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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 1

Appeal No. 2014AP002230-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

COURTNEY J. JAMES, Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY G. DUGAN PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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ISSUES PRESENTED

Did State's use of peremptory challenge to strike African-American male from venire constitute a **Batson**[1] violation?

The trial court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel would welcome oral argument should this Court determine that such argument would be helpful in addressing the issues presented in this brief.

Counsel believes that publication will not be warranted as this appeal involves the application of well-established law to a particular set of facts.

[1] **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

STATEMENT OF THE CASE

The State charged James with 1)first degree recklessly endangering safety as a party to a crime and with use of a dangerous weapon and 2)first degree reckless homicide as a party to a crime and with use of a dangerous weapon. A-Ap.100-107. According to the criminal complaint, the case originated from an argument that took place on February 3, 2012, at around 11:48 a.m. to 12:05 p.m., outside an "X-Stream Wireless" store in Milwaukee, between Erosa James, who is James's brother, and a Shanata Packer. A-Ap.101. The argument involved Packer's accusation that Erosa James had burglarized her house and stolen a television set. A-Ap.101. During the course of the argument, a third person, Artaze Williams, intervened and engaged in a physical fight with Erosa James. A-Ap.101. After the fight, James took his brother to the emergency room at St. Joseph's Hospital in Milwaukee. A-Ap.103. Hospital video surveillance footage showed James arriving at the emergency room entrance at about 12:31 p.m., and then leaving the hospital alone at 12:40 p.m. A-Ap.103. The complaint further alleges that at about 1:28 p.m. police officers responded to a reported shooting at Packer's residence. A-Ap.102. The complaint alleges that while Packer was away from the residence, with her

two children alone in it, somebody fired a number of gun shots into the front door shattering the door's glass window. A-Ap.102. Police recovered ten 9 millimeter casings and one fired bullet from the scene. A-Ap.102. The complaint further alleges that hospital video surveillance taken at 4:11 p.m, showed James, Erosa James, and their mother, Erica James, leaving the hospital emergency room and walking out to the parking lot. A-Ap.103. The complaint alleges that at about 5:20 p.m., police then responded to a shooting in the 2300 block of W. Vienna Street, Milwaukee, where they observed a car up on the sidewalk and stuck on a fence. A-Ap.103. Within the car, they found the body of a man, later identified as Artaze Williams, whose torso hung outside the driver's compartment on the sidewalk and whose lower body remained within the car. A-Ap.103. Police attempted life saving measures on Williams until the fire department arrived. A-Ap.104. An autopsy showed that Williams died from two gunshot wounds to his chest and leg. A-Ap.105. The complaint alleges that a Coria Stotts was with Williams in the car with when the shooting began. A-Ap.104. Stotts and Williams were parked in the car when Stotts saw a black male walking towards the car and pointing a medium sized black handgun at Williams. A-Ap.104. Williams allegedly pushed Stotts

down onto the car's floor board and attempted to speed away. Stotts heard gunshots and heard Williams moan. A-Ap.104. Williams slumped over the steering wheel as the car continued to move at about 40 miles per hour. A-Ap.104. Stotts unsuccessfully tried to shift the car into park before jumping out of it. A-Ap. Stotts watched as the car crashed into the fence where police ultimately found Williams's body. A-Ap.104.

The case proceeded to a four day jury trial wherein the jury found James guilty of both counts as charged. A-Ap.108-109. After the preparation of a pre-sentence investigation report, the trial court sentenced James to seven and a half years confinement and five years extended supervision on the recklessly endangering safety charge, and thirteen and a half years confinement and five years extended supervision on the reckless homicide charge, consecutive. A-Ap.108-109. The trial court found James ineligible for both the Challenge Incarceration Program and the Substance Abuse Program. A-Ap.109. James timely filed a notice of intent to pursue postconviction relief pursuant to which the State Public Defender appointed the undersigned counsel. These proceedings follow.

STATEMENT OF FACTS

The jury venire consisted of 35 individuals. A-Ap.110-111. The venire included four African-American males identified as juror nos. 6, 14, 21 and 22, and two African-American females. A-Ap.115,118; 51:62,65. As jury selection proceeded, the State challenged three of the four male African-American jurors, juror nos. 6, 21 and 22 for cause. A-Ap.116-117; 51:63-64. The defense agreed with the State's motion as to juror nos. 6 and 22, and the trial court granted the State's motion as to such jurors. A-Ap.116-117; 51:63-64. The State then used two of its five peremptory strikes to eliminate the two remaining male African-American jurors, juror nos. 14 and 21. A-Ap.117; 51:64. James made a motion under **Batson** which challenged the State's peremptory strike of juror no. 14, Kevin G.[2] A-Ap.114; 51:61. The State responded, in primary part, by explaining that it struck juror no. 14 because of a "reaction" he had during voir dire which led the State to believe that he could be "potentially hostile." A-Ap.118; 51:65. The trial court denied James's motion. A-Ap.123; 51:70. The trial court's specific findings appear in the appendix at pp.120-124. James will

[2] James did not challenge the State's peremptory strike of juror no.21. During voir dire, juror no. 21 expressed that he had "negative" feelings about "most" police officers, and that based on their employment, he would not find their testimony truthful. 51:20.

reference other facts later in this brief as such facts become relevant to the specific arguments made below.

ARGUMENT

The trial court's *Batson* analysis was erroneous both in its methodology and its conclusion, and requires a new trial.

A. Standard of review

Because the question of whether a prima facie case under **Batson** has been shown presents mixed questions of fact and law, a de novo review must be conducted. **United States v. Jordan**, 223 F.3d 676,686 (7th Cir. 2000); **Mahaffey v. Page**, 162 F.3d 481,484 (7th Cir. 1998); see also **United States v. Stephens**, 421 F.3d 503,513 (7th Cir. 2005)("We note initially that although deference is afforded fact findings in a **Batson** challenge, the prima facie determination is subject to de novo review.") A clearly erroneous standard of review applies to a trial court's factual findings made under **Batson**. See **United States v. Jordan**, 223 F.3d at 686, and **State v. Lamon**, 2003 WI 78,¶45, 262 Wis.2d 747, 664 N.W.2d 607.

B. Proper framework for **Batson** analysis

Peremptory challenges are part of the fabric of our jury system and allow parties to strike potential jurors "without a reason stated, without inquiry, and without being subject to the court's control." **State v. Lamon**, 2003 WI 78 at ¶23. However, peremptory challenges are subject to the commands of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. **Batson v. Kentucky**, 476 U.S. at 89. Purposeful racial discrimination in selection of the jury violates a defendant's right to equal protection because it denies the protection that a trial by jury is intended to secure. **State v. King**, 215 Wis.2d 295,300, 572 N.W.2d 530 (Ct. App.1997) (citing **Batson**, 476 U.S. at 86).[3] A defendant of whatever race is entitled to a jury selected without discrimination. **State v. Lamon**, 2003 WI 78 at¶28 n.5 (citing **Powers v. Ohio**, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed. 2d 411 (1991)). A prospective juror's right to equal protection is also violated when the juror is denied participation in jury service on account of race. **Batson**, 476 U.S. at 87. Jury selection procedures that purposefully exclude persons based on race undermine public confidence in the fairness of the justice system. **Id**. Wisconsin

[3] In **J.E.B. v. Alabama**, 511 U.S. 127,129, 114S.Ct. 1419, 128 L.Ed.2d 89 (1994) the Court extended **Batson** to include gender-based challenges.

courts have adopted the **Batson** principles and analysis. See **State v. Lamon**, 2003 WI 78 at ¶22; **State v. King**, 215 Wis.2d 295,300-301, 572 N.W.2d 530 (Ct. App.1997); and **State v. Davidson**, 166 Wis.2d 35,39-40, 479 N.W.2d 181 (Ct. App. 1991), petition for review denied.[4] **Batson** outlines a three-step process for determining whether a prosecutor's peremptory strikes violate the Equal Protection Clause. See **Batson**, 476 U.S. at 96-98. First, the defendant must make out a prima facie case "by showing that the totality of relevant facts gives rise to an inference of discriminatory purpose." **Johnson v. California**, 545 U.S. 162,168, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005) citing **Batson**, 476 U.S. at 93-94. 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 strike. **Id**. 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." **Id**. Wisconsin courts have interpreted **Batson** and **J.E.B**. to preclude striking a juror based on a prohibited characteristic even if other non-prohibited

[4] Of course, Wisconsin courts have recognized **Batson**'s application to claims of gender discrimination in jury selection. See **State v. King**, 215 Wis.2d 295,300-301, 572 N.W.2d 530 (Ct. App.1997) and **State v. Jagodinsky**, 209 Wis.2d 577,579-80, 563 N.W.2d 188 (Ct. App. 1997).

characteristics were also used. See **State v. King**, 215 Wis.2d 295,308, 572 N.W.2d 530 (Ct. App. 1997) and **State v. Jagodinsky**, 209 Wis.2d 577,584, 563 N.W.2d 188 (Ct. App.1997).

C. Trial court erred in failing to consider "all relevant circumstances" which supported inference of discrimination and in concluding that James did not establish a prima facie case.

The defendant must establish a prima facie case of discriminatory intent by showing that the prosecutor relied on race in exercising the peremptory strike. See **State v. King**, 215 Wis.2d at 300-301. The **Batson** Court held that a prima facie case can be made by offering a wide variety of evidence, so long as the totality of the relevant facts gives "rise to an *inference* of discriminatory purpose." **Johnson v. California**, 545 U.S. at 163. Italics added. "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 court to draw an *inference* that discrimination has occurred." **Id**. Italics added.

The burden at the prima facie stage is low, requiring only circumstances raising a *suspicion* that discrimination occurred, even where those circumstances are insufficient to indicate that it is more likely than not that the challenges were used to discriminate. **United States v. Stephens,** 421 F.3d at 512. Italics added. The persuasiveness of the constitutional challenge is to be determined at the *third* **Batson** stage, not the first. See **id**. at 516. Italics added. A trial court's "subjective" and "detailed weighing of factors" offered by the government has no place in the prima facie determination and is reserved for **Batson's** second and third steps. See **id**. at 517-518. An "inference" is generally understood to be a conclusion reached by considering other facts and deducing a logical consequence from them. See **id**. at 168 citing Black's Law Dictionary 781 (7^{th} ed. 1999). Among the circumstances relevant in making that determination, a pattern of strikes against jurors of a particular race may give rise to an inference of discrimination. **Batson**, 476 U.S. at 97. Such a pattern can be evident where a prosecutor uses peremptory challenges to eliminate all, or nearly all, members of a particular race. **United States v. Stephens**, 421 F.3d at 512. The **Batson** Court itself remarked that "total or seriously disproportionate exclusion of Negroes from jury venires…is

itself such an 'unequal application of the law…as to show intentional discrimination.'" **Batson**, 476 U.S. at 93. In determining whether a pattern is present, courts have also considered whether a disproportionate number of peremptory strikes were exercised to exclude members of a particular cognizable group. **Id**. In establishing a prima facie case, a defendant may also rely on the "indisputable fact that (peremptory) challenges permit those inclined to discriminate to do so," **Batson**, 476 U.S. at 96, and the lack of any "apparent reason" within the record for the strike, **United States v. Stephens**, 421 F.3d at 517. Under **Batson**, a trial court is required to consider "all relevant circumstances" that give rise to an inference of discrimination. See **Batson**, 476 U.S. at 97. A trial court commits reversible error when it fails to do so. See **McGahee v. Alabama Department of Corrections**, 560 F.3d 1252,1266 (11th Cir. 2009).

In this case, the trial court erred both in its methodology used to analyze whether James established a prima facie and in its ultimate conclusion that James did not. Specifically, the trial court failed to consider "all relevant circumstances" that gave rise to an inference of discrimination. The trial court's analysis of the prima facie issue was terse both in terms of its length and content. The trial court's on record analysis of the entire **Batson**

motion comprised only 4 pages of transcript. A-Ap.120-124; 51:67-70. Of these 4 pages, the first two pages, A-Ap.120-121; 51:67-68, contained the trial court's summary of **Batson**'s requirements. The trial court's actual analysis of the prima facie case issue consisted of only one and a half pages of transcript. A-Ap.122-123; 51:69-70. In such analysis, the trial court failed to consider pattern or statistical evidence regarding the State's elimination of a disproportionate number of African-American veniremembers, African-American males in particular, as well as the State's use of a disproportionate percentage of its strikes to exclude African-Americans, African-American males in particular. The closest the trial court came to considering the appropriate pattern or statistical evidence was in noting that by leaving two African-American females on the venire, the State allowed for a "significant percentage" of the total African-American venirepersons (2 of 6) who potentially could, and actually did, serve on the jury. A-Ap.123; 51:70. The trial court however failed to consider the more prominent pattern or statistics, as discussed more fully below, regarding the actual number or percentage of African-American veniremembers, African-American males in particular, that the State did eliminate, as well as the pattern and statistical evidence regarding the

State's disproportionate use of its strikes against African-Americans, again, African-American males in particular. The trial court also failed to consider that there was no evidence in the record to substantiate the State's claim that juror no. 14 presented a "reaction" during voir dire which led the State to believe that he was "potentially hostile." A-Ap.118, 51:65. Had the trial court properly considered such circumstances, the trial court could only have reasonably concluded that they established an inference of discrimination.

As to a prima facie case, James showed that the facts and relevant circumstances raised an *inference* that the prosecutor used peremptory strikes to exclude a venireperson on account of his race and/or gender. James, an African-American male, accomplished this first of all by demonstrating a racial and gender identity shared by himself and the veniremember excluded, juror no. 14, also an African-American male. A-Ap.114-115; 51:61,62. Next, James identified a pattern which consisted of the State's elimination of the majority of African-Americans on the venire (4 of 6), and an elimination of all the African-American males (4 of 4). A-Ap.114-116, 119-120; 51:61-63, 66-67. James additionally noted that the record did not reflect any "apparent reason" to which the strike of juror no.

14 could be attributed. A-Ap.114-115; 51:61-62. In terms of the pattern, although African-Americans comprised only 17% of the venire (6 of 35), by using challenges for cause or peremptory strikes, the State excluded 67% (4 of 6, juror nos. 6, 14, 21, and 22) of the African-Americans. Although African-American males comprised only 11% of the venire (4 of 35), the State excluded 100% of this group. These statistical facts alone established the requisite inference of discrimination. See **United States v. Bishop**, 959 F.2d 820,824 n.6 (9th Cir. 1992), reversed on other grounds, **United States v. Nevils**, 598 F.3d 1158 (9th Cir. 2010)(two of four black jurors striken supported inference); **United States v. Power**, 881 F.2d 733,740 (9th Cir. 1989)(one of two black jurors stricken supported inference); **United States v. Alvarado**, 923 F.2d 253,255 (2nd Cir. 1991)(four out of seven minority jurors stricken supported inference); **United States v. Battle**, 836 F.2d 1084,1085 (8th Cir. 1987)(five of seven black jurors stricken supported inference). Significantly, it is not dispositive that the State did not attempt to remove *all* the African-American venirepersons, specifically, the two female African-Americans who ultimately made it on to the jury. Regardless of the final racial makeup of the jury, the exclusion of a single minority juror on account of

race constitutes a **Batson** violation. See **United States v. Bishop**, supra at 827; **United States v. Johnson**, 873 F.2d 1137,1137 (8th Cir. 1989); and **United States v. Stephens**, supra at 513, where government struck only 2 of 3 African-American venirepersons.

Beyond evidence of the basic pattern and disproportionate effect illustrated by the original number of African-American venirepersons in relation to the number of those who were ultimately eliminated, pattern and statistical evidence regarding disproportionate use of the State's peremptory strikes against African-Americans also supported an inference of discrimination. In this case, although African-Americans comprised only 17% of the venire (6 out of 35), African-Americans were the subject of 40% (2 out of 5) of the State's peremptory strikes. When we consider both cause and peremptory challenges, the disparity is even greater. In this regard, the State made four challenges for cause, two of which successfully eliminated African-Americans, juror nos. 6 and 22. Therefore of the nine total challenges made by the State, four were directed against African-American venirepersons. This means that although African-Americans comprised only 17% of the venire, they were the subject of 44% (4 of 9) of the State's total challenges. If we consider the pattern as to African-American males,

the statistics are even more troubling. Although African-American males comprised just 11% of the venire (4 out of 35), they were the subject of 44% of the State's challenges. Again these statistical facts alone established the requisite inference of discrimination. See **United States v. Alvarado**, 923 F.2d at 255-256 (finding a prima facie case because the prosecution challenged 57 percent of the minority venirepersons who represented only 29 percent of the pool); **United States v. Johnson**, 873 F.2d at 1140(considering the disproportionate rate of strikes against blacks, 2 of 6, to be relevant evidence of discrimination); **Turner v. Marshall**, 63 F.3d 807,810 (9th Cir. 1995)(finding that although African-Americans comprised only 30 percent of the venire, (11 out of 37), government used 56 percent of its peremptory strikes against African-Americans supported inference of discrimination); and **United States v. Stephens,** 421 F.3d at 513, finding that government's use of 33% of its strikes against African-Americans who comprised less than 10% of the venire, supported inference of discrimination. Finally, in terms of the existence of any "apparent reason" within the record to which the strike could be attributed, there was none. During voir dire, juror no. 14's sole statements were as follows:

A JUROR: My name is Kevin (G). I'm on the north side. Single. Four kids from 25 to 18. I'm self-employed. Never been on a jury duty. Sports is my hobbies. 51:34.

THE COURT: What is your self-employment? 51:34.

A JUROR: I own a car wash detail shop. 51:34.

Other than the above exchange between juror no. 14 and the trial court, the record did not reflect any statement or other communication made by juror no. 14 during voir dire. Along with the "undisputable fact that peremptory challenges permit those inclined to discriminate, to do so," see **Batson**, 476 U.S. at 96, the absence of any "apparent reason" within the record, and the patterns discussed above, gave rise to the requisite *inference* of discrimination as to the State's strike of juror no. 14.

As specifically discussed above, the trial court erred in failing to consider "all relevant circumstances" which supported an inference of discrimination. Had the trial court properly considered all such relevant circumstances, it could only have reasonably concluded that such circumstances raised the requisite inference of discrimination. In concluding otherwise and ultimately concluding that James did not establish a prima facie case, the trial court erred.[5]

[5] As discussed earlier, James maintains that the standard of review as to the prima facie case issue is de novo. See **United States v. Stephens**, 421 F.3d 50,5113 (7th Cir. 2005, **United States v. Jordan**, 223 F.3d 676,686 (7th Cir. 2000) and **Mehaffey v. Page**, 162 F.2d 481,484 (7th Cir. 1998). Nonetheless, James similarly maintains that the errors committed by the trial court, for the same reasons examined earlier in this brief, were clear, and therefore establish a basis for reversal even under a clearly erroneous standard.

D. The trial court clearly erred in accepting State's proffered reason for striking juror no. 14 because such reason was not "clear " and "reasonably specific."

Under **Batson**, once the defendant has established a prima facie case, the burden shifts to the State to come forward with a neutral explanation for challenging the dismissed venireperson. **State v. Lamon**, 2003 WI 78 at ¶29. The prosecutor's explanation must be "clear, reasonably specific and related to the case at hand." **Id**.

In this case, the State argued that it used a peremptory strike against juror no. 14 because juror no. 14 exhibited a "reaction" during that portion of the voir dire which discussed how jurors viewed police officers. A-Ap.117-118; 51:64-65. The State argued that based on juror no. 14's "reaction," it believed juror no.14 was "potentially hostile" and not disposed to listening to the State. A-Ap.118; 51:65. The State's explanation failed **Batson**'s second prong because it was not "clear" and "reasonably specific." While the prosecutor referenced a "reaction" by juror no. 14, the prosecutor failed to provide any detail whatsoever about the "reaction." There was no indication if the "reaction" was a statement, facial expression, gesture, or

some other form of body language. James recognizes that a venireperson's demeanor may, under the right circumstances, constitute a legitimate factor under **Batson**'s second prong. However, even in cases where a venireperson's demeanor is proffered as the prosecutor's explanation, the demeanor is much more specifically described: **United States v. White**, 552 F.3d 240,251 (2d Cir.2009)(juror had "an angry look that she wasn't happy to be here"); **United States v. Fields**, 378 F.Supp.2d 1329,1331 (E.D. Okla. 2005)(juror had a "strong personality"); **Elder v. Berghuis**, 644 F.Supp.2d 888,895-896 (W.D. Mich. 2009)(juror looked at prosecutor "funny"); **United States v. Prather**, 279 F. Appx. 761,766, (11th Cir. 2008)(juror's demeanor used when describing personal histories made prosecutor sense bias); and **Hernandez v. New York**, 500 U.S. 352,356-57, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)(juror hesitated in responding to questions and presented a lack of eye contact). In this case, the State's proffered explanation was far too general and ambiguous to satisfy **Batson**'s second prong. When presented with the State's vague explanation, the trial court should have required more specificity. The trial court should have simply asked the prosecutor, "What are you talking about? What are you referring to? Can you describe this so-called

reaction?" The trial court failed to do so. Instead, without making a determination that juror no. 14 actually exhibited any type of a "reaction," the trial court simply accepted the State's proffered explanation. In doing so, the trial court clearly erred.

E. The trial court clearly erred in failing to consider "all of the surrounding circumstances" relevant to the plausibility and persuasiveness of the State's proffered reason for striking juror no. 14, and in concluding that James did not establish purposeful discrimination in connection with State's peremptory strike of juror no. 14.

Batson's third step provides that once steps one and two have been completed, the defendant may show that the prosecutor's explanation for the peremptory challenge is in fact pretext for racial discrimination. **State v. Lamon**, 2003 WI 78 at ¶32. It is at this step that the issue of persuasiveness and plausibility of the prosecutor's reasons for the strike become relevant, and "implausible or fantastic justifications may [] be found to be pretexts for purposeful discrimination." **Id**. At this step, the trial court must evaluate the plausibility of the prosecution's reasons, in light of *all of the surrounding circumstances*, to decide whether the defendant has proved purposeful discrimination. **Batson**, 476 U.S. at 98; italics added; see also, **Snyder v. Louisiana**, 552 U.S. 472,477, 128 S.Ct.

1203, 170 L.Ed.2d 175 (2008)(in considering a **Batson** objection, or in reviewing a ruling claimed to be **Batson** error, all of the circumstances that bear upon the issue of racial animosity must be considered); **Bennett v. Gaetz**, 592 F.3d 786,791 (7th Cir. 2010)(trial court must evaluate plausibility of the prosecutor's reasons in light of all of the surrounding circumstances to decide whether the defendant has proved purposeful discrimination); **Harris v. Hardy**, 680 F.3d 942,949,953 (7th Cir. 2012)(The persuasiveness of the justification becomes relevant at the third step, in which the court weighs the evidence and determines whether the race-neutral explanation is credible or a pretext for purposeful discrimination; a court misapplies **Batson** when it incorrectly recounts the record or fails to note material portions of it). In its attempt to carry out **Batson's** third step, the trial court clearly erred by failing to consider "all of the surrounding circumstances" which were relevant to the plausibility and persuasiveness of the State's proffered explanation. In fact, the trial court failed to consider any of surrounding circumstances. Like the trial court's analysis of the prima facie case issue, the trial court's analysis of third prong was starkly abbreviated in both length and substance. Of the 4 pages of transcript devoted to the entire **Batson** analysis, A-Ap.120-123; 51:67-70, a mere *half*

page pertains to both the second and third prongs of Batson. A-Ap.123-124; 51:70-71. After disposing of the prima facie case issue, the trial court addressed both the second and third **Batson** prongs as follows:

> Moreover, the Court would find if there were a prima facie case, the State articulated a reason justifying the exercise of the strike. It was a legitimate factor.
>
> Based upon observations of juror two and 14, regarding the question about police officers, there are going to be a lot of police officers testifying, and their reaction to the questions about police officers and Mr. Huebner's interpretation of their reaction to it, he might be wrong. *The explanation doesn't have to be plausible, it doesn't have to be persuasive,* but it is a clear, specific statement of the reasons, and there is a nexus between the legitimate factor for a strike and those two individuals, one being African-American and one being a Caucasian, *under those circumstances*, and therefore the Court finds that the defense has not proven under the totality of the circumstances a purposeful discrimination. Court will deny the motion. A-Ap.123-124; 51:70-71. Italics added.

At this point, before going further and considering those specific circumstances the trial court should have considered but did not, it makes sense to consider why the trial court did what it did, that is, why it conducted such a terse analysis of the third prong which ordinarily and expectedly calls for a lengthy and detailed weighing of "all the surrounding circumstances." The explanation lies within the trial court's own words as set forth above. According to the trial court, one of the "circumstances" that it did consider in evaluating whether James proved a purposeful discrimination was that "the explanation doesn't have to be plausible, it doesn't have to be persuasive…". A-Ap.123; 51:70. Of course, the State's

explanation under the third prong *did* have to be "plausible" and "persuasive." In fact, the trial court's fundamental duty under the third prong was to determine if in fact the State's explanation was "plausible" and "persuasive" by engaging in the "detailed weighing process," **United States v. Stephens,** 421 F.3d at 518, of "all surrounding circumstances." Nonetheless, with the mistaken belief that the State's proffered explanation did not have to be persuasive and plausible, the trial court did not labor to examine whether it was persuasive and plausible. As a result, we have virtually no "detailed weighing" of *any* circumstances much less "all surrounding circumstances" which bore upon the plausibility and persuasiveness of the State's proffered reason. Stated a simpler way, the trial court essentially skipped the third prong of **Batson**, the most important part of the analysis. In doing so, the trial court clearly erred.

Of course, had the trial court engaged in the requisite "detailed weighing" of "all the surrounding circumstances," it could only have reasonably concluded that the prosecutor's stated justification for the strike of juror no. 14 was implausible and a pretext for discrimination. The case of **Snyder v. Louisiana**, supra, is informative if not dispositive as to the issue before this court. In **Snyder**, the prosecutor's number one reason for using a

peremptory strike against a young African-American man, a "Mr. Brooks," was that the Mr. Brooks "looked very nervous" throughout the questioning. **Snyder v. Louisiana**, 552 U.S. at 478. Nonetheless, there were no facts in the record to support such characterization. **Id**. at 479 and 485. Significantly, the record did not show that the trial judge actually made a determination regarding Mr. Brooks's demeanor. **Id.** As such, there was nothing in the record to support the prosecutor's own, self-serving characterization that Mr. Brooks "looked very nervous." The Supreme Court concluded that "we cannot presume that the trial judge credited the prosecutor's assertion that Mr. Brooks, was nervous," and rejected the State's proffered grounds for striking Mr. Brooks. **Id**. at 479. The case before this Court presents a similar if not easier analysis. The State's specific inquiry on voir dire was as follows:

> MR. HUEBNER: Okay. Now, is there anybody here who has a strong feeling about police officers, one way or the other? Either you just don't like 'em, you don't—you just do not believe officers; or on the other hand if they're a police officer and they're telling you something, I believe it. Does anyone have that sort of strong reaction when it comes to police officers? Okay. I see a number of hands. 51:16

In response to the State's question, juror nos. 6,19,21 and 22 raised their hands. 51:16,18,20 and 21. The prosecutor specifically followed up with each such juror as to their "reaction." After examining juror no. 6, who sat

in the back row, the prosecutor made sure there were no other hands raised in the back row. 51:18. There were none. 51:18. The prosecutor then examined juror no. 19 who sat in the middle row. 51:18. After examining juror no. 19, the prosecutor then asked if there were other hands raised in the middle row. 51:19. Juror nos. 21 and 22 raised their hands and answered specific follow-up questions from the prosecutor. 51:20-22. The prosecutor asked again if there were any other hands from the middle row. 51:21. There was no response. 51:22. The prosecutor then asked if anybody in the first row had raised his or her hand. 51:22. There was no response. 51:22. The record as such plainly demonstrated that the only venirepersons who had any "reaction" to the State's questions about police officers were juror nos. 6,19,21 and 22. The record therefore specifically refuted the assertion that juror no. 14 had a "reaction" of any type. The record demonstrated that juror no. 14 did not raise his hand in response to the State's question. The record demonstrated that juror no. 14 did not say anything in connection with the State's question. The record demonstrated no other "reaction" by juror no. 14 of any sort. If juror no. 14 made some type of face or gesture, or expressed some other reaction, it wholly went unnoted by the prosecutor and the trial court.

In fact, expectedly, it was only once trial counsel made her objection under **Batson** and the prosecutor was on the spot to come up with some justifiable reason for striking juror no. 14, that the prosecutor referenced a "reaction" by juror no. 14:

> Juror number two is a white male, juror number 14 is an African-American male. Both of them had reactions during the discussions, and I have never had a series of discussions like this about officers where so many individuals have had such blatantly hostile view (sic) of officers. I never experienced that before.
>
> Juror numbers two and 14 had inclinations or had reactions that I view to be inclinations along those grounds. Oftentimes you will see that, and I believe that I did see this and it did appear that both of them appeared at least not—not disposed to listening to the State if not potentially hostile, and that was my reasoning for striking both of those. A-Ap.117-118; 51:64-65.

The fundamental flaw with the State's argument is that the record belies it. If juror no. 14 had a "reaction" to that portion of the voir dire which dealt with how veniremembers viewed police officers, it is only logical that such reaction would have been exhibited within the record in the form of a statement or some other verbal expression by juror no. 14. In fact, the prosecutor even told the trial court that he was basing the strike on a "reaction" which juror no. 14 had "during discussions that we had." A-Ap.119; 51:66. The problem is however that juror no. 14 had no discussion with the prosecutor and specifically no discussion with respect to how he

may have viewed police officers. If juror no. 14 had such a "reaction," it is only logical that he would have raised his hand just like juror nos. 6,19,21 and 22. He did not. If juror no. 14 had such a "reaction," it is only logical that the prosecutor would have followed up on it and asked juror no.14 a few questions just like he did with respect to juror nos. 6,19,21 and 22. The prosecutor however did not ask juror no.14 any questions. It is highly implausible that juror no. 14 would have such a "reaction" and yet have such reaction go unexamined or even noted by the prosecutor, if only for the benefit of the record, when all other venirepersons with any reaction, specifically, juror nos. 6,19,21 and 22, were pointedly examined by the prosecutor. Yet, juror no. 14's alleged "reaction" went unnoted or examined. It is similarly implausible that juror no. 14 would have such a "reaction" about police officers and yet not be the subject of a challenge for cause. Indeed, if the prosecutor had been so impressed by such a "reaction," it seems reasonable that the prosecutor would have used such "reaction" as a basis to challenge juror no. 14 for cause. After all, the prosecutor challenged juror nos. 6,19,21 and 22 for cause based on their "reactions" and responses to the question about police officers, and the court granted the challenges as to juror nos. 6,19 and 22. A-Ap.116-117;

51:63-64. Yet curiously, the prosecutor did not challenge juror no.14 for cause. Finally, there is no indication in the record that the trial court made any determination as to juror no. 14's demeanor. Specifically, the trial court failed to indicate that it observed any "reaction" by juror no. 14. The trial court merely countenanced the prosecutor's own stated "observations," of a reaction by juror no. 14, and accepted such stated observations as a "legitimate factor" under the second prong of **Batson**. This is far different from the trial court itself making a finding that juror no. 14 did in fact have a certain "reaction." There was no such finding by the trial court, and for that reason, there is wholly no support in the record for the State's proffered reason for striking juror no. 14. Like the government's striking of Mr. Brooks in **Snyder**, the strike against juror no. 14 was not supported by facts within the record. The trial court clearly erred in not considering this set of circumstances.

Another set of circumstances that the trial court failed to consider pertained to the credibility or voracity of the prosecutor's statement that he struck juror no. 2, a white male, for the same reason he struck juror no. 14. The problem with such statement is that it is not supported by the record. Indeed, just as it is with respect to juror no. 14, the record is silent as to any

"reaction" by juror no. 2 or statement by juror no. 2. The absence of supporting information in the record as such suggests that the prosecutor had other reasons for striking both juror no. 2 and juror no. 14 besides the stated reason of a certain "reaction" by each. Nonetheless, by attributing a "reaction" to juror no. 2, the prosecutor attempted to deflate the **Batson** issue as to juror no. 14. Stated another way, the State's reference to juror no. 2 weighs more towards the establishment of pretext than racial neutrality. Had the trial court considered "all surrounding circumstances," including what the record reflected as to what the veniremembers actually said or did, it would have recognized that there was no basis in fact for the prosecutor's characterization of either juror no. 14 or juror no. 2. At a minimum, such circumstances were relevant to the credibility of the State's explanation and should have been evaluated by the trial court. The trial court clearly erred in not doing so.

In addition to the circumstances showing that the record failed to support the State's proffered explanation, the circumstances regarding how the State used its strikes supported James's argument that the State's proffered explanation was a pretext. The pattern and statistical evidence regarding the State's use of its strikes has been more fully discussed earlier in this

brief, and therefore, James will not repeat the discussion here. James will merely emphasize the raw numbers comprising the circumstances before the trial court. Although African-Americans comprised only 17% of the venire (6 of 35), by using challenges for cause or peremptory strikes, the State excluded 67% (4 of 6, juror nos. 6, 14, 21, and 22) of the African-Americans. Although African-Americans comprised only 17% of the venire, they were the subject of 44% (4 of 9) of the State's total challenges. Although African-American males comprised only 11% of the venire (4 of 35), the State excluded 100% of this group. Although African-American males comprised just 11% of the venire (4 out of 35), they were the subject of 44% of the State's challenges. The trial court was plainly aware of how many people were on the venire. The trial court had a list. A-Ap.110-111. The trial court was similarly aware of the number of African-Americans on the venire and the specific number of African-American men and women. A-Ap.115,118; 51:62,65. The trial court was finally aware of which venirepersons were subject to the State's strikes, whether peremptory or for cause. A-Ap.122; 51:69,79. The trial court therefore had before it the numerical circumstances regarding how the State used its strikes against African-Americans and African-American males in particular, in

comparison to the venire as a whole. The trial court nonetheless failed to consider how such circumstances showed a pattern by the State of excluding a disproportionate percentage of African-Americans, especially African-American males from the venire, and of using a disproportionate percentage of its strikes against African-Americans, especially African-American men. The pattern and statistics underlying the State's use of its strikes against African-Americans and African-American men in particular constituted a set of circumstances that the trial court was required to consider and weigh against the State's proffered explanation. See **Harris v. Hardy**, 680 F.3d at 952-953, citing **McGahee v. Ala. Dep't of Corrs**., 560 F.3d at 1261-66, and **Kesser v. Cambra**, 465 F.3d 351,358 (9th Cir. 2006)(en banc). The trial court clearly erred in not doing so.

Finally, the trial court should have considered that African-American males constitute a sub-group within the larger, cognizable group of African-Americans, and that they enjoy protection under **Batson** and **J.E.B**. on account of their race-gender identity. In this regard, the proper inquiry was not simply whether there was purposeful discrimination against juror no. 14 on account of race but also on account of a combination of race and gender. Indeed, since the advent of **Batson** and especially **J.E.B**., courts from

around the country have interpreted and applied such cases to prohibit discrimination against hybrid identity groups consisting of a combination of race and gender.[6] These courts have used various approaches. Some courts have held that **Batson** and **J.E.B**. already encompass the hybrid group of race and gender. In **Robinson v. United States**, 878 A.2d 1273,1276-77 (D.C.2005), the court held that "[T]he critical question is whether the purposeful use of peremptory strikes to exclude black females …involves racial and/or gender discrimination. If it does, then it offends basic principles of equal protection and is prohibited under **Batson** and **J.E.B**." **Id**. at 1284. "Two bad partial reasons for a peremptory strike do not add up to a good reason; they simply equate to a reason that is doubly bad." **Id**. The **Robinson** court explained that it was not necessary to show the opposing party's peremptory challenge was motivated only by race or gender because such a requirement would not reflect reality as motivations behind peremptory strikes are often diverse. **Id**. Other courts embracing a

[6] Although various circuit courts have characterized the issue as ripe for review, the United States Supreme Court has not ruled on the issue of whether combined race-gender groups are indeed protected under **Batson** and **J.E.B**. See **Tolbert v. Page**, 182 F.3d 677 (9th Cir. 1999)("[T]he issue of whether African-American men could constitute a **Batson** class likely is worth of consideration in light of recent holdings that gender as well as race is an impermissible basis for peremptory challenges…"); and **Unites States v. Walker**, 490 F.3d 1282,1291 n.10 (11th Cir. 2007)("[W]e agree with the Ninth Circuit that whether **Batson** applies to combined race-gender groups is a question that merits a determination at some point…").

similar analysis include **Maddox v. State**, 708 So.2d 220,226 (Ala. Crim. App. 1997)(explaining that certain peremptory strikes exercised by the State to exclude black male potential jurors were not supported by the record and thus must have been "predicated on either race or gender, or both," implying that if a strike is employed on the basis of a combination of race and gender, the strike violates equal protection); and **Blair v. State**, 476 S.E.2d 263,264, 267 Ga. 166 (Ga. 1996)(concluding that the defendant failed to offer race and gender neutral justifications for removing six out of seven white female jurors, thus violating **Batson** and **J.E.B**. requirements). Other courts have expanded the reach of **Batson** and **J.E.B**. to specifically recognize discrete, cognizable groups based on race-gender identity. See **People v. Motton**, 704 P.2d 176,181, 39 Cal. 3d 596 (Cal. 1985)(holding that black women constitute a cognizable group); **People v. Gray**, 104 Cal. Rptr.2d 848,852-853, 87 Cal. App. 4th 781 (Cal. Ct. App. 2001)(deeming African-American males a cognizable group); **State v. Whitby**, 975 So.2d 1124,1125 (Fla.2008)(holding that Florida's procedure for challenging peremptory challenges applies to groups based on the combination of race and gender); **People v. Jerome**, 828 N.Y.S.2d 78,79 (N.Y. App. Div. 1995)(holding that black males are a cognizable group); **State v. Daniels**,

122 P.3d 796,801, 109 Hawai'i 1 (Haw. 2005)(holding that Caucasian males are cognizable group); and **State v. Shepherd**, 989 P.2d 503,511 n.4 (Utah Ct. App. 1999)(stating that the idea that race and gender is not protected, as held by the trial court, was erroneous). Finally, other courts have deemed race-gender groups protected from discrimination during jury selection based on their own state constitutions. See **Commonwealth v. Jordan**, 785 N.E.2d 368,378-79 (Mass. 2003) and **State v. Gonzales**, 808 P.2d 40,50 (N.M. Ct. App. 1991). The reason for the evolution of **Batson**'s scope is straight forward. Courts and scholars recognize that discrimination based on race and gender oftentimes overlaps and if the scope of inquiry under **Batson** and **J.E.B**. is limited only to race or gender, a loophole is created whereby a discriminating party may avoid liability by arguing that its peremptory strike was made not on the basis of race or gender but rather a combination of the two:

….Discrimination based on race, when combined with gender, becomes immune from scrutiny when litigants cannot pass the first step of **Batson** in order to challenge a peremptory strike.

If race-gender-based challenges are permitted, litigants will be able to defend against allegations of race-based or gender-based discrimination by asserting that their peremptory challenges are actually race-gender-based. Similarly, in **J.E.B**., the Supreme Court recognized that a prohibition on the use of gender-based challenges is necessary, not only because gender is an inappropriate proxy for determining juror capability, but also because gender should not be used as a pretext for race discrimination. The Court emphasized that race and gender are overlapping categories, and, as such, lower courts

had difficulty determining whether peremptory challenges were exercised on the basis of race or the then-permitted basis of gender. The Court's decision holding gender protected for **Batson** purposes was, presumably, meant to achieve two objectives: to remedy the violation of equal protection inherent in gender-based strikes and to require courts to prohibit discrimination on the basis of the overlapping categories of race and gender. Failure to recognize race-gender groups creates a loophole for litigants to use in order to discriminate on the basis of either of two protected statuses: race or gender. In light of the discussion in **J.E.B**. regarding the need to close loopholes that allow discrimination, race-gender groups must be deemed cognizable. Leah M. Provost, *Excavating from the Inside: Race, Gender, and Peremptory Challenges*, 45 Val. U.L. Rev.307,343 (2010).

In responding to trial counsel's **Batson** objection, both the prosecutor and the trial court attributed significance to the fact that although no African-American males served on the jury, two African-American females did. A-Ap.118,123; 50:65 and 70. In doing so, both the prosecutor and the trial court embraced the type of argument noted in the above article that stems from an analysis based solely on race or gender. According to such argument, the State did not discriminate on the basis of race because it allowed two African-Americans to serve on the jury, and it did not discriminate on the basis of gender because it allowed men to serve on the jury (of the 14 jurors who heard evidence, 7 were men, A-Ap.112). As a result, the argument seemingly allows for the conclusion that under such circumstances, the State did not purposefully discriminate under **Batson** or **J.E.B**. Such argument fails to countenance however that the State's actual discrimination focused more narrowly upon a group where the two

categories of race and gender overlapped, in this case, African-American males. The consideration of African-American males as a distinct sub-group within the larger, cognizable group of African-Americans precludes this argument and provides for a more accurate and meaningful application of the principles set forth in **Batson** and **J.E.B.** The trial court should have considered this circumstance in conducting the **Baston** analysis. The trial court clearly erred in not doing so.

CONCLUSION

For all of the above reasons, the trial court's **Batson** analysis was erroneous both in its methodology and its conclusion. This Court should vacate the judgment of conviction and remand the case for a new trial.

Dated this _____day of January 2015.

Respectfully submitted,
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CERTIFICATION

I hereby certify that this petition meets the form and length requirements of Wis. Stat. Rules 909.62(4) and 809.19(8)(b) and (d) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 7773 words.

Dated this _____day of January 2015

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic petition is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served upon all opposing parties.

Dated this ____day of January 2015.

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CERTIFICATION

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, is an appendix that complies with s.809.62(2)(f) and that contains: (1) the court of appeals decision; (2) the judgment, orders, findings of fact, conclusions of law, and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition; (3)any other portion of the record necessary for an understanding of the petition; (4) a copy of any unpublished opinion cited.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and the final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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