



1 with his girlfriend, 19-year-old Tamyra Frazier. The defendant and Gordon  
2 exchanged words, and the defendant began shooting. His first shot struck Frazier in  
3 the back, severing her aorta, causing her death within minutes. Defendant's  
4 remaining four shots struck Gordon, who was rushed to the hospital.

5 Alisha Brown, and her cousin Erica Baptiste, both friends of the defendant,  
6 were on Betty Street at the time of the shooting. They stated that they observed a  
7 tannish-brown colored Regal, with a tan top, stop at a stop sign, allowing them to  
8 cross the street. The defendant was on the passenger side of the car. Both girls  
9 watched as the defendant reached across the driver with a gun, and shot the victims.  
10 The car then sped off.

11 Police and paramedics arrived shortly after the shooting, and pronounced  
12 Tamyra Frazier dead at the scene. Emergency personnel also tended to Mister  
13 Gordon, and while still at the scene of the shooting, police removed from his  
14 waistband a gun and a bag containing several rocks of cocaine. Paramedics then  
15 transported him to the hospital, where he told a nurse and a detective that "Irvin" shot  
16 him. Gordon died in surgery.

17 On October 14, 1994, the district court issued an arrest warrant. The defendant  
18 turned himself in two days later and was subsequently indicted by a grand jury for  
19 first degree murder.

20 The defendant's trial began on November 28, 1995. At trial, the defendant  
21 testified that he had killed Gordon in self defense, and killed Frazier by accident.  
22 However, the jury found the defendant's account of events unconvincing, and on  
23 December 1, 1995, found him guilty as charged of two counts of first degree murder.  
24 In the penalty phase that followed, the jury recommended a sentence of death.

1  
2 **DISCUSSION**

3 Batson Challenges

4 Both in this state and throughout the nation, the law is firmly settled that  
5 peremptory strikes may not be based on race in either criminal or civil cases. *See*  
6 *Batson v. Kentucky*, 476 U.S. at 89, 106 S.Ct. at 1719 (dealing with prosecutor's  
7 strikes); *Georgia v. McCollum*, 505 U.S. 42, 59, 112 S.Ct. 2348, 120 L.Ed.2d 33  
8 (1992) (dealing with defense strikes in criminal trials); *Edmonson v. Leesville*  
9 *Concrete Co.*, 500 U.S. 614, 631, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) (dealing  
10 with civil trials); *State v. Collier*, 553 So.2d 815, 817 (La.1989) (holding that  
11 un-rebutted prima facie case requires reversal; La. C. Cr. P. art. 795(c)). If it appears  
12 that one party is using its peremptory strikes in a discriminatory manner, the other  
13 party may raise the issue by making what has come to be known as a *Batson*  
14 objection. *State v. Myers* 99-1803 (La. 4/11/00), 761 So.2d 498, 500. In several  
15 assignments of error, the defendant argues that the state exercised its peremptory  
16 challenges in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476  
17 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

18  
19 In *Batson v. Kentucky*, *supra*, the United States Supreme Court held that the  
20 Equal Protection Clause forbids the use of peremptory strikes to challenge potential  
21 jurors solely on account of their race or the assumption that members of a certain race  
22 will be unable to impartially consider the case before them. The Court concluded that  
23 such discriminatory practices in the use of peremptory challenges denies a defendant  
24 equal protection of the law and unconstitutionally discriminates against the potential  
25 juror in violation of the Fourteenth Amendment. *Id.* at 84-89, 106 S.Ct. at 1716-19.

1 To assure such discrimination does not occur, the Court, in *Batson*, established  
2 a three-part framework to be employed in evaluating an equal protection challenge  
3 to a prosecutor's use of a peremptory strike. First, the defendant must make a prima  
4 facie showing of discrimination in the prosecutor's use of the strike.<sup>1</sup> If he fulfills this  
5 requirement, then the prosecutor must offer a race-neutral explanation for the  
6 challenge. *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834  
7 (1995)(per curiam)(citations omitted); *State v. Collier*, 553 So.2d 815, 818 (La.  
8 1989). This is a burden of production, not one of persuasion. Then, the trial court  
9 must decide whether the defendant has carried the ultimate burden of proving that the  
10 strike constituted purposeful discrimination on the basis of race. See *Batson*, 476  
11 U.S. at 89, 106 S.Ct. at 1719; *Hernandez v. New York*, 500 U.S. 352, 358-59, 111  
12 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

13 In the instant case, the defendant claims that the state exercised peremptory  
14 challenges on the basis of race when it struck venirepersons Brown, Poch, and Davis.  
15 At the start of jury selection, both parties accepted the first two venire persons, both  
16 of whom are white.<sup>2</sup> When presented with the first African American panel member,  
17 Poch, the state exercised its first peremptory challenge, excusing her. Apparently  
18 acting to preserve the issue in the event that a pattern arose, the defendant objected.  
19 The trial court ruled that the defense had not established that the state engaged in a

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<sup>1</sup> The combination of factors needed to establish a prima facie case are: (1) the defendant must demonstrate that the prosecutor's challenge was directed at a member of a cognizable group; (2) the defendant must then show the challenge was peremptory rather than for cause (i.e., "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate'"); and (3) finally, the defendant must show circumstances sufficient to raise an inference that the prosecutor struck the venireperson on account of race. *Batson*, 476 U.S. at 96, 106 S.Ct. at 1723.

<sup>2</sup> The defendant's appellate brief indicates, and the state did not dispute, that venireperson Lester is white. Further, the second venireperson, Ferrara, was the subject of the state's McCullum challenge, and is therefore presumably white.

1 pattern of discrimination. Next, both parties accepted Uzee, a white female.<sup>3</sup> The  
2 state then challenged the fifth venireperson, Brown, a black male, peremptorily, and  
3 the defense again objected. The following colloquy ensued:

4 [State]: You want me to answer about Ms. Poch, or Mr.  
5 Brown, or both?  
6

7 The Court: Well, you have to answer them both now, because  
8 the pattern has been struck.  
9

10 [discussion about which assistant district attorney will speak for the  
11 state]  
12

13 [Defense]: I challenge that they're cutting all the blacks on the  
14 jury, and that they're cutting by race, they're making  
15 a decision based on race. There's *Batson* and the  
16 concurrent jurisprudence on that says that you  
17 cannot do that.  
18

19 [State]: Okay, just as long as he's aware that *Batson* is an old  
20 case --  
21

22 [Defense]: I know it's an old case. I mean, *Batson* and its  
23 progeny.  
24

25 [State]: There's a law that's changed *Batson* some -- I don't  
26 have any problem with putting our reasons on the  
27 record. I don't know that we need to do that, but I  
28 will, in an abundance of caution and at the court's  
29 request, I'll certainly do that.  
30

31 I reviewed my notes yesterday concerning Ms. Poch.  
32 Ms. Poch stated very clearly yesterday that she had  
33 a great deal of trouble with the death penalty. I'm  
34 still concerned about that issue that Judge -- the  
35 court denied any challenges for cause on her, but my  
36 notes reflect that she stated that she had a great deal  
37 of difficulty in posing [sic] the death penalty, that --  
38 I think her exact words were "can't take it back."  
39 She wants strong evidence and "can't take it back."  
40

41 [Defense]: Note our objection.  
42

43 [State]: And although Mr. Brown appeared attentive to most  
44 of what was going on, he seemed a little confused as

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<sup>3</sup> The defendant's appellate brief again indicates that Uzee is white, and the state does not disagree.

1 to the difference between the civil and criminal  
2 standard. **And he's also the only single black male**  
3 **on the panel with no children.**

4  
5 The Court: He's what?

6  
7 [State]: **He's a single black male on the panel with no**  
8 **children.**

9  
10 The Court: What does that have to do with --

11  
12 [State]: Well, I don't want him relating to the defendant  
13 more so than he would the State's part of the case.  
14 I would prefer to have older jurors or jurors with  
15 children, particularly if I'm dealing with men.

16  
17 Mr. Brown also waffled a little bit back and forth  
18 yesterday, I believe, on the death penalty issues, but  
19 my notes are not as clear on him as they are on Ms.  
20 Poch.

21  
22 [More discussion on who will speak for the state]

23  
24 [State]: [The state's concerns with] Mr. Brown are more  
25 related to the information that I got today than  
26 yesterday, anyway; the basic two reasons being, one,  
27 he lives in Harvey, which is the area where this  
28 happened, and I don't want him drawing any  
29 conclusions based on what he knows or doesn't  
30 know about the area or the neighborhood, and that  
31 he's single --

32  
33 The Court: All right.

34  
35 [State]: -- has no children.

36  
37 The Court: I'm going to deny the motion, finding that the State  
38 has articulated non-racial, neutral reasons for  
39 excusing these two jurors.

40  
41 [Defense]: Note the defense's objection.

42  
43 (emphasis added).

44 During the close of voir dire, the state backstruck Davis, leaving only one African  
45 American on the jury.

46 The trial court ruled that the defendant established a pattern of non race neutral

1 challenges by the state and ordered that the state provide a justification for its  
2 challenge of Brown. The state offered the above-claimed race neutral justifications  
3 for removal, namely, that Brown seemed a little confused as to the difference between  
4 the civil and criminal standard, that he was the only single black male on the panel  
5 with no children, and that he lives in Harvey. The above exchange indicates that the  
6 trial court found such reasons persuasive under step three of the *Batson* analysis.  
7 However, defendant contests this finding, claiming that the state's proffered  
8 justification was anything but race neutral. We agree with defendant's contention.

9         Defendant points to several problems with the state's articulated reasons. The  
10 state claimed that it was challenging Brown because he "seemed a little confused as  
11 to the difference between the civil and criminal standard," then added, and repeated,  
12 that Brown is "also the only single black male on the panel with no children." The  
13 state further explained that it did not "want [Brown] relating to the defendant more  
14 so than he would the State's part of the case." Only after this justification seemed to  
15 fall flat, the state offered that it wished to strike Brown because "he lives in  
16 Harvey[.]" which is near where the killings took place. Based on the reasons given  
17 by the state, we apply the framework of *Batson*, and determine whether the state's  
18 reasons were truly racial neutral.

19         The state rested its challenge of Brown on the fact that he lived in Harvey, and  
20 thus near the crime scene. While some courts have held such a justification  
21 acceptable despite the fact that location could be used as a proxy for excluding venire  
22 members of a particular race, others have not. *See, e.g., Brownlee v. State*, 535 So.2d  
23 221, 223 (Ala. Crim. App. 1988) (allowing strike of juror who lived in general area  
24 of crime); *People v. Davis*, 234 Cal. Rptr. 859, 869 (Cal. App. Ct. 1987) (allowing  
25 strike of juror from suburb adjacent to suburb where crime had occurred); *People v.*

1 *Andrews*, 614 N.E.2d 1184, 1189-93 (Ill. 1993) (allowing strikes of jurors same age  
2 as defendant, with children same age as defendant, or residing near crime scene). In  
3 addition, other courts have adopted the rule that before a court finds a peremptory  
4 challenge race neutral in a case in which a prosecutor infers a bias due to the  
5 proximity of the venireperson's residence to the crime scene, the prosecution must  
6 establish through further inquiry and explanation that such a bias actually exists.  
7 *Duncan v. State*, 612 So.2d 1304, 1309 (Ala. Cr. App. 1992) (discussing *Williams v.*  
8 *State*, 548 So.2d 501 (Ala. Cr. App. 1988)). Further, the fact that potential jurors are  
9 challenged on the basis of a claimed bias, without being questioned about such bias,  
10 "raises a strong inference that they were excluded on the basis of race alone."  
11 *Williams*, 548 So.2d at 507; *cf. Splunge v. Clark*, 960 F.2d 705, 707-08 (7<sup>th</sup> Cir. 1992)  
12 (explanation that venireman didn't understand burden of proof insufficient when  
13 prosecutor asks venireman whether the fact that both venireman and defendant are  
14 black would affect deliberations, but fails to ask more than one question about the  
15 burden of proof). We find the state's explanation that its sole reason for excluding  
16 Brown was based on his residency unpersuasive and was simply a pretext to its true  
17 reason, that the state excused Brown because of his race.

18 The state also proffered that it was striking Brown because he was single and  
19 had no children.<sup>4</sup> This justification is also unpersuasive as the record reflects that the  
20 state did not attempt to strike childless single white male venirepersons Louviere,  
21 Bordelon, Hidalgo, Lasana, or Daigle.<sup>5</sup> Accordingly, when examined alongside the  
22 state's earlier race based comments, as well as the childless single white veniremen

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<sup>4</sup> The record reveals that the state never asked Brown whether he had children. Although Brown did not mention that he had children in response to the court's general questioning, Brown did have four children at the time of the trial.

<sup>5</sup> Although the state did backstrike one single white male, Brammell, it did so for the apparent purpose of leaving additional backstrikes available, as Brammell would have completed the jury.



1 the state did not challenge, the state again failed to develop sufficient basis for its  
2 challenge. *See, e.g., State v. Collier*, 553 So.2d 815, 822 (La. 1989) (rejecting  
3 explanations when prosecution failed to exclude other prospective jurors, "who were  
4 not of a racial group, who shared the same characteristic as that claimed as the reason  
5 for the challenge."); *State v. Knighten*, 609 So.2d 950, 958 (La. App. 4<sup>th</sup> Cir. 1992)  
6 (same); *Andrews*, 614 N.E.2d at 1189 ("[W]here the State fails to exclude white  
7 venire members having the same characteristic as a black venire member who was  
8 excused on the basis of that characteristic, an inference of purposeful racial  
9 discrimination is raised.") (citing cases).

10 Yet another claimed justification for challenging Brown is that he appeared to  
11 have had difficulty understanding the difference between "preponderance of the  
12 evidence" and "beyond a reasonable doubt."<sup>6</sup> In at least one case, such a reason has  
13 been upheld as acceptable. *State v. Smith*, 608 A.2d 63, 70 (Conn. 1992) (upholding  
14 challenge of juror with "difficulty understanding legal concepts" based *inter alia* on  
15 such difficulty). However, another court has found that basing a challenge on such  
16 a misunderstanding could also be pretext. *Splunge*, 960 F.2d at 708. In the instant  
17 case, such confusion, if in fact harbored by Brown, would have helped the state, as  
18 Brown may have held the state to a lesser standard of proof. Accordingly, when  
19 examined in context of the state's overt mention of Brown's race, as well as its  
20 "scattershot" attempts to put forth racially neutral explanations without developing  
21 a basis for such, the state's attempt to explain its peremptory challenge of Brown  
22 appears pretextual.

23 A finding that the state's reasons for dismissing Brown were based on race is  
24 further supported in the instant case by the overt statement of the prosecutor that she

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<sup>6</sup> Despite the State's contention, the record reflects that Brown articulated a proper understanding of the burden of proof in a criminal trial.

1 was challenging Brown because he was the "only single black male on the panel with  
2 no children." This justification explicitly places the defendant's race at issue, and is  
3 thus not race neutral. *See e.g., Goggins v. State*, 529 So.2d 649, 651-52 (Miss. 1988)  
4 (challenge based on belief that blacks more favorable to black defendant invalid);  
5 *State v. Blackmon*, 744 S.W.2d 482, 486 (Mo. Ct. App. 1988) (same); *see also Owens*  
6 *v. State*, 531 So.2d 22, 26 (Al. Cr. App. 1987) (rejecting trial court's conclusion that  
7 consideration of race among other factors race neutral). Furthermore, in similar  
8 situations, trial courts have properly disallowed attempted peremptory challenges,  
9 finding them mere pretext. *See, e.g., Marks v. State*, 581 So.2d 1182, 1187 (Ala. Cr.  
10 App. 1990)(rejecting state's attempt to strike on claimed basis that venireman single  
11 and unemployed). Appellate courts have also found equal protection violations when  
12 prosecutors offer the venireperson's predominantly black neighborhood as  
13 justification, without connecting it to the case. *United States v. Bishop*, 959 F.2d 820,  
14 825-26 (9<sup>th</sup> Cir. 1992). The prosecutor in the instant case, in addition to giving thinly  
15 veiled reasons similar to those mentioned above, explicitly stated that she struck  
16 Brown because he was black.

17 Accordingly, in its dismissal of Brown, the state has "consciously taken color  
18 into account," *Cassell v. Texas*, 399 U.S. 282, 295, 70 S.Ct. 629, 636, 94 L.Ed.2d 839  
19 (1950), and violated the defendant's constitutional right to equal protection. *Batson*,  
20 476 U.S. at 86, 106 S.Ct. at 1717 ("The very idea of a jury is a body. . . composed of  
21 the peers or equals of the person whose rights it is selected or summoned to  
22 determine; that is, of his neighbors, fellows, associates, people having the same legal  
23 status in society as that which he holds.") (quoting *Strauder v. West Virginia*, 100  
24 U.S. 303, 308, 25 L.Ed. 664 (1880)). This error is a structural one, affecting the  
25 framework within which the trial proceeded, thus, we find that the defendant is

1 entitled to a new trial.

2 We conclude that the manner in which the state sought to dismiss jurors in this  
3 case, based solely on race, amounts to a violation of defendant's constitutional rights.  
4 As we find this error alone constitutes a reversal of the conviction and sentence, we  
5 pretermitted the remaining assignments of error.

6

7

### **CONCLUSION**

8 For the foregoing reasons, we find the trial judge erred in allowing the state to  
9 dismiss juror Brown, and find this error raises serious federal constitutional equal  
10 protection issues affecting the rights of both the defendant and the excused  
11 venirepersons. Thus, defendant's conviction is reversed and the case remanded to the  
12 trial court for a new trial.

13

### **DECREE**

14 For the reasons assigned herein, the defendant's conviction and death sentence  
15 are reversed.

16

**REVERSED AND REMANDED.**

17