal.Rptr.3d 1, 71 P.3d, at 272 (emphasis added). The judge did, however, warn the prosecutor that "'we are very close.'" *People v. Johnson*, 105 Cal.Rptr.2d 727, 729 (2001).

Defense counsel made an additional motion the next day when the prosecutor struck the final remaining prospective black juror. 30 Cal.4th, at 1307, 1 Cal. Rptr.3d 1, 71 P.3d, at 272. Counsel argued that the prosecutor's decision to challenge all of the prospective black jurors constituted a "systematic attempt to exclude African-Americans from the jury panel." 105 Cal.Rptr.2d, at 729. The trial judge still did not seek an explanation from the prosecutor. Instead, he explained that his own examination of the record had convinced him that the prosecutor's strikes could be justified by race-neutral reasons. Specifically, the judge opined that the black venire members had offered equivocal or confused answers in their written questionnaires. 30 Cal.4th, at 1307–1308, 1 Cal.Rptr.3d 1, 71 P.3d, at 272–273. Despite the fact that "'the Court would not grant the challenges for cause, there were answers ... at least on the questionnaires themselves [such] that the Court felt that there was sufficient basis'" for the strikes. *Id.*, at 1308, 1 Cal.Rptr.3d 1, 71 P.3d, at 273 (brackets added). Therefore, even considering that all of the prospective black jurors had been stricken from the pool, the judge determined that petitioner had failed to establish a prima facie case.

The California Court of Appeal set aside the conviction. *People v. Johnson*, 105 Cal.Rptr.2d 727 (2001). Over the dissent of one judge, the majority ruled that the trial judge had erred by requiring petitioner to establish a "strong likelihood" that the peremptory strikes had been impermissibly based on race. Instead, the trial judge should have only required petitioner to proffer enough evidence to support an "inference" of discrimination.[2] The Court of Appeal's holding relied on decisions of this Court, prior California case law, and the decision of the United States Court of Appeals for the Ninth Circuit in *Wade v. Terhune*, 202 F.3d 1190 (2000). Applying the proper "reasonable inference" standard, the majority concluded that petitioner had produced sufficient evidence to support a prima facie case.

Respondent appealed, and the California Supreme Court reinstated petitioner's conviction over the dissent of two justices. The court stressed that *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), left to state courts the task of establishing the standards used to evaluate the sufficiency of defendants' prima facie cases. 30 Cal.4th, at 1314, 1 Cal.Rptr.3d 1, 71 P.3d, at 277. The court then reviewed *Batson*, *Wheeler*, and those decisions' progeny, and concluded that "*Wheeler's* terms 'strong likelihood' and 'reasonable inference' state the same standard"—one that is entirely consistent with *Batson*. 30 Cal.4th, at 1313, 1 Cal.Rptr.3d 1, 71 P.3d, at 277. A prima facie case under *Batson* establishes a "'legally mandatory, rebuttable presumption,'" it does not merely constitute "enough evidence to *permit the inference*" that discrimination has occurred. 30 Cal.4th, at 1315, 1 Cal. Rptr.3d 1, 71 P.3d, at 278. *Batson*, the court held, "permits a court to require the objector to present, not merely 'some evidence' permitting the inference, but 'strong evidence' that makes discriminatory intent *more likely than not* if the challenges are not explained." 30 Cal.4th, at 1316, 1 Cal.Rptr.3d 1, 71 P.3d, at 278. The court opined that while this burden is "not onerous," it remains "substantial." *Ibid.*, 1 Cal.Rptr.3d 1, 71 P.3d, at 279.

Applying that standard, the court acknowledged that the case involved the "highly relevant" circumstance that a black defendant was "charged with killing 'his White girlfriend's child,'" and that "it certainly looks suspicious that all three African-American prospective jurors were removed from the jury." *Id.*, at 1326, 1 Cal.Rptr.3d 1, 71 P.3d, at 286. Yet petitioner's *Batson* showing, the court held, consisted "primarily of the statistical disparity of peremptory challenges between African-Americans and others." 30 Cal.4th, at 1327, 1 Cal.Rptr.3d 1, 71 P.3d, at 287. Although those statistics were indeed "troubling and, as the trial court stated, the question was close," *id.*, at 1328, 1 Cal.Rptr.3d 1, 71 P.3d, at 287, the court decided to defer to the trial judge's "carefully considered ruling." *Ibid.*[3] We granted certiorari, but dismissed the case for want of jurisdiction because the judg-

1. Petitioner's state objection was made under *People v. Wheeler*, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978).

2. In reaching this holding, the Court of Appeal rejected the notion that a showing of a "'strong likelihood'" is equivalent to a "'reasonable inference.'" To conclude so would "be as novel a proposition as the idea that 'clear and convincing evidence' has always meant a 'preponderance of the evidence.'" 105 Cal.Rptr.2d, at 733.

3. In dissent, Justice Kennard argued that "[r]equiring a defendant to persuade the trial court of the prosecutor's discriminatory purpose at the first *Wheeler-Batson* stage short-circuits the process, and provides inadequate protection for the defendant's right to a fair trial ...." 30 Cal.4th, at 1333, 1 Cal.Rptr.3d 1, 71 P.3d, at 291. The proper standard for measuring a prima facie case under *Batson* is whether the defendant has identified actions by the prosecutor that, "*if unexplained*, permit a reasonable inference of an improper purpose or motive." 30 Cal.4th, at 1339, 1 Cal. Rptr.3d 1, 71 P.3d, at 294. Trial judges, Justice Kennard argued, should not speculate when it is not "apparent that the [neutral] explanation was the true reason for the challenge." *Id.*, at 1340, 1 Cal.Rptr.3d 1, 71 P.3d, at 295.

ment was not yet final. *Johnson v. California*, 541 U.S. 428, 124 S.Ct. 1833, 158 L.Ed.2d 696 (2004) (per curiam). After the California Court of Appeal decided the remaining issues, we again granted certiorari. 543 U.S. ——, 125 S.Ct. 824, 160 L.Ed.2d 610 (2005).

II

[2] The issue in this case is narrow but important. It concerns the scope of the first of three steps this Court enumerated in *Batson*, which together guide trial courts' constitutional review of peremptory strikes. Those three *Batson* steps should by now be familiar. First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." 476 U.S., at 93–94, 106 S.Ct. 1712 (citing *Washington v. Davis*, 426 U.S. 229, 239–242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)).[4] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. 476 U.S., at 94, 106 S.Ct. 1712; see also *Alexander v. Louisiana*, 405 U.S. 625, 632, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination." *Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) *(per curiam)*.

[3] 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.

[4] We begin with *Batson* itself, which on its own terms provides no support for California's rule. There, we held that a prima facie case of discrimination can be made out by offering a wide variety of evidence,[5] so long as the sum of the proffered facts gives "rise to an inference of discriminatory purpose." 476 U.S., at 94, 106 S.Ct. 1712. We explained that

> "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a 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 relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id.*, at 96, 106 S.Ct. 1712 (citations omitted) (quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 97 L.Ed. 1244 (1953)).

Indeed, *Batson* held that because the petitioner had timely objected to the prosecutor's decision to strike "all black persons on the venire," the trial court was in error when it "flatly rejected the objection without requiring the prosecutor to give an explanation for his action." 476 U.S., at 100, 106 S.Ct. 1712. We did not hold that the petitioner had proved discrimination. Rather, we remanded the case for further proceedings because the trial court failed to demand an explanation from the prosecutor—*i.e.*, to proceed to *Batson's* second step—despite the fact that the petitioner's evidence supported *an inference* of discrimination. *Ibid.*

[5] Thus, in describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated. We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

Respondent, however, focuses on *Batson's* ultimate sentence: "If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed." *Ibid.* For this to be true, respondent contends, a *Batson* claim must prove the ultimate facts by a preponderance of the evidence in the prima facie case; otherwise, the argument goes, a prosecutor's failure to respond to a prima facie case would inexplicably entitle a defendant to judgment as a matter of law on the basis of nothing more than an inference that discrimination may have occurred. Brief for Respondent 13–18.

[6] Respondent's argument is misguided. *Batson*, of course, explicitly stated that the defendant ultimately carries the "burden of persuasion" to " 'prove the existence of purposeful discrimination.' " 476 U.S., at 93, 106 S.Ct. 1712 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967)). This burden of persuasion "rests with, and never shifts from, the opponent of the strike." *Purkett*, 514 U.S., at 768, 115 S.Ct. 1769. Thus, even if the State produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three. *Ibid.*[6] The first two *Batson* steps govern the production of

4. An "inference" is generally understood to be a "conclusion reached by considering other facts and deducing a logical consequence from them." Black's Law Dictionary 781 (7th ed.1999).

5. In *Batson*, we spoke of the methods by which prima facie cases could be proved in permissive terms. A defendant may satisfy his prima facie burden, we said, "by relying solely on the facts concerning [the selection of the venire] *in his case*." 476 U.S., at 95, 106 S.Ct. 1712 (emphasis in original). We declined to require proof of a pattern or practice because " '[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.' " *Ibid.* (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, n. 14, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)).

6. In the unlikely hypothetical in which the prosecutor declines to respond to a trial judge's inquiry regarding his justification for making a strike, the evidence before the judge would consist not only of the original facts from which the prima facie case was established, but also the prosecutor's refusal to justify his strike in light of the court's request. Such a refusal would provide additional support for the inference of discrimination raised

evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim. "It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Purkett, supra,* at 768, 115 S.Ct. 1769.[7]

Batson's purposes further support our conclusion. The constitutional interests *Batson* sought to vindicate are not limited to the rights possessed by the defendant on trial, see 476 U.S., at 87, 106 S.Ct. 1712, nor to those citizens who desire to participate "in the administration of the law, as jurors," *Strauder v. West Virginia,* 100 U.S. 303, 308, 25 L.Ed. 664 (1880). Undoubtedly, the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race. Yet 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,* 476 U.S., at 87, 106 S.Ct. 1712; see also *Smith v. Texas,* 311 U.S. 128, 130, 61 S.Ct. 164, 85 L.Ed. 84 (1940) ("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 it but it is at war with our basic concepts of a democratic society and a representative government" (footnote omitted)).

The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. See 476 U.S., at 97–98, and n. 20, 106 S.Ct. 1712. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. See *Paulino v. Castro,* 371 F.3d 1083, 1090 (C.A.9 2004) ("[I]t does not matter that the prosecutor might have had good reasons ... [w]hat matters is the real reason they were stricken" (emphasis deleted)); *Holloway v. Horn,* 355 F.3d 707, 725 (C.A.3 2004) (speculation "does not aid our inquiry into the reasons the prosecutor actually harbored" for a peremptory strike). The three-step process thus simultaneously serves the public purposes *Batson* is designed to vindicate and encourages "prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process."

by a defendant's prima facie case. Cf. *United States ex rel. Vajtauer v. Commissioner of Immigration,* 273 U.S. 103, 111, 47 S.Ct. 302, 71 L.Ed. 560 (1927).

7. This explanation comports with our interpretation of the burden-shifting framework in cases arising under Title VII of the Civil Rights Act of 1964. See, *e.g., Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) (noting that the *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), framework "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination"); see also *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 509–510, and n. 3, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) (holding that determinations at steps one and two of the *McDonnell Douglas* framework "can involve no credibility assessment" because "the burden-of-production determination necessarily *precedes* the credibility-assessment stage," and that the burden-shifting framework triggered by a defendant's prima face case is essentially just "a means of 'arranging the presentation of evidence' ") (quoting *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 986, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)).

Hernandez v. New York, 500 U.S. 352, 358–359, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (opinion of KENNEDY, J.).

The disagreements among the state-court judges who reviewed the record in this case illustrate the imprecision of relying on judicial speculation to resolve plausible claims of discrimination. In this case the inference of discrimination was sufficient to invoke a comment by the trial judge "that 'we are very close,' " and on review, the California Supreme acknowledged that "it certainly looks suspicious that all three African–American prospective jurors were removed from the jury." 30 Cal.4th, at 1307, 1326, 1 Cal.Rptr.3d 1, 71 P.3d, at 273, 286. Those inferences that discrimination may have occurred were sufficient to establish a prima facie case under *Batson.*

The facts of this case well illustrate that California's "more likely than not" standard is at odds with the prima facie inquiry mandated by *Batson.* The judgment of the California Supreme Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered

Justice BREYER, concurring.

I join the Court's opinion while maintaining here the views I set forth in my concurring opinion in *Miller–El v. Dretke, ante,*— U.S. ——, 125 S.Ct. 2317, —— L.Ed.2d ——, 2005 WL 1383365 (2005).

Justice THOMAS, dissenting.

The Court says that States "have flexibility in formulating appropriate procedures to comply with *Batson* [*v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)]," *ante,* at 2416, but it then tells California how to comply with "the prima facie inquiry mandated by *Batson,*" *ante,* at 2419. In *Batson* itself, this Court disclaimed any intent to instruct state courts on how to implement its holding. 476 U.S., at 99, 106 S.Ct. 1712 ("We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges"); *id.,* at 99–100, n. 24, 106 S.Ct. 1712. According to *Batson,* the Equal Protection Clause requires that prosecutors select juries based on factors other than race—not that litigants bear particular burdens of proof or persuasion. Because *Batson's* burden-shifting approach is "a prophylactic framework" that polices racially discriminatory jury selection rather than "an independent constitutional command," *Pennsylvania v. Finley,* 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), States have "wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy," *Smith v. Robbins,* 528 U.S. 259, 273, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); *Dickerson v. United States,* 530 U.S. 428, 438–439, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). California's procedure falls comfortably within its broad discretion to craft its own rules of criminal procedure, and I therefore respectfully dissent.

AMERICAN TRUCKING ASSOCIATIONS, INC. and USF Holland, Inc., Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION et al.

No. 03–1230.

Argued April 26, 2005.

Decided June 20, 2005.

***Purkett v. Elem* (1994) 514 U.S. 765**

Syllabus

PURKETT, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER *v.* ELEM

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 94–802. Decided May 15, 1995

Relying on *Batson* v. *Kentucky*, 476 U. S. 79, respondent objected to a prosecutor's use of a peremptory challenge to strike, *inter alios*, a black male juror from the jury at his robbery trial. The Missouri trial court overruled the objection after the prosecutor explained that he struck the juror because of the juror's long, unkempt hair, his moustache, and his beard. The jury was empaneled, and respondent was convicted. On direct appeal, the State Court of Appeals affirmed the *Batson* ruling, concluding that the prosecution had not engaged in purposeful discrimination. In denying respondent's subsequent petition for habeas corpus, the Federal District Court concluded that the state courts' purposeful discrimination determination was a factual finding entitled to a presumption of correctness and that the finding had support in the record. The Court of Appeals reversed, holding that the prosecution's explanation for striking the juror was pretextual and that the trial court had clearly erred in finding no intentional discrimination.

Held: The Court of Appeals erred in its evaluation of respondent's *Batson* claim. Under *Batson*, once the opponent of a peremptory challenge has made out a prima facie racial discrimination case (step one), the proponent of the strike must come forward with a race-neutral explanation (step two). If such an explanation is given, the trial court must decide (step three) whether the opponent has proved purposeful racial discrimination. Step two requires only that the prosecution provide a race-neutral justification for the exclusion, not that the prosecution show that the justification is plausible. The prosecutor's explanation in this case satisfied step two, and the state court found that the prosecutor was not motivated by discriminatory intent. In federal habeas proceedings, a state court's factual findings are presumed to be correct if they are fairly supported by the record. The Court of Appeals erred by combining the second and third steps. In doing so, the court did not conclude or even attempt to conclude that the state court's finding of no racial motive was not supported by the record, for its whole focus was upon the motive's *reasonableness* rather than its *genuineness*.

Certiorari granted; 25 F. 3d 679, reversed and remanded.

PER CURIAM.

Respondent was convicted of second-degree robbery in a Missouri court. During jury selection, he objected to the prosecutor's use of peremptory challenges to strike two black men from the jury panel, an objection arguably based on *Batson* v. *Kentucky*, 476 U. S. 79 (1986). The prosecutor explained his strikes:

> "I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. Those are the only two people on the jury . . . with the facial hair . . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me." App. to Pet. for Cert. A–41.

The prosecutor further explained that he feared that juror number 24, who had had a sawed-off shotgun pointed at him during a supermarket robbery, would believe that "to have a robbery you have to have a gun, and there is no gun in this case." *Ibid.*

The state trial court, without explanation, overruled respondent's objection and empaneled the jury. On direct appeal, respondent renewed his *Batson* claim. The Missouri Court of Appeals affirmed, finding that the "state's explanation constituted a legitimate 'hunch'" and that "[t]he circumstances fail[ed] to raise the necessary inference of racial discrimination." *State* v. *Elem*, 747 S. W. 2d 772, 775 (Mo. App. 1988).

Respondent then filed a petition for habeas corpus under 28 U. S. C. § 2254, asserting this and other claims. Adopting the Magistrate Judge's report and recommendation, the Dis-

trict Court concluded that the Missouri courts' determination that there had been no purposeful discrimination was a factual finding entitled to a presumption of correctness under § 2254(d). Since the finding had support in the record, the District Court denied respondent's claim.

The Court of Appeals for the Eighth Circuit reversed and remanded with instructions to grant the writ of habeas corpus. It said:

> "[W]here the prosecution strikes a prospective juror who is a member of the defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror. In the present case, the prosecutor's comments, 'I don't like the way [he] look[s], with the way the hair is cut. . . . And the mustach[e] and the bear[d] look suspicious to me,' do not constitute such legitimate race-neutral reasons for striking juror 22." 25 F. 3d 679, 683 (1994).

It concluded that the "prosecution's explanation for striking juror 22 . . . was pretextual," and that the state trial court had "clearly erred" in finding that striking juror number 22 had not been intentional discrimination. *Id.*, at 684.

Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. *Hernandez* v. *New York*, 500 U. S. 352, 358–359 (1991) (plurality opinion); *id.*, at 375 (O'CONNOR, J., concurring in judgment); *Batson*, *supra*, at 96–98. The

second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] 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." *Hernandez*, 500 U. S., at 360 (plurality opinion); *id.*, at 374 (O'CONNOR, J., concurring in judgment).

The Court of Appeals erred by combining *Batson*'s second and third steps into one, requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, *i. e.*, a "plausible" basis for believing that "the person's ability to perform his or her duties as a juror" will be affected. 25 F. 3d, at 683. It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. *Batson*, *supra*, at 98; *Hernandez*, *supra*, at 359 (plurality opinion). At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step three is quite different from saying that a trial judge *must terminate* the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. Cf. *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 511 (1993).

The Court of Appeals appears to have seized on our admonition in *Batson* that to rebut a prima facie case, the proponent of a strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," *Batson*, *supra*, at 98, n. 20 (quoting *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 258 (1981)), and that the reason must be "related to the particular case

to be tried," 476 U. S., at 98. See 25 F. 3d, at 682, 683. This warning was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith. 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; cf. *Burdine, supra,* at 255 ("The explanation provided must be legally sufficient to justify a judgment for the defendant").

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.

In habeas proceedings in federal courts, the factual findings of state courts are presumed to be correct, and may be set aside, absent procedural error, only if they are "not fairly supported by the record." 28 U. S. C. § 2254(d)(8). See *Marshall* v. *Lonberger,* 459 U. S. 422, 432 (1983). Here the Court of Appeals did not conclude or even attempt to conclude that the state court's finding of no racial motive was not fairly supported by the record. For its whole focus was upon the *reasonableness* of the asserted nonracial motive (which it thought required by step two) rather than the *genuineness* of the motive. It gave no proper basis for overturning the state court's finding of no racial motive, a finding which turned primarily on an assessment of credibility, see *Batson,* 476 U. S., at 98, n. 21. Cf. *Marshall, supra,* at 434.

Accordingly, respondent's motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are

granted. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

In my opinion it is unwise for the Court to announce a law-changing decision without first ordering full briefing and argument on the merits of the case. The Court does this today when it overrules a portion of our opinion in *Batson* v. *Kentucky*, 476 U. S. 79 (1986).[1]

In *Batson*, the Court held that the Equal Protection Clause of the Fourteenth Amendment forbids a prosecutor to use peremptory challenges to exclude African-Americans from jury service because of their race. The Court articulated a three-step process for proving such violations. First, a pattern of peremptory challenges of black jurors may establish a prima facie case of discriminatory purpose. Second, the prosecutor may rebut that prima face case by tendering a race-neutral explanation for the strikes. Third, the court must decide whether that explanation is pretextual. *Id.*, at 96–98. At the second step of this inquiry, neither a mere denial of improper motive nor an incredible explanation will suffice to rebut the prima facie showing of discriminatory purpose. At a minimum, as the Court held in *Batson*, the prosecutor "must articulate a neutral explanation related to the particular case to be tried." *Id.*, at 98.[2]

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[1] This is the second time this Term that the Court has misused its summary reversal authority in this way. See *Duncan* v. *Henry*, 513 U. S. 364, 367 (1995) (STEVENS, J., dissenting).

[2] We explained: "Nor may the prosecutor rebut the defendant's case merely by 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. 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*, [294 U. S. 587, 598

Today the Court holds that it did not mean what it said in *Batson*. Moreover, the Court resolves a novel procedural question without even recognizing its importance to the unusual facts of this case.

I

In the Missouri trial court, the judge rejected the defendant's *Batson* objection to the prosecutor's peremptory challenges of two jurors, juror number 22 and juror number 24, on the ground that the defendant had not made out a prima facie case of discrimination. Accordingly, because the defendant had failed at the first step of the *Batson* inquiry, the judge saw no need even to confirm the defendant's assertion that jurors 22 and 24 were black;[3] nor did the judge require the prosecutor to explain his challenges. The prosecutor nevertheless did volunteer an explanation,[4] but the judge evaluated neither its credibility nor its sufficiency.

(1935)]. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Batson* v. *Kentucky*, 476 U. S., at 97–98 (footnotes omitted).

[3] The following exchange took place between the defense attorney and the trial judge:

"MR. GOULET: Mr. Larner stated that the reason he struck was because of facial hair and long hair as prejudicial. Number twenty-four, Mr. William Hunt, was a victim in a robbery and he stated that he could give a fair and impartial hearing. To make this a proper record if the Court would like to call up these two individuals to ask them if they are black or will the Court take judicial notice that they are black individuals?

"THE COURT: I am not going to do that, no, sir." App. to Pet. for Cert. A–42.

[4] The prosecutor stated:

"I struck number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and a goatee type beard. Those are the only two people on the jury, numbers twenty-two and twenty-four with facial hair of any

The Missouri Court of Appeals affirmed, relying partly on the ground that the use of one-third of the prosecutor's peremptories to strike black veniremen did not require an explanation, *State* v. *Elem*, 747 S. W. 2d 772, 774 (1988), and partly on the ground that if any rebuttal was necessary then the volunteered "explanation constituted a legitimate 'hunch,'" *id.*, at 775. The court thus relied, alternatively, on steps one and two of the *Batson* analysis without reaching the question whether the prosecutor's explanation might have been pretextual under step three.

The Federal District Court accepted a Magistrate's recommendation to deny petitioner's petition for habeas corpus without conducting a hearing. The Magistrate had reasoned that state-court findings on the issue of purposeful discrimination are entitled to deference. App. to Pet. for Cert. A–27. Even though the trial court had made no such findings, the Magistrate treated the statement by the Missouri Court of Appeals that the prosecutor's reasons "constituted a legitimate 'hunch'" as a finding of fact that was supported by the record.[5] When the case reached the United States Court of Appeals for the Eighth Circuit, the parties apparently assumed that petitioner had satisfied the first step of the *Batson* analysis.[6] The disputed issue in the Court of

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kind of all the men and, of course, the women, those are the only two with the facial hair. And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me. And number twenty-four had been in a robbery in a supermarket with a sawed-off shotgun pointed at his face, and I didn't want him on the jury as this case does not involve a shotgun, and maybe he would feel to have a robbery you have to have a gun, and there is no gun in this case." *Id.*, at A–41.

[5] The Magistrate stated: "The Court of Appeals determined that the prosecutor's reasons for striking the men constituted a legitimate 'hunch' .... The record supports the Missouri Court of Appeals' finding of no purposeful discrimination." *Id.*, at A–27.

[6] In this Court, at least, the State does not deny that the prosecutor's pattern of challenges established a prima facie case of discrimination.

Appeals was whether the trial judge's contrary finding was academic because the prosecutor's volunteered statement satisfied step two and had not been refuted in step three.

The Court of Appeals agreed with the State that excluding juror 24 was not error because the prosecutor's concern about that juror's status as a former victim of a robbery was related to the case at hand. 25 F. 3d 679, 681, 682 (1994). The court did, however, find a *Batson* violation with respect to juror 22. In rejecting the prosecutor's "race-neutral" explanation for the strike, the Court of Appeals faithfully applied the standard that we articulated in *Batson:* The explanation was not "'*related to the particular case to be tried.*'" 25 F. 3d, at 683, quoting 476 U. S., at 98 (emphasis in Court of Appeals opinion).

Before applying the *Batson* test, the Court of Appeals noted that its analysis was consistent with both the Missouri Supreme Court's interpretation of *Batson* in *State* v. *Antwine*, 743 S. W. 2d 51 (1987) (en banc), and this Court's intervening opinion in *Hernandez* v. *New York*, 500 U. S. 352 (1991). 25 F. 3d, at 683. Referring to the second stage of the three-step analysis, the *Antwine* court had observed:

> "We do not believe, however, that *Batson* is satisfied by 'neutral explanations' which are no more than facially legitimate, reasonably specific and clear. Were facially neutral explanations sufficient without more, *Batson* would be meaningless. It would take little effort for prosecutors who are of such a mind to adopt rote 'neutral explanations' which bear facial legitimacy but conceal a discriminatory motive. We do not believe the Supreme Court intended a charade when it announced *Batson*." 743 S. W. 2d, at 65.

In *Hernandez*, this Court rejected a *Batson* claim stemming from a prosecutor's strikes of two Spanish-speaking Latino jurors. The prosecutor explained that he struck the jurors because he feared that they might not accept an inter-

preter's English translation of trial testimony given in Spanish. Because the prosecutor's explanation was directly related to the particular case to be tried, it satisfied the second prong of the *Batson* standard. Moreover, as the Court of Appeals noted, 25 F. 3d, at 683, the plurality opinion in *Hernandez* expressly observed that striking all venirepersons who speak a given language, "without regard to the particular circumstances of the trial," might constitute a pretext for racial discrimination. 500 U. S., at 371–372 (opinion of KENNEDY, J.).[7] Based on our precedent, the Court of Appeals was entirely correct to conclude that the peremptory strike of juror 22 violated *Batson* because the reason given was unrelated to the circumstances of the trial.[8]

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[7] True, the plurality opinion in *Hernandez* stated that explanations unrelated to the particular circumstances of the trial "may be found by the trial judge to be a pretext for racial discrimination," 500 U. S., at 372, and thus it specifically referred to the third step in the *Batson* v. *Kentucky*, 476 U. S. 79 (1986), analysis. Nevertheless, if this comment was intended to modify the *Batson* standard for determining the sufficiency of the prosecutor's response to a prima facie case, it was certainly an obtuse method of changing the law.

[8] In my opinion, it is disrespectful to the conscientious judges on the Court of Appeals who faithfully applied an unambiguous standard articulated in one of our opinions to say that they appear "to have seized on our admonition in *Batson* . . . that the reason must be 'related to the particular case to be tried,' 476 U. S., at 98." *Ante*, at 768–769. Of course, they "seized on" that point because *we told them to*. The Court of Appeals was following *Batson*'s clear mandate. To criticize those judges for doing their jobs is singularly inappropriate.

The Court of Appeals for the Eighth Circuit is not the only court to have taken our admonition in *Batson* seriously. Numerous courts have acted on the assumption that we meant what we said when we required the prosecutor's neutral explanation to be "related to the particular case to be tried." See, *e. g.*, *Jones* v. *Ryan*, 987 F. 2d 960, 974 (CA3 1993); *Ex parte Bird*, 594 So. 2d 676, 682–683 (Ala. 1991); *State* v. *Henderson*, 112 Ore. App. 451, 456, 829 P. 2d 1025, 1028 (1992); *Whitsey* v. *State*, 796 S. W. 2d 707, 713–716 (Tex. Crim. App. 1989); *Jackson* v. *Commonwealth*, 8 Va. App. 176, 186–187, 380 S. E. 2d 1, 6–7 (1989); *State* v. *Butler*, 731 S. W. 2d

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 768, 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. See *ante*, at 769; *Batson*, 476 U. S., at 98. It is not too much to ask that a prosecutor's explanation for his strikes be race neutral, reasonably specific, *and* trial related. Nothing less will serve to rebut the inference of race-based discrimination that arises when the defendant has made out a prima facie case. Cf. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 253 (1981). That, in any event, is what we decided in *Batson*.

II

The Court's peremptory disposition of this case overlooks a tricky procedural problem. Ordinarily, a federal appeals court reviewing a claim of *Batson* error in a habeas corpus proceeding must evaluate, with appropriate deference, the factual findings and legal conclusions of the state trial court. But in this case, the only finding the trial judge made was that the defendant had failed to establish a prima facie case. Everyone now agrees that finding was incorrect. The state trial judge, holding that the defendant had failed at step one,

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265, 271 (Mo. App. 1987); *Slappy* v. *State*, 503 So. 2d 350, 355 (Fla. App. 1987); *Walker* v. *State*, 611 So. 2d 1133, 1142 (Ala. Crim. App. 1992); *Huntley* v. *State*, 627 So. 2d 1011, 1012 (Ala. Crim. App. 1991). This Court today calls into question the reasoning of all of these decisions without even the courtesy of briefing and argument.

made no finding with respect to the sufficiency or credibility of the prosecutor's explanation at step two. The question, then, is whether the reviewing court should (1) go on to decide the second step of the *Batson* inquiry, (2) reverse and remand to the District Court for further proceedings, or (3) grant the writ conditioned on a proper step-two and (if necessary) step-three hearing in the state trial court. This Court's opinion today implicitly ratifies the Court of Appeals' decision to evaluate on its own whether the prosecutor had satisfied step two. I think that is the correct resolution of this procedural question, but it deserves more consideration than the Court has provided.

In many cases, a state trial court or a federal district court will be in a better position to evaluate the facts surrounding peremptory strikes than a federal appeals court. But I would favor a rule giving the appeals court discretion, based on the sufficiency of the record, to evaluate a prosecutor's explanation of his strikes. In this case, I think review is justified because the prosecutor volunteered reasons for the challenges. The Court of Appeals reasonably assumed that these were the same reasons the prosecutor would have given had the trial court required him to respond to the prima facie case. The Court of Appeals, in its discretion, could thus evaluate the explanations for their sufficiency. This presents a pure legal question, and nothing is gained by remand if the appeals court can resolve that question on the facts before it.

Assuming the Court of Appeals did not err in reaching step two, a new problem arises when that court (or, as in today's case, this Court) conducts the step-two inquiry and decides that the prosecutor's explanation was sufficient. Who may evaluate whether the prosecutor's explanation was pretextual under step three of *Batson?* Again, I think the question whether the Court of Appeals decides, or whether it refers the question to a trial court, should depend on the state of the record before the Court of Appeals. Whatever

procedure is contemplated, however, I think even this Court would acknowledge that some implausible, fantastic, and silly explanations could be found to be pretextual without any further evidence. Indeed, in *Hernandez* the Court explained that a trial judge could find pretext based on nothing more than a consistent policy of excluding all Spanish-speaking jurors if that characteristic was entirely unrelated to the case to be tried. 500 U. S., at 371–372 (plurality opinion of KENNEDY, J.). Parallel reasoning would justify a finding of pretext based on a policy of excusing jurors with beards if beards have nothing to do with the pending case.

In some cases, conceivably the length and unkempt character of a juror's hair and goatee type beard might give rise to a concern that he is a nonconformist who might not be a good juror. In this case, however, the prosecutor did not identify any such concern. He merely said he did not "'like the way [the juror] looked,'" that the facial hair "'look[ed] suspicious.'" *Ante*, at 766. I think this explanation may well be pretextual as a matter of law; it has nothing to do with the case at hand, and it is just as evasive as "I had a hunch." Unless a reviewing court may evaluate such explanations when a trial judge fails to find that a prima facie case has been established, appellate or collateral review of *Batson* claims will amount to nothing more than the meaningless charade that the Missouri Supreme Court correctly understood *Batson* to disfavor. *Antwine*, 743 S. W. 2d, at 65.

In my opinion, preoccupation with the niceties of a three-step analysis should not foreclose meaningful judicial review of prosecutorial explanations that are entirely unrelated to the case to be tried. I would adhere to the *Batson* rule that such an explanation does not satisfy step two. Alternatively, I would hold that, in the absence of an explicit trial court finding on the issue, a reviewing court may hold that such an explanation is pretextual as a matter of law. The Court's unnecessary tolerance of silly, fantastic, and implausible explanations, together with its assumption that there is

a difference of constitutional magnitude between a statement that "I had a hunch about this juror based on his appearance," and "I challenged this juror because he had a mustache," demeans the importance of the values vindicated by our decision in *Batson*.

I respectfully dissent.

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

HERNANDEZ *v.* NEW YORK

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 89-7645. Argued February 25, 1991—Decided May 28, 1991

Counsel for petitioner Hernandez at his New York trial objected that the prosecutor had used four peremptory challenges to exclude Latino potential jurors. Two of the jurors had brothers who had been convicted of crimes, and petitioner no longer presses his objection to exclusion of those individuals. The ethnicity of one of the other two jurors was uncertain. Without waiting for a ruling on whether Hernandez had established a prima facie case of discrimination under *Batson* v. *Kentucky*, 476 U. S. 79, the prosecutor volunteered that he had struck these two jurors, who were both bilingual, because he was uncertain that they would be able to listen and follow the interpreter. He explained that they had looked away from him and hesitated before responding to his inquiry whether they would accept the translator as the final arbiter of the witnesses' responses; that he did not know which jurors were Latinos; and that he had no motive to exclude Latinos from the jury, since the complainants and all of his civilian witnesses were Latinos. The court rejected Hernandez's claim, and its decision was affirmed by the state appellate courts.

Held: The judgment is affirmed.

75 N. Y. 2d 350, 552 N. E. 2d 621, affirmed.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SOUTER, announced the judgment of the Court, concluding that the prosecutor did not use peremptory challenges in a manner violating the Equal Protection Clause. Under *Batson*'s three-step process for evaluating an objection to peremptory challenges, (1) a defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race, (2) the burden then shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question, and (3) the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. Pp. 358–372.

(a) Since the prosecutor offered an explanation for the peremptory challenges and the trial court ruled on the ultimate question of intentional discrimination, the preliminary issue whether Hernandez made a prima facie showing of discrimination is moot. Cf. *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 715. P. 359.

(b) The prosecutor offered a race-neutral basis for his peremptory strikes. The issue here is the facial validity of the prosecutor's explanation, which must be based on something other than race. While the prosecutor's criterion for exclusion—whether jurors might have difficulty in accepting the translator's rendition of Spanish-language testimony—might have resulted in the disproportionate removal of prospective Latino jurors, it is proof of racially discriminatory intent or purpose that is required to show a violation of the Equal Protection Clause. See *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265. This Court need not address Hernandez's argument that Spanish-speaking ability bears such a close relation to ethnicity that exercising a peremptory challenge on the former ground violates equal protection, since the prosecutor explained that the jurors' specific responses and demeanor, and not their language proficiency alone, caused him to doubt their ability to defer to the official translation. That a high percentage of bilingual jurors might hesitate before answering questions like those asked here and, thus, would be excluded under the prosecutor's criterion would not cause the criterion to fail the race-neutrality test. The reason offered by the prosecutor need not rise to the level of a challenge for cause, but the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character. Pp. 359–363.

(c) The trial court did not commit clear error in determining that the prosecutor did not discriminate on the basis of the Latino jurors' ethnicity. A trial court should give appropriate weight to the disparate impact of the prosecutor's criterion in determining whether the prosecutor acted with a forbidden intent, even though that factor is not conclusive in the preliminary race-neutrality inquiry. Here, the court chose to believe the prosecutor's explanation and reject Hernandez's assertion that the reasons were pretextual. That decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal, regardless of whether it is a state-court decision and whether it relates to a constitutional issue. See, *e. g.*, *324 Liquor Corp.* v. *Duffy*, 479 U. S. 335, 351. Deference makes particular sense in this context because the finding will largely turn on an evaluation of credibility. Hernandez's argument that there should be "independent" appellate review of a state trial court's denial of a *Batson* claim is rejected. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, *Miller* v. *Fenton*, 474 U. S. 104, *Norris* v. *Alabama*, 294 U. S. 587, distinguished. Here, the court took a permissible view of the evidence in crediting the prosecutor's explanation. Apart from the prosecutor's demeanor, the court could have relied on the facts that he defended his use of peremptory challenges without being asked to do so by

In this case, the prosecutor's asserted justification for striking certain Hispanic jurors was his uncertainty about the jurors' ability to accept the official translation of trial testimony. App. 3–4. If this truly was the purpose of the strikes, they were not strikes because of race, and therefore did not violate the Equal Protection Clause under *Batson*. They may have acted like strikes based on race, but they were *not* based on race. No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race. That is the distinction between disproportionate effect, which is not sufficient to constitute an equal protection violation, and intentional discrimination, which is.

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*, at 93. 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. *Batson* does not require that a prosecutor justify a jury strike at the level of a for-cause challenge. It also does not require that the justification be unrelated to race. *Batson* requires only that the prosecutor's reason for striking a juror not *be* the juror's race.

JUSTICE BLACKMUN, dissenting.

I dissent, essentially for the reasons stated by JUSTICE STEVENS in Part II of his opinion, *post*, at 378–379.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

A violation of the Equal Protection Clause requires what our cases characterize as proof of "discriminatory purpose." By definition, however, a prima facie case is one that is established by the requisite proof of invidious intent. Unless

supra, at 89 (emphasis added). See also *Powers* v. *Ohio*, 499 U. S. 400, 409 (1991) ("[T]he Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race"). *Batson*'s requirement of a race-neutral explanation means an explanation other than race.

In *Washington* v. *Davis*, *supra*, we outlined the dangers of a rule that would allow an equal protection violation on a finding of mere disproportionate effect. Such a rule would give rise to an unending stream of constitutional challenges:

> "A rule that [state action] designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Id.*, at 248.

In the same way, a rule that disproportionate effect might be sufficient for an equal protection violation in the use of peremptory strikes runs the serious risk of turning *voir dire* into a full-blown disparate impact trial, with statistical evidence and expert testimony on the discriminatory effect of any particular nonracial classification. In addition to creating unacceptable delays in the trial process, such a practice would be antithetical to the nature and purpose of the peremptory challenge. Absent intentional discrimination violative of the Equal Protection Clause, parties should be free to exercise their peremptory strikes for any reason, or no reason at all. The peremptory challenge is, "as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." *Lewis* v. *United States*, 146 U. S. 370, 378 (1892) (internal quotation marks omitted).

motivated by discriminatory intent; the disproportionate effects of state action are not sufficient to establish such a violation. In *Washington* v. *Davis*, 426 U. S. 229, 239 (1976), we explained that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." "[A] defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'" *McCleskey* v. *Kemp*, 481 U. S. 279, 292 (1987). See also *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265 (1977); *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, 198 (1973); *Wright* v. *Rockefeller*, 376 U. S. 52, 56–57 (1964).

We have recognized the discriminatory intent requirement explicitly in the context of jury selection. Thus, "[a] purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." *Akins* v. *Texas*, 325 U. S. 398, 403–404 (1945). See also *Alexander* v. *Louisiana*, 405 U. S. 625, 628–629 (1972); *Whitus* v. *Georgia*, 385 U. S. 545, 549–550 (1967); *Norris* v. *Alabama*, 294 U. S. 587, 589 (1935); *Neal* v. *Delaware*, 103 U. S. 370, 394 (1881). The point was made clearly in *Batson* itself: "As in any equal protection case, the 'burden is, of course,' on the defendant who alleges discriminatory selection . . . 'to prove the existence of purposeful discrimination.'" 476 U. S., at 93, quoting *Whitus*, *supra*, at 550.

Consistent with our established equal protection jurisprudence, a peremptory strike will constitute a *Batson* violation only if the prosecutor struck a juror *because of the juror's race*. "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors *solely on account of their race* or on the assumption that *[Hispanic] jurors as a group* will be unable impartially to consider the State's case." *Batson*,

without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination. But that case is not before us.

III

We find no error in the application by the New York courts of the three-step *Batson* analysis. The standard inquiry into the objecting party's prima facie case was unnecessary given the course of proceedings in the trial court. The state courts came to the proper conclusion that the prosecutor offered a race-neutral basis for his exercise of peremptory challenges. The trial court did not commit clear error in choosing to believe the reasons given by the prosecutor.

Affirmed.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA joins, concurring in the judgment.

I agree with the plurality that we review for clear error the trial court's finding as to discriminatory intent, and agree with its analysis of this issue. I agree also that the finding of no discriminatory intent was not clearly erroneous in this case. I write separately because I believe that the plurality opinion goes further than it needs to in assessing the constitutionality of the prosecutor's asserted justification for his peremptory strikes.

Upon resolution of the factfinding questions, this case is straightforward. Hernandez asserts an equal protection violation under the rule of *Batson* v. *Kentucky*, 476 U. S. 79 (1986). In order to demonstrate such a violation, Hernandez must prove that the prosecutor intentionally discriminated against Hispanic jurors on the basis of their race. The trial court found that the prosecutor did not have such intent, and that determination is not clearly erroneous. Hernandez has failed to meet his burden.

An unwavering line of cases from this Court holds that a violation of the Equal Protection Clause requires state action

opment: A Theoretical Framework, 6 J. Multilingual & Multicultural Development 325, 326–327 (1985).

Our decision today does not imply that exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases. It is a harsh paradox that one may become proficient enough in English to participate in trial, see, *e. g.*, 28 U. S. C. §§1865(b)(2), (3) (English-language ability required for federal jury service), only to encounter disqualification because he knows a second language as well. As the Court observed in a somewhat related context: "Mere knowledge of [a foreign] language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable." *Meyer* v. *Nebraska*, 262 U. S. 390, 400 (1923).

Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. 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. We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. 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. Cf. *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500 (1926) (law prohibiting keeping business records in other than specified languages violated equal protection rights of Chinese businessmen); *Meyer* v. *Nebraska*, *supra* (striking down law prohibiting grade schools from teaching languages other than English). And, as we make clear, a policy of striking all who speak a given language,

jurors were Latinos, and that the ethnicity of the victims and prosecution witnesses tended to undercut any motive to exclude Latinos from the jury. Any of these factors could be taken as evidence of the prosecutor's sincerity. The trial court, moreover, could rely on the fact that only three challenged jurors can with confidence be identified as Latinos, and that the prosecutor had a verifiable and legitimate explanation for two of those challenges. Given these factors, that the prosecutor also excluded one or two Latino venirepersons on the basis of a subjective criterion having a disproportionate impact on Latinos does not leave us with a "definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, *supra*, at 395.

D

Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. Bilinguals, in a sense, inhabit two communities, and serve to bring them closer. Indeed, some scholarly comment suggests that people proficient in two languages may not at times think in one language to the exclusion of the other. The analogy is that of a high-hurdler, who combines the ability to sprint and to jump to accomplish a third feat with characteristics of its own, rather than two separate functions. Grosjean, The Bilingual as a Competent but Specific Speaker-Hearer, 6 J. Multilingual & Multicultural Development 467 (1985). This is not to say that the cognitive processes and reactions of those who speak two languages are susceptible of easy generalization, for even the term "bilingual" does not describe a uniform category. It is a simple word for a more complex phenomenon with many distinct categories and subdivisions. Sánchez, Our Linguistic and Social Context, in Spanish in the United States 9, 12 (J. Amastae & L. Elías-Olivares eds. 1982); Dodson, Second Language Acquisition and Bilingual Devel-

Other cases in the *Norris* line also express our respect for factual findings made by state courts. See *Whitus*, *supra*, at 550; *Pierre*, *supra*, at 358.

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*, at 499, to conduct a more searching review of findings made in state trial court than we conduct with respect to federal district court findings. As a general matter, we think the *Norris* line of cases reconcilable with this clear error standard of review. In those cases, the evidence was such that a "reviewing court on the entire evidence [would be] left with the definite and firm conviction that a mistake ha[d] been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948). For instance, in *Norris* itself, uncontradicted testimony showed that "no negro had served on any grand or petit jury in [Jackson County, Alabama,] within the memory of witnesses who had lived there all their lives." 294 U. S., at 591; see also *Avery* v. *Georgia*, *supra*, at 560–561; *Patton* v. *Mississippi*, *supra*, at 466; *Smith* v. *Texas*, *supra*, at 131. In circumstances such as those, a finding of no discrimination was simply too incredible to be accepted by this Court.

We discern no clear error in the state trial court's determination that the prosecutor did not discriminate on the basis of the ethnicity of Latino jurors. We have said that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson* v. *Bessemer City*, 470 U. S. 564, 574 (1985). The trial court took a permissible view of the evidence in crediting the prosecutor's explanation. Apart from the prosecutor's demeanor, which of course we have no opportunity to review, the court could have relied on the facts that the prosecutor defended his use of peremptory challenges without being asked to do so by the judge, that he did not know which

right may be assured," *id.*, at 590, or to "make independent inquiry and determination of the disputed facts," *Pierre* v. *Louisiana*, 306 U. S. 354, 358 (1939). See, *e. g.*, *Whitus* v. *Georgia*, 385 U. S. 545, 550 (1967); *Avery* v. *Georgia*, 345 U. S. 559, 561 (1953); *Patton* v. *Mississippi*, 332 U. S. 463, 466 (1947); *Smith* v. *Texas*, 311 U. S. 128, 130 (1940). The review provided for in those cases, however, leaves room for deference to state-court factual determinations, in particular on issues of credibility. For instance, in *Akins* v. *Texas*, 325 U. S. 398 (1945), we said:

> "[T]he transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of Negroes on the grand jury. Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a federal constitutional right has been denied, expressly or in substance and effect, *Norris* v. *Alabama*, 294 U. S. 587, 589–90; *Smith* v. *Texas*, 311 U. S. 128, 130, we accord in that examination great respect to the conclusions of the state judiciary, *Pierre* v. *Louisiana*, 306 U. S. 354, 358. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process,' *Lisenba* v. *California*, 314 U. S. 219, 238, or equal protection. Cf. *Ashcraft* v. *Tennessee*, 322 U. S. 143, 152, 153; *Malinski* v. *New York*, 324 U. S. 401, 404." *Id.*, at 401–402.

clearly erroneous. Then, based on these facts, the appellate court independently determines whether there has been discrimination." Reply Brief for Petitioner 17. But if an appellate court accepts a trial court's finding that a prosecutor's race-neutral explanation for his peremptory challenges should be believed, we fail to see how the appellate court nevertheless could find discrimination. The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review.

Petitioner seeks support for his argument in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485 (1984), and *Miller* v. *Fenton*, *supra*. *Bose Corp.* dealt with review of a trial court's finding of "actual malice," a First Amendment precondition to liability in a defamation case, holding that an appellate court "must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." 466 U. S., at 514. *Miller* accorded similar treatment to a finding that a confession was voluntary. 474 U. S., at 110. Those cases have no relevance to the matter before us. They turn on the Court's determination that findings of voluntariness or actual malice involve legal, as well as factual, elements. See *Miller*, *supra*, at 115–117; *Bose Corp.*, *supra*, at 501–502; see also *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U. S. 657, 685 (1989) ("The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law"). Whether a prosecutor intended to discriminate on the basis of race in challenging potential jurors is, as *Batson* recognized, a question of historical fact.

Petitioner also looks to a line of this Court's decisions reviewing state-court challenges to jury selection procedures. Many of these cases, following *Norris* v. *Alabama*, 294 U. S. 587 (1935), have emphasized this Court's duty to "analyze the facts in order that the appropriate enforcement of the federal

ard should apply to review of findings in criminal cases on issues other than guilt. *Maine* v. *Taylor*, 477 U. S. 131, 145 (1986); *Campbell* v. *United States*, 373 U. S. 487, 493 (1963). See also 2 C. Wright, Federal Practice and Procedure § 374 (2d ed. 1982 and Supp. 1990). On federal habeas review of a state conviction, 28 U. S. C. § 2254(d) requires the federal courts to accord state-court factual findings a presumption of correctness.

This case comes to us on direct review of the state-court judgment. No statute or rule governs our review of facts found by state courts in cases with this posture. The reasons justifying a deferential standard of review in other contexts, however, apply with equal force to our review of a state trial court's findings of fact made in connection with a federal constitutional claim. Our cases have indicated that, in the absence of exceptional circumstances, we would defer to state-court factual findings, even when those findings relate to a constitutional issue. See *324 Liquor Corp.* v. *Duffy*, 479 U. S. 335, 351 (1987); *California Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 111–112 (1980); see also *Time, Inc.* v. *Firestone*, 424 U. S. 448, 463 (1976); *General Motors Corp.* v. *Washington*, 377 U. S. 436, 441–442 (1964) (quoting *Norton Co.* v. *Department of Revenue of Ill.*, 340 U. S. 534, 537–538 (1951)); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 68 (1963); *Lloyd A. Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160 (1952). Moreover, "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Miller* v. *Fenton*, *supra*, at 113 (citing *Dayton Bd. of Ed.* v. *Brinkman*, *supra*).

Petitioner advocates "independent" appellate review of a trial court's rejection of a *Batson* claim. We have difficulty understanding the nature of the review petitioner would have us conduct. Petitioner explains that "[i]ndependent review requires the appellate court to accept the findings of historical fact and credibility of the lower court unless they are

was not adopted out of racial animus); *Rogers* v. *Lodge*, 458 U. S. 613, 622–623 (1982) (clearly-erroneous standard applies to review of finding that at-large voting system was maintained for discriminatory purposes); *Dayton Bd. of Ed.* v. *Brinkman*, 443 U. S. 526, 534 (1979) (affirming Court of Appeals' conclusion that District Court's failure to find the intentional operation of a dual school system was clearly erroneous); *Akins* v. *Texas*, 325 U. S. 398, 401–402 (1945) (great respect accorded to findings of state court in discriminatory jury selection case); see also *Miller* v. *Fenton*, 474 U. S. 104, 113 (1985). As *Batson*'s citation to *Anderson* suggests, it also corresponds with our treatment of the intent inquiry under Title VII. See *Pullman-Standard* v. *Swint*, 456 U. S. 273, 293 (1982).

Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding "largely will turn on evaluation of credibility." 476 U. S., at 98, n. 21. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." *Wainwright* v. *Witt*, 469 U. S. 412, 428 (1985), citing *Patton* v. *Yount*, 467 U. S. 1025, 1038 (1984).

The precise formula used for review of factfindings, of course, depends on the context. *Anderson* was a federal civil case, and we there explained that a federal appellate court reviews the finding of a district court on the question of intent to discriminate under Federal Rule of Civil Procedure 52(a), which permits factual findings to be set aside only if clearly erroneous. While no comparable rule exists for federal criminal cases, we have held that the same stand-

population speaks fluent Spanish, and that many consider it their preferred language, the one chosen for personal communication, the one selected for speaking with the most precision and power, the one used to define the self.

The trial judge can consider these and other factors when deciding whether a prosecutor intended to discriminate. For example, though petitioner did not suggest the alternative to the trial court here, Spanish-speaking jurors could be permitted to advise the judge in a discreet way of any concerns with the translation during the course of trial. A prosecutor's persistence in the desire to exclude Spanish-speaking jurors despite this measure could be taken into account in determining whether to accept a race-neutral explanation for the challenge.

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:

> "In a recent Title VII sex discrimination case, we stated that 'a finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court. *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985). Since the trial judge's findings in the context under consideration here largely turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. *Id.*, at 575–576." *Batson, supra*, at 98, n. 21.

Batson's treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard, accords with our treatment of that issue in other equal protection cases. See *Hunter* v. *Underwood*, 471 U. S. 222, 229 (1985) (Court of Appeals correctly found that District Court committed clear error in concluding state constitutional provision

challenge for cause, *Batson*, 476 U. S., at 97, the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character.

C

Once the prosecutor offers a race-neutral basis for his exercise of peremptory challenges, "[t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination." *Id.*, at 98. While the disproportionate impact on Latinos resulting from the prosecutor's criterion for excluding these jurors does not answer the race-neutrality inquiry, it does have relevance to the trial court's decision on this question. "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another." *Washington* v. *Davis*, 426 U. S., at 242. If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination.

In the context of this trial, the prosecutor's frank admission that his ground for excusing these jurors related to their ability to speak and understand Spanish raised a plausible, though not a necessary, inference that language might be a pretext for what in fact were race-based peremptory challenges. This was not a case where by some rare coincidence a juror happened to speak the same language as a key witness, in a community where few others spoke that tongue. If it were, the explanation that the juror could have undue influence on jury deliberations might be accepted without concern that a racial generalization had come into play. But this trial took place in a community with a substantial Latino population, and petitioner and other interested parties were members of that ethnic group. It would be common knowledge in the locality that a significant percentage of the Latino

reason because "[a]ny honest bilingual juror would have answered the prosecutor in the exact same way." Brief for Petitioner 14. Petitioner asserts that a bilingual juror would hesitate in answering questions like those asked by the judge and prosecutor due to the difficulty of ignoring the actual Spanish-language testimony. In his view, no more can be expected than a commitment by a prospective juror to try to follow the interpreter's translation.

But even if we knew that a high percentage of bilingual jurors would hesitate in answering questions like these and, as a consequence, would be excluded under the prosecutor's criterion, that fact alone would not cause the criterion to fail the race-neutrality test. As will be discussed below, disparate impact should be given appropriate weight in determining whether the prosecutor acted with a forbidden intent, but it will not be conclusive in the preliminary race-neutrality step of the *Batson* inquiry. An argument relating to the impact of a classification does not alone show its purpose. See *Personnel Administrator of Mass.* v. *Feeney*, *supra*, at 279. Equal protection analysis turns on the intended consequences of government classifications. Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality. Nothing in the prosecutor's explanation shows that he chose to exclude jurors who hesitated in answering questions about following the interpreter *because* he wanted to prevent bilingual Latinos from serving on the jury.

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

The prosecutor here offered a race-neutral basis for these peremptory strikes. As explained by the prosecutor, the challenges rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals. The prosecutor's articulated basis for these challenges divided potential jurors into two classes: those whose conduct during *voir dire* would persuade him they might have difficulty in accepting the translator's rendition of Spanish-language testimony and those potential jurors who gave no such reason for doubt. Each category would include both Latinos and non-Latinos. While the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor's actions into a *per se* violation of the Equal Protection Clause.

Petitioner contends that despite the prosecutor's focus on the individual responses of these jurors, his reason for the peremptory strikes has the effect of a pure, language-based

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"DOROTHY KIM (JUROR NO. 8): Your Honor, is it proper to ask the interpreter a question? I'm uncertain about the word La Vado *[sic]*. You say that is a bar.

"THE COURT: The Court cannot permit jurors to ask questions directly. If you want to phrase your question to me—

"DOROTHY KIM: I understood it to be a restroom. I could better believe they would meet in a restroom rather than a public bar if he is undercover.

"THE COURT: These are matters for you to consider. If you have any misunderstanding of what the witness testified to, tell the Court now what you didn't understand and we'll place the—

"DOROTHY KIM: I understand the word La Vado *[sic]*—I thought it meant restroom. She translates it as bar.

"MS. IANZITI: In the first place, the jurors are not to listen to the Spanish but to the English. I am a certified court interpreter.

"DOROTHY KIM: You're an idiot." *Id.*, at 662.

Upon further questioning, "the witness indicated that none of the conversations in issue occurred in the restroom." *Id.*, at 663. The juror later explained that she had said "'it's an idiom'" rather than "'you're an idiot,'" but she was nevertheless dismissed from the jury. *Ibid.*

tionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265 (1977); see also *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279 (1979) (footnote and citation omitted); see also *McCleskey* v. *Kemp*, 481 U. S. 279, 297–299 (1987).

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.

Petitioner argues that Spanish-language ability bears a close relation to ethnicity, and that, as a consequence, it violates the Equal Protection Clause to exercise a peremptory challenge on the ground that a Latino potential juror speaks Spanish. He points to the high correlation between Spanish-language ability and ethnicity in New York, where the case was tried. We need not address that argument here, for the prosecutor did not rely on language ability without more, but explained that the specific responses and the demeanor of the two individuals during *voir dire* caused him to doubt their ability to defer to the official translation of Spanish-language testimony.[3]

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[3] Respondent cites *United States* v. *Perez*, 658 F. 2d 654 (CA9 1981), which illustrates the sort of problems that may arise where a juror fails to accept the official translation of foreign-language testimony. In *Perez*, the following interchange occurred:

neutral explanation for striking the jurors in question. *Id.*, at 97–98. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.*, at 98. This three-step inquiry delimits our consideration of the arguments raised by petitioner.

A

The prosecutor defended his use of peremptory strikes without any prompting or inquiry from the trial court. As a result, the trial court had no occasion to rule that petitioner had or had not made a prima facie showing of intentional discrimination. This departure from the normal course of proceeding need not concern us. We explained in the context of employment discrimination litigation under Title VII of the Civil Rights Act of 1964 that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 715 (1983). The same principle applies under *Batson*. Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.

B

Petitioner contends that the reasons given by the prosecutor for challenging the two bilingual jurors were not race neutral. In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law. A court addressing this issue must keep in mind the fundamental principle that "official action will not be held unconstitutional solely because it results in a racially dispropor-

After further interchange among the judge and attorneys, the trial court again rejected petitioner's claim. *Id.*, at 12.

On appeal, the New York Supreme Court, Appellate Division, noted that though the ethnicity of one challenged bilingual juror remained uncertain, the prosecutor had challenged the only three prospective jurors with definite Hispanic surnames. 140 App. Div. 2d 543, 528 N. Y. S. 2d 625 (1986). The court ruled that this fact made out a prima facie showing of discrimination. The court affirmed the trial court's rejection of petitioner's *Batson* claim, however, on the ground that the prosecutor had offered race-neutral explanations for the peremptory strikes sufficient to rebut petitioner's prima facie case.

The New York Court of Appeals also affirmed the judgment, holding that the prosecutor had offered a legitimate basis for challenging the individuals in question and deferring to the factual findings of the lower New York courts. 75 N. Y. 2d 350, 552 N. E. 2d 621 (1990). Two judges dissented, concluding that on this record, analyzed in the light of standards they would adopt as a matter of state constitutional law, the prosecutor's exclusion of the bilingual potential jurors should not have been permitted. We granted certiorari, 498 U. S. 894 (1990), and now affirm.

II

In *Batson*, we outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. 476 U. S., at 96–98. The analysis set forth in *Batson* permits prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. *Id.*, at 96–97. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-

> in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury." *Id.*, at 3–4.[1]

Defense counsel moved for a mistrial "based on the conduct of the District Attorney," and the prosecutor requested a chance to call a supervisor to the courtroom before the judge's ruling.

Following a recess, defense counsel renewed his motion, which the trial court denied. Discussion of the objection continued, however, and the prosecutor explained that he would have no motive to exclude Latinos from the jury:

> "[T]his case, involves four complainants. Each of the complainants is Hispanic. All my witnesses, that is, civilian witnesses, are going to be Hispanic. I have absolutely no reason—there's no reason for me to want to exclude Hispanics because all the parties involved are Hispanic, and I certainly would have no reason to do that." *Id.*, at 5–6.[2]

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[1] The prosecutor later gave the same explanation for challenging the bilingual potential jurors:

". . . I felt that from their answers they would be hard pressed to accept what the interpreter said as the final thing on what the record would be, and I even had to ask the Judge to question them on that, and their answers were—I thought they both indicated that they would have trouble, although their final answer was they could do it. I just felt from the hesitancy in their answers and their lack of eye contact that they would not be able to do it." App. 6.

[2] The trial judge appears to have accepted the prosecutor's reasoning as to his motivation. In response to a charge by defense counsel that the prosecutor excluded Latino jurors out of fear that they would sympathize with the defendant, the judge stated:

"The victims are all Hispanics, he said, and, therefore, they will be testifying for the People, so there could be sympathy for them as well as for the defendant, so he said [it] would not seem logical in this case he would look to throw off Hispanics, because I don't think that his logic is wrong. They might feel sorry for a guy who's had a bullet hole through him, he's Hispanic, so they may relate to him more than they'll relate to the shooter." *Id.*, at 8.

eled, defense counsel objected that the prosecutor had used four peremptory challenges to exclude Latino potential jurors. Two of the Latino venirepersons challenged by the prosecutor had brothers who had been convicted of crimes, and the brother of one of those potential jurors was being prosecuted by the same District Attorney's office for a probation violation. Petitioner does not press his *Batson* claim with respect to those prospective jurors, and we concentrate on the other two excluded individuals.

After petitioner raised his *Batson* objection, the prosecutor did not wait for a ruling on whether petitioner had established a prima facie case of racial discrimination. Instead, the prosecutor volunteered his reasons for striking the jurors in question. He explained:

> "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." App. 3.

After an interruption by defense counsel, the prosecutor continued:

> "We talked to them for a long time; the Court talked to them, I talked to them. I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE WHITE and JUSTICE SOUTER join.

Petitioner Dionisio Hernandez asks us to review the New York state courts' rejection of his claim that the prosecutor in his criminal trial exercised peremptory challenges to exclude Latinos from the jury by reason of their ethnicity. If true, the prosecutor's discriminatory use of peremptory strikes would violate the Equal Protection Clause as interpreted by our decision in *Batson* v. *Kentucky*, 476 U. S. 79 (1986). We must determine whether the prosecutor offered a race-neutral basis for challenging Latino potential jurors and, if so, whether the state courts' decision to accept the prosecutor's explanation should be sustained.

Petitioner and respondent both use the term "Latino" in their briefs to this Court. The *amicus* brief employs instead the term "Hispanic," and the parties referred to the excluded jurors by that term in the trial court. Both words appear in the state-court opinions. No attempt has been made at a distinction by the parties and we make no attempt to distinguish the terms in this opinion. We will refer to the excluded venirepersons as Latinos in deference to the terminology preferred by the parties before the Court.

I

The case comes to us on direct review of petitioner's convictions on two counts of attempted murder and two counts of criminal possession of a weapon. On a Brooklyn street, petitioner fired several shots at Charlene Calloway and her mother, Ada Saline. Calloway suffered three gunshot wounds. Petitioner missed Saline and instead hit two men in a nearby restaurant. The victims survived the incident.

The trial was held in the New York Supreme Court, Kings County. We concern ourselves here only with the jury selection process and the proper application of *Batson*, which had been handed down before the trial took place. After 63 potential jurors had been questioned and 9 had been empan-

the judge, that he did not know which jurors were Latinos, and that ethnicity of the victims and the prosecution witnesses tended to undercut any motive to exclude Latinos from the jury. Moreover, the court could rely on the facts that only three of the challenged jurors can with confidence be identified as Latinos, and that the prosecutor had a verifiable and legitimate explanation for two of those challenges. Pp. 363–370.

(d) This decision does not imply that exclusion of bilinguals from jury service is wise, or even constitutional in all cases. It may 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. Cf., *e. g.*, *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500. And, a policy of striking all who speak a given language, without regard to the trial's particular circumstances or the jurors' individual responses, may be found by the trial judge to be a pretext for racial discrimination. Pp. 370–372.

JUSTICE O'CONNOR, joined by JUSTICE SCALIA, while agreeing that the Court should review for clear error the trial court's finding as to discriminatory intent, and that the finding of no discriminatory intent was not clearly erroneous in this case, concluded that JUSTICE KENNEDY's opinion goes further than necessary in assessing the constitutionality of the prosecutor's asserted justification for his peremptory strikes. 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 inquiry. *Batson* v. *Kentucky*, 476 U. S. 79, does not require that a prosecutor justify a jury strike at the level of a for-cause challenge or that the justification be unrelated to race. *Batson* requires only that the prosecutor's reason for striking a juror not *be* the juror's race. Pp. 372–375.

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. 372. BLACKMUN, J., filed a dissenting opinion, *post*, p. 375. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 375.

Kenneth Kimerling argued the cause for petitioner. With him on the briefs were *Ruben Franco* and *Arthur Baer*.

Jay M. Cohen argued the cause for respondent. With him on the brief were *Charles J. Hynes*, *Peter A. Weinstein*, *Carol Teague Schwartzkopf*, and *Victor Barall*.*

**E. Richard Larson*, *Antonia Hernández*, and *Juan Cartagena* filed a brief for the Mexican American Legal Defense and Educational Fund et al. as *amici curiae* urging reversal.

the prosecutor comes forward with an explanation for his peremptories that is sufficient to rebut that prima facie case, no additional evidence of racial animus is required to establish an equal protection violation. In my opinion, the Court therefore errs when it concludes that a defendant's *Batson* challenge fails whenever the prosecutor advances a nonpretextual justification that is not facially discriminatory.

I

In *Batson* v. *Kentucky*, 476 U. S. 79 (1986), we held that "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination" sufficient to satisfy the defendant's burden of proving an equal protection violation. *Id.*, at 97. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation." *Ibid.* If the prosecutor offers no explanation, the defendant has succeeded in establishing an equal protection violation based on the evidence of invidious intent that gave rise to the prima facie case. If the prosecutor seeks to dispel the inference of discriminatory intent, in order to succeed his explanation "need not rise to the level justifying exercise of a challenge for cause." *Ibid.* However, the prosecutor's justification must identify "'legitimate reasons'" that are "related to the particular case to be tried" and sufficiently persuasive to "rebu[t] a defendant's prima facie case." *Id.*, at 98, and n. 20.

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. See *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 265–266 (1977); *Washington* v. *Davis*, 426 U. S. 229, 242 (1976). An explanation based on a concern that can easily be accommodated by means less drastic than excluding the challenged venireperson from the petit jury will also generally not qualify as a legitimate reason be-

cause it is not in fact "related to the particular case to be tried." *Batson*, 476 U. S., at 98; see *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425 (1975) (availability of nondiscriminatory alternative is evidence of discriminatory motive). Cf. also *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 507 (1989) (State cannot make race-based distinctions if there are equally effective nondiscriminatory alternatives). And, as in any other equal protection challenge to a government classification, a justification that is frivolous or illegitimate should not suffice to rebut the prima facie case. See, *e. g.*, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432 (1985); *id.*, at 452 (STEVENS, J., concurring); *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization of Cal.*, 451 U. S. 648, 677 (1981) (STEVENS, J., dissenting).

If any explanation, no matter how insubstantial and no matter how great its disparate impact, could rebut a prima facie inference of discrimination provided only that the explanation itself was not facially discriminatory, "the Equal Protection Clause 'would be but a vain and illusory requirement.'" *Batson*, 476 U. S., at 98 (quoting *Norris* v. *Alabama*, 294 U. S. 587, 598 (1935)). The Court mistakenly believes that it is compelled to reach this result because an equal protection violation requires discriminatory purpose. See *ante*, at 359–360, 364. The Court overlooks, however, the fact that the "discriminatory purpose" which characterizes violations of the Equal Protection Clause can sometimes be established by objective evidence that is consistent with a decisionmaker's honest belief that his motive was entirely benign. "Frequently the most probative evidence of intent will be objective evidence of what actually happened," *Washington* v. *Davis*, 426 U. S., at 253 (STEVENS, J., concurring), including evidence of disparate impact. See, *e. g.*, *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); *Sims* v. *Georgia*, 389 U. S. 404, 407 (1967); *Turner* v. *Fouche*, 396 U. S. 346, 359 (1970). The line between discriminatory purpose and discriminatory impact is

neither as bright nor as critical as the Court appears to believe.[1]

The Court therefore errs in focusing the entire inquiry on the subjective state of mind of the prosecutor. In jury selection challenges, the requisite invidious intent is established once the defendant makes out a prima facie case. No additional evidence of this intent is necessary unless the explanation provided by the prosecutor is sufficiently powerful to rebut the prima facie proof of discriminatory purpose. By requiring that the prosecutor's explanation itself provide additional, direct evidence of discriminatory motive, the Court has imposed on the defendant the added requirement that he generate evidence of the prosecutor's actual subjective intent to discriminate. Neither *Batson* nor our other equal protection holdings demand such a heightened quantum of proof.

II

Applying the principles outlined above to the facts of this case, I would reject the prosecutor's explanation without

[1] In *Washington* v. *Davis*, 426 U. S. 229 (1976) (concurring opinion), I noted that the term "purposeful discrimination" has been used in many different contexts.

"Although it may be proper to use the same language to describe the constitutional claim in each of these contexts, the burden of proving a prima facie case may well involve differing evidentiary considerations. The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.

"Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. . . .

"My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is as dramatic as in *Gomillion* v. *Lightfoot*, 364 U. S. 339, or *Yick Wo* v. *Hopkins*, 118 U. S. 356, it really does not matter whether the standard is phrased in terms of purpose or effect." *Id.*, at 253–254.

reaching the question whether the explanation was pretextual. Neither the Court nor respondent disputes that petitioner made out a prima facie case. See *ante*, at 359. Even assuming the prosecutor's explanation in rebuttal was advanced in good faith, the justification proffered was insufficient to dispel the existing inference of racial animus.

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.

Each of these reasons considered alone might not render insufficient the prosecutor's facially neutral explanation. In combination, however, they persuade me that his explanation should have been rejected as a matter of law. Accordingly, I respectfully dissent.

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[2] An even more effective solution would be to employ a translator, who is the only person who hears the witness' words and who simultaneously translates them into English, thus permitting the jury to hear only the official translation.

***Miller-El v. Dretke* (2005) 125 S.Ct. 2317**

Thomas Joe MILLER-EL, Petitioner,

v.

Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

No. 03-9659.

Argued Dec. 6, 2004.

Decided June 13, 2005.

Syllabus *

When Dallas County prosecutors used peremptory strikes against 10 of the 11 qualified black venire members during jury selection for petitioner Miller–El's capital murder trial, he objected, claiming that the strikes were based on race and could not be presumed legitimate since the District Attorney's Office had a history of excluding blacks from criminal juries. The trial court denied his request for a new jury, and his trial ended with a death sentence. While his appeal was pending, this Court decided, in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, that discrimination by a prosecutor in selecting a defendant's jury violated the Fourteenth Amendment. On remand, the trial court reviewed the *voir dire* record, heard prosecutor Macaluso's justifications for the strikes that were not explained during *voir dire*, and found no showing that prospective black jurors were struck because of their race. The State Court of Criminal Appeals affirmed. Subsequently, the Federal District Court denied Miller–El federal habeas relief, and the Fifth Circuit denied a certificate of appealability. This Court reversed, finding that the merits of Miller–El's *Batson* claim were, at least, debatable by jurists of reason. *Miller–El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931. The Fifth Circuit granted a certificate of appealability but rejected Miller–El's *Batson* claim on the merits.

Held: Miller–El is entitled to prevail on his *Batson* claim and, thus, entitled to habeas relief. Pp. 2323–2340.

(a) "[T]his Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause." *Georgia v. McCollum*, 505 U.S. 42, 44, 112 S.Ct. 2348, 120 L.Ed.2d 33. The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature and subject to a myriad of legitimate influences. The *Batson* Court held that a defendant can make out a prima facie case of discriminatory jury selection by "the totality of the relevant facts" about a prosecutor's conduct during the defendant's own trial. 476 U.S., at 94, 106 S.Ct. 1712. Once that showing is made, the burden shifts to the State to come forward with a neutral explanation, *id.*, at 97, 106 S.Ct. 1712, and the trial court must determine if the defendant has shown "purposeful discrimination," *id.*, at 98, 106 S.Ct. 1712, in light of "all relevant circumstances," *id.*, at 98, 106 S.Ct. 1712. Since this case is on review of a denial of habeas relief under 28 U.S.C. § 2254, and since the Texas trial court's prior determination that the State's race-neutral explanations were true is a factual determination, Miller–El may obtain relief only by showing the trial court's conclusion to be "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(e)(1). Pp. 2323–2325.

(b) The prosecutors used peremptory strikes to exclude 91% of the eligible black venire panelists, a disparity unlikely to have been produced by happenstance. *Miller–El v. Cockrell*, 537 U.S., at 342, 123 S.Ct. 1029. More powerful than the bare statistics are side-by-side comparisons of some black venire panelists who were struck and white ones who were

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

not. If a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve, that is evidence tending to prove purposeful discrimination. The details of two panel member comparisons bear out this Court's observation, *id.*, at 343, 123 S.Ct. 1029, that the prosecution's reason for exercising peremptory strikes against some black panel members appeared to apply equally to some white jurors. There are strong similarities and some differences between Billy Jean Fields, a black venireman who expressed unwavering support for the death penalty but was struck, and similarly situated nonblack jurors; but the differences seem far from significant, particularly when reading Fields's *voir dire* testimony in its entirety. Upon that reading, Fields should have been an ideal juror in the eyes of a prosecutor seeking a death sentence, and the prosecutors' explanations for the strike, that Fields would not vote for death if rehabilitation were possible, a mischaracterization of his testimony, cannot reasonably be accepted when there were nonblack veniremen expressing comparable views on rehabilitation who were not struck. The prosecution's reason that Fields's brother had prior convictions is not creditable in light of its failure to enquire about the matter. The prosecution's proffered reasons for striking Joe Warren, another black venireman, are comparably unlikely. The fact that the reason for striking him, that he thought death was an easy way out and defendants should be made to suffer more, also applied to nonblack panel members who were selected is evidence of pretext. The suggestion of pretext is not, moreover, mitigated by Macaluso's explanation that Warren was struck when the State could afford to be liberal in using its 10 remaining peremptory challenges. Were that the explanation for striking Warren and later accepting similar panel members, prosecutors would have struck white panel member Jenkins, who was examined and accepted before Warren despite her similar views. Macaluso's explanation also weakens any suggestion that the State's acceptance of Woods, the one black juror, shows that race was not in play. When he was selected as the eighth juror, the State had used 11 of its 15 peremptory challenges, 7 on black panel members; and the record shows that at least 3 of the remaining venire panel opposed capital punishment. Because the prosecutors had to exercise prudent restraint, the late-stage decision to accept a black panel member willing to impose the death penalty does not neutralize the early-stage decision to challenge a comparable venireman, Warren. The Fifth Circuit's substituted reason for the elimination, Warren's general ambivalence about the penalty, was erroneous as a matter of fact and law. As to fact, Macaluso said nothing about general ambivalence, and Warren's answer to several questions was that he could impose the death penalty. As for law, the *Batson* rule provides the prosecutor an opportunity to give the reason for striking a juror and requires the judge to assess the reason's plausibility in light of all of the evidence, but it does not does not call for a mere exercise in thinking up any rational basis. Because a prosecutor is responsible for the reason he gave, the Fifth Circuit's substitution of a reason for excluding Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions. Comparing Warren's strike with the treatment of panel members with similar views supports a conclusion that race was significant in determining who was challenged and who was not. Pp. 2325–2332.

(c) The prosecution's broader patterns of practice during jury selection also support the case for discrimination. Texas law permits either side to shuffle the cards bearing panel member names to rearrange the order in which they are questioned. Members seated in the back may escape *voir dire*, for those not questioned by the end of each week are dismissed. Here, the prosecution shuffled the cards when a number of black members were seated at the front of the panel at the beginning of the second week. The third week, they shuffled when the first four members were black, placing them in the back. After the defense reshuffled the cards, and the black members reappeared in the front, the court denied the prosecution's request for another shuffle. No racially neutral reason for the shuffling has ever been offered, and nothing stops the suspicion of discriminatory intent from rising to an inference. The contrasting *voir dire* questions posed respectively to black and nonblack panel members also indicate that the State was trying to avoid black jurors. Prosecutors gave a bland description of the death penalty to 94% of white venire panel members before asking about the individual's feelings on the subject, but used a script describing imposition of the death penalty in graphic terms for 53% of the black venire members. The argument that prosecutors used the graphic script to weed out ambivalent panel members simply does not fit the facts. Black venire members were more likely to receive that script regardless of their expressions of certainty or ambivalence about the death penalty, and the State's chosen explanation failed for four out of the eight black panel members who received it: two received it after clearly stating their opposition to the death penalty and two received it even though they unambiguously favored that penalty. The State's explanation misses the mark four out of five times with regard to the nonblacks who received the graphic description. Ambivalent black panel members were also more likely to receive the graphic script than nonblack ambivalent ones. The State's attempt at a race-neutral rationalization fails to explain what the prosecutors did. The explanation that the prosecutors' first object was to use the graphic script to make a case for excluding black panel members opposed to, or ambivalent about, the death penalty is more persuasive than the State's explanation, and the reasonable inference is that race was the major consideration when the prosecution chose to follow the graphic script. The same is true for another kind of disparate questioning. The prosecutors asked all black panel members opposed to, or ambivalent about, the death penalty how low a sentence they would consider imposing for murder without telling them that the State requires a 5-year minimum, but prosecutors did not put that question to most white panel members who had expressed similar views. The final body of evidence confirming the conclusion here is that the Dallas County District Attorney's Office had, for decades, followed a specific policy of systematically excluding blacks from juries. The Miller-El prosecutors' notes of the race of each panel member show that they took direction from a jury selection manual that included racial stereotypes. Pp. 2332–2339.

(d) The Fifth Circuit's conclusion that Miller-El failed to show by clear and convincing evidence that the state court's no-discrimination finding was wrong is as unsupportable as the "dismissive and strained interpretation" of his evidence that this Court disapproved when deciding that he was entitled to a certificate of appealability, *Miller-El*, *supra*, at 344, 123 S.Ct. 1029. Ten of the eleven black venire members were peremptorily struck. At least two of them were ostensibly accept-

able to prosecutors seeking the death penalty. The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion. The selection process was replete with evidence that prosecutors were selecting and rejecting potential jurors because of race. And the prosecutors took their cues from a manual on jury selection with an emphasis on race. It blinks reality to deny that the State struck Fields and Warren because they were black. The facts correlate to nothing as well as to race. The state court's contrary conclusion was unreasonable as well as erroneous. Pp. 2339–2340.

361 F.3d 849, reversed and remanded.

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. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined.

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For U.S. Supreme Court briefs, see:

2004 WL 2190703 (Pet.Brief)

2004 WL 2446199 (Resp.Brief)

2004 WL 2787136 (Reply.Brief)

Justice SOUTER delivered the opinion of the Court.

Two years ago, we ordered that a certificate of appealability, under 28 U.S.C. § 2253(c), be issued to habeas petitioner Miller–El, affording review of the District Court's rejection of the claim that prosecutors in his capital murder trial made peremptory strikes of potential jurors based on race. Today we find Miller–El entitled to prevail on that claim and order relief under § 2254.

I

In the course of robbing a Holiday Inn in Dallas, Texas in late 1985, Miller–El and his accomplices bound and gagged two hotel employees, whom Miller–El then shot, killing one and severely injuring the other. During jury selection in Miller–El's trial for capital murder, prosecutors used peremptory strikes against 10 qualified black venire members. Miller–El objected that the strikes were based on race and could not be presumed legitimate, given a history of excluding black members from criminal juries by the Dallas County District Attorney's Office. The trial court received evidence of the practice alleged but found no "systematic exclusion of blacks as a matter of policy" by that office, App. 882–883, and therefore no entitlement to relief under *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the case then defining and marking the limits of relief from racially biased jury selection. The court denied Miller–El's request to pick a new jury, and the trial ended with his death sentence for capital murder.

While an appeal was pending, this Court decided *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), which replaced *Swain's* threshold requirement to prove systemic discrimination under a Fourteenth Amendment jury claim, with the rule that discrimination by the prosecutor in selecting the defendant's jury sufficed to establish the constitutional violation. The Texas Court of Criminal Appeals then remanded the matter to the trial court to determine whether Miller–El could show that prosecutors in his case peremptorily struck prospective black jurors because of race. *Miller–El v. State*, 748 S.W.2d 459 (1988).

The trial court found no such demonstration. After reviewing the *voir dire* record of the explanations given for some of the challenged strikes, and after hearing one of the prosecutors, Paul Macaluso, give his justification for those previously unexplained, the trial court accepted the stated race-neutral reasons for the strikes, which the judge called "completely credible [and] sufficient" as the grounds for a finding of "no purposeful discrimination." Findings of Fact and Conclusions of Law Upon Remand from the Court of Criminal Appeals in *State v. Miller–El*, No. 8668–NL (5th Crim. Dist. Ct., Dallas County, Tex., Jan. 13, 1989), pp. 5–6, App. 928–929. The Court of Criminal Appeals affirmed, stating it found "ample support" in the *voir dire* record for the race-neutral explanations offered by prosecutors for the peremptory strikes. *Miller–El v. State*, No. 69,677 (Sept. 16, 1992) *(per curiam)*, p. 2, App. 931.

Miller–El then sought habeas relief under 28 U.S.C. § 2254, again pressing his *Batson* claim, among others not now before us. The District Court denied relief, *Miller–El v. Johnson*, Civil No. 3:96–CV–1992–H, 2000 WL 724534 (N.D.Tex., June 5, 2000), App. 987, and the Court of Appeals for the Fifth Circuit precluded appeal by denying a certificate of appealability, *Miller–El v. Johnson*, 261 F.3d 445 (2001). We granted certiorari to consider whether Miller–El was entitled to review on the *Batson* claim, *Miller–El v. Cockrell*, 534 U.S. 1122, 122 S.Ct. 981, 151 L.Ed.2d 963 (2002), and reversed the Court of Appeals. After examining the record of Miller–El's extensive evidence of purposeful discrimination by the Dallas County District Attorney's Office before and during his trial, we found an appeal was in order, since the merits of the *Batson* claim were, at the least, debatable by jurists of reason. *Miller–El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). After granting a certificate of appealability, the Fifth Circuit rejected Miller–El's *Batson* claim on the merits. 361 F.3d 849 (2004). We again granted certiorari, 542 U.S. 936, 124 S.Ct. 2908, 159 L.Ed.2d 811 (2004), and again we reverse.

II

A

"It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Strauder v. West Virginia*, 100 U.S. 303, 309, 25 L.Ed. 664 (1880); see also *Batson v. Kentucky*, *supra*, at 86, 106 S.Ct. 1712. Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, *Strauder v. West Virginia*, *supra*, at 308, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice," *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 128, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

[1] Nor is the harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that "overt wrong ... casts doubt over the obligation of the parties, the jury, and

indeed the court to adhere to the law throughout the trial . . . ." *Powers v. Ohio*, 499 U.S. 400, 412, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination "invites cynicism respecting the jury's neutrality," *id.*, at 412, 111 S.Ct. 1364, and undermines public confidence in adjudication, *Georgia v. McCollum*, 505 U.S. 42, 49, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); *Batson v. Kentucky*, *supra*, at 87, 106 S.Ct. 1712. So, "[f]or more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause." *Georgia v. McCollum*, *supra*, at 44, 112 S.Ct. 2348; see *Strauder v. West Virginia*, *supra*, at 308, 310; *Norris v. Alabama*, 294 U.S. 587, 596, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); *Swain v. Alabama*, *supra*, at 223–224, 85 S.Ct. 824; *Batson v. Kentucky*, *supra*, at 84, 106 S.Ct. 1712; *Powers v. Ohio*, *supra*, at 404, 111 S.Ct. 1364.

The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected. In *Swain v. Alabama*, we tackled the problem of "the quantum of proof necessary" to show purposeful discrimination, 380 U.S., at 205, 85 S.Ct. 824, with an eye to preserving each side's historical prerogative to make a peremptory strike or challenge, the very nature of which is traditionally "without a reason stated," *id.*, at 220, 85 S.Ct. 824. The *Swain* Court tried to relate peremptory challenge to equal protection by presuming the legitimacy of prosecutors' strikes except in the face of a longstanding pattern of discrimination: when "in case after case, whatever the circumstances," no blacks served on juries, then "giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge [were] being perverted." *Id.*, at 223–224, 85 S.Ct. 824.

[2–4] *Swain's* demand to make out a continuity of discrimination over time, however, turned out to be difficult to the point of unworkable, and in *Batson v. Kentucky*, we recognized that this requirement to show an extended pattern imposed a "crippling burden of proof" that left prosecutors' use of peremptories "largely immune from constitutional scrutiny." 476 U.S., at 92–93, 106 S.Ct. 1712. By *Batson's* day, the law implementing equal protection elsewhere had evolved into less discouraging standards for assessing a claim of purposeful discrimination, *id.*, at 98, 106 S.Ct. 1712 (citing, *e.g.*, *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), and *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)), and we accordingly held that a defendant could make out a prima facie case of discriminatory jury selection by "the totality of the relevant facts" about a prosecutor's conduct during the defendant's own trial. *Batson v. Kentucky*, 476 U.S., at 94, 96, 106 S.Ct. 1712. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging . . . jurors" within an arguably targeted class. *Id.*, at 97, 106 S.Ct. 1712. Although there may be "any number of bases on which a prosecutor reasonably [might] believe that it is desirable to strike a juror who is not excusable for cause , . . , the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challeng[e]." *Id.*, at 98, n. 20, 106 S.Ct. 1712 (internal quotation marks omitted). "The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id.*, at 98, 106 S.Ct. 1712.

[5] Although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain's* wide net, the net was not entirely consigned to history, for *Batson's* individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give. If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson's* explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination. 476 U.S., at 96–97, 106 S.Ct. 1712.

B

This case comes to us on review of a denial of habeas relief sought under 28 U.S.C. § 2254, following the Texas trial court's prior determination of fact that the State's race-neutral explanations were true, see *Purkett v. Elem*, 514 U.S. 765, 769, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) *(per curiam)*; *Batson v. Kentucky*, *supra*, at 98, n. 21, 106 S.Ct. 1712.

[6] Under the Antiterrorism and Effective Death Penalty Act of 1996, Miller-El may obtain relief only by showing the Texas conclusion to be "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). 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.

III

A

[7] The numbers describing the prosecution's use of peremptories are remarkable. Out of 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution. *Id.*, at 331, 123 S.Ct. 1029. "The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members . . . . Happenstance is unlikely to produce this disparity." *Id.*, at 342, 123 S.Ct. 1029.

[8] More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step. Cf. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (in employment discrimination cases, "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive"). While we did not develop a comparative juror analysis last time, we did note that the prosecution's reasons for exercising peremptory strikes against some black panel members appeared

equally on point as to some white jurors who served. *Miller–El v. Cockrell, supra,* at 343, 123 S.Ct. 1029.[1] The details of two panel member comparisons bear this out.[2]

The prosecution used its second peremptory strike to exclude Billy Jean Fields, a black man who expressed unwavering support for the death penalty. On the questionnaire filled out by all panel members before individual examination on the stand, Fields said that he believed in capital punishment, Joint Lodging 14, and during questioning he disclosed his belief that the State acts on God's behalf when it imposes the death penalty. "Therefore, if the State exacts death, then that's what it should be." App. 174. He testified that he had no religious or philosophical reservations about the death penalty and that the death penalty deterred crime. *Id.,* at 174–175. He twice averred, without apparent hesitation, that he could sit on Miller–El's jury and make a decision to impose this penalty. *Id.,* at 176–177.

Although at one point in the questioning, Fields indicated that the possibility of rehabilitation might be relevant to the likelihood that a defendant would commit future acts of violence, *id.,* at 183, he responded to ensuing questions by saying that although he believed anyone could be rehabilitated, this belief would not stand in the way of a decision to impose the death penalty:

"[B]ased on what you [the prosecutor] said as far as the crime goes, there are only two things that could be rendered, death or life in prison. If for some reason the testimony didn't warrant death, then life imprisonment would give an individual an opportunity to rehabilitate. But, you know, you said that the jurors didn't have the opportunity to make a personal decision in the matter with reference to what I thought or felt, but it was just based on the questions according to the way the law has been handed down." *Id.,* at 185 (alteration omitted).

1. While many of these explanations were offered contemporaneously, "the state trial court had no occasion to judge the credibility of these explanations at that time because our equal protection jurisprudence then, dictated by *Swain,* did not require it." *Miller–El v. Cockrell,* 537 U.S., at 343, 123 S.Ct. 1029. Other evidence was presented in the *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), hearing, but this was offered two years after trial and "was subject to the usual risks of imprecision and distortion from the passage of time." 537 U.S., at 343, 123 S.Ct. 1029.

2. The dissent contends that comparisons of black and nonblack venire panelists, along with Miller–El's arguments about the prosecution's disparate questioning of black and nonblack panelists and its use of jury shuffles, are not properly before this Court, not having been "put before the Texas courts." *Post,* at 2347 (opinion of THOMAS, J.). But the dissent conflates the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence. See 28 U.S.C. § 2254(d)(2) (state court fact-finding must be assessed "in light of the evidence presented in the State court proceeding"); *Miller–El v. Cockrell,* 537 U.S. 322, 348, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (habeas petitioner must show unreasonability "in light of the record before the [state] court"). There can be no question that the transcript of *voir dire,* recording the evidence on which Miller–El bases his arguments and on which we base our result, was before the state courts, nor does the dissent contend that Miller–El did not "fairly presen[t]" his *Batson* claim to the state courts. *Picard v. Connor,* 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971).

Only as to the juror questionnaires and information cards is there question about what was before the state courts. Unlike the dissent, see *post,* at 2349, we reach no decision about whether the limitation on evidence in § 2254(d)(2) is waiveable. See *infra,* at 2334–2335, n. 15.

Fields also noted on his questionnaire that his brother had a criminal history. Joint Lodging 13. During questioning, the prosecution went into this, too:

"Q Could you tell me a little bit about that?"

"A He was arrested and convicted on [a] number of occasions for possession of a controlled substance."

"Q Was that here in Dallas?"

"A Yes."

"Q Was he involved in any trials or anything like that?"

"A I suppose of sorts. I don't really know too much about it."

"Q Was he ever convicted?"

"A Yeah, he served time."

"Q Do you feel that that would in any way interfere with your service on this jury at all?"

"A No." App. 190.

Fields was struck peremptorily by the prosecution, with prosecutor James Nelson offering a race-neutral reason:

"[W]e ... have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he later made the comment that any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case." *Id.,* at 197 (alteration omitted).

Thus, Nelson simply mischaracterized Fields's testimony. He represented that Fields said he would not vote for death if rehabilitation was possible, whereas Fields unequivocally stated that he could impose the death penalty regardless of the possibility of rehabilitation. Perhaps Nelson misunderstood, but unless he had an ulterior reason for keeping Fields off the jury we think he would have proceeded differently. In light of Fields's outspoken support for the death penalty, we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.

If, indeed, Fields's thoughts on rehabilitation did make the prosecutor uneasy, he should have worried about a number of white panel members he accepted with no evident reservations. Sandra Hearn said that she believed in the death penalty "if a criminal cannot be rehabilitated and continues to commit the same type of crime." *Id.,* at 429.[3] Hearn went so far as to express doubt that at the penalty phase of a capital case she could conclude that a convicted murderer "would probably commit some criminal acts of violence in the future." *Id.,* at 440. "People change," she said, making it hard to assess the risk of someone's future dangerousness. "[T]he evidence would have to be awful strong." *Ibid.* But the prosecution did not respond to Hearn the way it did to Fields, and without delving into her views about rehabilitation with any further question, it raised no objection to her serving on the jury. White panelist Mary Witt said she would take the possibility of rehabilitation into account in deciding at the penalty phase of the trial about a defendant's probability of future dangerousness, 6 Record of *Voir Dire* 2433 (hereinafter Record), but the prosecutors asked her no further question about her views on reformation, and

3. Hearn could give the death penalty for murder if the defendant had committed a prior offense of robbery, in which case she would judge "according to the situation," App. 430, and she thought the death penalty might be appropriate for offenses like "[e]xtreme child abuse," *ibid.*

they accepted her as a juror. *Id.*, at 2464–2465.[4] Latino venireman Fernando Gutierrez, who served on the jury, said that he would consider the death penalty for someone who could not be rehabilitated, App. 777, but the prosecutors did not question him further about this view. In sum, nonblack jurors whose remarks on rehabilitation could well have signaled a limit on their willingness to impose a death sentence were not questioned further and drew no objection, but the prosecution expressed apprehension about a black juror's belief in the possibility of reformation even though he repeatedly stated his approval of the death penalty and testified that he could impose it according to state legal standards even when the alternative sentence of life imprisonment would give a defendant (like everyone else in the world) the opportunity to reform.[5]

The unlikelihood that his position on rehabilitation had anything to do with the peremptory strike of Fields is underscored by the prosecution's response after Miller–El's lawyer pointed out that the prosecutor had misrepresented Fields's responses on the subject. A moment earlier the prosecutor had finished his misdescription of Fields's views on potential rehabilitation with the words, "Those are our reasons for exercising our . . . strike at this time." *Id.*, at 197. When defense counsel called him on his misstatement, he neither defended what he said nor withdrew the strike. *Id.*, at 198. Instead, he suddenly came up with Fields's brother's prior conviction as another reason for the strike. *Id.*, at 199.

It would be difficult to credit the State's new explanation, which reeks of afterthought. While the Court of Appeals tried to bolster it with the observation that no seated juror was in Fields's position with respect to his brother, 361 F.3d, at 859–860, the court's readiness to accept the State's substitute reason ignores not only its pretextual timing but the other reasons rendering it implausible. Fields's testimony indicated he was not close to his brother, App. 190 ("I don't really know too much about it"), and the prosecution asked nothing further about the influence his brother's history might have had on Fields, as it probably would have done if the family history had actually mattered. See, *e.g.*, *Ex parte Travis*, 776 So.2d 874, 881 (Ala.2000) ("[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination"). There is no good reason to doubt that the State's afterthought about Fields's brother was anything but makeweight.

4. Witt ultimately did not serve because she was peremptorily struck by the defense. 6 Record 2465. The fact that Witt and other venire members discussed here were peremptorily struck by the defense is not relevant to our point. For each of them, the defense did not make a decision to exercise a peremptory until after the prosecution decided whether to accept or reject, so each was accepted by the prosecution before being ultimately struck by the defense. And the underlying question is not what the defense thought about these jurors but whether the State was concerned about views on rehabilitation when the venireperson was not black.

The dissent offers other reasons why these nonblack panel members who expressed views on rehabilitation similar to Fields's were otherwise more acceptable to the prosecution than he was. See *post*, at 2355–2357. In doing so, the dissent focuses on reasons the prosecution itself did not offer. See *infra*, at 2332.

5. Prosecutors did exercise peremptory strikes on Penny Crowson and Charlotte Whaley, who expressed views about rehabilitation similar to those of Witt and Gutierrez. App. 554, 715.

The Court of Appeals's judgment on the Fields strike is unsupportable for the same reason the State's first explanation is itself unsupportable. The Appeals Court's description of Fields's *voir dire* testimony mentioned only his statements that everyone could be rehabilitated, failing to note that Fields affirmed that he could give the death penalty if the law and evidence called for it, regardless of the possibility of divine grace. The Court of Appeals made no mention of the fact that the prosecution mischaracterized Fields as saying he could not give death if rehabilitation were possible. 361 F.3d, at 856.

In sum, when we look for nonblack jurors similarly situated to Fields, we find strong similarities as well as some differences.[6] But the differences seem far from significant, particularly when we read Fields's *voir dire* testimony in its entirety. Upon that reading, Fields should have been an ideal juror in the eyes of a prosecutor seeking a death sentence, and the prosecutors' explanations for the strike cannot reasonably be accepted. See *Miller–El v. Cockrell*, 537 U.S., at 339, 123 S.Ct. 1029 (the credibility of reasons given can be measured by "how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy").

The prosecution's proffered reasons for striking Joe Warren, another black venireman, are comparably unlikely. Warren gave this answer when he was asked what the death penalty accomplished:

> "I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment." App. 205; 3 Record 1532.

The prosecution said nothing about these remarks when it struck Warren from the panel, but prosecutor Paul Macaluso referred to this answer as the first of his reasons when he testified at the later *Batson* hearing:

> "I thought [Warren's statements on *voir dire*] were inconsistent responses. At one point he says, you know, on a case-by-case basis and at another point he said, well, I think—I got the impression, at least, that he suggested that the death penalty was an easy way out, that they should be made to suffer more." App. 909.

On the face of it, the explanation is reasonable from the State's point of view, but its plausibility is severely undercut by the prosecution's failure to object to other panel members who expressed views much like Warren's. Kevin Duke, who served on the jury, said, "sometimes death would be better to me than—being in prison would be like dying every day and, if you were in prison for life with no hope of parole, I['d] just as soon have it over with

6. The dissent contends that there are no white panelists similarly situated to Fields and to panel member Joe Warren because " ' "[s]imilarly situated" does not mean matching any one of several reasons the prosecution gave for striking a potential juror—it means matching *all* of them.' " *Post*, at 2354 (quoting *Miller–El v. Cockrell*, 537 U.S., at 362–363, 123 S.Ct. 1029 (THOMAS, J., dissenting)). None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these purported reasons were pretextual. A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

than be in prison for the rest of your life." *Id.*, at 372. Troy Woods, the one black panelist to serve as juror, said that capital punishment "is too easy. I think that's a quick relief .... I feel like [hard labor is] more of a punishment than putting them to sleep." *Id.*, at 408. Sandra Jenkins, whom the State accepted (but who was then struck by the defense) testified that she thought "a harsher treatment is life imprisonment with no parole." *Id.*, at 542. Leta Girard, accepted by the State (but also struck by the defense) gave her opinion that "living sometimes is a worse—is worse to me than dying would be." *Id.*, at 624. The fact that Macaluso's reason also applied to these other panel members, most of them white, none of them struck, is evidence of pretext.

The suggestion of pretext is not, moreover, mitigated much by Macaluso's explanation that Warren was struck when the State had 10 peremptory challenges left and could afford to be liberal in using them. *Id.*, at 908. If that were the explanation for striking Warren and later accepting panel members who thought death would be too easy, the prosecutors should have struck Sandra Jenkins, whom they examined and accepted before Warren. Indeed, the disparate treatment is the more remarkable for the fact that the prosecutors repeatedly questioned Warren on his capacity and willingness to impose a sentence of death and elicited statements of his ability to do so if the evidence supported that result and the answer to each special question was yes, *id.*, at 202.2, 202.3, 205, 207, whereas the record before us discloses no attempt to determine whether Jenkins would be able to vote for death in spite of her view that it was easy on the convict, *id.*, at 98, 106 S.Ct. 1712. Yet the prosecutors accepted the white panel member Jenkins and struck the black venireman Warren.

Macaluso's explanation that the prosecutors grew more sparing with peremptory challenges as the jury selection wore on does, however, weaken any suggestion that the State's acceptance of Woods, the one black juror, shows that race was not in play. Woods was the eighth juror, qualified in the fifth week of jury selection. Joint Lodging 125. When the State accepted him, 11 of its 15 peremptory strikes were gone, 7 of them used to strike black panel members. *Id.*, at 137, 106 S.Ct. 1712. The juror questionnaires show that at least three members of the venire panel yet to be questioned on the stand were opposed to capital punishment, Janice Mackey, *id.*, at 98, 106 S.Ct. 1712; Paul Bailey, *id.*, at 98, 106 S.Ct. 1712; and Anna Keaton, *id.*, at 98, 106 S.Ct. 1712.[7] With at least three remaining panel members highly undesirable to the State, the prosecutors had to exercise prudent restraint in using strikes. This late-stage decision to accept a black panel member willing to impose a death sentence does not, therefore, neutralize the early-stage decision to challenge a comparable venireman, Warren. In fact, if the prosecutors were going to accept any black juror to obscure the otherwise consistent pattern of opposition to seating one, the time to do so was getting late.[8]

7. Each of them was black and each was peremptorily struck by the State after Woods's acceptance. It is unclear whether the prosecutors knew they were black prior to the *voir dire* questioning on the stand, though there is some indication that they did: prosecutors noted the race of each panelist on all of the juror cards, *Miller-El v. Cockrell*, 537 U.S., at 347, 123 S.Ct. 1029, even for those panelists who were never questioned individually because the week ended before it was their turn.

8. Nor is pretextual indication mitigated by Macaluso's further reason that Warren had a brother-in-law convicted of a crime having to do with food stamps for which he had to make restitution. App. 910. Macaluso never questioned Warren about his errant relative at all; as with Fields's brother, the failure to ask undermines the persuasiveness of the claimed concern. And Warren's brother's criminal history was comparable to those of relatives of other panel members not struck by prosecutors. Cheryl Davis's husband had been convicted of theft and received seven years' probation. *Id.*, at 695–696. Chatta Nix's brother was involved in white-collar fraud. *Id.*, at 613–614. Noad Vickery's sister served time in a penitentiary several decades ago. *Id.*, at 240–241.

The Court of Appeals pretermitted these difficulties by stating that the prosecution's reason for striking Warren was a more general ambivalence about the penalty and his ability to impose it, 361 F.3d, at 856–857 (and the dissent presses that explanation here, *post*, at 2351–2353). But this rationalization was erroneous as a matter of fact and as a matter of law.

As to fact, Macaluso said nothing about any general ambivalence. He simply alluded to the possibility that Warren might think the death penalty too easy on some defendants, saying nothing about Warren's ability to impose the penalty when it appeared to be warranted.[9] On the contrary, though Warren had indeed questioned the extent to which the death penalty served a purpose in society, App. 205, he explained his position in response to the very next question: it was not any qualm about imposing what society generally deems its harshest punishment, but his concern that the death penalty might not be severe enough, *ibid.* When Warren was asked whether he could impose the death penalty he said he thought he could; when told that answering yes to the special issue questions would be tantamount to voting for death he said he could give yes answers if the evidence supported them. *Id.*, at 207.[10]

[9–11] As for law, the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it. 476 U.S., at 96–97, 106 S.Ct. 1712; *Miller–El v. Cock-*

9. But even if Macaluso actually had explained that he exercised the strike because Warren was diffident about imposing death, it would have been hard to square that explanation with the prosecution's tolerance for a number of ambivalent white panel members. Juror Marie Mazza, for example, admitted some concern about what her associates might think of her if she sat on a jury that called for the death penalty. *Id.*, at 354–355, 123 S.Ct. 1029. Ronald Salsini, accepted by the prosecution but then struck by the defense, worried that if he gave the death penalty he might have a "problem" in the future with having done so. *Id.*, at 593. Witt, another panel member accepted by the State but struck by the defense, said she did not know if she could give that sentence. 6 Record 2423.

10. The Court of Appeals also found ambivalence in Warren's statement, when asked how he felt generally about the death penalty, that, "there are some cases where I would agree, you know, and there are others that I don't." App. 202.2 (quoted in 361 F.3d 849, 857 (C.A.5 2004)). But a look at Warren's next answers shows what he meant. The sorts of cases where he would impose it were those where "maybe things happen that could have been avoided," such as where there is a choice not to kill, but he would not impose it for killing "in self[-]defense sometimes." App. 202.2–202.3. Where the death penalty is sought for murder committed at the same time as another felony, Warren thought that it "depends on the case and the circumstances involved at the time." *Id.*, at 204. None of these responses is exceptionable. A number of venire members not struck by the State, including some seated on the jury, offered some version of the uncontroversial, and responsible, view that imposition of the death penalty ought to depend on the circumstances. See Joint Lodging 176 (Marie Mazza, a seated juror); *id.*, at 223 (Filemon Zablan, a seated juror); App. 548 (Colleen Moses, struck by the defense); *id.*, at 618 (Mary Witt, struck by the defense); 11–(B) Record 4455–4456 (Max O'Dell, struck by the defense).

rell, 537 U.S., at 339, 123 S.Ct. 1029. It is true that peremptories are often the subjects of instinct, *Batson v. Kentucky*, 476 U.S., at 106, 106 S.Ct. 1712 (Marshall, J., concurring), and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.

The whole of the *voir dire* testimony subject to consideration casts the prosecution's reasons for striking Warren in an implausible light. Comparing his strike with the treatment of panel members who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not.[11]

B

The case for discrimination goes beyond these comparisons to include broader patterns of practice during the jury selection. The prosecution's shuffling of the venire panel, its enquiry into views on the death penalty, its questioning about minimum acceptable sentences: all indicate decisions probably based on race. Finally, the appearance of discrimination is confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller–El's jury was selected.

[12] The first clue to the prosecutors' intentions, distinct from the peremptory challenges themselves, is their resort during *voir dire* to a procedure known in Texas as the jury shuffle. In the State's criminal practice, either side may literally reshuffle the cards bearing panel members' names, thus rearranging the order in which members of a venire panel are seated and reached for questioning.[12] Once

11. There were other black members of the venire struck purportedly because of some ambivalence, about the death penalty or their capacity to impose it, who Miller–El argues must actually have been struck because of race, none of them having expressed any more ambivalence than white jurors Mazza and Hearn. We think these are closer calls, however. Edwin Rand said at points that he could impose the death penalty, but he also said "right now I say I can, but tomorrow I might not." App. 265 (alterations omitted). Wayman Kennedy testified that he could impose the death penalty, but on his questionnaire and *voir dire*, he was more specific, saying that he believed in the death penalty for mass murder. *Id.*, at 317; Joint Lodging 46. (Arguably Fernando Gutierrez, accepted by the prosecution, expressed a similar view when he offered as an example of a defendant who merited the death penalty a "criminally insane" person who could not be rehabilitated. App. 777. But perhaps prosecutors took Gutierrez to mean this only as an example.) Roderick Bozeman stated that he thought he could vote for the death penalty but he didn't really know. *Id.*, at 145. Finally, Carrol Boggess expressed uncertainty whether she could go through with giving the death penalty, *id.*, at 298–299, although she later averred that she could, *id.*, at 302–304.

We do not decide whether there were white jurors who expressed ambivalence just as much as these black members of the venire panel. There is no need to go into these instances, for the prosecutors' treatment of Fields and Warren supports stronger arguments that *Batson* was violated.

12. The procedure is conducted under Tex. Code Crim. Proc. Ann., Art. 35.11 (Vernon Supp.2004–2005). While that statute says that the court clerk is to conduct a shuffle on the request of either party, the transcripts in this case make clear that each side did its own shuffles. See, *e.g.*, App. 124.

the order is established, the panel members seated at the back are likely to escape *voir dire* altogether, for those not questioned by the end of the week are dismissed. As we previously explained,

> "the prosecution's decision to seek a jury shuffle when a predominant number of African–Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African–Americans from the jury. Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past." *Miller–El v. Cockrell*, *supra*, at 346, 123 S.Ct. 1029.

In this case, the prosecution and then the defense shuffled the cards at the beginning of the first week of *voir dire*; the record does not reflect the changes in order. App. 113–114. At the beginning of the second week, when a number of black members were seated at the front of the panel, the prosecution shuffled.[13] 2 Record 836–837. At the beginning of the third week, the first four panel members were black. The prosecution shuffled, and these black panel members ended up at the back. Then the defense shuffled, and the black panel members again appeared at the front. The prosecution requested another shuffle, but the trial court refused. App. 124–132. Finally, the defense shuffled at the beginning of the fourth and fifth weeks of *voir dire*; the record does not reflect the panel's racial composition before or after those shuffles. *Id.*, at 621–622; 9 Record 3585.

The State notes in its brief that there might be racially neutral reasons for shuffling the jury, Brief for Respondent 36–37, and we suppose there might be. But no racially neutral reason has ever been offered in this case, and nothing stops the suspicion of discriminatory intent from rising to an inference.[14]

[13] The next body of evidence that the State was trying to avoid black jurors is the contrasting *voir dire* questions posed respectively to black and nonblack panel members, on two different subjects. First, there were the prosecutors' statements preceding questions about a potential juror's thoughts on capital punishment. Some of these prefatory statements were cast in general terms, but some followed the so-called graphic script, describing the method of execution in rhetorical and clinical detail. It is intended, Miller–El contends, to prompt some expression of hesitation to consider the death penalty and thus to elicit plausibly neutral grounds for a peremptory strike of a potential juror subjected to it, if not a strike for cause. If the graphic script is given to a higher proportion of blacks than whites, this is

13. Of the first 10 panel members before the prosecution shuffled, 4 were black. Of the second 10, 3 were black. Of the third 10, 2 were black, and only 1 black was among the last 10 panel members. 2 Record 837.

14. The Court of Appeals declined to give much weight to the evidence of racially motivated jury shuffles because "Miller–El shuffled the jury five times and the prosecutors shuffled the jury only twice." 361 F.3d, at 855. But Miller–El's shuffles are flatly irrelevant to the question whether prosecutors' shuffles revealed a desire to exclude blacks. (The Appeals Court's statement was also inaccurate: the prosecution shuffled the jury three times.)

evidence that prosecutors more often wanted blacks off the jury, absent some neutral and extenuating explanation.

As we pointed out last time, for 94% of white venire panel members, prosecutors gave a bland description of the death penalty before asking about the individual's feelings on the subject. *Miller-El v. Cockrell*, 537 U.S., at 332, 123 S.Ct. 1029. The abstract account went something like this:

> "I feel like it [is] only fair that we tell you our position in this case. The State of Texas ... is actively seeking the death penalty in this case for Thomas Joe Miller-El. We anticipate that we will be able to present to a jury the quantity and type of evidence necessary to convict him of capital murder and the quantity and type of evidence sufficient to allow a jury to answer these three questions over here in the affirmative. A yes answer to each of those questions results in an automatic death penalty from Judge McDowell." App. 564–565.

Only 6% of white venire panelists, but 53% of those who were black, heard a different description of the death penalty before being asked their feelings about it. This is an example of the graphic script:

> "I feel like you have a right to know right up front what our position is. Mr. Kinne, Mr. Macaluso and myself, representing the people of Dallas County and the state of Texas, are actively seeking the death penalty for Thomas Joe Miller-El ...."
>
> "We do that with the anticipation that, when the death penalty is assessed, at some point Mr. Thomas Joe Miller-El—the man sitting right down there—will be taken to Huntsville and will be put on death row and at some point taken to the death house and placed on a gurney and injected with a lethal substance until he is dead as a result of the proceedings that we have in this court on this case. So that's basically our position going into this thing." *Id.*, at 572–573.

The State concedes that this disparate questioning did occur but argues that use of the graphic script turned not on a panelist's race but on expressed ambivalence about the death penalty in the preliminary questionnaire.[15] Prosecutors were trying, the argument goes, to weed out noncommittal or uncertain jurors, not black jurors. And while some white venire members expressed opposition to the death penalty on their questionnaires, they were not read the graphic script because their feelings were already clear. The State says that giving the graphic script to these panel members would only have antagonized them. Brief for Respondent 27–32.

This argument, however, first advanced in dissent when the case was last here, *Miller-El v. Cockrell*, *supra*, at 364–368, 123 S.Ct. 1029 (opinion of THOMAS, J.), and later adopted by the State and the Court of Appeals, simply does not fit the facts. Looking at the answers on the questionnaires, and at *voir dire* testimony expressly discussing answers on the questionnaires,[16] we find that black venire members were more likely than nonblacks to receive the graphic script regardless of their expressions of certainty or ambivalence about the death penalty, and the State's chosen explanation for the graphic script fails in the cases of four out of the eight black panel members who received it.[17] Two of them, Janice Mackey and Anna Keaton, clearly stated opposition to the death penalty but they received the graphic script,[18] while the black panel members Wayman Kennedy and Jeannette Butler were unambiguously in favor[19] but got the graphic description any-

15. So far as we can tell from the voluminous record before us, many of the juror questionnaires, along with juror information cards, were added to the habeas record after the filing of the petition in the District Court. See Supplemental Briefing on *Batson/Swain* Claim Based on Previously Unavailable Evidence, Record in No. 00-10784(CA5), p. 2494. The State raised no objection to receipt of the supplemental material in the District Court or the Fifth Circuit, and in this Court the State has joined with Miller-El in proposing that we consider this material, by providing additional copies in a joint lodging (apparently as an alternative to a more costly printing as part of the joint appendix). Neither party has referred to the provision that the reasonableness of the state-court determination be judged by the evidence before the state court, 28 U.S.C. § 2254(d)(2), and it is not clear to what extent the lodged material expands upon what the state judge knew; the same judge presided over the *voir dire*, the *Swain* hearing, and the *Batson* hearing, and the jury questionnaires were subjects of reference at the *voir dire*. The last time this case was here the State expressly relied on the questionnaires for one of its arguments, Brief for Respondent in *Miller-El v. Cockrell*, O.T. 2002, No. 01-7662, p. 17, and although it objected to the Court's consideration of some other evidence not before the state courts, *id.*, at 28–29, it did not object either to questionnaires or juror cards. This time around, the State again relies on the jury questionnaires for its argument that the prosecution's disparate questioning was not based on race. We have no occasion here to reach any question about waiver under § 2254(d)(2).

It is worth noting that if we excluded the lodged material in this case, the State's arguments would fare even worse than they do. The panel members' cards and answers to the questionnaires were the only items of information that the prosecutors had about them, other than their appearances, before reaching the point of choosing whether to employ the graphic script; if we excluded consideration of the questionnaires, the State would be left with no basis even to argue extenuation of the extreme racial disparity in the use of the graphic script.

16. We confine our analysis to these sources because the questionnaires and any testimony about their answers provided the only information available to prosecutors about venire members' views on the death penalty before they decided whether to use the graphic script.

17. The dissent has conducted a similar statistical analysis that it contends supports the State's argument that the graphic script was used to expose the true feelings of jurors who professed ambivalence about the death penalty on their questionnaires. See *post*, at 2357–2360. A few examples suffice to show that the dissent's conclusions rest on characterizations of panel members' questionnaire responses that we consider implausible. In the dissent's analysis, for example, Keaton and Mackey were ambivalent, despite Keaton's questionnaire response that she did not believe in the death penalty and felt it was not for her to punish anyone, Joint Lodging 55, and Mackey's response that "[t]hou shall [n]ot kill," *id.*, at 79. But we believe neither can be fairly characterized as someone who might turn out to be a juror acceptable to the State upon pointed questioning. The dissent also characterizes the questionnaires of Vivian Sztybel, Filemon Zablan, and Dominick Desinise as revealing ambivalence. But Sztybel's questionnaire stated that she believed in the death penalty "[i]f a person is found guilty of murder or other crime ... without a valid defense" because "[t]hey may continue to do this again and again." *Id.*, at 184. She also reported that she had no moral, religious, or personal belief that would prevent her from imposing the death penalty. *Ibid.* Zablan stated on the questionnaire that he was able to impose the death penalty and that he supported it "[i]f it's the law and if the crime fits such punishment." *Id.*, at 223. Desinise reported in *voir dire* that he had stated in the questionnaire his opposition to the death penalty. App. 573.

18. App. 728 (Mackey); *id.*, at 769 (Keaton).

19. Kennedy said that he believed in the death penalty but would apply it only in an extreme case such as one involving multiple murders. Joint Lodging 46. There is no ambivalence in his questionnaire responses. Butler's questionnaire is not available, but she affirmed in *voir dire* that she had said on her questionnaire that she believed in the death penalty, that she had no moral, religious, or personal beliefs that would prevent her from imposing the death penalty, and that she had reported on her questionnaire that she "believe[d] in the death penalty only when a crime has been committed concerning a child such as beating

way.[20] The State's explanation does even worse in the instances of the five nonblacks who received the graphic script, missing the mark four times out of five: Vivian Sztybel and Filemon Zablan received it,[21] although each was unambiguously in favor of the death penalty,[22] while Dominick Desinise and Clara Evans unambiguously opposed it[23] but were given the graphic version.[24]

The State's purported rationale fails again if we look only to the treatment of ambivalent panel members, ambivalent black individuals having been more likely to receive the graphic description than ambivalent nonblacks. Three nonblack members of the venire indicated ambivalence to the death penalty on their questionnaires;[25] only one of them, Fernando Gutierrez, received the graphic script.[26] But of the four black panel members who expressed ambivalence,[27] all got the graphic treatment.[28]

The State's attempt at a race-neutral rationalization thus simply fails to explain what the prosecutors did. But if we posit instead that the prosecutors' first object was to use the graphic script to make a case for excluding black panel members opposed to or ambivalent about the death penalty, there is a much tighter fit of fact and explanation.[29] Of the 10 nonblacks whose questionnaires expressed ambivalence or opposition,[30] only 80% received the graphic treatment.[31] But of the seven blacks who expressed ambivalence or opposition,[32] 86% heard the graphic script.[33] As between the State's ambivalence explanation and Miller-El's racial one, race is much the better, and the reasonable inference is that race was the major consideration when the prosecution chose to follow the graphic script.

to death or some form of harsh physical abuse, and when an innocent victim's life is taken." 4 Record 1874; see also *id.*, at 1906–1907.

20. App. 579 (Butler); *id.*, at 317 (Kennedy).

21. *Id.*, at 640–641 (Sztybel); *id.*, at 748 (Zablan).

22. Joint Lodging 184 (Sztybel); *id.*, at 223 (Zablan).

23. Neither questionnaire is available, but Desinise and Evans both confirmed on *voir dire* that on the questionnaire they stated their opposition to the death penalty. App. 573 (Desinise); *id.*, at 626–628 (Evans).

24. *Id.*, at 573 (Desinise); *id.*, at 626 (Evans).

25. In answering the question whether she had moral, religious, or personal beliefs that might prevent her from giving the death penalty, Colleen Moses confirmed at *voir dire* that she said, "I don't know. It would depend." 3 Record 1141. Noad Vickery confirmed at *voir dire* that he reported on the questionnaire that he was not sure what he believed about the death penalty. 4 *id.*, at 1611. Fernando Gutierrez reported on the questionnaire that he believed in the death penalty for some crimes but answered "yes" to the question whether he had moral, religious, or personal beliefs that might prevent him from imposing it. Joint Lodging 231.

26. App. 775 (Gutierrez); *id.*, at 547 (Moses); 4 Record 1569 (Vickery).

27. These were Linda Baker, Joint Lodging 71; Paul Bailey, *id.*, at 63; Carrol Boggess, *id.*, at 38; and Troy Woods, *id.*, at 207.

28. App. 294 (Boggess); *id.*, at 652–653 (Baker); *id.*, at 405–406 (Woods); *id.*, at 737 (Bailey).

29. The dissent posits that prosecutors did not use the graphic script with panel members opposed to the death penalty because it would only have antagonized them. See *post*, at 2359. No answer is offered to the question why a prosecutor would take care with the feelings of a panel member he would excuse for cause or strike yet would antagonize an ambivalent member whose feelings he wanted to smoke out, but who might turn out to be an acceptable juror.

30. These were John Nelson, 2 Record 625; James Holtz, *id.*, at 1022; Moses, 3 *id.*, at 1141; Linda Berk, *id.*, at 1445, 1450; Desinise, App. 573; Vickery, 4 Record 1610; Gene Hinson, App. 576; Girard, *id.*, at 624; Evans, *id.*, at 627–628; Gutierrez, Joint Lodging 231.

31. These were Desinise, App. 573; Evans, *id.*, at 626; and Gutierrez, *id.*, at 775.

The same is true for another kind of disparate questioning, which might fairly be called trickery. The prosecutors asked members of the panel how low a sentence they would consider imposing for murder. Most potential jurors were first told that Texas law provided for a minimum term of five years, but some members of the panel were not, and if a panel member then insisted on a minimum above five years, the prosecutor would suppress his normal preference for tough jurors and claim cause to strike. Two Terms ago, we described how this disparate questioning was correlated with race:

"Ninety-four percent of whites were informed of the statutory minimum sentence, compared [with] only twelve and a half percent of African–Americans. No explanation is proffered for the statistical disparity." *Pierre v. Louisiana*, 306 U.S. 354, 361–362, 59 S.Ct. 536, 83 L.Ed. 757] (1939) ("The fact that the testimony . . . was not challenged by evidence appropriately direct, cannot be brushed aside." Had there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be assumed that the State would have refrained from introducing it (quoting *Norris v. Alabama*, 294 U.S. 587, 594–595] 55 S.Ct. 579, 79 L.Ed. 1074] (1935))). Indeed, while petitioner's appeal was pending before the Texas Court of Criminal Appeals, that court found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case. *Chambers v. State*, 784 S.W.2d 29, 31 (Tex.Crim.App.1989)." *Miller-El v. Cockrell*, 537 U.S., at 345, 123 S.Ct. 1029.

The State concedes that the manipulative minimum *punishment* questioning was used to create cause to strike, Brief for Respondent 33, and n. 26, but now it offers the extenuation that prosecutors omitted the 5–year information not on the basis of race, but on stated opposition to the death penalty, or ambivalence about it, on the questionnaires and in the *voir dire* testimony. *Id.*, at 34–35. On the State's identification of black panel members opposed or ambivalent, all were asked the trick question.[34] But the State's rationale flatly fails to explain why most white panel members who expressed similar opposition or ambivalence were not subjected to it. It is entirely true, as the State argues, *id.*, at 35, that prosecutors struck a number of nonblack members of the panel (as well as black members) for cause or by agreement before they reached the point in the stan-

32. These were Jerry Mosley, 7 Record 2658; Baker, *id.*, at 71; Bailey, *id.*, at 63; Keaton, *id.*, at 55; Mackey, *id.*, at 79; Boggess, *id.*, at 38; and Woods, *id.*, at 207.

33. Only Mosley did not. App. 630.

34. The State puts the number of black panel members who expressed opposition or ambivalence at seven, and each received the minimum punishment ruse. Bozeman, *id.*, at 162; Fields, *id.*, at 187–188; Warren, *id.*, at 213–214; Rand, *id.*, at 270; Boggess, *id.*, at 306–307; Kennedy, *id.*, at 327–328; and Baker, *id.*, at 654. Woods, the State argues, had been revealed through questioning as a supporter of the death penalty, and accordingly he was told that five years was the statutory minimum. As explained *supra*, at 2325–2331, Fields and Warren were neither ambivalent nor opposed; on our analysis of black venire members opposed or ambivalent, all received

dard *voir dire* sequence to question about minimum punishment. But this is no answer; 8 of the 11 nonblack individuals who voiced opposition or ambivalence were asked about the acceptable minimum only after being told what state law required.[35] Hence, only 27% of nonblacks questioned on the subject who expressed these views were subjected to the trick question, as against 100% of black members. Once again, the implication of race in the prosecutors' choice of questioning cannot be explained away.[36]

There is a final body of evidence that confirms this conclusion. We know that for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries, as we explained the last time the case was here.

"Although most of the witnesses [presented at the *Swain* hearing in 1986] denied the existence of a systematic policy to exclude African–Americans, others disagreed. A Dallas County district judge testified that, when he had served in the District Attorney's Office from the late–1950's to early–1960's, his superior warned him that he would be fired if he permitted any African–Americans to serve on a jury. Similarly, another

the trick question, along with two proponents of capital punishment.

35. Moses confirmed at *voir dire* that she reported on her questionnaire that she did not know the answer to Question 58, 3 Record 1141, although she did express support for the death penalty, App. 548. She was not subjected to the manipulative script. *Id.*, at 547. Crowson said that if there was a chance at rehabilitation she probably would not go with death. *Id.*, at 554. The prosecution used a peremptory strike against her but did not employ the manipulative minimum punishment script. 3 Record 1232. Vickery said he did not know how he felt about the death penalty, 4 *id.*, at 1572, but was not subjected to the manipulative script, *id.*, at 1582. Salsini thought he would have a problem in the future if he voted to impose a death sentence, App. 593, but he was not subjected to the script, *id.*, at 595. Mazza was worried about what other people would think if she imposed the death penalty, *id.*, at 354–355, but was not subjected to the script, *id.*, at 356. Witt said she did not know if she could give the death penalty, 6 Record 2423, but was not subjected to the script, *id.*, at 2439. Whaley thought that she could not give the death penalty without proof of premeditation, even though Texas law did not require it, 10 *id.*, at 3750, but she was not subjected to the script, *id.*, at 3768. Hearn said that the death penalty should be given only to those who could not be rehabilitated, App. 429, but she was not subjected to the script, *id.*, at 441. The three nonblacks who expressed ambivalence or opposition and were subjected to the script were James Holtz, *id.*, at 538; Margaret Gibson, *id.*, at 514; and Fernando Gutierrez, 11–(B) Record 4397.

36. The dissent reaches a different statistical result that supports the State's explanation. See *post*, at 2360–2361. There are two flaws in its calculations. First, it excises from its calculations panel members who were struck for cause or by agreement, on the theory that prosecutors knew they could be rid of those panel members without resorting to the minimum punishment ruse. See *post*, at 2360–2361. But the prosecution's calculation about whether to ask these manipulative questions occurred before prosecutors asked the trial court to strike panel members for cause and, frequently, before prosecutors and defense counsel would have reached agreement about removal. It is unlikely that prosecutors were so assured of being able to remove certain panel members for cause or by agreement that they would forgo the chance to create additional grounds for removal by employing the minimum-punishment ruse. Second, as with its analysis of the panelists receiving the graphic script, the dissent characterizes certain panel members in ways that in our judgment are unconvincing. For example, for purposes of the minimum-punishment analysis, the dissent considers Colleen Moses and Noad Vickery to be panelists so favorable to the prosecution that there was no need to resort to the minimum-punishment ruse, *post*, at 2361, yet the dissent acknowledged Moses's and Vickery's ambivalent questionnaire responses in its discussion of the graphic script, *post*, at 2359.

Dallas County district judge and former assistant district attorney from 1976 to 1978 testified that he believed the office had a systematic policy of excluding African–Americans from juries."

"Of more importance, the defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service .... A manual entitled 'Jury Selection in a Criminal Case' [sometimes known as the Sparling Manual] was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller–El's trial." *Miller–El v. Cockrell*, 537 U.S., at 334–335, 123 S.Ct. 1029.[37]

Prosecutors here "marked the race of each prospective juror on their juror cards." *Id.*, at 347, 123 S.Ct. 1029.[38]

The Court of Appeals concluded that Miller–El failed to show by clear and convincing evidence that the state court's finding of no discrimination was wrong, whether his evidence was viewed collectively or separately. 361 F.3d, at 862. We find this conclusion as unsupportable as the "dismissive and strained interpretation" of his evidence that we disapproved when we decided Miller–El was entitled to a certificate of appealability. See *Miller–El v. Cockrell*, *supra*, at 344, 123 S.Ct. 1029. It is true, of course, that at some points the significance of Miller–El's evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination.

In the course of drawing a jury to try a black defendant, 10 of the 11 qualified black venire panel members were peremptorily struck. At least two of them, Fields and Warren, were ostensibly acceptable to prosecutors seeking a death verdict, and Fields was ideal. The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny.

The strikes that drew these incredible explanations occurred in a selection process replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race. At least two of the jury shuffles conducted by the State make no sense except as efforts to delay consideration of black jury panelists to the end of the week, when they might not even be reached. The State has in fact never offered any other explanation. Nor has the State denied that disparate lines of questioning were pursued: 53% of black panelists but only 3% of nonblacks were questioned with a graphic script meant to induce qualms about applying the death penalty (and thus explain a strike), and 100% of blacks but only 27% of nonblacks were subjected to a trick question about the minimum acceptable penalty for murder, meant to induce a disqualifying an-

37. The material omitted from the quotation includes an excerpt from a 1963 circular given to prosecutors in the District Attorney's Office, which the State points out was not in evidence in the state trial court. The Sparling Manual, however, was before the state court.

38. The State claimed at oral argument that prosecutors could have been tracking jurors' races to be sure of avoiding a *Batson* violation. Tr. of Oral Arg. 44. *Batson*, of course, was decided the month after Miller–El was tried.

swer. The State's attempts to explain the prosecutors' questioning of particular witnesses on nonracial grounds fit the evidence less well than the racially discriminatory hypothesis.

If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20–year old manual of tips on jury selection, as shown by their notes of the race of each potential juror. By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.

It blinks reality to deny that the State struck Fields and Warren, included in that 91%, because they were black. The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State. The State's pretextual positions confirm Miller–El's claim, and the prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.

The state court's conclusion that the prosecutors' strikes of Fields and Warren were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous. The judgment of the Court of Appeals is reversed, and the case is remanded for entry of judgment for petitioner together with orders of appropriate relief.

It is so ordered.

Justice BREYER, concurring.

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Court adopted a burden-shifting rule designed to ferret out the unconstitutional use of race in jury selection. In his separate opinion, Justice Thurgood Marshall predicted that the Court's rule would not achieve its goal. The only way to "end the racial discrimination that peremptories inject into the jury-selection process," he concluded, was to "eliminat[e] peremptory challenges entirely." *Id.*, at 102–103, 106 S.Ct. 1712 (concurring opinion). Today's case reinforces Justice Marshall's concerns.

I

To begin with, this case illustrates the practical problems of proof that Justice Marshall described. As the Court's opinion makes clear, Miller–El marshaled extensive evidence of racial bias. But despite the strength of his claim, Miller–El's challenge has resulted in 17 years of largely unsuccessful and protracted litigation—including 8 different judicial proceedings and 8 different judicial opinions, and involving 23 judges, of whom 6 found the *Batson* standard violated and 16 the contrary.

The complexity of this process reflects the difficulty of finding a legal test that will objectively measure the inherently subjective reasons that underlie use of a peremptory challenge. *Batson* seeks to square this circle by (1) requiring defendants to establish a prima facie case of discrimination, (2) asking prosecutors then to offer a race-neutral explanation for their use of the peremptory, and then (3) requiring defendants to prove that the neutral reason offered is pretextual. See *ante*, at 2324–2325. But *Batson* embodies defects intrinsic to the task.

At *Batson's* first step, litigants remain free to misuse peremptory challenges as long as the strikes fall *below* the prima facie threshold level. See 476 U.S., at 105, 106 S.Ct. 1712 (Marshall, J., concurring). At *Batson's* second step, prosecutors need only tender a neutral reason, not a "persuasive, or even plausible" one. *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (*per curiam*); see also *id.*, at 766, 115 S.Ct. 1769 (" 'mustaches and the beards look suspicious' "). And most importantly, at step three, *Batson* asks judges to engage in the awkward, sometime hopeless, task of second-guessing a prosecutor's instinctive judgment—the underlying basis for which may be invisible even to the prosecutor exercising the challenge. See 476 U.S., at 106, 106 S.Ct. 1712 (Marshall, J., concurring) (noting that the unconscious internalization of racial stereotypes may lead litigants more easily to conclude "that a prospective black juror is 'sullen,' or 'distant,' " even though that characterization would not have sprung to mind had the prospective juror been white); see also Page, Batson's Blind–Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 B.U.L.Rev. 155, 161 (2005) (" '[s]ubtle forms of bias are automatic, unconscious, and unintentional' " and " 'escape notice, even the notice of those enacting the bias' " (quoting Fiske, What's in a Category?: Responsibility, Intent, and the Avoidability of Bias Against Outgroups, in The Social Psychology of Good and Evil 127 (A. Miller ed.2004))). In such circumstances, it may be impossible for trial courts to discern if a " 'seat-of-the-pants' " peremptory challenge reflects a " 'seat-of-the-pants' " racial stereotype. *Batson*, 476 U.S., at 106, 106 S.Ct. 1712 (Marshall, J., concurring) (quoting *id.*, at 98, 106 S.Ct. 1712 (REHNQUIST, J., dissenting)).

Given the inevitably clumsy fit between any objectively measurable standard and the subjective decisionmaking at issue, I am not surprised to find studies and anecdotal reports suggesting that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem. See, *e.g.*, Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis, 3 U. Pa. J. Const. L. 3, 52–53, 73, n. 197 (2001) (in 317 capital trials in Philadelphia between 1981 and 1997, prosecutors struck 51% of black jurors and 26% of nonblack jurors; defense counsel struck 26% of black jurors and 54% of nonblack jurors; and race-based uses of prosecutorial peremptories declined by only 2% after *Batson*); Rose, The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County, 23 Law and Human Behavior 695, 698–699 (1999) (in one North Carolina county, 71% of excused black jurors were removed by the prosecution; 81% of excused white jurors were removed by the defense); Tucker, In Moore's Trials, Excluded Jurors Fit Racial Pattern, Washington Post, Apr. 2, 2001, p. A1 (in D.C. murder case spanning four trials, prosecutors excused 41 blacks or other minorities and 6 whites; defense counsel struck 29 whites and 13 black venire members); Mize, A Legal Discrimination; Juries Are Not Supposed to be Picked on the Basis of Race and Sex, But It Happens All the Time, Washington Post, Oct. 8, 2000, p. B8 (authored by judge on the D.C. Superior Court); see also Melilli, Batson in Practice: What We Have Learned About Batson and Peremptory Challenges, 71 Notre Dame L.Rev. 447, 462–464 (1996) (finding *Batson* challenges' success rates lower where peremptories were used to strike black, rather than white, potential jurors); Brand, The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters, 1994 Wis. L.Rev. 511, 583–589 (examining judicial decisions and concluding that few *Batson* challenges succeed); Note, Batson v. Kentucky and J.E.B. v. Alabama ex rel. T.B.: Is the Peremptory Challenge Still Preeminent?, 36 Boston

College L.Rev. 161, 189, and n. 303 (1994) (same); Montoya, The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory Challenge, 29 U. Mich. J.L. Reform 981, 1006, nn. 126–127, 1035 (1996) (reporting attorneys' views on the difficulty of proving *Batson* claims).

II

Practical problems of proof to the side, peremptory challenges seem increasingly anomalous in our judicial system. On the one hand, the Court has widened and deepened *Batson's* basic constitutional rule. It has applied *Batson's* antidiscrimination test to the use of peremptories by criminal defendants, *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), by private litigants in civil cases, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), and by prosecutors where the defendant and the excluded juror are of different races, *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). It has recognized that the Constitution protects not just defendants, but the jurors themselves. *Id.*, at 409, 111 S.Ct. 1364. And it has held that equal protection principles prohibit excusing jurors on account of gender. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). Some lower courts have extended *Batson's* rule to religious affiliation as well. See, *e.g.*, *United States v. Brown*, 352 F.3d 654, 668–669 (C.A.2 2003); *State v. Hodge*, 248 Conn. 207, 244–246, 726 A.2d 531, 553 (1999); *United States v. Stafford*, 136 F.3d 1109, 1114 (C.A.7 1998) (suggesting same); see also *Davis v. Minnesota*, 511 U.S. 1115, 1117, 114 S.Ct. 2120, 128 L.Ed.2d 679 (1994) (THOMAS, J., dissenting from denial of certiorari). But see *Casarez v. State*, 913 S.W.2d 468, 496 (Tex.Crim.App.1994) (en banc) (declining to extend *Batson* to religious affiliation); *State v. Davis*, 504 N.W.2d 767, 771 (Minn.1993) (same).

On the other hand, the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before. See, *e.g.*, Post, A Loaded Box of Stereotypes: Despite 'Batson,' Race, Gender Play Big Roles in Jury Selection., Nat. L. J., Apr. 25, 2005, pp. 1, 18 (discussing common reliance on race and gender in jury selection). For example, one jury-selection guide counsels attorneys to perform a "demographic analysis" that assigns numerical points to characteristics such as age, occupation, and marital status—in addition to race as well as gender. See V. Starr & A. McCormick, Jury Selection 193–200 (3d ed.2001). Thus, in a hypothetical dispute between a white landlord and an African-American tenant, the authors suggest awarding two points to an African-American venire member while subtracting one point from her white counterpart. *Id.*, at 197–199.

For example, a bar journal article counsels lawyers to "rate" potential jurors "demographically (age, gender, marital status, etc.) and mark who would be under stereotypical circumstances [their] natural *enemies* and *allies*." Drake, The Art of Litigating: Deselecting Jurors Like the Pros, 34 Md. Bar J. 18, 22 (Mar.-Apr.2001) (emphasis in original).

For example, materials from a legal convention, while noting that "nationality" is less important than "once was thought," and emphasizing that "the answers a prospective juror gives to questions are much more valuable," still point out that "[s]tereotypically" those of "Italian, French, and Spanish" origin "are thought to be pro-plaintiff as well as other minorities, such as Mexican and Jewish[;] [p]ersons of German, Scandinavian, Swedish, Finnish, Dutch, Nordic, British, Scottish, Oriental, and Russian origin are thought to be better for the defense"; African-Americans "have always been considered good for the plaintiff," and "[m]ore politically conservative minorities will be more likely to lean toward defendants." Blue, Mirroring, Proxemics, Nonverbal Communication and Other Psychological Tools, Advocacy Track—Psychology of Trial, Association of Trial Lawyers of America Annual Convention Reference Materials, 1 Ann.2001 ATLA-CLE 153, available at WESTLAW, ATLA-CLE database (June 8, 2005).

For example, a trial consulting firm advertises a new jury-selection technology: "Whether you are trying a civil case or a criminal case, SmartJURY & trade; has likely determined the exact demographics (age, race, gender, education, occupation, marital status, number of children, religion, and income) of the type of jurors you should select and the type you should strike." SmartJURY Product Information, http://www.cts-america.com/smartjury_pi.asp (as visited June 8, 2005, and available in Clerk of Court's case file).

These examples reflect a professional effort to fulfill the lawyer's obligation to help his or her client. Cf. *J.E.B., supra*, at 148–149, 114 S.Ct. 1419 (O'CONNOR, J., concurring) (observing that jurors' race and gender may inform their perspective). Nevertheless, the outcome in terms of jury selection is the same as it would be were the motive less benign. And as long as that is so, the law's antidiscrimination command and a peremptory jury-selection system that permits or encourages the use of stereotypes work at cross-purposes.

Finally, a jury system without peremptories is no longer unthinkable. Members of the legal profession have begun serious consideration of that possibility. See, *e.g.*, *Alen v. Florida*, 596 So.2d 1083, 1088–1089 (Fla.App.1992) (Hubbart, J., concurring); Broderick, Why the Peremptory Challenge Should Be Abolished, 65 Temp. L.Rev. 369 (1992) (authored by Senior Judge on the U.S. District Court for the Eastern District of Pennsylvania); Hoffman, Peremptory Challenges Should be Abolished: A Trial Judge's Perspective, 64 U. Chi. L.Rev. 809 (1997) (authored by a Colorado state-court judge); Altschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Chi. L.Rev. 153, 199–211 (1989); Amar, Reinventing Juries: Ten Suggested Reforms, 28 U.C.D.L.Rev. 1169, 1182–1183 (1995); Melilli, 71 Notre Dame L.Rev., at 502–503; Page, 85 B.U.L.Rev., at 245–246. And England, a common-law jurisdiction that has eliminated peremptory challenges, continues to administer fair trials based largely on random jury selection. See Criminal Justice Act, 1988, ch. 33, § 118(1), 22 Halsbury's Statutes 357 (4th ed.2003 reissue) (U.K.); see also 2 Jury Service in Victoria, Final Report, ch. 5, p. 165 (Dec.1997) (1993 study of English barristers showed majority support for system without peremptory challenges).

III

I recognize that peremptory challenges have a long historical pedigree. They may help to reassure a party of the fairness of the jury. But long ago, Blackstone recognized the peremptory challenge as an "arbitrary and capricious species of [a] challenge." 4 W. Blackstone, Commentaries on the Laws of England 346 (1769). If used to express stereotypical judgments about race, gender, religion, or national origin, peremptory challenges betray the jury's democratic origins and undermine its representative function. See 1 A. de Tocqueville, Democracy in America 287 (H. Reeve transl. 1900) ("[T]he institution of the jury raises the people . . . to the bench

of judicial authority [and] invests [them] with the direction of society"); A. Amar, The Bill of Rights 94–96 (1998) (describing the Founders' vision of juries as venues for democratic participation); see also Stevens, Foreword, Symposium: The Jury at a Crossroad: The American Experience, 78 Chi.-Kent L.Rev. 907, 907–908 (2003) (citizens should not be denied the opportunity to serve as jurors unless an impartial judge states a reason for the denial, as with a strike for cause). The "scientific" use of peremptory challenges may also contribute to public cynicism about the fairness of the jury system and its role in American government. See, *e.g.*, S. O'Connor, Juries: They May Be Broke, But We Can Fix Them, Chautauqua Institution Lecture, July 6, 1995. And, of course, the right to a jury free of discriminatory taint is constitutionally protected—the right to use peremptory challenges is not. See *Stilson v. United States*, 250 U.S. 583, 586, 40 S.Ct. 28, 63 L.Ed. 1154 (1919); see also *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988) (defendant's loss of a peremptory challenge does not violate his right to an impartial jury).

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 (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.

Justice THOMAS, with whom THE CHIEF JUSTICE and Justice SCALIA join, dissenting.

In the early morning hours of November 16, 1985, petitioner Thomas Joe Miller–El and an accomplice, Kennard Flowers, robbed a Holiday Inn in Dallas, Texas. Miller–El and Flowers bound and gagged hotel employees Donald Hall and Doug Walker, and then laid them face down on the floor. When Flowers refused to shoot them, Miller–El shot each twice in the back, killing Walker and rendering Hall a paraplegic. Miller–El was convicted of capital murder by a jury composed of seven white females, two white males, a black male, a Filipino male, and a Hispanic male.

For nearly 20 years now, Miller–El has contended that prosecutors peremptorily struck potential jurors on the basis of race. In that time, seven state and six federal judges have reviewed the evidence and found no error. This Court concludes otherwise, because it relies on evidence never presented to the Texas state courts. That evidence does not, much less "clear[ly] and convincing[ly]," show that the State racially discriminated against potential jurors. 28 U.S.C. § 2254(e)(1). However, we ought not even to consider it. In deciding whether to grant Miller–El relief, we may look only to "the evidence presented in the State court proceeding." § 2254(d)(2). The majority ignores that restriction on our review to grant Miller–El relief. I respectfully dissent.

I

Miller–El requests federal habeas relief from a state-court judgment, and hence our review is controlled by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. Because Miller–El's claim of racial discrimination in jury selection was adjudicated on the merits in Texas state court, AEDPA directs that a writ of habeas corpus "*shall not be granted*" unless the state court's decision "was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding.*" 28 U.S.C. § 2254(d)(2) (emphasis added).

To obtain habeas relief, then, Miller–El must show that, based on the evidence before the Texas state courts, the only reasonable conclusion was that prosecutors had racially discriminated against prospective jurors. He has not even come close to such a showing. The state courts held two hearings, but despite ample opportunity, Miller–El presented little evidence that discrimination occurred during jury selection. In view of the evidence actually presented to the Texas courts, their conclusion that the State did not discriminate was eminently reasonable. As a close look at the state-court proceedings reveals, the majority relies almost entirely on evidence that Miller–El has never presented to any Texas state court.

A

Jury selection in Miller–El's trial took place over five weeks in February and March 1986. During the process, 19 of the 20 blacks on the 108-person venire panel were not seated on the jury: 3 were dismissed for cause, 6 were dismissed by the parties' agreement, and 10 were peremptorily struck by prosecutors. Miller–El objected to 8 of these 10 strikes, asserting that the prosecutors were discriminating against black veniremen. Each time, the prosecutors proffered a race-neutral, case-related reason for exercising the challenge, and the trial court permitted the venireman to be removed. The remaining black venireman, Troy Woods, served on the jury that convicted Miller–El.

At the completion of *voir dire*, Miller–El moved to strike the jury under this Court's decision in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), which required Miller–El to prove "systematic exclusion of black persons through the use of peremptories over a period of time." *Powers v. Ohio*, 499 U.S. 400, 405, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). At the pretrial *Swain* hearing in March 1986, Miller–El presented three types of documentary evidence: the juror questionnaires of the 10 black veniremen struck by the State; excerpts from a series of newspaper articles on racial bias in jury selection; and a manual on jury selection in criminal cases authored by a former Dallas County prosecutor. The *voir dire* transcript was part of the official record. Miller–El, however, introduced none of the other 98 juror questionnaires, no juror cards, and no evidence related to jury shuffling. See *ante*, at 2334–2335, n. 15.

Miller–El also presented nine witnesses, five of whom had spent time as prosecutors in the Dallas County District Attorney's (D.A.) Office and five of whom were current or former judges in Dallas County. Their testimony made three things clear. First, the D. A.'s Office had never officially sanctioned or promoted racial discrimination in jury selection, as several witnesses testified, including the county's Chief Public Defender as well as one of the first black prosecutors to serve in the D. A.'s Office. App. 842 (Baraka); *id.*, at 846–848 (Tait); *id.*, at 860 (Entz); *id.*, at 864 (Kinkeade). Second, witnesses testified that, despite the absence of any official policy, individual prosecutors had almost certainly excluded blacks in particular cases. *Id.*, at 830, 833 (Hampton); *id.*, at 841–842 (Bara-

ka); *id.*, at 846–848 (Tait); *id.*, at 863–864 (Kinkeade). Third and most important, no witness testified that the prosecutors in Miller–El's trial—Norman Kinne, Paul Macaluso, and Jim Nelson—had ever engaged in racially discriminatory jury selection. *Id.*, at 843 (Baraka); *id.*, at 859 (Entz); *id.*, at 863 (Kinkeade). The trial court concluded that, although racial discrimination "may have been done by individual prosecutors in individual cases[,]" there was no evidence of "any systematic exclusion of blacks as a matter of policy by the District Attorney's office." *Id.*, at 882–883.

Miller–El was then tried, convicted, and sentenced to death. While his appeal was pending, this Court decided *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). *Batson* announced a new three-step process for evaluating claims that a prosecutor used peremptory challenges to strike prospective jurors because of their race:

> "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Miller–El v. Cockrell*, 537 U.S. 322, 328–329, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) *(Miller–El I)*.

The Texas Court of Criminal Appeals remanded Miller–El's case for a hearing to be held under *Batson*.

B

At the *Batson* hearing in May 1988, before the same judge who had presided over his trial, Miller–El sought to establish that prosecutors at his trial had struck potential jurors on the basis of their race. To make his prima facie case, Miller–El reintroduced some of what he had presented two years earlier at the *Swain* hearing: the testimony of the nine witnesses, the 10 juror questionnaires, and the excerpted newspaper articles. App. 893–895. The court instructed the State to explain its strikes. *Id.*, at 898–899. Of the 10 peremptory strikes at issue, prosecutors had already explained 8 at trial in response to Miller–El's objections. The State therefore called Paul Macaluso, one of the prosecutors who had conducted the *voir dire*, to testify regarding his reasons for striking veniremen Paul Bailey and Joe Warren.

Macaluso testified that he had struck Bailey because Bailey seemed firmly opposed to the death penalty, even though Bailey tempered his stance during *voir dire*. *Id.*, at 905–906. This was accurate. Bailey expressed forceful opposition to the death penalty when questioned by Macaluso. See, *e.g.*, 11–(A) Record of *Voir Dire* 4110 (hereinafter Record) ("I don't believe in capital punishment. Like I said on [my juror questionnaire], I don't believe anyone has the right to take another person's life"); *id.*, at 4112 (saying that he felt "[v]ery strongly" that the State should not impose the death penalty). Later, however, when questioned by defense counsel, Bailey said that he could impose the death penalty if the State proved the necessary aggravating circumstances. *Id.*, at 4148–4150, 4152. When the trial court overruled the State's challenge for cause, the State exercised a peremptory challenge. *Id.*, at 4168.

Macaluso next testified that he dismissed veniremen Warren because Warren gave inconsistent answers regarding his ability to apply the death penalty and because Warren's brother had been recently convicted. App. 908–910. Macaluso conceded that Warren was not as clearly unfavorable to the State as Bailey. *Id.*, at 911. Nevertheless, Macaluso struck Warren because it was early in the jury selection process and the State had plenty of remaining peremptories with which it could remove marginal jurors. Macaluso candidly stated that he might not have removed Warren if fewer peremptories had been available. *Id.*, at 910.

After the State presented nonracial, case-related reasons for all its strikes, the focus shifted to *Batson's* third step: whether Miller–El had "carried his burden of proving purposeful discrimination." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) *(per curiam)*; *Batson*, *supra*, at 97–98, 106 S.Ct. 1712. At this point, Miller–El stood on his *Swain* evidence. App. 921. That evidence bore on whether some Dallas County prosecutors had discriminated generally in past years; none of the evidence indicated that the prosecutors at *Miller–El's* trial—Kinne, Macaluso, and Nelson—had discriminated in the selection of *Miller–El's* jury. Moreover, none of this generalized evidence came close to demonstrating that the State's explanations were pretextual in Miller–El's particular trial. Miller–El did not even attempt to rebut the State's racially neutral reasons at the hearing. He presented no evidence and made no arguments. *Id.*, at 919–922.

Nevertheless, the majority concludes that the trial judge was unreasonable in finding as a factual matter that the State did not discriminate against black veniremen. *Ante*, at 2340. That is not so "in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). From the scanty evidence presented to the trial court, "it is at least reasonable to conclude" that purposeful discrimination did not occur, "which means that the state court's determination to that effect must stand." *Early v. Packer*, 537 U.S. 3, 11, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) *(per curiam)*.

II

Not even the majority is willing to argue that the evidence before the state court shows that the State discriminated against black veniremen. Instead, it bases its decision on juror questionnaires and juror cards that Miller–El's new attorneys unearthed during his federal habeas proceedings and that he never presented to the state courts.[1] *Ante*, at 2334–2335, n. 15. Worse still, the majority marshals those documents in support of theories that Miller–El never argued to the state courts. AEDPA does not permit habeas petitioners to engage in this sort of sandbagging of state courts.

A

The majority discusses four types of evidence: (1) the alleged similarity between black veniremen who were struck by the prosecution and white veniremen who were not; (2) the apparent disparate questioning of black and white veniremen with respect to their views on the death penalty and their ability to impose the minimum punishment; (3) the use of the "jury shuffle" by the prosecution; and (4) evidence of historical discrimination by the D. A.'s Office in the selection of juries. Only the last was ever put before the Texas courts—and it does not prove that any constitutional violation occurred at Miller–El's trial. The majority's discussion of the other types of evidence relies on documents like juror questionnaires and juror

1. The supplemental material appears in a joint lodging submitted by the parties. It includes the State's copies of questionnaires for 12 prospective jurors (11 of whom served at Miller–El's trial), and the State's juror cards for all 108 members of the venire panel.

cards that were added to the record before the District Court.

The majority's willingness to reach outside the state-court record and embrace evidence never presented to the Texas state courts is hard to fathom. AEDPA mandates that the reasonableness of a state court's factual findings be assessed "in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2), and also circumscribes the ability of federal habeas litigants to present evidence that they "failed to develop" before the state courts. § 2254(e)(2); *Williams v. Taylor*, 529 U.S. 420, 429–430, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). Miller–El did not argue disparate treatment or disparate questioning at the *Batson* hearing, so he had no reason to submit the juror questionnaires or cards to the trial court. However, Miller–El could have developed and presented all of that evidence at the *Batson* hearing.[2] Consequently, he must satisfy § 2254(e)(2)'s requirements to adduce the evidence in federal court—something he cannot do. *Williams*, *supra*, at 437, 120 S.Ct. 1479 ("Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings"). For instance, there is no doubt that Miller–El's supplemental material could have been "previously discovered through the exercise of due diligence." § 2254(e)(2)(A)(ii).

Just last Term, we summarily reversed the Court of Appeals for the Sixth Circuit for doing what the Court does here: granting habeas relief on the basis of evidence not presented to the state court. See *Holland v. Jackson*, 542 U.S. ——, ——, 124 S.Ct. 2736, 159 L.Ed.2d 683 (2004) *(per curiam)*. We reaffirmed "that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." *Id.*, at ——, 124 S.Ct., at 2737–2738; see also *Miller–El I*, 537 U.S., at 348, 123 S.Ct. 1029 ("[P]etitioner must demonstrate that a state court's ... factual determination was 'objectively unreasonable' in light of the record before the court"). In an about-face, the majority now reverses the Court of Appeals for the Fifth Circuit for *failing* to grant habeas relief on the basis of evidence not before the state court. By crediting evidence that Miller–El never placed before the state courts, the majority flouts AEDPA's plain terms and encourages habeas applicants to attack state judgments collaterally with evidence never tested by the original triers of fact.

B

The majority presents three arguments for ignoring AEDPA's requirement that the state-court decision be unreasonable "in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). None is persuasive.

1

First, without briefing or argument on the question, the majority hints that we may ignore AEDPA's limitation on the record under § 2254(d)(2) because the parties have ignored it. *Ante*, at 2334–2335, n. 15. The majority then quickly retreats and expressly does not decide the question. *Ibid.* But its retreat is as inexplicable as its advance: Unless § 2254(d)(2) is waivable and the parties have waived it, the majority cannot consider evidence outside the state-court proceedings, as it concededly does.

The majority's venture beyond the state-court record is indefensible. Even if § 2254(d) is not jurisdictional, but see *Lindh v. Murphy*, 521 U.S. 320, 343–344, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (REHNQUIST, C. J., dissenting), "it shares the most salient characteristic of jurisdictional statutes: Its commands are addressed to courts rather than to individuals," *id.*, at 344, 117 S.Ct. 2059. Section 2254(d) speaks directly to federal courts when it states that a habeas application by a state prisoner "*shall not be granted*" except under the specified conditions. (Emphasis added); *ibid.* (REHNQUIST, C. J., dissenting). The strictures of § 2254(d) are not discretionary or waivable. Through AEDPA, Congress sought to ensure that federal courts would defer to the judgments of state courts, not the wishes of litigants.

Nevertheless, there is no need to decide whether § 2254(d)(2) may be waived, for the State has not waived it. Contrary to the majority's assertions, *ante*, at 2334–2335, n. 15, the State has argued that § 2254(d)(2) bars our review of certain evidence not before the state trial court, Brief for Respondent 41–42, just as it did in its last appearance, see Brief for Respondent in *Miller–El I*, O.T.2002, No. 01–7662, pp. 28–29, 39. The majority is correct that the State has not argued § 2254(d)(2) precludes consideration of the juror questionnaires and juror cards in particular, *ante*, at 2334–2335, n. 15, but the majority does not assert that the State may selectively invoke § 2254(d)(2) to cherry-pick only favorable evidence that lies outside the state-court record.

2

The majority next suggests that the supplemental material, particularly the juror questionnaires, might not expand on what the state trial court knew, since "the same judge presided over the *voir dire*, the *Swain* hearing, and the *Batson* hearing, and the jury questionnaires were subjects of reference at the *voir dire*." *Ante*, at 2334–2335, n. 15. This is incorrect. At the *Batson* hearing, Miller–El introduced into evidence only the questionnaires of the 10 black veniremen peremptorily struck by the State. App. 893–895. The questionnaires of the other 98 veniremen—including many on which the majority relies—were never introduced into evidence or otherwise placed before the trial judge. Miller–El and the State had copies; the trial judge did not.

Yet the majority insinuates that the questionnaires effectively were before the state court because they "were subjects of reference at the *voir dire*." *Ante*, at 2334–2335, n. 15. That is extremely misleading on the facts of this case. Although counsel for Miller–El and the State questioned witnesses partially on the basis of their questionnaire responses, the lawyers' references to questionnaires were scattered and sporadic. Even the majority does not attempt to show that the specific questionnaire responses on which it relies were called to the trial court's attention. Clearly they were not called to the trial court's attention at the only time that mattered: the *Batson* hearing.

The majority's insinuation is doubly misleading when coupled with its insistence that "the transcript of *voir dire* ... was before the state courts." *Ante*, at 2326, n. 2. Miller–El's arguments gave the state

2. The juror questionnaires had been in Miller–El's possession since before the 1986 *Swain* hearing; Miller–El's attorneys used them during the *voir dire*. But because Miller–El did not argue disparate treatment or questioning at the *Batson* hearing, Miller–El's attorneys had no reason to submit the questionnaires to the trial court. The juror cards could have been requested at any point under the Texas Public Information Act. See Supplemental Briefing on *Batson/Swain* Claim Based on Previously Unavailable Evidence, Record in No. 00–10784(CA5), p. 2494.

court no reason to go leafing through the voir dire transcript. What is more, voir dire at Miller–El's trial lasted five weeks, and the transcript occupies 11 volumes numbering 4,662 pages. To think that two years after the fact a trial court should dredge up on its own initiative passing references to unseen questionnaires—references buried in a more than 4,600–page transcript no less—is unrealistic. That is why § 2254(d)(2) demands that state courts be taken to task only on the basis of evidence "presented in the State court proceeding." The 98 questionnaires before the parties, unlike the 10 questionnaires that Miller–El entered into evidence, were not "presented" to the state court.

The majority also asserts that by considering the questionnaires, it is only attempting to help the State. After all, the State claims that any disparate questioning and treatment of black and white veniremen resulted from their questionnaires, not their respective races. As the majority sees it, if the questionnaires are not properly before us, then the State cannot substantiate its defense.

This is a startling repudiation of both *Batson* and AEDPA. A strong presumption of validity attaches to a trial court's factual finding at *Batson's* third step, *Hernandez v. New York*, 500 U.S. 352, 364, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion); *id.*, at 372, 111 S.Ct. 1859 (O'CONNOR, J., concurring in judgment); see also *Batson*, 476 U.S., at 98, n. 21, 106 S.Ct. 1712, and that presumption is doubly strong when the *Batson* finding is under collateral attack in habeas, *Miller–El I*, 537 U.S., at 340, 123 S.Ct. 1029. Thus, it is Miller–El's burden to prove racial discrimination under *Batson*, and it is his burden to prove it by clear and convincing evidence under AEDPA. Without the questionnaires never submitted to the trial court, Miller–El comes nowhere near establishing that race motivated any disparate questioning or treatment, which is precisely why the majority must strain to include the questionnaires within the state-court record.

That Miller–El needs the juror questionnaires could not be clearer in light of how the *Batson* hearing unfolded. After offering racially neutral reasons for all of its strikes, the State could have remained silent—as Miller–El did. However, the State pointed out, among other things, that any disparate questioning of black and white veniremen was based on answers given on the juror questionnaires or during the *voir dire* process. App. 920–921. The State further noted that Miller–El had never alleged disparate treatment of black and white veniremen. *Id.*, at 921. Because Miller–El did not dispute the State's assertions, there was no need for the State to enter the juror questionnaires into the record. There was nothing to argue about. Miller–El had presented only generalized evidence of historical discrimination by the D. A.'s Office, which no one believes was sufficient in itself to prove a *Batson* violation. That is why Miller–El, not the State, marshaled supplemental material during his federal habeas proceedings. Without that evidence, he cannot prove now what he never attempted to prove 17 years ago: that the State's justifications for its strikes were a pretext for discrimination.

3

Finally, the majority suggests that the 2–year delay between the *voir dire* and the post-trial *Batson* hearing is reason for weakened deference. See *ante*, at 2326, n. 1. This is an argument not for setting aside § 2254(d)(2)'s limit on the record, but for relaxing the level of deference due state courts' factual findings under §§ 2254(d)(2) and (e)(1). The presumption of correctness afforded factual findings on habeas review, however, does not depend on the manner in which the trial court reaches its factual findings, for reasons I have explained before. *Miller–El I*, *supra*, at 357–359, 123 S.Ct. 1029 (dissenting opinion). The majority leaves those arguments unanswered.

The majority's own argument is implausible on its face: "'[T]he usual risks of imprecision and distortion from the passage of time'" are far greater after 17 years than after 2. *Ante*, at 2326, n. 1 (quoting *Miller–El I*, *supra*, at 343, 123 S.Ct. 1029). The majority has it just backward. The passage of time, as AEDPA requires and as this Court has held, counsels in favor of *more* deference, not less. At least the trial court, unlike this Court, had the benefit of gauging the witnesses' and prosecutors' credibility at both the *Swain* and *Batson* hearings. *Miller–El I*, *supra*, at 339, 123 S.Ct. 1029 ("Deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations"); see also *Hernandez*, *supra*, at 364, 111 S.Ct. 1859 (plurality opinion); *Batson*, *supra*, at 98, n. 21, 106 S.Ct. 1712.

III

Even taken on its own terms, Miller–El's cumulative evidence does not come remotely close to clearly and convincingly establishing that the state court's factual finding was unreasonable. I discuss in turn Miller–El's four types of evidence: (1) the alleged disparate treatment and (2) disparate questioning of black and white veniremen; (3) the prosecution's jury shuffles; and (4) historical discrimination by the D. A.'s Office in the selection of juries. Although each type of evidence "is open to judgment calls," *ante*, at 2339, the majority finds that a succession of unpersuasive arguments amounts to a compelling case. In the end, the majority's opinion is its own best refutation: It strains to demonstrate what should instead be patently obvious.

A

The majority devotes the bulk of its opinion to a side-by-side comparison of white panelists who were allowed to serve and two black panelists who were struck, Billy Jean Fields and Joe Warren. *Ante*, at 2326–2332. The majority argues that the prosecution's reasons for striking Fields and Warren apply equally to whites who were permitted to serve, and thus those reasons must have been pretextual. The *voir dire* transcript reveals that the majority is mistaken.

It is worth noting at the outset, however, that Miller–El's and the Court's claims have always been a moving target. Of the 20 black veniremen at Miller–El's trial, 9 were struck for cause or by the parties' agreement, and 1 served on the jury. Miller–El claimed at the *Batson* hearing that all 10 remaining black veniremen were dismissed on account of race. That number dropped to 7 on appeal, and then again to 6 during his federal habeas proceedings. Of those 6 black veniremen, this Court once found debatable that the entire lot was struck based on race. *Miller–El I*, *supra*, at 343, 123 S.Ct. 1029. However, 4 (Carrol Boggess, Roderick Bozeman, Wayman Kennedy, and Edwin Rand) were dismissed for reasons other than race, as the majority effectively concedes. *Ante*, at 2332, n. 11; *Miller–El I*, *supra*, at 351–354, 123 S.Ct. 1029 (SCALIA, J., concurring).

The majority now focuses exclusively on Fields and Warren. But Warren was obviously equivocal about the death penalty. In the end, the majority's case reduces to a single veniremen, Fields, and its reading

of a 20-year-old *voir dire* transcript that is ambiguous at best. This is the antithesis of clear and convincing evidence.

1

From the outset of questioning, Warren did not specify when he would vote to impose the death penalty. When asked by prosecutor Paul Macaluso about his ability to impose the death penalty, Warren stated, "[T]here are some cases where I would agree, you know, and there are others that I don't." 3 Record 1526. Macaluso then explained at length the types of crimes that qualified as capital murder under Texas law, and asked whether Warren would be able to impose the death penalty for those types of heinous crimes. *Id.*, at 1527–1530. Warren continued to hedge: "I would say it depends on the case and the circumstances involved at the time." *Id.*, at 1530. He offered no sense of the circumstances that would lead him to conclude that the death penalty was an appropriate punishment.

Macaluso then changed tack and asked whether Warren believed that the death penalty accomplished any social purpose. *Id.*, at 1531–1532. Once again, Warren proved impossible to pin down: "Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that." *Id.*, at 1532. Macaluso then focused on what the death penalty accomplished in those cases where Warren believed it useful. *Ibid.* Even then, Warren expressed no firm view:

> "I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment." *Ibid.*

While Warren's ambivalence was driven by his uncertainty that the death penalty was severe enough, *ante*, at 2331, that is beside the point. Throughout the examination, Warren gave no indication whether or when he would prefer the death penalty to other forms of punishment, specifically life imprisonment. 3 Record 1532–1533. To prosecutors seeking the death penalty, the reason for Warren's ambivalence was irrelevant.

At *voir dire*, there was no dispute that the prosecution struck Warren not for his race, but for his ambivalence on the death penalty. Miller-El's attorneys did not object to the State's strikes of Warren or Paul Bailey, though they objected to the removal of every other black veniremen. Both Bailey and Warren shared the same characteristic: It was not clear, based on their questionnaires and *voir dire* testimony, that they could impose the death penalty. See *supra*, at 2346. In fact, Bailey was so clearly struck for nonracial reasons that Miller-El has never objected to his removal at any stage in this case.

There also was no question at the *Batson* hearing why the prosecution struck Warren. Macaluso testified:

> "I thought [Warren's statements on *voir dire*] were inconsistent responses. At one point he says, you know, on a case-by-case basis and at another point he said, well, I think—I got the impression, at least, that he suggested that the death penalty was an easy way out, that they should be made to suffer more." App. 909.

In addition, Macaluso noted that Warren's brother recently had been convicted for a crime involving food stamps. *Id.*, at 909–910. This suggested that Warren might be more sympathetic to defendants than other jurors. Macaluso was quite candid

that Warren was not as obviously disfavorable to the State as Bailey, and Macaluso stated that he might not have exercised a peremptory against Warren later in jury selection. *Id.*, at 910–911. But Macaluso used only his 6th of 15 peremptory challenges against Warren.

According to the majority, Macaluso testified that he struck Warren for his statement that the death penalty was " 'an easy way out,' " *ante*, at 2329 (quoting App. 909), and not for his ambivalence about the death penalty, *ante*, at 2331. This grossly mischaracterizes the record. Macaluso specifically testified at the *Batson* hearing that he was troubled by the "*inconsisten[cy]*" of Warren's responses. App. 909 (emphasis added). Macaluso was speaking of Warren's ambivalence about the death penalty, a reason wholly unrelated to race. This was Macaluso's "stated reason," and Macaluso ought to "stand or fall on the plausibility" of this reason—not one concocted by the majority. *Ante*, at 2332.

The majority points to four other panel members—Kevin Duke, Troy Woods, Sandra Jenkins, and Leta Girard—who supposedly expressed views much like Warren's, but who were not struck by the State. *Ante*, at 2329–2330. According to the majority, this is evidence of pretext. But the majority's premise is faulty. None of these veniremen was as difficult to pin down on the death penalty as Warren. For instance, Duke supported the death penalty. App. 378 ("I've always believed in having the death penalty. I think it serves a purpose"); *ibid.* ("I mean, it's a sad thing to see, to have to kill someone, but they shouldn't have done the things that they did. Sometimes they deserve to be killed"); *id.*, at 98, 106 S.Ct. 1712 ("If I feel that I can answer all three of these [special-issue] questions yes and I feel that he's done a crime worthy of the death penalty, yes, I will give the death penalty"). By contrast, Warren never expressed a firm view one way or the other.

Troy Woods, who was black and who served on the jury, was even more supportive of the death penalty than Duke. The majority suggests that prosecutors might have allowed Woods to serve on the jury because they were running low on peremptories or they wanted to obscure a pattern of discrimination. *Ante*, at 2330. That such rank conjecture can serve as "clear and convincing evidence" is error in its own right, but it is also belied by the record. Woods said that capital punishment was "too quick" because defendants "don't feel the pain." App. 409. When asked what sort of punishment defendants ought to receive, Woods said that he would "[p]our some honey on them and stake them out over an ant bed." *Ibid.* He testified that he would mete out such sentences because if defendants "survive for a length of time, that would be enough punishment and ... they wouldn't do it again." *Id.*, at 410 (alteration omitted). Woods also testified that he was a lifelong believer in the death penalty, *id.*, at 98, 106 S.Ct. 1712; that he could impose death generally as a juror, *id.*, at 98, 106 S.Ct. 1712; and that he could impose death for murder during the course of a robbery, the specific crime of which Miller-El stood accused, *ibid.* It is beyond cavil why the State accepted Woods as a juror: He could impose the punishment sought by the State.

Nevertheless, even assuming that any of these veniremen expressed views similar to Warren's, Duke, Woods, and Girard were questioned much later in the jury selection process, when the State had fewer peremptories to spare. Only Sandra Jenkins was questioned early in the *voir dire* process, and thus only Jenkins was even arguably similarly situated to War-

ren. However, Jenkins and Warren were different in important respects. Jenkins expressed no doubt whatsoever about the death penalty. She testified that she had researched the death penalty in high school, and she said in response to questioning by both parties that she strongly believed in the death penalty's value as a deterrent to crime. 3 Record 1074–1075, 1103–1104. This alone explains why the State accepted Jenkins as a juror, while Miller–El struck her. In addition, Jenkins did not have a relative who had been convicted of a crime, but Warren did. At the *Batson* hearing, Macaluso testified that he struck Warren both for Warren's inconsistent responses regarding the death penalty and for his brother's conviction. *Supra*, at 2346.

The majority thinks it can prove pretext by pointing to white veniremen who match only one of the State's proffered reasons for striking Warren. *Ante*, at 2329–2330. This defies logic. "'Similarly situated' does not mean matching any one of several reasons the prosecution gave for striking a potential juror—it means matching *all* of them." *Miller–El I*, 537 U.S., at 362–363, 123 S.Ct. 1029 (THOMAS, J., dissenting); cf. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983) (Title VII of the Civil Rights Act of 1964 discrimination occurs when an employee is treated "'"in a manner which but for that person's sex would be different"'" (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 711, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978))). Given limited peremptories, prosecutors often must focus on the potential jurors most likely to disfavor their case. By ignoring the totality of reasons that a prosecutor strikes any particular venireman, it is the majority that treats potential jurors as "products of a set of cookie cutters," *ante*, at 2329, n. 6—as if potential jurors who share only some among many traits must be treated the same to avoid a *Batson* violation. Of course jurors must not be "identical in all respects" to gauge pretext, *ante*, at 2329, n. 6, but to isolate race as a variable, the jurors must be comparable in all respects that the prosecutor proffers as important. This does not mean "that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror." *Ibid.* It means that a defendant cannot support a *Batson* claim by comparing veniremen of different races unless the veniremen are truly similar.

2

The second black venireman on whom the majority relies is Billy Jean Fields. Fields expressed support for the death penalty, App. 174–175, but Fields also expressed views that called into question his ability to impose the death penalty. Fields was a deeply religious man, *id.*, at 98, 106 S.Ct. 1712, and prosecutors feared that his religious convictions might make him reluctant to impose the death penalty. Those fears were confirmed by Fields' view that all people could be rehabilitated if introduced to God, a fear that had special force considering the special-issue questions necessary to impose the death penalty in Texas. One of those questions asked whether there was a probability that the defendant would engage in future violence that threatened society. When they reached this question, Macaluso and Fields had the following exchange:

"[MACALUSO:] What does that word probability mean to you in that connotation?"

"[FIELDS:] Well, it means is there a possibility that [a defendant] will continue to lead this type of life, will he be rehabilitated or does he intend to make this a life-long ambition."

"[MACALUSO:] Let me ask you, Mr. Fields, do you feel as though some people simply cannot be rehabilitated?"

"[FIELDS:] No."

"[MACALUSO:] You think everyone can be rehabilitated?"

"[FIELDS:] Yes." *Id.*, at 183–184.

Thus, Fields indicated that the possibility of rehabilitation was ever-present and relevant to whether a defendant might commit future acts of violence. In light of that view, it is understandable that prosecutors doubted whether he could vote to impose the death penalty.

Fields did testify that he could impose the death penalty, even on a defendant who could be rehabilitated. *Id.*, at 185. For the majority, this shows that the State's reason was pretextual. *Ante*, at 2327. But of course Fields said that he could fairly consider the death penalty—if he had answered otherwise, he would have been challengeable *for cause*. The point is that Fields' earlier answers cast significant doubt on whether he could impose the death penalty. The very purpose of peremptory strikes is to allow parties to remove potential jurors whom they suspect, but cannot prove, may exhibit a particular bias. See *Swain*, 380 U.S., at 220, 85 S.Ct. 824; *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 148, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (O'CONNOR, J., concurring). Based on Fields' *voir dire* testimony, it was perfectly reasonable for prosecutors to suspect that Fields might be swayed by a penitent defendant's testimony.[3] The prosecutors may have been worried for nothing about Fields' religious sentiments, but that does not mean they were instead worried about Fields' race.

As with Warren, the majority attempts to point to similarly situated nonblack veniremen who were not struck by the State, but its efforts again miss their mark for several reasons. First, the majority would do better to begin with white veniremen who *were* struck by the State. For instance, it skips over Penny Crowson, a white panelist who expressed a firm belief in the death penalty, but who also stated that she probably would not impose the death penalty if she believed there was a chance the defendant could be rehabilitated. *Ante*, at 2328, n. 5; 3 Record 1211. The State struck Crowson, which demonstrates that it "was concerned about views on rehabilitation when the venireperson was not black." *Ante*, at 2328, n. 4.

Second, the nonblack veniremen to whom the majority points—Sandra Hearn, Mary Witt, and Fernando Gutierrez—were more favorable to the State than Fields for various reasons.[4] For instance, Sandra

3. The majority argues that prosecutors mischaracterized Fields' testimony when they struck him. *Ante*, at 2327. This is partially true but wholly irrelevant. When Miller–El's counsel suggested that Fields' strike was related to race, prosecutor Jim Nelson responded:

"[W]e're certainly not exercising a preemptory strike on Mr. Fields because of his race in this case, but we do have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he later made the comment that any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case." App. 197 (alteration omitted).

Nelson partially misstated Fields' testimony. Fields had not said that he would give the death penalty only if a person was beyond rehabilitation, *id.*, at 185, but he had said that any person could be rehabilitated if introduced to God, *id.*, at 184. This is precisely why prosecutors were concerned that Fields' "religious feelings [might] affect his jury service." *Id.*, at 197.

4. In explaining why veniremen Hearn, Witt, and Gutierrez were more favorable to the State than Fields, the majority faults me for

Hearn was adamant about the value of the death penalty for callous crimes. App. 430, 451–452. Miller–El, of course, shot in cold blood two men who were lying before him bound and gagged. In addition, Hearn's father was a special agent for the Federal Bureau of Investigation, and her job put her in daily contact with police officers for whom she expressed the utmost admiration. *Id.*, at 445–446, 457–460. This is likely why the State accepted Hearn and Miller–El challenged her for cause. *Id.*, at 447, 467.

In fact, on appeal Miller–El's counsel had this to say about Hearn: "If ever—if ever—there was a Venireperson that should have been excluded *for cause* from the Jury in this case, or any capital Murder Jury, it was Venirewoman HEARN. It is hoped that the Lord will save us from future jurors with her type of thinking and beliefs." *Id.*, at 1015 (emphasis added and alteration omitted); see also *id.*, at 1010. This same juror whom Miller–El's counsel once found so repugnant has been transformed by the majority's revisionist history into a *defense-prone* juror just as objectionable to the State as Fields. *Ante*, at 2327–2328.

Mary Witt did not even have the same views on rehabilitation as Fields: She testified to the commonplace view that some, but not all, people can be rehabilitated. 6 Record 2461. Moreover, Witt expressed strong support for the death penalty. *Id.*, at 2414–2416, 2443–2444. She testified that the death penalty was appropriate for the crime of murder in the course of a robbery, *id.*, at 2428, or for a convict who was released from prison and committed murder (Miller–El previously had twice spent time in prison for armed robberies), *id.*, at 2462–2463. This is likely why the State accepted Witt and Miller–El struck her. *Id.*, at 2464–2465. Finally, Fernando Gutierrez testified that he could impose the death penalty for brutal crimes. 11–(B) Record 4391–4392. In fact, the only issue during *voir dire* was whether Gutierrez could apply Texas' more lenient penalties, not its more severe ones. *Id.*, at 4398–4399, 4413–4414, 4431. The court questioned Gutierrez at length, and ultimately he was accepted by both parties and seated on the jury. *Id.*, at 4439–4449.

Third, Hearn, Witt, and Gutierrez were not similarly situated to Fields even apart from their views on the death penalty. Fields was dismissed not only for his pro-defense views on rehabilitation, but also because his brother had several drug convictions and had served time in prison. App. 190, 199. Hearn, Witt, and Gutierrez did not have relatives with significant criminal histories. Thus, there was an additional race-neutral reason to dismiss Fields that simply was not true of the other jurors. Surely the State did not need to expend peremptories on all veniremen who expressed some faith in rehabilitation to avoid violating *Batson*.

The majority dismisses as "makeweight" the State's justification as to Fields' brother, *ante*, at 2328, but it is the majority's arguments that are contrived. The State questioned Fields during *voir dire* about his brother's drug offenses, where the offenses occurred, whether his brother had been tried, whether his brother had been convicted, and whether his brother's criminal history would affect Fields' ability to serve on the jury. App. 190. The State did not fail to engage in a "'meaningful voir dire examination,'" as the majority contends. *Ante*, at 2328 (quoting *Ex parte Travis*, 776 So.2d 874, 881 (Ala.2000)).

The majority also contends that the State's justification as to Fields' brother illustrates pretext, because the State first pointed to Fields' views on rehabilitation as the reason for its strike. *Ante*, at 2328. The timing of the State's explanation was unexceptional. In context, the State discussed Fields' brother at essentially the same time it discussed Fields' religious views. The entire exchange between the State and counsel for Miller–El took place in a couple of minutes at most. App. 197–199. Thus, to call the State's second reason an "afterthought," *ante*, at 2328, ignores what is obvious even from a cold record: that the State simply offered both of its reasons in quick succession.

B

Miller–El's claims of disparate questioning also do not fit the facts. Miller–El argues, and the majority accepts, that the prosecution asked different questions at *voir dire* of black and nonblack veniremen on two subjects: (1) the manner of execution and (2) the minimum punishment allowed by state law. The last time this case was here, I refuted Miller–El's claim that the prosecutors' disparate questioning evinced racial bias, and explained why it did not even entitle him to a certificate of appealability. *Miller–El I*, 537 U.S., at 363–370, 123 S.Ct. 1029 (dissenting opinion).

This time, the majority has shifted gears, claiming that a different set of jurors demonstrates the State's racial bias. The majority's new claim is just as flawed as its last. The State questioned panelists differently when their questionnaire responses indicated ambivalence about the death penalty. Any racial disparity in questioning resulted from the reality that more nonblack veniremen favored the death penalty and were willing to impose it.

1

While most veniremen were given a generic description of the death penalty at the outset of their *voir dire* examinations, some were questioned with a "graphic script" that detailed Texas' method of execution. *Ante*, at 2333. According to Miller–El and the majority, prosecutors used the graphic script to create cause for removing black veniremen who were ambivalent about or opposed to the death penalty. *Ante*, at 2336. This is incorrect.

The jury questionnaires asked two questions directly relevant to the death penalty. Question 56 asked, "Do you believe in the death penalty?" It offered panelists the chance to circle "yes" or "no," and then asked them to "[p]lease explain your answer" in the provided space. *E.g.*, Joint Lodging 6. Question 58 asked, "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" and offered panelists only the chance to circle "yes" or "no." *Ibid.*

According to the State, those veniremen who took a consistent stand on the death penalty—either for or against it—did not receive the graphic script. These prospective jurors either answered "no" to question 56 and "yes" to question 58 (meaning they did not believe in the death penalty and had qualms about imposing it), or answered "yes" to question 56 and "no" to question 58 (meaning they did believe in the death penalty and had no qualms about

"focus[ing] on reasons the prosecution itself did not offer." *Ante*, at 2328, n. 4. The majority's complaint is hard to understand. The State *accepted* Hearn, Witt, and Gutierrez. Although it is apparent from the *voir dire* transcript why the State wanted to seat these veniremen on the jury, it was never required to "offer" its reasons for doing so. If the majority instead means that I focus on whether these veniremen opposed the death penalty and whether they had relatives with significant criminal histories, those are precisely the reasons offered by the State for its strike of Fields.

imposing it). Only those potential jurors who answered inconsistently, thereby indicating ambivalence about the death penalty, received the graphic script.

The questionnaires bear out this distinction. Fifteen blacks were questioned during *voir dire*. Only eight of them—or 53%—received the graphic script. All eight had given ambivalent questionnaire answers regarding their ability to impose the death penalty. There is no question that veniremen Baker, Bailey, Boggess, Woods, and Butler were ambivalent in their questionnaire answers. See *ante*, at 2336, n. 27; 4 Record 1874–1875.[5] The majority claims that Keaton, Kennedy, and Mackey were not ambivalent, *ante*, at 2335–2336, and nn. 17, 19, but their questionnaire answers show otherwise. For instance, Keaton circled "no" for question 56, indicating she did not believe in the death penalty, and wrote, "It's not for me to punished *[sic]* anyone." Joint Lodging 55. However, she then circled "no" for question 58, indicating that she had no qualms about imposing the death penalty. *Ibid.* Likewise, Mackey indicated she did not believe in the death penalty and wrote "Thou Shall Not Kill" in the explanation space. *Id.*, at 79. Mackey then said that she had no qualms, religious or otherwise, about imposing the death penalty, even though she had just quoted one of the Ten Commandments. *Ibid.* Keaton's and Mackey's answers cannot be reconciled, and the majority makes no attempt to do so. *Ante*, at 2335, n. 17. Kennedy wrote on his questionnaire that he would impose the death penalty "[o]nly in extreme cases, such as multiple murders." Joint Lodging 46. This left prosecutors uncertain about whether Kennedy could impose the death penalty on Miller–El, who had murdered only one person (though he had paralyzed another).

Of the seven blacks who did not receive the graphic script, six took a stand on the death penalty—either for or against it—in their questionnaires. There was no need to use the graphic script to clarify their positions. Veniremen Bozeman, Fields, Rand, and Warren all answered "yes" to question 56 (indicating that they believed in the death penalty) and "no" to question 58 (indicating that they had no qualms about imposing it).[6] *Id.*, at 6 (Bozeman); *id.*, at 14 (Fields); *id.*, at 30 (Rand); *id.*, at 22 (Warren). Venireman Mosley was the opposite: He said that he was opposed to the death penalty, 7 Record 2656, 2681, and that he definitely could not impose it, *id.*, at 2669–2670. The same appears true of venireman Smith, 2 *id.*, at 927–928, who was so adamantly opposed to the death penalty throughout her *voir dire* that she was struck for cause. *Id.*, at 1006. The only apparent exception is veniremen Carter. She said that she believed in the death penalty, but wrote on the questionnaire, "Yes and no. It would depend on what the person had done." 4 *id.*, at 1993. She then answered "'[y]es'" to question 58, indicating that she had some difficulties with imposing the death penalty. *Ibid.* Despite her ambivalence, Carter did not receive the full graphic script. Prosecutors told her only that Miller–El "[would] be executed by lethal injection at Huntsville." *Id.*, at 1952.

Thus far, the State's explanation for its use of the graphic script fares far better than Miller–El's or the majority's. Questionnaire answers explain prosecutors' use of the graphic script with 14 out of the 15 blacks, or 93%. By contrast, race explains use of the script with only 8 out of 15 veniremen, or 53%. The majority's more nuanced explanation is likewise inferior to the State's. It hypothesizes that the script was used to remove only those black veniremen ambivalent about *or* opposed to the death penalty. *Ante*, at 2336. But that explanation accounts for only 12 out of 15 veniremen, or 80%. The majority cannot explain why prosecutors did not use the script on Mosley and Smith, who were opposed to the death penalty, or Carter, who was ambivalent. Because the majority does not account for veniremen like Carter, and also mischaracterizes veniremen like Keaton, Kennedy, and Mackey, it arrives at different percentages. This is not clear and convincing evidence of racial bias.

The State's explanation also accounts for its treatment of the 12 nonblack veniremen (10 whites, 1 Hispanic, and 1 Filipino) on whom the majority relies. Granted, it is more difficult to draw conclusions about these nonblack veniremen. With the blacks, 11 of their 15 questionnaires are available; with the nonblacks, that number plummets to 3 of 12, because those veniremen were not discussed before the state court. See *supra*, at 6. Nevertheless, the questionnaires and *voir dire* permit some tentative conclusions.

First, of the five nonblacks who received the graphic script—Desinise, Evans, Gutierrez, Sztybel, and Zablan—four were ambivalent. On his questionnaire, Gutierrez answered both that he believed in the death penalty and that he had qualms about imposing it. Joint Lodging 231. Sztybel and Zablan averred that they believed in the death penalty and could impose it, but their written answers to question 56 made it unclear under what circumstances they could vote to impose the death penalty.[7] Desinise is a closer call, but he was genuinely undecided about his ability to impose the death penalty, and the parties struck him by agreement. 3 Record 1505–1506, 1509, 1511, 1514. Of the five nonblacks who received the graphic script, Evans was the only one steadfastly opposed to the death penalty. 6 *id.*, at 2588–2589, 2591, 2595.

Of the seven nonblacks who allegedly did not receive the graphic script, four were strongly opposed to the death penalty. See *Miller–El I*, 537 U.S., at 364–365, 123 S.Ct. 1029 (THOMAS, J., dissenting). Berk, Hinson, and Nelson were so opposed that they were struck for cause, and Holtz was struck by the State because he was opposed unless a policeman or fireman was murdered. *Ibid.* Administering the graphic script to these potential jurors would have been useless. "No trial lawyer would willingly antagonize a potential juror ardently opposed to the death penalty with an extreme portrait of its implementation." *Id.*, at 364, 123 S.Ct. 1029.

Of the remaining three nonblacks, the majority is correct that Moses was ambivalent in her questionnaire responses, 3 Record 1140–1141, 1177, although it is not certain that Vickery was, 4 *id.*, at 1611. Neither received the graphic script. However, the final nonblack, Girard, confirms

5. The majority's own recitation of the *voir dire* transcript captures Butler's ambivalence. *Ante*, at 2335–2336, n. 19. Butler said both that she had no qualms about imposing the death penalty, 4 Record 1906–1907, and that she would impose the death penalty "only when a crime has been committed concerning a child such as beating to death or some form of harsh physical abuse and when an innocent victim's life is taken," *id.*, at 1874.

6. The State's concerns with Fields and Warren stemmed not from their questionnaire responses, but from their subsequent *voir dire* testimony. *Supra*, at 2352, 2355.

7. Joint Lodging 184 (Sztybel) ("If a person is found guilty of murder or other crime, which they have taken someone else's life, without a valid defense. They may continue to do this again and again. Even if they are sentenced to jail when they are released this could keep happening"); *id.*, at 223 (Zablan) ("If it's the law and if the crime fits such punishment").

the State's explanation. It was not clear from Girard's questionnaire whether she was ambivalent.[8] On the stand, prosecutor Nelson started off with the abstract script. 6 *id.*, at 2520–2521. But it quickly became apparent that Girard was "just not real sure" about her ability to impose the death penalty, and she testified that she had not decided its value as a form of punishment. *Id.*, at 2522–2523. At that point, Nelson gave her the graphic script—for no other reason than to discern her basic reaction. *Id.*, at 2524–2525. Not only did it succeed—Girard testified that she did not want to serve on a capital jury, *id.*, at 2529, 2531—but Miller–El's attorney also used the graphic script when he questioned Girard, *id.*, at 2553. Miller–El's counsel was using the graphic script just as the State was: to discern a potential juror's true feelings, not to create cause for removing a venireman. After all, Girard's views were favorable to Miller–El.

In any event, again the State's explanation fares well. The State's explanation accounts for prosecutors' choice between the abstract and graphic scripts for 9 of 12 nonblack veniremen, or 75%. Moses and Vickery were likely ambivalent but did not receive the graphic script, while Evans was opposed to the death penalty but did receive it. However, the majority's theory accounts for the State's treatment of only 6 of 12 nonblacks, or 50%. The majority can explain why jurors like Moses and Vickery did not receive the graphic script, because it believes the State was using the graphic script primarily with *blacks* opposed to or ambivalent about the death penalty. *Ante*, at 2336. But the majority cannot explain the State's use of the script with an opposed nonblack like Evans, or ambivalent nonblacks like Desinise, Girard, Gutierrez, Sztybel, and Zablan.

Finally, the majority cannot take refuge in any supposed disparity between use of the graphic script with ambivalent black and nonblack veniremen. *Ante*, at 2336. The State gave the graphic script to 8 of 9 ambivalent blacks, or 88%, and 5 of 7 ambivalent nonblacks, or 71%. This is hardly much of a difference. However, when the majority lumps in veniremen opposed to the death penalty, *ibid.*, the disparity increases. The State gave the graphic script to 8 of 11 ambivalent or opposed blacks, or 73%, and 6 of 12 ambivalent or opposed nonblacks, or 50%. But the reason for the increased disparity is not race: It is, as the State maintains, that veniremen who were opposed to the death penalty did not receive the graphic script.

In sum, the State can explain its treatment of 23 of 27 potential jurors, or 85%, while the majority can only account for the State's treatment of 18 of 27 potential jurors, or 67%. This is a far cry from clear and convincing evidence of racial bias.

2

Miller–El also alleges that the State employed two different scripts on the basis of race when asking questions about imposition of the minimum sentence. This disparate-questioning argument is even more flawed than the last one. The evidence confirms that, as the State argues, prosecutors used different questioning on minimum sentences to create cause to strike veniremen who were ambivalent about or opposed to the death penalty. Brief for Respondent 33, and n. 26.

8. Girard did not answer question 56 about her belief in the death penalty, 6 Record 2522, but she indicated in answer to question 58 that her personal beliefs would not prevent her from imposing the death penalty, *id.*, at 2555–2556.

Of the 15 blacks, 7 were given the minimum punishment script (MPS). All had expressed ambivalence about the death penalty, either in their questionnaires (Baker, Boggess, and Kennedy) or during *voir dire* (Bozeman, Fields, Rand, and Warren).[9] Woods expressed ambivalence in his questionnaire, but his *voir dire* testimony made clear that he was a superb juror for the State. See *supra*, at 2353. Thus, Woods did not receive the MPS. There was no reason to give the MPS to Butler, Carter, Mosley, or Smith, all of whom were dismissed for cause or by agreement of the parties. That leaves Bailey, Keaton, and Mackey, all of whom were so adamantly opposed to the death penalty during *voir dire* that the State attempted to remove them for cause. 11–(A) Record 4112, 4120, 4142 (Bailey); *id.*, at 4316 (Keaton); 10 *id.*, at 3950, 3953 (Mackey). Because the State believed that it already had grounds to strike these potential jurors, it did not need the MPS to disqualify them. However, even assuming that the State should have used the MPS on these 3 veniremen, the State's explanation still accounts for 7 of the 10 ambivalent blacks, or 70%.

The majority does not seriously contest any of this. *Ante*, at 2337–2338, and n. 34. Instead, it contends that the State used the MPS less often with nonblacks, which demonstrates that the MPS was a ruse to remove blacks. This is not true: The State used the MPS more often with ambivalent nonblacks who were not otherwise removable for cause or by agreement.

Of the nonblacks who reached the point in the *voir dire* sequence where the MPS was typically administered, the majority points to 11 whom it alleges were ambivalent and should have received the script. *Ante*, at 2337–2338, and n. 34. Three of these veniremen—Gibson, Gutierrez, and Holtz—were given the MPS, just like many of the blacks. Four of the remaining eight veniremen—Moses, Salsini, Vickery, and Witt—were favorable enough to the State that Miller–El peremptorily struck them.[10] The State had no interest in disqualifying these jurors. Two of the remaining four veniremen—Hearn and Mazza—indicated that they could impose the death penalty, both on their questionnaires and during *voir dire*. The State likewise had no interest in disqualifying these jurors. Assuming that the State should have used the MPS on the two remaining veniremen, Crowson and Whaley, the State's explanation still accounts for 9 of the 11 ambivalent nonblacks, or 81%. Miller–El's evidence is not even minimally persuasive, much less clear and convincing.

C

Miller–El's argument that prosecutors shuffled the jury to remove blacks is pure speculation. At the *Batson* hearing, Miller–El did not raise, nor was there any discussion of, the topic of jury shuffling as a racial tactic. The record shows only that the State shuffled the jury during the first

9. In making the decision whether to employ the MPS, prosecutors could rely on both the questionnaires and substantial *voir dire* testimony, because the minimum punishment questioning occurred much later in the *voir dire* than questioning about the death penalty. *Miller–El I*, 537 U.S. 322, 369, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (THOMAS, J., dissenting).

10. Moses gave ambivalent answers on her questionnaire, as perhaps did Vickery. *Supra*, at 2359. However, Moses and Vickery indicated during their *voir dire* testimony that they could impose the death penalty, 3 Record 1139–1141; 4 *id.*, at 1576–1579, and thus they were not questioned on minimum sentences. But see *ante*, at 2338, n. 36.

three weeks of jury selection, while Miller–El shuffled the jury during each of the five weeks. This evidence no more proves that prosecutors sought to eliminate blacks from the jury, than it proves that Miller–El sought to eliminate whites even more often. *Miller–El I*, 537 U.S., at 360, 123 S.Ct. 1029 (THOMAS, J., dissenting).

Miller–El notes that the State twice shuffled the jury (in the second and third weeks) when a number of blacks were seated at the front of the panel. *Ante*, at 2333. According to the majority, this gives rise to an "inference" that prosecutors were discriminating. *Ibid.* But Miller–El should not be asking this Court to draw "inference[s]"; he should be asking it to examine clear and convincing proof. And the inference is not even a strong one. We do not know if the nonblacks near the front shared characteristics with the blacks near the front, providing race-neutral reasons for the shuffles. We also do not know the racial composition of the panel during the first week when the State shuffled, or during the fourth and fifth weeks when it did not.

More important, any number of characteristics other than race could have been apparent to prosecutors from a visual inspection of the jury panel. See *Ladd v. State*, 3 S.W.3d 547, 563–564 (Tex.Crim.App.1999). Granted, we do not know whether prosecutors relied on racially neutral reasons, *ante*, at 2333, but that is because Miller–El never asked at the *Batson* hearing. It is Miller–El's burden to prove racial discrimination, and the jury-shuffle evidence itself does not provide such proof.

D

The majority's speculation would not be complete, however, without its discussion (block-quoted from *Miller–El I*) of the history of discrimination in the D. A.'s Office. This is nothing more than guilt by association that is unsupported by the record. Some of the witnesses at the *Swain* hearing did testify that individual prosecutors had discriminated. *Ante*, at 2338. However, no one testified that the prosecutors in Miller–El's trial—Norman Kinne, Paul Macaluso, and Jim Nelson—had ever been among those to engage in racially discriminatory jury selection. *Supra*, at 2346.

The majority then tars prosecutors with a manual entitled Jury Selection in a Criminal Case (hereinafter Manual or Sparling Manual), authored by John Sparling, a former Dallas County prosecutor. There is no evidence, however, that Kinne, Macaluso, or Nelson had ever read the Manual—which was written in 1968, almost two decades before Miller–El's trial.[11] The reason there is no evidence on the question is that Miller–El never asked. During the entire *Batson* hearing, there is no mention of the Sparling Manual. Miller–El never questioned Macaluso about it, and he never questioned Kinne or Nelson at all. The majority simply assumes that all Dallas County prosecutors were racist and remained that way through the mid–1980's.

Nor does the majority rely on the Manual for anything more than show. The Manual contains a single, admittedly stereotypical line on race: "Minority races almost always empathize with the Defendant." App. 102. Yet the Manual also tells prosecutors not to select "anyone who had a close friend or relative that was prosecuted by the State." *Id.*, at 112. That was true of both Warren and Fields, and yet the majority cavalierly dismisses as "makeweight" the State's justification that Warren and Fields were struck because they were related to individuals convicted of crimes. *Ante*, at 2328, 2330–2331, n. 8. If the Manual is to be attributed to Kinne, Macaluso, and Nelson, then it ought to be attributed in its entirety. But if the majority did that, then it could not point to any black venireman who was even arguably dismissed on account of race.

Finally, the majority notes that prosecutors " 'marked the race of each prospective juror on their juror cards.' " *Ante*, at 2339 (quoting *Miller–El I*, *supra*, at 347, 123 S.Ct. 1029). This suffers from the same problems as Miller–El's other evidence. Prosecutors did mark the juror cards with the jurors' race, sex, and juror number. We have no idea—and even the majority cannot bring itself to speculate—whether this was done merely for identification purposes or for some more nefarious reason. The reason we have no idea is that the juror cards were never introduced before the state courts, and thus prosecutors were never questioned about their use of them.

* * *

Thomas Joe Miller–El's charges of racism have swayed the Court, and AEDPA's restrictions will not stand in its way. But Miller–El has not established, much less established by clear and convincing evidence, that prosecutors racially discriminated in the selection of his jury—and he certainly has not done so on the basis of the evidence presented to the Texas courts. On the basis of facts and law, rather than sentiments, Miller–El does not merit the writ. I respectfully dissent.

11. Judge Larry Baraka, one of the first black prosecutors to serve in the D. A.'s Office, testified that, to the best of his recollection, the Manual was no longer used in 1977 when he attended the training course. App. 844.

GRABLE & SONS METAL PRODUCTS, INC., Petitioner,

v.

DARUE ENGINEERING & MANUFACTURING.

No. 04–603.

June 13, 2005.

***People v. Willis* (2002) 27 Cal.4th 811**

[No. S096349. Apr. 4, 2002.]

THE PEOPLE, Plaintiff and Respondent, v.
EDWARD CHARLES WILLIS, Defendant and Appellant.

SUMMARY

A jury found defendant guilty of possessing cocaine with seven prior convictions (Health & Saf. Code, § 11350, subd. (a); Pen. Code, §§ 667, subds. (b)-(i), 1170.12). During jury selection, the trial court found that defense counsel, who had earlier unsuccessfully opposed the entire venire as not having ethnic minorities, exhibited group bias in exercising peremptory challenges to exclude White male prospective jurors. With the People's assent, the trial court rejected defendant's motion to dismiss the remaining venire, imposed (and later vacated) monetary sanctions on defense counsel, and continued voir dire with the original venire. (Superior Court of Los Angeles County, No. NA040114, Arthur H. Jean, Jr., Judge.) The Court of Appeal, Second Dist., Div. One, No. B135755, reversed and remanded for a new trial, concluding that the trial court prejudicially erred in failing to quash the entire remaining venire.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the cause to that court for disposition of defendant's remaining appellate issues. The court held that the trial court did not err by rejecting defendant's motion to dismiss the remaining venire and instead imposing monetary sanctions. The trial court, acting with the prosecutor's assent, had discretion to consider and impose remedies or sanctions short of outright dismissal of the entire jury venire. To remedy the improper conduct by dismissing the remaining venire not only would have rewarded such conduct and encouraged similar conduct in future cases, but also would have frustrated the trial court's substantial and legitimate interest in the expeditious processing of cases for trial. Thus, with the assent of the complaining party, a trial court has the discretion to issue appropriate orders short of outright dismissal of the remaining jury, including assessment of sanctions against counsel whose challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve. (Opinion by Chin, J., expressing the unanimous view of the court.)

bias, and reseating any improperly discharged jurors if they are available to serve. However, trial courts lack discretion to impose alternative procedures in the absence of consent or waiver by the complaining party.

[See 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, §§ 497, 503-504; West Key Number System, Jury ⇐ 121.]

COUNSEL

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Bill Lockyer, Attorney General, David P. Druliner, Robert R. Anderson, Chief Assistant Attorneys General, Carol Wendelin Pollack, Pamela C. Hamanaka, Assistant Attorneys General, William T. Harter, Kenneth C. Byrne, Marc E. Turchin and April S. Rylaarsdam, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

CHIN, J.—Under existing law, when either party in a criminal case succeeds in showing that the opposing party has improperly exercised peremptory challenges to exclude members of a cognizable group, the court must dismiss all the jurors thus far selected and quash the remaining venire. (*People v. Wheeler* (1978) 22 Cal.3d 258, 282 [148 Cal.Rptr. 890, 583 P.2d 748] (*Wheeler*); see *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*).) *Wheeler* reasoned that the remedy of dismissal was appropriate because "the complaining party is entitled to a random draw from an entire venire—not one that has been partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges." (*Wheeler, supra*, 22 Cal.3d at p. 282.)

In the present case, defense counsel, representing a Black defendant, exhibited group bias in exercising his peremptory challenges to exclude White male prospective jurors, thereby violating the People's right to a representative and impartial jury. (See *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 315 [120 S.Ct. 774, 781-782, 145 L.Ed.2d 792] [defense counsel, like prosecutors, are precluded from peremptorily excusing prospective jurors on racial, ethnic or gender grounds]; *Georgia v. McCollum* (1992) 505 U.S. 42, 49-50, 57, 59 [112 S.Ct. 2348, 2353-2354, 2357-2358,

2359, 120 L.Ed.2d 33]; *Wheeler, supra,* 22 Cal.3d at p. 282, fn. 29 ["the People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community"].) Counsel, having first unsuccessfully moved to dismiss and replace the entire jury venire as underrepresentative of Blacks, evidently attempted to solve the problem by using his peremptory challenges to exclude White males from the jury, a clear violation of the People's right to an impartial jury. The trial court, after inquiring of counsel regarding his reasons for excluding these persons, found that he had exercised discriminatory peremptory challenges due to group bias against White males. With the People's assent, the court rejected defendant's motion to dismiss the remaining venire, imposed (and later vacated) monetary sanctions on defense counsel, and continued voir dire with the original venire. The jury eventually convicted defendant of cocaine possession.

On appeal, defendant argues that dismissal of the venire, an objective he had sought from the outset in this case, was the only available remedy for his own exercise of group bias. According to defendant, he was "not tried by a [*sic*] impartial jury within the meaning of the California Constitution, his trial was fundamentally unfair, and it constituted a quintessential 'miscarriage of justice,' requiring reversal of the judgment." As will appear, we disagree, concluding that the trial court, acting with the prosecutor's assent, had discretion to consider and impose remedies or sanctions short of outright dismissal of the entire jury venire. Accordingly, we will reverse the contrary judgment of the Court of Appeal and remand the cause to that court for disposition of defendant's remaining appellate issues.

FACTS

The following uncontradicted facts were taken largely from the Court of Appeal's opinion in this case. Defendant, Edward Charles Willis, appeals from a judgment entered after his conviction by jury of possessing cocaine with seven prior strike convictions. (Health & Saf. Code, § 11350, subd. (a); Pen. Code, §§ 667, subds. (b)-(i), 1170.12.) Defendant received a 25-year-to-life sentence.

The details of defendant's offense, and the circumstances of his arrest and conviction for cocaine possession, are not pertinent to the issues presently before us. During jury selection, after the first group of 12 prospective jurors was seated, but before any further proceedings, defendant's trial counsel, Ken Rutherford, asked to approach the bench. Outside the jury's presence, defendant's counsel stated: "This panel is not a sample of the community for my client. . . . I would oppose this panel at this point as it not being

reflective of the community at large. [Defendant] needs a jury of his peers. . . ." Counsel continued, with the transcript stating: "[T]here appear to be no minorities from the first twelve called to the juror box. There don't appear to be any at all in the large jury panel. [¶] The Court: What minorities are you speaking about? [¶] Mr. Rutherford: In general, Black to be specific. There is one Black on the entire panel. There appear to be no eth[n]ic minorities in the twelve seated. There appear to be maybe one Hispanic or Asian descent in the large group, one Hispanic male in the large group. And I believe that would be a fair representation that the rest would be White individuals. [¶] The Court: Without a further showing of an improper jury ven[ire] selection, the motion is denied."

After defense counsel used 11 peremptory challenges, the prosecutor asked for a bench conference. Outside the jury's presence, the prosecutor made "a *Wheeler* motion based on the defense . . . kicking [off] male Whites." The prosecutor noted the defense had used seven of its 11 peremptory challenges against male Whites, "and has now left the jury completely female except for one male Black and one male White." "The Court: Mr. Rutherford. [¶] Mr. Rutherford: Is the court finding a prima facie case? [¶] The Court: You bet."

Defense counsel first unsuccessfully argued that White males were not a protected class under *Wheeler.* The court noted defendant also had excused a female Hispanic and a female Asian. The court stated, "It seems to me that you are systematically, for racial reasons alone, kicking off male Whites." Counsel denied doing so, and said he had racially neutral reasons for his peremptory challenges, including that the challenged jurors were crime victims and were related to police officers. After the court repeated it had made a prima facie finding of a *Wheeler* violation, defense counsel offered explanations for each challenged peremptory.

The court ultimately concluded "I find that there is a systematic exclusion of a protected class, male Whites. And [defense counsel] can't do that just as [the prosecutor] can't do that. [¶] So now what do you want me to do about it? [¶] [The prosecutor]: . . . [A]t this point obviously the remedy of excusing a panel would only . . . serve to his benefit because that is what he is seeking to do. At this point I would ask for the court to admonish him to not continue that kind of behavior. And if he does, sanction him if he does so. [¶] The Court: You are admonished not to violate *Wheeler* again. Should you do so, I will impose personal monetary sanctions under [section] 177.35 of the Code of Civil Procedure."

Defendant moved for a mistrial, asserting he should not be left with the remaining members of the original venire, and claiming that the process was depriving him of a fair trial. The court denied the motion, stating for the record its "suspicion" that counsel was committing *Wheeler* error in the hope the court would dismiss the venire, and admonishing counsel that such a tactic would be illegal, immoral and improper. Jury selection resumed. The court did not excuse the venire or reseat any of the improperly excused jurors.

Later, the prosecutor made a second *Wheeler* motion based on defendant's using eight of his next nine peremptories to strike White males. After demanding explanations, the court again found defendant had violated *Wheeler*. The court sanctioned defense counsel with $1,500 in monetary sanctions (which were stayed and, following trial, lifted). Defendant's renewed motion for mistrial was denied. Again, the court did not reseat any improperly challenged jurors or quash the venire and begin jury selection again with a new venire.

Defendant appealed the ultimate adverse judgment on a variety of grounds, including the court's failure to dismiss the remaining venire. On appeal, neither party challenges the trial court's ruling on the *Wheeler* motions or its findings that defendant twice violated *Wheeler*. Defendant's central argument is that the court had no discretion to impose sanctions or other remedies short of dismissing the entire venire and granting a mistrial. As previously noted, the Court of Appeal majority reversed and remanded for new trial, concluding that, under *Wheeler*, the trial court prejudicially erred in failing to quash the entire remaining venire.

DISCUSSION

(1) As we stated in *Wheeler*, "[i]f a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. . . . [¶] . . . [¶] Upon presentation of this and similar evidence—in the absence, of course, of the jury—the court must determine whether a reasonable inference arises that peremptory challenges are being used on the ground of group bias alone. . . . [¶] If the court finds that a prima facie case has been made, the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone. . . . [¶] If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted. Accordingly, the court must then conclude that the jury as constituted fails to comply with the representative cross-section requirement, *and it must dismiss the jurors thus far selected. So too it must quash any remaining venire . . . . Upon such dismissal a different venire shall be drawn and the jury selection process may begin anew.*" (*Wheeler, supra*, 22 Cal.3d at pp. 280-282, italics added, fns. omitted; see *Batson, supra*, 476 U.S. at pp. 93-98 [106 S.Ct. at pp. 1721-1724]; *People v. Turner* (1994) 8 Cal.4th 137, 164-165 [32 Cal.Rptr.2d 762, 878 P.2d 521].)

(2) The Court of Appeal majority in this case agreed with defendant that, under *Wheeler*, the trial court had no discretion other than to dismiss the entire venire once it concluded that defense counsel had exhibited group bias in exercising peremptory challenges. The appellate court readily acknowledged the anomaly in requiring dismissal as the sole remedy in this case, a remedy that essentially would reward the defense for its exercise of group bias. As the Court of Appeal stated, "Restarting jury selection with a new venire punishes the offending party by preventing it from trying its case to a jury wrongly selected by that party to be biased in its favor. However, the remedy also rewards the offending party by letting it try jury selection a second time and try and obtain a more sympathetic panel. This single remedy thus encourages both parties, if dissatisfied with the venire or the petit jury as it develops during the selection process, to violate the rule so they can try and mold a new panel more to their liking. In addition to encouraging rather than deterring *Wheeler/Batson* violations, the single remedy forces busy trial courts to prolong jury selection by beginning again, thus compounding court congestion and frustrating trial judges from efficiently managing their crowded calendars."

The Court of Appeal, after exploring possible alternative solutions but rejecting them as unauthorized by *Wheeler*, concluded that "[w]e think the facts of this case and the continuing struggles of trial and appellate courts to implement the *Wheeler* rules demonstrate the need for the Supreme Court to revisit its opinion." (See also *People v. Smith* (1993) 21 Cal.App.4th 342, 345-346 [25 Cal.Rptr.2d 850] [reluctantly reversing judgment for failure to dismiss remaining jury venire, stating that until this court "changes its mind, we have no option"]; *People v. Lopez* (1991) 3 Cal.App.4th Supp. 11, 17-18 [5 Cal.Rptr.2d 775] (*Lopez*) [noting need for some "flexible alternative remedy" other than outright dismissal].)

Justice Mallano in dissent argued that *Wheeler* does not compel reversal, given defendant's role in violating its commands, and "thereby creating the grounds upon which he requested that the jury be dismissed. Because defendant's wrongdoing was the cause of the error, if any, he is estopped from arguing that the trial court erred in not discharging the jury."

We accept the Court of Appeal majority's suggestion that we revisit *Wheeler*. We note that *Wheeler* itself left open the possibility of reconsidering its ruling that dismissal of the remaining jury venire was the sole remedy for an exercise of peremptory challenges based on group bias. As we stated in *Wheeler*, "Additional sanctions are proposed in the literature . . . , but we have no present grounds to believe that the above procedure will be ineffective to deter such abuses of the peremptory challenge. If experience should prove otherwise, it will be time enough then to consider alternative penalties." (*Wheeler, supra*, 22 Cal.3d at p. 282, fn. 29.)

We first observe that the *Wheeler* remedy of dismissal is not compelled by the federal Constitution, for the high court in *Batson* expressly left to the state courts "how best to implement our holding," including "whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case [citation], or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire [citation]." (*Batson, supra*, 476 U.S. at p. 99, fn. 24 [106 S.Ct. at p. 1725].)

The present case vividly demonstrates the need for the availability of some discretionary remedy short of dismissal of the remaining jury venire. Here, defendant, through counsel, originally sought that very remedy as a ready means of curing a perceived imbalance in the initial jury venire. Failing to achieve that end through appropriate proof, the defense then engaged in a series of concededly improper and biased peremptory exclusions, aimed at indirectly accomplishing what it could not directly achieve, thereby violating the People's right to a representative and impartial jury. To remedy that improper course of conduct by dismissing the remaining venire not only would reward such conduct and encourage similar conduct in future cases, but also would frustrate the court's substantial and legitimate interest in the expeditious processing of cases for trial. (See *Morning v. Zapata Protein (USA), Inc.* (4th Cir. 1997) 128 F.3d 213, 215 [recognizing importance of timely ruling on and correcting *Batson* violations to avoid necessity of impaneling new jury]; *Koo v. McBride* (7th Cir. 1997) 124 F.3d 869, 873 [upholding remedy short of reinstating all improperly dismissed jurors or dismissing remaining venire]; *Mata v. Johnson* (5th Cir. 1996) 99 F.3d 1261, 1270-1271 [acknowledging *Batson* violation but refusing to grant new trial to defendant who participated in scheme to rid jury of Black jurors]; *McCrory v. Henderson* (2d Cir. 1996) 82 F.3d 1243, 1247 [stressing importance of timely *Batson* motions]; Alschuler, *The Supreme Court and the Jury: Voir dire, Peremptory Challenges, and the Review of Jury Verdicts* (1989) 56 U. Chi. L.Rev. 153, 178-179 (Alschuler).)

People v. Williams (1994) 26 Cal.App.4th Supp. 1 [31 Cal.Rptr.2d 769] (*Williams*), illustrates the practical need for alternative remedies. There, the trial court disbelieved defense counsel's explanations for peremptorily excusing White prospective jurors and, finding a *Wheeler* violation, declared a mistrial and dismissed the remaining venire. After the case was reset for trial and a second venire was drawn up, defense counsel began to systematically exclude Asian prospective jurors, and again the court declared a mistrial and discharged the jury venire. (*Id.* at pp. Supp. 4-5.)

Prior to voir dire of the *third* panel, the court discussed with counsel possible methods for passing on *Wheeler* motions without the necessity of discharging the entire venire and declaring a third mistrial. (*Williams, supra*, 26 Cal.App.4th at p. Supp. 5.) Over defense objection, the court indicated that further peremptory challenges initially would be made at sidebar outside the jury's presence, so that any successful *Wheeler* objection could be ruled on, and any improperly challenged jurors retained, without revealing to them which party had attempted their removal. As the trial court stated, " 'I would simply not allow the peremptory, rather than declare a mistrial.' " (*Ibid.*)

The trial court in *Williams* recognized that the remedy it fashioned was one not " 'mentioned in any case that I have seen, but I haven't seen any case where there's been two *Wheeler* mistrials.' " (*Williams, supra*, 26 Cal.App.4th at p. Supp. 5.) The court observed that, lacking such an alternative remedy to yet another dismissal, " 'we could be in a position of never getting to trial . . . .' " (*Ibid.*) Thereafter, the court sustained the prosecutor's *Wheeler* objection to another peremptory challenge, and ordered the challenged juror reseated without declaring a third mistrial. (*Williams, supra*, 26 Cal.App.4th at p. Supp. 7.)

On appeal, the appellate department in *Williams* upheld the trial court's ruling, noting that the People, as the party raising the *Wheeler* objection, waived its right to a mistrial and dismissal of the venire by agreeing to the court's alternative remedy. The *Williams* court observed that "[i]mportantly, the trial court's procedure of conducting preliminary peremptory challenges and *Wheeler* motions at the sidebar prevented potential bias by the challenged juror against the party whose attempt to excuse the juror was unsuccessful." (*Williams, supra*, 26 Cal.App.4th at pp. Supp. 9-10.)

Other cases in addition to *Williams* have noted the need to develop alternative remedies to dismissal. *Lopez* noted that "not all jurisdictions have

followed the *Wheeler* remedy exclusively. The Supreme Court of Massachusetts has invested trial courts with the power to fashion alternative relief in such cases, should they choose to do so. (*Com.* v. *Reid* (1981) 384 Mass. 237, 255 [424 N.E.2d 495].) '[T]he judge has the authority to fashion relief without declaring a mistrial. In *Soares*, we suggested that where no blacks remained on the venire, dismissal was an appropriate remedy. We did not hold that dismissal of the entire venire was the only appropriate relief. Such a limitation on the trial judge's ability to respond in these circumstances would place in the hands of litigants the unchecked power to have a mistrial declared based on their own misconduct. It would be a reproach to the administration of justice were we to sanction such a result. [Citation.]' (*Reid, supra,* 384 Mass. at p. 255 [424 N.E.2d at p. 500].) The Massachusetts court criticized the adoption of a per se approach such as the one in *Wheeler* as too rigid, stating that the trial judge can cope with all the various situations as they arise. (*Ibid.*)

"The trial judge below employed a remedy for the *Wheeler* violation sanctioned in Massachusetts, but not in California. Much though we may admire the flexible alternative remedy fashioned by the Massachusetts courts, we feel bound by the mandatory language in *Wheeler*. Thus, we are obliged to reverse the judgment of conviction." (*Lopez, supra,* 3 Cal.App.4th at p. Supp. 18; accord, *People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1026 [58 Cal.Rptr.2d 108] [error in failing to strike remaining venire]; *People v. Smith, supra,* 21 Cal.App.4th at p. 346 [same]; see also Sleeper, *Maryland's Unfortunate Attempt to Define a Batson Remedy* (1998) 57 Md. L.Rev. 773, 779-780 (Sleeper) [noting the majority of states give trial courts discretion to "select the remedy that best fits the facts and circumstances of each case"].)

In the present case, the Court of Appeal majority, after discussing *Williams* and *Lopez*, among other decisions, explored at length possible alternatives to outright dismissal of the jury venire. The court suggested "[a]n alternative approach would give trial judges discretion to fashion additional remedies for *Wheeler/Batson* violations. One alternative would be to disallow the improper challenge(s) and seat the wrongfully excluded juror(s). This remedy fully vindicates all the rights supported by the principles, avoids the problems outlined [above], yet permits trial judges to employ the new-venire alternative when that remedy is more appropriate. Alternative forms of jury selection may be used to keep parties from being prejudiced by jurors returned to the panel after an improper challenge is disallowed. (Compare *People v. Harris* (1992) 10 Cal.App.4th 672 [12 Cal.Rptr.2d 758] [having all peremptory challenges in chambers violates defendant's right to a public trial] with *People v. Williams, supra,* 26 Cal.App.4th at pp. Supp. 7-8 [proper to make each challenge at sidebar to permit opponent to make a *Wheeler* motion, after which the use of and party making any peremptory was announced in open court].)

"A second potential alternative remedy, the one chosen here by the trial court at the prosecution's urging, would be imposing sanctions on the offending party. Here, the court later vacated the sanctions, thus making them meaningless and effectively providing no remedy at all for the violation. Moreover, unless combined with one or both of the remedies discussed above, this alternative completely fails to vindicate the juror's fundamental right not to be wrongly excluded from participation, and permits the case to be tried by an intentionally unrepresentative and biased jury. Thus, this remedy permits a wrongly selected jury to actually resolve the case, giving the appearance that the court system approves of this process, rather than having the system prevent such a result."

The court below concluded that "[h]owever, despite the merits or drawbacks of alternative remedies, to date our Supreme Court has unequivocally stated that no alternatives are available. Violations of the *Wheeler/Batson* rule must be remedied only by quashing the venire and beginning jury selection anew with a fresh venire. Thus, we are compelled to find the trial court erred in violating this mandate. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].)"

We think the benefits of discretionary alternatives to mistrial and dismissal of the remaining jury venire outweigh any possible drawbacks. As the present case demonstrates, situations can arise in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial. Under such circumstances, and with the assent of the complaining party, the trial court should have the discretion to issue appropriate orders short of outright dismissal of the remaining jury, including assessment of sanctions against counsel whose challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve. In the event improperly challenged jurors have been discharged, some cases have suggested that the court might allow the innocent party additional peremptory challenges. (See *Koo v. McBride, supra,* 124 F.3d at p. 873; *McCrory v. Henderson, supra,* 82 F.3d at p. 1247.)

Additionally, to ensure against undue prejudice to the party unsuccessfully making the peremptory challenge, the courts may employ the *Williams* procedure of using sidebar conferences followed by appropriate disclosure in open court as to *successful* challenges. (See *Williams, supra,* 26 Cal.App.4th

at pp. Supp. 7-8, distinguishing *People v. Harris, supra,* 10 Cal.App.4th 672 [trial court violated defendant's public trial right by conducting all peremptory challenges at sidebar]; see also *Georgia v. McCollum, supra,* 505 U.S. at p. 53, fn. 8 [112 S.Ct. at p. 2356] [common practice not to reveal to jurors identity of challenging party]; *Jefferson v. State* (Fla. 1992) 595 So.2d 38, 40; Sleeper, *supra,* 57 Md. L.Rev. at pp. 789-790, and authorities cited; Alschuler, *supra,* 56 U. Chi. L.Rev. at pp. 178-179.)

We note that the American Bar Association has included as one of its Criminal Justice Trial by Jury Standards that "[a]ll challenges, whether for cause or peremptory, should be addressed to the court outside the presence of the jury, in a manner so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge." (ABA Stds. for Crim. Justice, Discovery and Trial by Jury (3d ed. 1996) std. 15-2.7, p. 167.) But requiring all challenges to be made at sidebar may be unduly burdensome. Trial courts should have discretion to develop appropriate procedures to avoid such burdens, such as limiting such conferences to situations in which the opposing party has voiced a *Wheeler* objection to a particular challenge. For example, to avoid prejudicing the party making unsuccessful challenges in open court, the court in its discretion might require counsel first privately to advise opposing counsel of an anticipated peremptory challenge. If no objection is raised, then the challenge could be openly approved. In that way, only objectionable challenges would be heard at sidebar.

Defendant insists, however, that *Wheeler* foreclosed any such experimentation or exercise of discretion in the present case. He first argues that the trial court's failure to dismiss the remaining jury venire violated *Wheeler* by denying him his rights to a fair trial and impartial jury "drawn from a representative cross-section of the community . . . ." (*Wheeler, supra,* 22 Cal.3d at p. 272.) Defendant asserts that his conviction must be reversed because the composition of the jury calls in question "[t]he integrity and the fairness of the proceedings." We disagree, for defendant, acting through his counsel, caused the unrepresentative jury of which he complains, and in doing so thereby violated the People's right to a representative and impartial jury. Under defendant's reasoning, a defendant could deliberately, and with group bias, deplete a jury of White jurors, convince the trial court to deny the prosecutor's *Wheeler* motion, and then, if convicted by the jury so selected, could appeal the resulting conviction on the ground he was tried by an improperly selected jury. The law cannot tolerate such an anomalous result. (See, e.g., *People v. Edwards* (1991) 54 Cal.3d 787, 812-813 [1 Cal.Rptr.2d 696, 819 P.2d 436].)

Wheeler, moreover, is distinguishable. Its rationale was that "the complaining party is entitled to a random draw from an entire venire—not one

that has been partially or totally stripped of members of a cognizable group . . . ." (*Wheeler, supra,* 22 Cal.3d at p. 282.) In our case, defendant was not the party "complaining" of group bias, but indeed was the very party who caused it. The complaining party was the prosecution, which waived its rights to a new venire in favor of sanctioning defense counsel and continuing the proceedings. As noted, the high court in *Batson* found no constitutional impediment to a remedy short of outright dismissal of the remaining venire (*Batson, supra,* 476 U.S. at p. 99, fn. 24 [106 S.Ct. at p. 1725]), and our *Wheeler* decision left open the question of possible alternative remedies (*Wheeler, supra,* 22 Cal.3d at p. 282, fn. 29). The law was unclear as to whether outright dismissal of the jury venire was mandated where the improper group bias was exhibited by the same party seeking dismissal. *Wheeler* did not involve such a situation, and the trial court's refusal to dismiss the entire remaining venire under similar circumstances was supported by at least one appellate decision (*Williams, supra,* 26 Cal.App.4th at pp. Supp. 8-10).

Defendant argues that any remedy short of outright dismissal of the remaining venire would fail to vindicate the rights of improperly discharged jurors to participate in the jury process without unfair reflections on their fitness and impartiality. (See *Batson, supra,* 476 U.S. at p. 87 [106 S.Ct. at p. 1718]; *Georgia v. McCollum, supra,* 505 U.S. at pp. 49-50 [112 S.Ct. at pp. 2353-2354]; *People v. Turner* (1986) 42 Cal.3d 711, 716-717 [230 Cal.Rptr. 656, 726 P.2d 102].) We disagree. Although the foregoing cases may protect the rights of persons of all races to serve as jurors, they do not assure any particular juror the right to be seated, or reseated, on a particular jury. Moreover, to the extent the court has retained control over improperly discharged jurors and can reseat them, their rights are indeed vindicated. And if some improperly dismissed jurors are no longer available to serve, dismissing the remaining jurors and calling a mistrial does little to vindicate the rights of those excluded. (See *Jefferson v. State, supra,* 595 So.2d at p. 40 [remedy of striking the venire and convening a new one "does nothing to remedy the recognized discrimination against those improperly removed from the jury"].) On balance, it seems more appropriate, and consistent with the ends of justice, to permit the complaining party to waive the usual remedy of outright dismissal of the remaining venire.

We stress that such waiver or consent is a prerequisite to the use of such alternative remedies or sanctions, for *Wheeler* made clear that "the complaining party is entitled to a random draw from an entire venire" and that dismissal of the remaining venire is the appropriate remedy for a violation of that right. (*Wheeler, supra,* 22 Cal.3d at p. 282.) Thus, trial courts lack discretion to impose alternative procedures in the absence of consent or

waiver by the complaining party. On the other hand, if the complaining party does effectively waive its right to mistrial, preferring to take its chances with the remaining venire, ordinarily the court should honor that waiver rather than dismiss the venire and subject the parties to additional delay.

For like reasons, we reject defendant's claim that failure to dismiss the entire venire and declare a mistrial would erode public confidence in the courts. (See *Batson, supra*, 476 U.S. at p. 99 [106 S.Ct. at pp. 1724-1725]; *Georgia v. McCollum, supra*, 505 U.S. at pp. 49-50 [112 S.Ct. at pp. 2353-2354]; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1028-1029 [30 Cal.Rptr.2d 851].) In terms of eroding public confidence, we think that allowing a defendant to manipulate the justice system, repeatedly exercising group bias to obtain a new jury venire and delay the proceedings against him, would cause far more damage. (See *Mata v. Johnson, supra*, 99 F.3d at pp. 1270-1271; Sleeper, *supra*, 57 Md. L.Rev. at p. 793 & fn. 169; Alschuler, *supra*, 56 U. Chi. L.Rev. at p. 178.)

In sum, the trial court did not err in rejecting defendant's motion to dismiss the remaining jury venire in favor of monetary sanctions. One aspect of the trial court's decision, however, is troubling. As observed by the Court of Appeal majority, "[h]ere, the court later vacated the sanctions, thus making them meaningless and effectively providing no remedy at all for the violation." Although the trial court may have had good reasons for ultimately deciding not to impose sanctions (the record is silent), in future cases courts should consider framing a more effective form of relief for *Wheeler* errors, including reseating improperly challenged jurors and imposing sanctions severe enough to guard against a repetition of the improper conduct. We conclude, however, that in light of defendant's own exercise of group bias, and the People's assent to the remedies chosen, the court did not err in failing to act more effectively in this case.

Having concluded the trial court did not err in refusing to dismiss the remaining jury venire at defendant's urging, we find it unnecessary to reach the Attorney General's alternative argument (supported by Justice Mallano's dissenting position in the court below), that defendant, who exercised the improper challenges at issue, should not be heard to complain about the resulting composition of the jury and should be deemed to have invited any error in allowing that jury to try his case. Additionally, because the Court of Appeal had no occasion to reach defendant's remaining appellate contentions, we will remand the cause to that court for further proceedings to resolve the appeal.

The judgment of the Court of Appeal is reversed and the cause remanded to that court for disposition of defendant's remaining appellate issues.

George, C. J., Kennard, J., Baxter, J., Werdegar, J., Brown, J., and Moreno, J., concurred.

***People v. Ward* (2005) 36 Cal.4th 186**

[No. S019697. June 30, 2005.]

THE PEOPLE, Plaintiff and Respondent, v.
CARMEN LEE WARD, Defendant and Appellant.

SUMMARY

The trial court convicted defendant of first degree murder, second degree murder, and attempted murder and found true a firearm use allegation, enhancements for the infliction of great bodily injury, and a multiple-murder special circumstance under Pen. Code, § 190.2, subd. (a)(2). The trial court sentenced defendant to death for the first degree murder. Defendant shot the second degree murder victim after perceiving that he broke a piece of rock cocaine. Several months later, defendant walked into a rival gang territory and began shooting, killing one man and wounding another. (Superior Court of Los Angeles County, No. A647633, Madge S. Watai, Judge.)

The Supreme Court affirmed the convictions. The court held that substantial evidence supported the trial court's denial of defendant's *Batson/Wheeler* claim. The prosecutor could have reasonably viewed six prospective jurors as unfavorable on the death penalty issue, and a seventh juror expressed some hostility in response to the prosecutor's questioning regarding his knowledge of gangs. Five out of the 12 sitting jurors were African-Americans, which was an indication of good faith in exercising peremptories. The court held further that defendant forfeited his objection regarding his shackling in the courtroom because he failed to make an appropriate and timely objection. The trial court did not abuse its discretion in admitting the testimony of two gang experts. The substance of the experts' testimony related to defendant's motivation for entering rival gang territory and his likely reaction to language or actions he perceived as gang challenges. The trial court did not err by failing to instruct regarding accomplice liability under a natural and probable consequence theory because there was no evidence that the alleged accomplice was associated in any way with defendant in the selling of drugs. In addition, the record contained no evidence of a conspiracy between the alleged accomplice and defendant or that this witness somehow aided and abetted defendant in the commission of any crime. Even if the trial court had

a sua sponte duty to modify CALJIC No. 2.92 regarding an eyewitness's level of certainty, any error was harmless because numerous witnesses identified defendant at the scene of the crime and as the shooter.

The Supreme Court further affirmed the verdict of death, holding that the multiple-murder special-circumstance finding was made by a jury, as required by Blakely. After severing the murder charges, the trial court correctly instructed the jury on the elements of the special circumstance. The trial court instructed in the standard terms of Pen. Code, § 190.3, factors (a) and (k), which sufficiently encompassed the concept of lingering doubt, and the trial court was under no duty to give a more specific instruction. (Opinion by Brown, J., expressing the unanimous view of the court.)

B. Wheeler/Batson *Issues*

During jury selection, the prosecutor exercised his first two peremptory challenges against Juanita D., an African-American woman, and Lawrence H., an African-American man. Defense counsel objected and made a motion pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748]. The trial court declined to find a prima facie violation and denied the motion. After the prosecutor exercised his fourth peremptory challenge against Charlotte B., an African-American woman, defense counsel made a second *Wheeler* motion. Although the trial court did not at that point "feel there [was] a conscious exclusion," it observed that the prosecutor had excused a total of three out of the eight African-American jurors—two out of the seven African-American women—on the panel and invited an explanation. Following the prosecutor's explanation, the court denied the motion. Defense counsel made his third *Wheeler* motion after the prosecutor exercised his next peremptory challenge against Mary E., an African-American woman. Without prompting, the prosecutor offered an explanation, and the trial court denied the motion.

Following voir dire of a second group of jurors, the prosecutor exercised his sixth peremptory challenge against Rose B., an African-American woman. Defense counsel then made his fourth *Wheeler* motion. After the trial court prompted the prosecutor, he offered a lengthy explanation for this latest challenge. The trial court accepted the explanation and denied the motion. The prosecutor exercised one more peremptory challenge against a Caucasian man, and the prosecutor and defense counsel then accepted the jury as constituted.

During selection of the alternate jurors, the prosecutor exercised his first peremptory challenge against Harriette V., an African-American woman. Defense counsel made another *Wheeler* motion. Although the trial court apparently declined to find a pattern of impermissible exclusion because selection of the alternate jurors had just begun, it invited an explanation from the prosecutor. The prosecutor offered an explanation for this challenge, and his next challenge to Carolyn P., an African-American woman. At this point, defense counsel indicated that he would also object to the prosecutor's proposed challenge to Carolyn P. Again, the trial court denied the motions. The prosecutor exercised one more peremptory challenge before the parties accepted the alternates as constituted.

On appeal, defendant renews these *Wheeler* claims and contends the prosecutor violated his rights under the state and federal Constitutions. Assuming without deciding that defendant preserved the federal claim, we deny his claims.

(2) "The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution (*People v. Wheeler*[, *supra*, 22 Cal.3d at pp. 276–277]) as well as the equal protection clause of the Fourteenth Amendment to the United States Constitution. (*Batson v. Kentucky* [(1986) 476 U.S. 79, 89 [90 L.Ed.2d 69, 106 S.Ct. 1712]].)" (*People v. Burgener* (2003) 29 Cal.4th 833, 863 [129 Cal.Rptr.2d 747, 62 P.3d 1].) "A party who suspects improper use of peremptory challenges must raise a timely objection and make a prima facie showing that one or more jurors has been excluded on the basis of group or racial identity. . . . Once a prima facie showing has been made, the prosecutor then must carry the burden of showing that he or she had genuine nondiscriminatory reasons for the challenge at issue." (*People v. Jenkins* (2000) 22 Cal.4th 900, 993 [95 Cal.Rptr.2d 377, 997 P.2d 1044].) " '[T]he trial court must then decide . . . whether the opponent of the strike has proved purposeful . . . discrimination.' " (*People v. McDermott* (2002) 28 Cal.4th 946, 971 [123 Cal.Rptr.2d 654, 51 P.3d 874].)

(3) "The trial court's ruling on this issue is reviewed for substantial evidence." (*People v. McDermott*, *supra*, 28 Cal.4th at p. 971.) "We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges ' "with great restraint." ' [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]" (*People v. Burgener*, *supra*, 29 Cal.4th at p. 864.) "[I]n fulfilling [this] obligation, the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's [nondiscriminatory] reason for exercising a peremptory challenge is being accepted by the court as genuine. This is particularly true where the prosecutor's [nondiscriminatory] reason for exercising a peremptory challenge is based on the prospective juror's demeanor, or similar intangible factors, while in the courtroom." (*People v. Reynoso* (2003) 31 Cal.4th 903, 919 [3 Cal.Rptr.3d 769, 74 P.3d 852].)

In this case, the People concede that, with respect to defendant's fourth *Wheeler* motion, "the preliminary issue of whether the defendant [has] made a prima facie showing" is moot, and this court must therefore examine the adequacy of the prosecutor's explanation. (See *Hernandez v. New York* (1991) 500 U.S. 352, 359 [114 L.Ed.2d 395, 111 S.Ct. 1859].) Although the parties apparently disagree over whether this concession is sufficient to require an examination of the adequacy of all of the prosecutor's explanations or whether a prima facie showing with respect to the other *Wheeler* challenges

had been or should have been found by the trial court, we find it unnecessary to resolve these questions here. Even assuming a prima facie showing as to all the challenged jurors, we find substantial evidence to support the trial court's denial of defendant's claim under either *People v. Wheeler*, *supra*, 22 Cal.3d 258, or *Batson v. Kentucky*, *supra*, 476 U.S. at page 79.[2]

In justifying his challenges to Juanita D., Charlotte B., Mary E., Harriette V., and Carolyn P., the prosecutor cited their responses to *Hovey* questioning (*Hovey v. Superior Court* (1980) 28 Cal.3d 1 [168 Cal.Rptr. 128, 616 P.2d 1301]) and his perception that these jurors were likely to be hesitant to impose the death penalty. With respect to Juanita D. and Carolyn P., defendant concedes that the prosecutor's "stated reason is supported by the record," and our review of the record confirms that the prosecutor could reasonably view Juanita D. and Carolyn P. as unfavorable on the death penalty issue. We therefore see no basis for reversing the trial court's denial of defendant's *Wheeler* motion as to either prospective juror. (See *People v. McDermott*, *supra*, 28 Cal.4th at pp. 972–973 [finding that substantial evidence of a juror's hesitance to impose the death penalty supported the trial court's denial of the *Wheeler* motion].)

4

(4) We reach the same conclusion as to Charlotte B. and Mary E. Our review of the record reveals substantial evidence supporting the prosecutor's explanation that both of these jurors expressed some reluctance in imposing the death penalty during *Hovey* questioning. For example, Charlotte B., in response to a question from the prosecutor asking whether she could impose the death penalty if the evidence made it appropriate, stated that: "I can do that, but I would rather not." She also stated that she was "not strongly" in favor of the death penalty. Similarly, Mary E., in response to a question asking whether she would automatically vote for life without parole in every case, answered with some apparent hesitancy: "I don't think I would, no. I wouldn't." She also acknowledged that she "might" find it "difficult" to vote for the death penalty and noted that "extenuating circumstances," such as the person's "particular environment," may lessen that person's responsibility for his actions. Accordingly, we find substantial evidence to support the trial court's denial of defendant's *Wheeler* motion as to both Charlotte B. and Mary E. (See *People v. Burgener*, *supra*, 29 Cal.4th at p. 864 ["A prosecutor legitimately may exercise a peremptory challenge against a juror who is skeptical about imposing the death penalty"].)

[2] In *Johnson v. California* (2005) ___ U.S. ___ [125 S.Ct. 2410, 2419, 162 L.Ed.2d 129] (*Johnson*), the United States Supreme Court recently reversed our decision in *People v. Johnson* (2003) 30 Cal.4th 1302 [1 Cal.Rptr.3d 1, 71 P.3d 270], and held that "California's 'more likely than not' standard is at odds with the prima facie inquiry mandated by *Batson*." Because we assume that defendant made a prima facie showing, *Johnson* does not affect our holding here.

(5) In addition, we find substantial evidence to support the challenge to Harriette V. based on "her demeanor" during questioning—which, according to the prosecutor, suggested that she was a "death skeptic." Specifically, the trial court expressly confirmed that it had also observed that Harriette V.'s "manner" during *Hovey* questioning suggested a reluctance to impose the death penalty. Because we give " 'great deference' on appeal" to the trial court's observations regarding a "prospective juror's demeanor" and nothing in the record contradicts these observations, we see no grounds for reversing the court's decision to deny defendant's *Wheeler* motion as to Harriette V. (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 926.)

(6) The record also provides substantial evidence to support the trial court's finding that the prosecutor's reasons for challenging Lawrence H. and Rose B. were nondiscriminatory. With respect to Lawrence H., the prosecutor cited Lawrence H.'s apparent antagonism toward him during questioning. The record reveals that Lawrence H. expressed some hostility toward the prosecutor in response to the prosecutor's questioning regarding his knowledge of gangs, and the trial court expressly confirmed its recollection of this hostility. Defendant contends the prosecutor intentionally provoked this hostility but cites nothing in the record to support his contention. Indeed, our review of the record reveals that the prosecutor's questions appeared innocuous and, in any event, were appropriate. Where, as here, the record supports a finding that a prospective juror evinced "a degree of hostility toward the prosecutor," we find that substantial evidence supports the trial court's denial of defendant's *Wheeler* claim. (*People v. Farnam* (2002) 28 Cal.4th 107, 138 [121 Cal.Rptr.2d 106, 47 P.3d 988].)

(7) With respect to Rose B., the prosecutor cited a number of reasons for challenging her, including (1) her responses in her juror questionnaire; (2) her unconventional appearance—i.e., wearing 30 silver chains around her neck and rings on every one of her fingers—which suggested that she might not fit in with the other jurors; and (3) her "body language" during questioning suggesting that she was "uptight with" the prosecutor. The first cited reason is supported by the record, which establishes that Rose B. described the death penalty as a "horrible thing" in her juror questionnaire. This alone supports the denial of defendant's *Wheeler* motion. (See *People v. Burgener*, *supra*, 29 Cal.4th at p. 864.) Moreover, the trial court's implied finding that the prosecutor's stated reasons were sincere and genuine is entitled to great deference where, as here, the reasons are based on the prospective juror's appearance and demeanor. (See *People v. Reynoso*, *supra*, 31 Cal.4th at p. 926.) Because nothing in the record contradicts this finding, we see no basis for defendant's *Wheeler* claim as to Rose B. (See *People v. Wheeler*, *supra*, 22 Cal.3d at p. 275 [holding that a party may legitimately challenge a prospective juror based on the juror's appearance or a subjective mistrust of the juror's objectivity].)

(8) We further note that five out of the 12 sitting jurors were African-Americans, and four out of those five jurors were women. "While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection." (*People v. Turner* (1994) 8 Cal.4th 137, 168 [32 Cal.Rptr.2d 762, 878 P.2d 521].) Considering the jury's composition in conjunction with our analysis of the prosecutor's proffered reasons for excusing each prospective juror, we conclude defendant has not demonstrated that the prosecutor employed an impermissible group bias.

Even assuming that we must conduct a comparative juror analysis for the first time on appeal (See *Miller-El v. Dretke* (2005) ___ U.S. ___ [125 S.Ct. 2317, 2326, fn. 2, 162 L.Ed.2d 196]), such an analysis casts no doubt on this conclusion. According to defendant, a side-by-side comparison of two non-African-American jurors who were allowed to serve—Dianne G. and Maria G.—and the prospective jurors struck by the prosecutor establish purposeful discrimination. We disagree.

Contrary to plaintiff's assertions, Dianne G. is not similarly situated to any of the prospective African-American jurors struck by the prosecutor. For example, the prosecutor's decision to question Lawrence H.—but not Dianne G.—about gangs is understandable given the material differences in their background. Lawrence H. worked in the probation department and was a group supervisor for 40 to 50 juvenile delinquents. Given Lawrence H.'s job, the prosecutor reasonably asked him if he had any experience with gangs. In fact, Lawrence H. was very familiar with gangs and even noted that he used to be a gang member. By contrast, nothing in Dianne G.'s jury questionnaire or her answers during voir dire suggested that she had any familiarity with gangs. While her son had been arrested for drug possession and had been involved in a fight where he suffered stab wounds, there was no evidence in the record of gang involvement. As such, the prosecutor's failure to ask Dianne G. about gangs does not cast the prosecutor's reasons for striking prospective jurors "in an implausible light." (*Miller-El v. Dretke*, *supra*, 125 S.Ct. at p. 2332.)

Likewise, the fact that Dianne G. had served on a prior criminal jury that was unable to reach a verdict does not demonstrate that one of the prosecutor's reasons for striking Rose B.—that she would not fit in—was pretextual. The prosecutor stated that he thought that Rose B. would not fit in with the other jurors because of her unconventional appearance, i.e., her excessive use of jewelry. There is nothing in the record to suggest that Dianne G.'s

appearance was unconventional, and defendant does not make any such claim. Moreover, nothing in the record suggests that Dianne G.'s previous stint as a juror resulted in a hung jury because of her. As such, the prosecutor had no reason to think that she would not fit in with the other jurors.

And Dianne G.'s statement in her jury questionnaire that she believed that LWOP was a more severe punishment than the death penalty does not establish that the prosecutor's proffered reasons for striking other prospective jurors were implausible. In striking prospective jurors because of their perceived hesitancy to impose the death penalty, the prosecutor, with the exception of Rose B., relied *solely* on that juror's answers or demeanor during *Hovey* questioning—and not on the answers on the jury questionnaires. And unlike the prospective jurors struck by the prosecutor because of their apparent hesitance during *Hovey* questioning to impose the death penalty, Dianne G. expressed, and the record reveals, *no* such reluctance during *Hovey* questioning. Moreover, aside from the single answer cited by defendant, the rest of Dianne G.'s answers in her questionnaire evinced no apparent reluctance to impose the death penalty. By contrast, Rose B.—the only prospective juror ostensibly struck by the prosecutor because of her answers in her jury questionnaire—wrote that she thought the death penalty was a "horrible thing." As such, Dianne G. is not similarly situated to the African-American jurors struck by the prosecutor and a side-by-side comparison reveals no pretext in the prosecutor's proffered reasons.

Similarly, and contrary to defendant's assertions, Maria G. is not similarly situated to the prospective jurors struck by the prosecutor. According to defendant, Maria G.'s answers in her jury questionnaire show that she was just as much of a death skeptic as the jurors struck by the prosecutor. But unlike most of those jurors, Maria G. expressed *no* reluctance to impose the death penalty during *Hovey* questioning, and the record reveals no evidence of any such reluctance. Moreover, a careful perusal of Maria G.'s jury questionnaire demonstrates that she did not have the same personal distaste for the death penalty evidenced by Rose B.'s jury questionnaire. For example, while Maria G. did disagree somewhat with the proposition that "[a]nyone who intentionally kills another person without legal justification and not in self defense, should receive the death penalty," her disagreement did not appear to result from a personal distaste for the death penalty. Rather, she reasonably recognized that "every case is different and it has to be looked in its content entirely, death penalty is not for everyone!" Likewise, her uncertainty regarding whether she would vote for LWOP regardless of the evidence and her belief that LWOP was a more severe punishment than death did not appear to result from any visceral reaction to the death penalty. Indeed, Maria G.'s answers to her jury questionnaire also indicated that she believed that "the death penalty should always be considered" in certain circumstances.

And the fact that Maria G. stated in her jury questionnaire that she thought her son had been unfairly treated by the criminal justice system does not demonstrate that the prosecutor's reasons were pretextual. The prosecutor struck no jurors based on their experiences with the criminal justice system. In any event, Maria G. explained that she felt that her son was treated unfairly because of the victim's links to law enforcement. Because the victim in this case had no apparent relationship to law enforcement, the prosecutor could reasonably believe that Maria G. would be a suitable juror. Thus, a side-by-side comparison of Maria G. and the struck jurors casts no doubt on the prosecutor's proffered reasons for striking these jurors.

(9) Finally, we reject defendant's contention that the trial court failed to "conduct a sincere and genuine inquiry into the prosecutor's stated reasons for his challenges." Indeed, this contention is belied by the record. In discussing defendant's last two *Wheeler* objections, the court noted that "I went back and checked my notes on the *Hovey* question, and I have a lot of these jurors marked as potential peremptory because of their manner of responding during the *Hovey*. This is the reason I have been very reluctant to find any type of prima facie violation of the *Wheeler* because I did notice that they were very reluctant. They tried to give an answer that would follow the instructions of the court but they did have problems." The court further explained that: "I certainly in making my little notes as I took this, it wasn't because they were Black but I gauged it all on their responses and their demeanor, that I sat here and I made my little notes for myself, just for my own information, and I certainly didn't do it because they were Black." As such, the record establishes that the court did make a "sincere and reasoned effort" to evaluate the prosecutor's "nondiscriminatory justifications." (*People v. Burgener*, *supra*, 29 Cal.4th at p. 864.)

In any event, no detailed trial court findings regarding the reasons for each peremptory challenge are necessary here. The prosecutor's stated reasons for exercising each peremptory challenge are neither contradicted by the record nor inherently implausible. (See *People v. Reynoso*, *supra*, 31 Cal.4th at p. 929.)[3] Accordingly, we find no *Batson/Wheeler* error.

C. *Shackling of Defendant*

Defendant contends the trial court committed numerous errors in relation to his being shackled during the Adkins-Shy trial. Specifically, he alleges the

[3] Defendant contends our recent decision in *People v. Reynoso*, *supra*, 31 Cal.4th 903, violates his rights under the equal protection and due process clauses of the federal Constitution and urges us to reconsider it. Because he presents nothing new, we decline to do so.