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THE PROPER REMEDY FOR A LACK OF *BATSON* FINDINGS: THE FALL-OUT FROM *SNYDER V. LOUISIANA*

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I. INTRODUCTION

Batson v. Kentucky[1] is familiar to most law students and to many fans of *Law & Order*. The Supreme Court held in *Batson* that the Equal Protection Clause forbids prosecutors from using peremptory challenges to exclude potential jurors from a jury on the basis of race. Racial discrimination in jury selection harms the defendant, violates the rights of the excluded juror, and harms the public by undermining confidence in the criminal justice system.[2] If a criminal defendant (or the defendant's attorney) believes that a prosecutor has attempted to use a peremptory challenge to remove a prospective juror on the basis of race, the defendant may make a "*Batson* challenge." The Supreme Court's opinion in *Batson* sets forth a procedure that the trial court must follow in resolving such challenges: if the defendant makes a prima facie showing that the prosecutor's peremptory challenge was motivated by race, then the prosecutor must offer a race-neutral explanation for striking the juror and

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[1] 476 U.S. 79 (1986).

[2] *Id.* at 87; Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

the trial court must then decide whether the defendant has shown purposeful discrimination.[3]

The *Batson* procedure is an attempt to reconcile the tension between the constitutional guarantee of the Equal Protection Clause and the centuries-old practice of permitting prosecutors and defense attorneys to exercise peremptory challenges during jury selection. More than twenty years of experience with that procedure has demonstrated the importance of the trial court's observations during jury selection and contemporaneous findings of fact regarding the credibility of the race-neutral explanation that a prosecutor offers when challenged on the use of a peremptory challenge. Although the trial court's resolution of a *Batson* challenge is subject to appellate review, appellate courts rely heavily upon the trial court's findings and observations. Whether a *Batson* challenge should be sustained ultimately turns on whether the prosecutor is credible when he or she asserts a race-neutral explanation for the peremptory challenge. In some instances, the race-neutral explanation can be confirmed or rejected on the basis of the record—for example, when a transcript confirms that a juror said something inconsistent with the juror's duty to weigh the evidence impartially, or where a questionnaire confirms that a juror's background may inject bias. But a prosecutor's race-neutral explanation often turns on a juror's demeanor observed during jury selection, which is not something that an appellate court can discern from a cold record. Moreover, peremptory strikes are often the product of instincts of which the prosecutor is not fully aware. Accordingly, courts hold that demeanor-based explanations, in particular, should be scrutinized carefully, as they are often a convenient way to hide racial prejudice. Where a prosecutor gives a demeanor-based, race-neutral explanation for a peremptory challenge and the trial court allows the challenge without observing the demeanor of the challenged juror and without commenting on how it determined that the prosecutor was credible, appellate review of the trial court's ruling is practically impossible.

In recent years, state and federal appellate courts have struggled with the question of what should happen when (1) the trial court denies a defendant's *Batson* challenge without making the necessary factual findings to permit appellate review and (2) the prosecutor's race-neutral explanation for the challenged strike cannot be confirmed or rejected on the basis of the record.[4] The question arises frequently in criminal cases, and one of the Supreme Court's most recent decisions addressing *Batson* challenges—

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[3] *Batson*, 476 U.S. at 96–98; *see also infra* Part II.C.

[4] *See infra* Part III.

Snyder v. Louisiana[5]—has added to the confusion. In *Snyder*, the Supreme Court granted review some twelve years after jury selection and ordered a new trial where the trial court had failed in its duty to make factual findings assessing the credibility of the prosecutor's race-neutral explanation for questionable peremptory strikes. As the prosecutor's explanation was based on the juror's demeanor, it could not be confirmed or rejected on the basis of the record.

Despite the fact that the Court in *Snyder* ordered a new trial, the lower courts are divided on whether a new trial is always required in similar situations, or whether it is instead permissible to remand to the trial court for retroactive findings or to conduct an evidentiary hearing to reconstruct the prosecutor's state of mind at the time of jury selection.[6] Decisions permitting such remands have invited post hoc justifications for questionable peremptory strikes and have sown further confusion as litigants dispute the permissible parameters of such proceedings (such as whether and to what extent discovery should be permitted, whether defense attorneys may question the prosecutor under oath, and whether the prosecutor may give new reasons on remand that were not given at trial).[7] Such remands have occasionally taken on lives of their own and wasted judicial resources.[8] Lower courts will continue to struggle with the question until the Supreme Court provides a definitive answer.

This Article argues that both doctrinal and practical considerations counsel in favor of granting the criminal defendant a new trial when the trial court fails to make sufficient findings of fact and where the prosecutor's race-neutral explanation for the challenged strike cannot be confirmed or rejected on the basis of the existing record.

Part II explains the doctrinal underpinnings of the Supreme Court's decision in *Batson*, and the significance of the Supreme Court's decision in *Snyder v. Louisiana*. In *Batson*, the Court articulated a three-part test to determine whether the exercise of a peremptory challenge violated the Equal Protection Clause.[9] In *Snyder*, the Court applied that test in the context of a peremptory challenge exercised on the basis of juror demeanor,

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[5] 552 U.S. 472 (2008).

[6] *Compare* McGahee v. Dep't of Corr., 560 F.3d 1252, 1259–60 (11th Cir. 2009) (ordering a new trial), *with* United States v. McMath, 559 F.3d 657, 670 (7th Cir. 2009) (remanding for further findings), *cert. denied*, 130 S. Ct. 373; *see also infra* Part III.A–B.

[7] *See infra* Part IV.B–C.

[8] *See infra* Part IV.D.

[9] Batson v. Kentucky, 476 U.S. 79, 96–98 (1986); *see also infra* Part II.C.

underscoring that trial courts have a duty to make explicit, on-the-record findings in rejecting a *Batson* challenge.[10]

Part III discusses the different approaches that state and federal appellate courts have taken when the trial court has failed to make the findings required by *Batson* and where the prosecutor's race-neutral explanation cannot be confirmed or denied on the basis of the record. Some courts have held that *Snyder* requires a new trial in all such cases.[11] Other courts have ordered a remand, directing the trial court to supply the missing findings retroactively if it can, and sometimes permitting the trial court to hold an evidentiary hearing for that purpose.[12] At least one federal court has held, however, that even after *Snyder*, a lack of explicit findings in resolving a *Batson* challenge is not necessarily reversible error.[13]

Part IV offers an analysis of the doctrinal and practical considerations bearing on the question, concluding that those considerations counsel in favor of a bright-line rule directing appellate courts to order a new trial whenever a trial court resolves a *Batson* challenge without making the required findings and where the prosecutor's race-neutral explanation cannot be confirmed or rejected on the basis of the existing record. Several considerations counsel in favor of such a bright-line rule. For example, such a rule eliminates the possibility that a remand may morph into a series of endless proceedings with additional appeals and subsequent remand. It also avoids the temptation to engage in post hoc rationalization of the trial court's prior ruling and avoids the problem that occurs when the lapse of time since the trial court's initial ruling renders subsequent findings unreliable. Finally, it avoids placing on trial judges what is often an insurmountable burden—to attempt to reconstruct what happened sometimes months or years earlier, often based solely on the judge's recollection. In light of these inherent problems, a new trial is in many, if not most, cases the best solution.

II. *BATSON* CHALLENGES AND THE SUPREME COURT'S DECISION IN *SNYDER V. LOUISIANA*

The Supreme Court's decision in *Batson* addresses the conflict between the longstanding practice of allowing prosecutors to use peremptory challenges during jury selection and the constitutional prohibition against excluding people from juries on the basis of race. The

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[10] *See infra* Part II.D.

[11] *See infra* Part III.A.

[12] *See infra* Part III.B.

[13] Smulls v. Roper, 535 F.3d 853, 860 (8th Cir. 2008) (en banc); *see also infra* Part III.C.

Supreme Court held that the Equal Protection Clause requires that peremptory challenges be subject to scrutiny whenever a criminal defendant can make a prima facie showing of purposeful racial discrimination in the exercise of the challenge.[14] While this might seem like a commonsense application of the Equal Protection Clause, particularly in light of the fundamental nature of the right to serve on a jury, in practice it has been somewhat problematic, largely because of the difficulty of discerning with any confidence whether a prosecutor's use of a peremptory challenge is motivated by race.[15] Litigants have repeatedly called upon the Supreme Court to clarify how the *Batson* procedure is to be applied in practice.[16]

A. THE HISTORICAL BACKGROUND OF THE PEREMPTORY CHALLENGE

Although there is no constitutional right to peremptory challenges, or requirement that they be allowed for either the prosecution or the defense,[17] peremptory challenges have been part of jury trials in the United States and England for centuries and have been traditionally viewed as a valuable tool in the selection of an impartial jury.[18] Among other things, peremptory challenges allow defendants and prosecutors to remove jurors they intuitively suspect of bias where the evidence of bias is not sufficient to support a challenge for cause. Peremptory challenges also allow attorneys

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[14] *Batson*, 476 U.S. at 93–96.

[15] *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 267–68 (2005) (Breyer, J., concurring) (describing 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"); Munson v. State, 774 S.W.2d 778, 780 (Tex. Crim. App. 1989) (citing *Batson* and a state court case applying it as giving the defendant the "practical burden to make a liar out of the prosecutor"); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 162–63 (2010) (disussing—and criticizing—the reluctance of trial judges to reject prosecutors' race-neutral explanations).

[16] *See infra* Parts II.C–D; *infra* notes 69–82, 145 and accompanying text.

[17] Rivera v. Illinois, 129 S. Ct. 1446, 1450 (2009); United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000); Stilson v. United States, 250 U.S. 583, 586 (1919).

[18] *Batson*, 476 U.S. at 91 (citing Swain v. Alabama, 380 U.S. 202, 219 (1965)); 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 22.3(d), at 121–22 (3d ed. 2007); *see also* Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 510–16 (1997) (comparing the American system of voir dire and peremptory challenges with practice in civil law countries and discussing the strategic and sometimes abusive use of peremptory challenges); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 400–02, 434–36, 470–72 (1996) (explaining the history and practice of peremptory challenges in England and the United States).

to remove jurors they have inadvertently alienated through voir dire questioning.[19]

The use of peremptory challenges has been traced back at least as far as the early fourteenth century in England,[20] and one of the statutes passed by the First Congress in the United States explicitly provided for the use of peremptory challenges by criminal defendants charged with crimes against the United States.[21] Every jurisdiction in the United States currently grants peremptory challenges to the defense and the prosecution.[22] A characteristic feature of peremptory challenges as historically exercised is that, unlike a challenge for cause, the party exercising a peremptory challenge generally need not explain its reasons to the court or to anyone else. As Blackstone observed, traditionally the peremptory challenge was "an arbitrary and capricious" procedure.[23]

B. *STRAUDER, SWAIN*, AND THE EQUAL PROTECTION CLAUSE

The unrestricted nature of peremptory challenges changed in 1965 in *Swain v. Alabama*,[24] where the Supreme Court subjected the practice to the strictures of the Constitution. In a long line of cases beginning in 1880 with *Strauder v. West Virginia*,[25] the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibited the government

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[19] *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *353 ("[P]erhaps the bare questioning his indifference may sometimes provoke a resentment: to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.").

[20] JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 147–48 (1977) (citing The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305)); *see also Swain*, 380 U.S. at 212–13 (same); 6 LAFAVE, *supra* note 18, at § 22.3(d), at 122 (same). Although the 1305 statute, by its terms, took away the prosecution's right to exercise peremptory challenges, the practice under the statute was such that the prosecution could still remove potential jurors without explanation, so long as there were a sufficient number of jurors remaining at the end of jury selection. The procedure was referred to as "standing aside" because the prosecutor could direct a juror to "stand aside" until the end of jury selection. The prosecutor would only have to explain an objection to those jurors if there were not enough jurors remaining. VAN DYKE, *supra*, at 148; *see also* United States v. Marchant, 25 U.S. 480, 483 (1827) (Story, J.).

[21] An Act for the Punishment of Certain Crimes Against the United States § 30, 1 Stat. 112, 119 (1790).

[22] 6 LAFAVE, *supra* note 18, at § 22.3(d), at 123.

[23] 4 BLACKSTONE, *supra* note 19, at *353 ("[I]n criminal trials, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all, which is called a *peremptory* challenge.").

[24] 380 U.S. 202 (1965).

[25] 100 U.S. 303 (1880).

from purposefully excluding people from juries on account of race.[26] In *Strauder*, the Supreme Court invalidated a West Virginia statute that forbade African Americans from serving on juries and reversed the conviction of an African-American man who was found guilty of murder by an all-white jury constituted under that statute.[27] Between 1880 and 1965, the Supreme Court reaffirmed *Strauder* repeatedly and invalidated several other state statutes that excluded African Americans from jury service.[28]

In *Swain*, the Supreme Court held that the principle of *Strauder*—that the Equal Protection Clause forbids excluding people from jury service on the basis of race—applied to peremptory challenges, but in a very limited sense.[29] The Court imposed a high burden of proof, however, on criminal defendants seeking to show a constitutional violation. The Court held that the presumption must be that the prosecutor has used peremptory challenges properly, and that the presumption is not overcome merely by showing that the prosecutor has removed all of the potential jurors of a certain race from the jury pool.[30] Instead, a defendant must show a "systematic use" of purposefully race-based peremptory challenges "over a period of time."[31] The Court reasoned that a low burden of proof would defeat the purpose and operation of peremptory challenges. If the prosecutor's motives for peremptory challenges could be examined in every case in which the defense alleged racial discrimination, without the need to show systematic discrimination over time, "[t]he challenge, *pro tanto*, would no longer be peremptory."[32] The defendant did not meet its burden in *Swain*, the Court held, even though the prosecution had used six peremptory challenges to remove all of the African-American jurors from the jury,[33] and the defense had introduced uncontradicted testimony that no African-American person had served on a jury in that county since 1950.[34] Three Justices dissented, accusing the majority of undermining the principle

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[26] *See Swain*, 380 U.S. at 204 n.1 (collecting cases); Batson v. Kentucky, 476 U.S. 79, 84 n.3 (1986) (same).

[27] *Strauder*, 100 U.S. at 312.

[28] *Swain*, 380 U.S. at 228–29 (Goldberg, J., dissenting) (citing eighteen cases applying *Strauder*).

[29] *Id.* at 203–05.

[30] *Id.* at 226–27.

[31] *Id.* at 227.

[32] *Id.* at 222.

[33] There were eight African-American jurors in the pool. Two were excused, and the prosecutor used peremptory challenges to remove the remaining six. *Id.* at 205; VAN DYKE, *supra* note 20, at 151.

[34] *Swain*, 380 U.S. at 226 ("The fact remains, of course, that there has not been a Negro on a jury in Talladega County since about 1950."); *see also* VAN DYKE, *supra* note 20, at 57.

of *Strauder*,[35] and *Swain* was subjected to withering criticism in the ensuing years as setting an impossibly high burden of proof.[36]

C. *BATSON V. KENTUCKY* AND THE MODERN PROCEDURE FOR OBJECTING TO THE USE OF PEREMPTORY CHALLENGES

In 1986, the *Batson* Court overruled *Swain*'s burden of proof for showing a violation of the Equal Protection Clause in jury selection.[37] The Court held that a defendant need not show "systematic" use over time of racially discriminatory peremptory challenges, but could instead rely "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."[38] So long as a defendant was "a member of a cognizable racial group" and the prosecutor has used peremptory challenges to remove prospective jurors "of the defendant's race" from the jury pool, a defendant could rely solely on circumstantial evidence from his own trial to make a prima facie showing of racial discrimination.[39] Drawing on prior cases applying the Equal Protection Clause in jury selection and in other contexts, *Batson* established a three-step procedure to adjudicate a defendant's claim that a prosecutor used a peremptory challenge on the basis of race, which courts repeatedly applied and refined in the ensuing years.[40] The Supreme Court recently described the procedure as follows:

> First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the

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[35] *Swain*, 380 U.S. at 228–47 (Goldberg, J., joined by Warren, C.J, and Douglas, J., dissenting) ("[T]he Court today while referring with approval to *Strauder* and the cases which have followed, seriously impairs their authority and creates additional barriers to the elimination of jury discrimination practices which have operated in many communities to nullify the command of the Equal Protection Clause.").

[36] *See, e.g.*, McCray v. Abrams, 750 F.2d 1113, 1120–22 (2d Cir. 1984) (describing the *Swain* burden of proof in a section titled "Mission Impossible" and documenting several cases in which there was strong evidence of racial discrimination in the prosecution's use of peremptory challenges, but where defendants failed to meet the *Swain* burden of proof); Willis v. Zant, 720 F.2d 1212, 1220 n.17 (11th Cir. 1983) (collecting academic commentary critical of *Swain*). *But see* Batson v. Kentucky, 476 U.S. 79, 90 n.14 (1986) (noting that some commentators had urged the Supreme Court to adhere to *Swain* and citing as an example of such commentary Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337 (1982)).

[37] *Batson*, 476 U.S. at 92–93; *see also id.* at 100 (White, J., concurring) ("The Court overturns the principal holding in *Swain v. Alabama*.").

[38] *Id.* at 94, 96.

[39] *Id.* at 96.

[40] *Id.* at 93–98.

> prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.[41]

Accordingly, once a prosecutor has offered a race-neutral explanation for the exercise of a peremptory challenge, the trial court has "'the duty to determine if the defendant has established purposeful discrimination.'"[42] In doing so, the court must conduct an "evaluation of the prosecutor's state of mind based on demeanor and credibility."[43]

"[T]he trial court's first-hand observations [are] of even greater importance" where "race-neutral reasons for peremptory challenges . . . invoke a juror's demeanor."[44] There, "the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor."[45] Accordingly, an "explicit, on-the-record analysis" is required.[46]

Under *Batson*, the prosecution's race-neutral explanation for the challenge must be "clear and reasonably specific" and contain "legitimate reasons."[47] While "[a]n impression of the conduct and demeanor of a prospective juror during the voir dire may provide a legitimate basis for the exercise of a peremptory challenge," the "prosecutor's explanations in the face of a *Batson* inquiry" must be "sufficiently specific to provide a basis upon which to evaluate their legitimacy."[48] "[B]ecause such after-the-fact rationalizations are susceptible to abuse, a prosecutor's reason for discharge bottomed on demeanor evidence deserves particularly careful scrutiny."[49]

The *Batson* procedure is "designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury

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[41] Snyder v. Louisiana, 552 U.S. 472, 476–77 (2008) (citations and alterations omitted).

[42] Hernandez v. New York, 500 U.S. 352, 363 (1991) (quoting *Batson*, 476 U.S. at 98).

[43] *Id.* at 365.

[44] *Snyder*, 552 U.S. at 477.

[45] *Id.*

[46] McCurdy v. Montgomery Cnty., 240 F.3d 512, 521–22 (6th Cir. 2001). The court explained that "an explicit, on-the-record analysis . . . is especially important when the purported race-neutral justification is predicated on subjective explanations like body language or demeanor"; the district court ruling in which it "perfunctorily accepted the County's race-neutral explanation" did not comply with the "requirement that the district court make expressed findings on each of the elements of a *Batson* claim" and was only corrected when "the district court made its own findings pertaining to [juror's] demeanor." *Id.*

[47] *Batson*, 476 U.S. at 98 n.20 (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

[48] Brown v. Kelly, 973 F.2d 116, 121 (2d Cir. 1992).

[49] *Id.*

selection process,"[50] and seeks to accommodate the inherent tension arising out of the coexistence of peremptory challenges and the constitutional guarantee of the Equal Protection Clause.[51] When the Supreme Court decided *Batson*, Justice Marshall feared that it did not go far enough and would have abolished peremptory strikes altogether. He noted the difficulties of assessing the motives of prosecutors, particularly where a strike may be the product of unconscious bias, and particularly where demeanor-based explanations for peremptory strikes could easily be used to hide racial bias.[52] The *Batson* majority defended its procedure, in part, by asserting its faith in the diligence and alertness of trial judges during jury selection: "Certainly, this Court may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination."[53]

D. *SNYDER V. LOUISIANA*

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[50] Johnson v. California, 545 U.S. 162, 172 (2005).

[51] In *Batson*, Justice Marshall stated that the tension between peremptory challenges and the Equal Protection Clause is unresolvable, and called for the abolition of peremptory challenges by prosecutors. *Batson*, 476 U.S. at 105–07 (Marshall, J., concurring); *cf.* Swain v. Alabama, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting). Justice Breyer has echoed Justice Marshall's concerns, arguing that subsequent experience has underscored the conflict between peremptory challenges and the Equal Protection Clause. Rice v. Collins, 546 U.S. 333, 344 (2006) (Breyer, J., concurring); Miller-El v. Dretke, 545 U.S. 231, 266–73 (2005) (Breyer, J., concurring). However, Justice Breyer has stopped short of an explicit call for the abolition of peremptory challenges, noting that "legal life without peremptories is no longer unthinkable," *Rice*, 546 U.S. at 344 (Breyer, J., concurring); *Miller-El*, 545 U.S. at 272 (same) (Breyer, J., concurring), and calling for the Court to "reconsider *Batson*'s test and the peremptory challenge system as a whole." *Rice*, 546 U.S. at 344 (Breyer, J., concurring); *Miller-El*, 545 U.S. at 273 (same) (Breyer, J., concurring). Judge Bennett of the U.S. District Court for the Northern District of Iowa reads Justice Breyer's concurring opinions as a call for the abolition of peremptory challenges, and calls for the same result. Bennett, *supra* note 15, at 167.

[52] *Batson*, 476 U.S. at 105–06 (Marshall, J., concurring). In the years following *Batson*, its holding has been extended to other forms of discrimination in the use of peremptory challenges. *See, e.g.*, Georgia v. McCollum, 505 U.S. 42, 59 (2000) (holding that a criminal defendant's use of race-based peremptory challenges violates the Equal Protection Clause); J.E.B. v. Alabama, 511 U.S. 127, 130–31 (1994) (holding that prosecutor's use of gender-based peremptory challenges violates the Equal Protection Clause); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (permitting a private party in a civil case to use peremptory challenges on the basis of race is a violation of the Equal Protection Clause, though framed as "the equal protection component of the Fifth Amendment's Due Process Clause"); Powers v. Ohio, 499 U.S. 400, 416 (1991) (finding that *Batson's* holding applies regardless of whether defendant and excluded juror are of the same race).

[53] *Batson*, 476 U.S. at 99 n.22 (majority opinion).

In *Snyder v. Louisiana*, the Supreme Court issued significant guidance regarding the *Batson* procedure. In *Snyder*, an African-American man was convicted of murder after a jury trial. Although jury selection occurred in 1996,[54] the case did not reach the Supreme Court until 2007.[55] The Court reversed the conviction and ordered a new trial where the trial court failed to make adequate findings in the course of rejecting a *Batson* challenge.[56] In so ruling, the Supreme Court emphasized that the *Batson* procedure relies heavily on the firsthand observations of the trial court judge.

The facts and circumstances in *Snyder* were particularly compelling. The prosecution exercised a peremptory challenge to excuse an African-American prospective juror and offered two race-neutral explanations when challenged, one of which was that the prospective juror "looked very nervous."[57] Defense counsel disputed those explanations, but the trial court allowed the peremptory challenge without comment.[58] Accordingly, there was no basis in the record to determine precisely why the trial court rejected the *Batson* challenge.

The Court reaffirmed that "the Constitution forbids striking even a single juror for a discriminatory purpose,"[59] and proceeded to examine the record regarding the prosecutor's explanations. The Court found that the prosecution's first explanation—that the prospective juror had a work obligation that would conflict with jury service—could be evaluated on the basis of the record, which showed that the explanation was "suspicious" and "implausib[le]."[60] Regarding the explanation that the juror looked nervous, the Court noted that there was no record of the prospective juror's demeanor, and "nervousness cannot be shown from a cold transcript."[61] In the absence of express findings regarding the nervousness explanation, the Court could not "presume that the trial judge credited the prosecutor's assertion that [the juror] was nervous."[62]

The ultimate resolution in *Snyder* is the main source of confusion in the lower courts—in *Snyder*, the Court vacated the defendant's conviction

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[54] 552 U.S. at 475.

[55] Petition for Writ of Certiorari, Snyder v. Louisiana, 552 U.S. 473 (2007), *available at* 2007 WL 1812490.

[56] *Synder*, 552 U.S. at 485–86.

[57] *Id.* at 478.

[58] *Id.* at 479.

[59] *Id.* at 478.

[60] *Id.* at 483. The record reflected that service as a juror would not substantially interfere with the prospective juror's work obligations and that the prosecutor "accept[ed] white jurors who disclosed conflicting obligations that appear[ed] to have been at least as serious." *Id.*

[61] *Id.* at 479 (quoting Louisiana Supreme Court).

[62] *Id.*

and remanded for a new trial. In *Batson*, after announcing its new procedure, the Supreme Court noted that the trial court did not require the prosecutor to explain his peremptory challenge, and the Court thus remanded for further proceedings.[63] The Court's order did not vacate the conviction, but instead instructed the lower courts to revisit the peremptory challenge: "[i]f 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."[64] In *Snyder*, however, the Court rejected the possibility of remanding for further findings, noting that the record did not show "that the prosecution would have pre-emptively challenged [the juror] based on his nervousness alone. Nor [was] there any realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date, more than a decade after petitioners' trial."[65] Accordingly, the Court set aside the defendant's conviction and sentence, and remanded for "further proceedings not inconsistent with this opinion."[66] The Louisiana Supreme Court understood the Court's instructions to require a new trial.[67]

The Court was not explicit in *Snyder* about whether and to what extent its decision to order a new trial instead of a remand rested on (1) the lapse of more than ten years between jury selection in the trial court and the Court's decision—as opposed to the two years that had passed in *Batson*—or (2) the trial court's failure to make any factual findings in disposing of the defendant's *Batson* objection. It is perhaps for that reason that *Snyder* has helped to deepen and crystallize a preexisting split of authority in the lower courts, as different courts have drawn different lessons from *Snyder* and reached different conclusions regarding the remedy required for a trial court's failure to make the findings required by *Batson*. Depending on how one reads *Snyder*, there are four apparent possible consequences of a trial court's failure to make the required findings in cases where the appellate court cannot confirm or reject the prosecution's race-neutral explanation on the basis of the record: (1) *Snyder* requires a new trial in all such cases, (2) *Snyder* requires a new trial only in cases of extreme delay between the

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[63] Baston v. Kentucky, 476 U.S. 79, 100 (1986).

[64] *Id.*

[65] *Snyder*, 552 U.S. at 485–86.

[66] *Id.* at 486.

[67] State v. Snyder, 982 So. 2d 763 (La. 2008) (characterizing the Court's holding as "effectively set[ting] aside defendant's conviction and sentence"); *see also* Paul Purpura, *Kenner Man Indicted Again in 1995 Killing: Supreme Court Tossed Earlier Conviction*, TIMES-PICAYUNE (New Orleans), Jan. 30, 2009, at B3 (noting the pendency of the new trial).

initial jury selection and the remand, (3) *Snyder* permits appellate courts to order remands for further findings, or (4) *Snyder* permits appellate courts to presume that the trial court's ruling was correct.

III. THE CONFLICT AMONG THE LOWER COURTS

The Supreme Court's decision in *Snyder* has generated a great deal of uncertainty regarding the proper relief in a case where the trial court failed to make the required *Batson* findings. Some courts have read *Snyder* as requiring a new trial in all such cases. Other courts have continued to order a remand to the trial court to make the required findings, in some instances ordering that the court undertake an evidentiary hearing. Finally, at least one court—the Eighth Circuit—has held that the failure to make *Batson* findings is not necessarily error at all.[68]

A. COURTS ORDERING NEW TRIALS

Where a prosecutor's race-neutral explanation for a strike cannot be confirmed or rejected on the basis of the trial record, and where the trial court failed to make the required findings in the course of resolving a *Batson* objection to a peremptory strike, the Fifth and Eleventh Circuits have ordered new trials, as have several state appellate courts and federal district courts ruling on habeas petitions. Those courts have done so in large measure in reliance upon *Snyder*, reading the Court's decision granting a new trial as imposing a broad and general command regarding the proper relief when there is an absence of *Batson* findings.

In *Haynes v. Quarterman*,[69] the Fifth Circuit ordered a new trial. At the defendant's original trial, two different judges presided over different parts of jury selection. One judge presided at the beginning when the jurors were addressed as a group and again at the end when the parties exercised peremptory challenges and when the defendant made the *Batson* challenge. The other trial judge presided over a middle stage in which the attorneys questioned prospective jurors individually.[70] During the *Batson* hearing,

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[68] *See* Smulls v. Roper, 535 F.3d 853, 860 (8th Cir. 2008) (en banc) ("In fact, federal law has never required explicit fact-findings following a *Batson* challenge, especially where a prima facie case is acknowledged and the prosecution presents specific nondiscriminatory reasons on the record."), *cert. denied*, 129 S. Ct. 1905 (2009) (habeas case); United States v. Grant, 563 F.3d 385 (8th Cir. 2009) (applying *Smulls* on direct review of a criminal conviction), *cert. denied*, 130 S. Ct. 1504 (2009); *see also infra* Part III.C. (discussing *Smulls* and *Grant*).

[69] 561 F.3d 535, 540–41 (5th Cir. 2009), *rev'd sub nom.* Thaler v. Haynes, 130 S. Ct. 1171 (2010).

[70] *Id.* at 537.

the prosecutor explained his decision to use peremptory challenges to excuse two prospective jurors solely on the basis of their demeanor in responding to questions during the middle stage of jury selection.[71] The judge who ruled on the defendant's *Batson* challenge—who had not observed the demeanor of those witnesses, as he did not preside over the middle stage—nonetheless allowed the peremptory challenge. The Fifth Circuit, on habeas review, held that the judge's decision to deny the *Batson* challenge, even though he had not observed the basis of the prosecutor's explanation, was error and that the defendant was entitled to a new trial or to release from custody.[72]

In ordering a new trial, the Fifth Circuit relied in part on the Supreme Court's guidance in *Snyder* regarding the critical role of the trial court in resolving *Batson* objections, particularly those involving demeanor-based explanations from the prosecutor.[73] "For demeanor-based explanations especially," the court noted, "appellate review is necessarily dependent on the trial court's inquiry into the prosecutor's reasons and his personal observations of the juror's demeanor that is the basis for those reasons."[74] Because the trial judge who ruled on the defendant's *Batson* challenge assessed the plausibility of the prosecutor's demeanor-based explanation on the basis of the "cold record," the Fifth Circuit held that the trial court erred and therefore ordered that the defendant's petition for a writ of habeas corpus be granted.[75]

The Supreme Court summarily reversed the Fifth Circuit, without addressing the appropriate relief under such circumstances.[76] The Court clarified that, despite the importance of the trial court's firsthand observations during jury selection, neither *Batson* nor *Snyder* established a per se rule that a demeanor-based explanation must be rejected if the trial judge did not observe or could not recall the juror's demeanor.[77] While the trial court's firsthand observations of jurors can be important, the Court noted that the ultimate inquiry concerns the intentions of the prosecutor, and "the best evidence of the attorney exercising a strike is often that attorney's demeanor."[78] The Court understood the Fifth Circuit to have granted the writ of habeas corpus by applying a categorical rule that a

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[71] *Id.* at 537–38.
[72] *Id.* at 540–41.
[73] *Id.*
[74] *Id.* at 540.
[75] *Id.* at 541.
[76] Thaler v. Haynes, 130 S. Ct. 1171 (2010).
[77] *Id.* at 1174.
[78] *Id.* at 1175.

prosecutor's demeanor-based explanation for a peremptory strike must be rejected if the trial judge did not personally observe or could not recall the juror's demeanor.[79] Accordingly, the Court reversed and remanded.[80] The Court left open the question of "whether the [trial court's] determination may be overcome under the federal habeas statute's standard for reviewing a state court's resolution of questions of fact."[81]

In *McGahee v. Department of Corrections*,[82] the Eleventh Circuit ordered a new trial where the trial judge failed to make any of the findings required by *Batson* and resolved the defendant's *Batson* objection without comment, saying only, "Your motion is denied."[83] After trial, the trial court asked the prosecution for more specific reasons for its use of peremptory strikes, but again failed to make a specific ruling on the adequacy or credibility of those reasons.[84] The failure to make any factual findings on the defendant's *Batson* objection, the Eleventh Circuit held, was an unreasonable application of clearly established federal law, entitling the defendant to a new trial.[85] As the Fifth Circuit did in *Haynes*, the Eleventh Circuit relied heavily on the Supreme Court's guidance in *Snyder*.[86]

State courts in Louisiana and Colorado have ordered new trials based on similar reasoning. In *State v. Jacobs*,[87] the Louisiana Court of Appeal ordered a new trial where the trial judge resolved the defendant's *Batson* objections without comment, saying only, "The Court is going to deny the defense's motion."[88] Throughout its opinion, the court of appeal relied upon the Supreme Court's decision in *Snyder*, holding that each instance in which the trial judge denied the defendant's *Batson* objection without specifically addressing the prosecutor's race-neutral explanations constituted reversible error.[89]

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[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] 560 F.3d 1252, 1259–60 (11th Cir. 2009).

[83] *Id.* at 1259.

[84] *Id.* at 1259–60.

[85] *Id.* at 1259–61.

[86] *Id.* at 1260, 1268, 1269.

[87] 13 So. 3d 677 (La. Ct. App. 2009).

[88] *Id.* at 692.

[89] *See, e.g.*, *id.* ("Yet again, the trial judge failed to specifically address the plausibility of any of the prosecutor's proffered race-neutral explanations, based on the prosecutor's credibility and the prospective juror's demeanor. This failure constituted reversible error."); *id.* at 693 ("These strikes . . . illustrate the need for the trial judge to perform his pivotal role in evaluating the claims as required by *Snyder*.").

In *People v. Collins*,[90] the Colorado Court of Appeals ordered a new trial where the trial court focused more clearly on the defendant's *Batson* objection but ultimately overruled it without making any findings crediting the prosecutor's proffered race-neutral explanations.[91] The prosecutor gave five race-neutral explanations for the peremptory strike at issue, two of which concerned the juror's demeanor. When the trial court initially indicated an inclination to sustain the *Batson* objection, the prosecutor stated that, as evidence of his lack of racial bias, he had no objection to the other African-American prospective juror serving on the panel.[92] The trial court ultimately overruled the *Batson* objection, discussing the individual steps of the *Batson* procedure and ultimately concluding: "I'm going to find, by preponderance of the evidence, that the decision to exclude [the juror] was not motivated by racial—or because of her race. Again, I'm considering the totality of the circumstances, which I think were not present at the initial challenge."[93]

The court of appeals reversed and ordered a new trial. The court noted that the fact that the prosecutor struck one, rather than two, African-American jurors was "relevant" but "not dispositive."[94] Regarding the five race-neutral reasons the prosecutor gave for the strike, the court held that "three of the race-neutral reasons . . . are affirmatively refuted by the record, and the district court did not specifically credit the others."[95] The two reasons that the trial court did not specifically credit were based on the prospective juror's demeanor and could not be confirmed or rejected on the basis of the record: the juror allegedly had her arms crossed and slept during part of voir dire.[96] Citing and discussing *Snyder*, the court of appeals refused to presume that the trial court credited the prosecutor's statements about the juror sleeping and crossing her arms where the trial court did not specifically credit those explanations and where there was some reason to believe that the trial court in fact did not credit those statements. Accordingly, the court of appeals held that given its lack of specific factual findings, the trial court "clearly erred in overruling the defendant's *Batson* objection."[97] Unlike the cases in which trial courts have overruled *Batson* objections without comment, in *Collins* there was greater

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[90] 187 P.3d 1178 (Colo. App. 2008).
[91] *Id.* at 1183–84.
[92] *Id.* at 1180–81.
[93] *Id.* at 1181.
[94] *Id.* at 1183–84.
[95] *Id.* at 1183.
[96] *Id.*
[97] *Id.* at 1184.

reason to suspect that the trial court paid attention to the prosecutor and the jury pool during jury selection and might have been able to recall the events in sufficient detail to make reliable findings if the court of appeals ordered a remand. Nonetheless, the court of appeals held that the trial court's clear error required reversal of the defendant's convictions.[98]

Indeed, several other state and federal courts have ordered new trials when confronted with a situation in which the trial judge has failed to make the required findings and overruled a defendant's *Batson* objection with little or no comment.[99] Many of these decisions predate the Supreme Court's ruling in *Snyder*.[100] These courts have held that a new trial is a natural extension of the *Batson* framework and is the appropriate remedy where a trial court fails to make required findings.

B. COURTS REMANDING FOR FURTHER FINDINGS

In contrast, the Second, Seventh, and Ninth Circuits (the last in an unpublished opinion),[101] as well as several lower courts, have remanded to the trial court to allow it to make retroactive factual findings or to hold evidentiary hearings to reconstruct the prosecutor's state of mind at the time of jury selection. Where the trial court has failed to make the required findings in the first instance, these courts in essence allow the trial court to try again.

Many of these courts seem to read the relief ordered in *Snyder* as resting solely on the fact that more than ten years had passed since jury selection. They place great weight on the Supreme Court's statement that there was not "any realistic possibility that this subtle question of causation [the motivation for the prosecutor's peremptory challenge] could be profitably explored further on remand at this late date, more than a decade

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[98] *Id.*

[99] *See, e.g.*, Conway v. Dexter, No. 00-CV-7350, 2008 WL 4814260, at *13 (C.D. Cal. Oct. 31, 2008) (ordering a new trial on habeas review where "neither the trial court nor the court of appeal made any serious effort to conduct the thorough inquiry required by *Batson*"); State v. Cheatteam, 986 So. 2d 738, 753 (La. Ct. App. 2008) (relying on *Snyder* in ordering a new trial where the prosecutor struck a juror because she was rolling her eyes, but the trial court did not, through explicit findings, "verify the aspect of the juror's demeanor upon which the prosecutor based his or her peremptory challenge"); *cf.* People v. Gonzales, 81 Cal. Rptr. 3d 205, 214 (Cal. Ct. App. 2008) (reversing for a new trial after *Snyder* where "[t]he trial court . . . did not sufficiently question and evaluate the prosecutor's exercise of his peremptory challenges").

[100] Wright v. State, 586 So. 2d 1024, 1039 (Fla. 1991); Bernard v. State, 659 So. 2d 1346, 1348 (Fla. Dist. Ct. App. 1995); Jackson v Commonwealth, 380 S.E.2d 1, 6 (Va. Ct. App. 1989).

[101] Love v. Scribner, 278 F. App'x 714 (9th Cir. 2008).

after petitioner's trial."[102] Other courts have reached the same result without directly addressing the appropriateness of that remedy.[103]

United States v. McMath[104] is one of the clearer examples of how some courts have read *Snyder* as having ordered a new trial instead of a remand because of the passage of time. In *McMath*, the trial court resolved the defendant's *Batson* challenge without making any factual findings. During jury selection, the Government used one of its peremptory challenges to excuse one of the two African-American jurors on the panel.[105] Defense counsel raised a *Batson* challenge, and the prosecutor responded that her reason for striking the prospective juror was the "expression on his face": "He looked angry and not happy to be here." Defense counsel disputed that explanation, and the district court denied the *Batson* challenge without making any findings, simply stating "[t]he *Batson* challenge is denied."[106] On appeal, the Seventh Circuit held that the district court "clearly erred in denying the *Batson* challenge without making findings regarding the credibility of the proffered race-neutral justification for the strike."[107] As the court put it, "the district court [1] did not indicate whether it agreed that Juror 7 had an unhappy expression on his face, [2] did not indicate whether this expression was unique to Juror 7 or common to other jurors, and [3] made no evaluation of the prosecutor's credibility."[108] Accordingly, the court could not "presume that the prosecutor's race-neutral justification was credible simply because the district judge ultimately denied the challenge."[109] Although the defendant argued that he was entitled to a new trial under the Supreme Court's decision in *Snyder*, the Seventh Circuit disagreed and instead ordered a remand "for further findings and a possible evidentiary hearing on the *Batson* issue."[110] The Seventh Circuit explained that it viewed *Snyder* as ordering a new trial instead of a remand because of the passage of time:

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[102] Snyder v. Louisiana, 552 U.S. 472, 486 (2008).

[103] *See, e.g.*, *Love*, 278 F. App'x at 718 (remanding for an evidentiary hearing after *Snyder* where the trial court prevented the defendant from "elicit[ing] the facts that would have allowed the trial court [and appellate courts] to evaluate the alleged similarities" between jurors who were struck and jurors who were not struck).

[104] 559 F.3d 657 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 373 (2009). The authors represented Mr. McMath in his appeal and other proceedings following his initial trial and sentencing.

[105] *Id.* at 661.

[106] *Id.*

[107] *Id.* at 666.

[108] *Id.*

[109] *Id.*

[110] *Id.*

> In *Snyder*, remand for the trial judge to make findings regarding the juror's demeanor was deemed fruitless because the trial had occurred more than ten years prior. But remand may be more worthwhile in this case, as voir dire occurred only a little over a year ago. While it is certainly possible that the passage of time will make it impossible for the district judge to make findings of fact, our concern for judicial economy persuades us that allowing the district judge the opportunity for such findings is the correct course. Upon remand, if the passage of time precludes the district court from making factual findings, it must vacate the judgment of conviction.[111]

If, however, the district court found that it could make the required findings on remand, the Seventh Circuit directed it to do so and then either move on to sentencing or order a new trial.[112]

In *Dolphy v. Mantello*,[113] the Second Circuit ordered a remand under similar circumstances. There, the prosecution exercised a peremptory strike to remove an African-American prospective juror. When challenged, the prosecutor stated that he struck the juror because she was overweight and because, in the prosecutor's experience, "heavy-set people tend to be very sympathetic toward any defendant."[114] The trial court overruled the defendant's *Batson* objection, stating only that "I'm satisfied that is a race neutral explanation . . . ."[115] On habeas review, the Second Circuit could not "say that the trial court properly applied *Batson*."[116] "Because the trial court failed to assess the credibility of the prosecution's explanation," the court held, "it follows that there was no adjudication of [the defendant's] *Batson* claim on the merits."[117] The court therefore remanded to the district court, stating that it "may, in its discretion, hold a hearing to reconstruct the prosecutor's state of mind at the time of jury selection . . . or, if the passage of time has made such a determination impossible or unsatisfactory, the district court may grant the writ [of habeas corpus] contingent on the state granting [the defendant] a new trial."[118]

Other lower federal and state courts have joined the Second, Seventh, and Ninth Circuits in ordering remands instead of new trials. As noted,

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[111] *Id.* (citation omitted).

[112] *Id.* at 670. In *United States v. Taylor*, 509 F.3d 839, 844–45 (7th Cir. 2007), *appeal after remand*, 277 F. App'x 610, 612–13 (7th Cir. 2008), the Seventh Circuit likewise ordered a limited remand, directing the trial court to supply missing findings of fact. That case is discussed in greater detail in Part IV.D, *infra*.

[113] 552 F.3d 236 (2d Cir. 2009).

[114] *Id.* at 237.

[115] *Id.*

[116] *Id.* at 239.

[117] *Id.*

[118] *Id.* at 240.

some of those opinions appear to order remands based on the belief that the Supreme Court ordered a new trial in *Snyder* based solely on the fact that more than ten years had passed since jury selection.[119] Other decisions, however, call for remand proceedings—or evidentiary hearings, in the case of federal courts exercising habeas review—several years after jury selection without any apparent consideration of the choice of remedy the Supreme Court made in *Snyder*.[120]

C. THE EIGHTH CIRCUIT'S NARROW INTERPRETATION OF *SNYDER*

Further demonstrating the degree of doctrinal confusion in the lower courts after *Snyder* is the fact that the Eighth Circuit does not read *Snyder* as requiring explicit findings by the trial court at all.[121] The Eighth Circuit apparently stands alone in this regard. In contrast to *Snyder*, where the Supreme Court refused to presume that the trial court credited the prosecutor's proffered race-neutral explanation absent specific findings, the majority in *Smulls* apparently took the opposite view, explaining that "[a] trial court's ruling on a *Batson* challenge is itself a factual determination, and we have repeatedly upheld rulings made without additional reasoning."[122]

The *Smulls* majority distinguished *Snyder*, noting that "a number of factors" supported the Supreme Court's refusal to presume that the trial court credited the prosecutor's proffered race-neutral reason for exercising a peremptory challenge.[123] The majority focused on the fact that in *Snyder* the prosecutor gave *two* reasons, one of which was belied by the record and the other of which was demeanor-based.[124] In *Smulls*, by contrast, neither of the prosecutor's nondiscriminatory reasons was as suspect as the

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[119] *See, e.g.*, Kassem v. State, 263 S.W.3d 377, 383 (Tex. Ct. App. 2008) (remanding for the intermediate appellate court "to conduct a full *Batson* hearing and to enter findings of fact and conclusions of law or to make a determination that such a hearing would not be practicable, in which case the [court] should remand for a new trial").

[120] *See, e.g.*, Patterson v. Alameida, No. 02-CV-2321, 2008 WL 2326295, at *15 (E.D. Cal. June 3, 2008) (ordering an evidentiary hearing eight years after jury selection); People v. Davis, 899 N.E.2d 238, 249-50 (Ill. 2008) (ordering a remand four years after jury selection); United States v. Taylor, 277 F. App'x 610, 612–13 (7th Cir. 2008).

[121] *See* Smulls v. Roper, 535 F.3d 853, 860 (8th Cir. 2008) (en banc) ("In fact, federal law has never required explicit fact-findings following a *Batson* challenge, especially where a prima facie case is acknowledged and the prosecution presents specific nondiscriminatory reasons on the record."), *cert. denied*, 129 S. Ct. 1905 (2009) (habeas case); United States v. Grant, 563 F.3d 385 (8th Cir. 2009) (applying *Smulls* on direct review of a criminal conviction), *cert. denied*, 130 S. Ct. 1504 (2009).

[122] *Smulls*, 535 F.3d at 860.

[123] *Id.* at 860–61.

[124] *Id.*

prosecutor's reason in *Snyder*, and thus the court held, "the trial court's failure to make explicit findings [did not] relieve [the appellate] court of its obligation to view the state trial court's findings as presumptively correct."[125]

Although there is some language in *Smulls* suggesting that its holding was based on the AEDPA standard of review,[126] the Eighth Circuit subsequently applied *Smulls* on direct review in *United States v. Grant*.[127] In *Grant*, the court of appeals examined a case in which the defendant argued on appeal that the district court did not make detailed findings at step three of the *Batson* procedure. In rejecting the defendant's arguments, the majority in *Grant* cited *Smulls* repeatedly for the proposition that trial courts are not required to make findings of fact in the course of ruling on a *Batson* challenge.[128] Both *Smulls* and *Grant* drew spirited dissents.[129]

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[125] *Id.* at 861.

[126] *See id.* ("In any event, *Snyder* was not clearly established law at the time of the state courts' rejection of Smulls' *Batson* claim . . . ."). Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214, a federal court may not grant a writ of habeas corpus with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication was either "an unreasonable determination of the facts in light of the evidence" presented in state court or "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d) (2006).

[127] 563 F.3d 385 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 1504 (2010).

[128] *See id.* at 389 ("A trial court's ruling on a *Batson* challenge is itself a factual determination. [F]ederal law has never required explicit fact-findings following a *Batson* challenge, especially where a prima facie case is acknowledged and the [non-moving party] presents specific nondiscriminatory reasons on the record.") (quoting *Smulls*, 535 F.3d at 860 (original alterations)); *id.* at 390 n.3 (quoting the same language from *Smulls*); *id.* at 391 n.5 ("The district court's analysis did not have to address, or make specific factfindings on, all of Grant's counsel's reasons for striking Juror Ham."); *id.* at 392 n.6 ("The district court was not required to make specific factfindings, or provide explanation, on each reason offered by Grant's counsel.").

[129] *Smulls*, 535 F.3d at 868–74 (Bye, J., dissenting); *Grant*, 563 F.3d at 394–99 (Bye, J., dissenting). In *Smulls*, in particular, Judge Bye described the inconsistency between the majority's opinion and *Snyder* and rebutted the grounds on which the majority sought to distinguish *Snyder*. *Smulls*, 535 F.3d at 870–73 (Bye, J., dissenting).

Although the split predates *Snyder*,[130] most of the pre-*Snyder* cases appear to hold that a trial court may order a limited remand most of the time, as the Supreme Court did in *Batson*. Several cases have recognized, however, that it is often unrealistic to expect anything useful to result from those remands in light of the passage of time, the nature of the *Batson* inquiry, and the fallibility of human memory.[131]

By ordering a new trial instead of a remand, and by emphasizing the importance of contemporaneous observations and factfinding by trial courts during jury selection, *Snyder* has brought the remedy question into sharp focus and further deepened the confusion among the lower courts. There is now a mature split of authority that includes both the federal and state courts and is in need of clarification.

IV. THE APPROPRIATE REMEDY AFTER *SNYDER*

The practice of allowing remands for further findings on a defendant's *Batson* challenge has often proven to be unworkable and has caused significant inefficiency in the lower courts. There are many practical and theoretical problems associated with this practice, which at times has taken

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[130] *Compare, e.g.*, Wright v. State, 586 So. 2d 1024, 1029 (Fla. 1991) (reversing conviction on the ground that "[p]eremptory challenges based on bare looks and gestures are not acceptable reasons unless observed by the trial judge and confirmed by the judge on the record"), Bernard v. State, 659 So. 2d 1346, 1348 (Fla. Dist. Ct. App. 1995) (stating, in ordering a new trial, that "[p]eremptory challenges based on bare looks and gestures are not acceptable reasons unless observed by the trial court and confirmed by the judge on the record. In this case, the trial court did not confirm the facial expressions, and the record, therefore, does not support the reason the state gave for its challenge.") (citation omitted), Davis v. State, 796 S.W.2d 813, 819 (Tex. Ct. App. 1990) (ordering a new trial where the prosecutor "fail[ed] to explain why he considered [the juror's] appearance and reaction during voir dire to be adverse"), Jackson v. Commonwealth, 380 S.E.2d 1, 5–6 (Va. Ct. App. 1989) (ordering new trial where "[t]he trial judge made no factual findings," and observing that under *Batson* "[t]he trial judge cannot merely accept at face value the reasons proffered but must independently evaluate those reasons as he would any disputed fact" and thus "[t]he record must contain findings by the trial judge, not just a conclusion, in order to facilitate both the initial inquiry and appellate review"), *and* Hill v. State, 547 So. 2d 175, 176–77 (Fla. Dist. Ct. App. 1989) (granting new trial where no evidence of juror yawning existed other than prosecutor's representation), *with* United States v. Taylor, 509 F.3d 839 (7th Cir. 2007) (remand for further findings), *and* People v. Johnson, 136 P.3d 804, 808 (Cal. 2006) (same).

[131] *See, e.g.*, People v. Garcia, 92 Cal. Rptr. 2d 339, 348 (Cal. Ct. App. 2000) (stating that it would be "unrealistic" "[i]n many—perhaps most—cases" to expect that the prosecutor and trial will be able to recall the circumstances of jury selection in any useful way and that "[w]hile we have every confidence in the good faith and professionalism of the parties, we have less confidence in their memories").

on a life of its own, leading to successive appeals and additional proceedings.

A. THE IMPOSSIBLE BURDEN ON TRIAL COURT JUDGES

At the third step of the *Batson* procedure, the trial judge must assess the plausibility of the prosecutor's race-neutral explanation "in light of *all* evidence with a bearing on it."[132] The *Batson* majority described this as a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[133] When an appellate court orders a remand for retroactive findings on a *Batson* challenge, the trial judge may be asked to recall—often years after jury selection—such things as a challenged juror's facial expression, whether a prosecutor's race-neutral explanation for challenging an African-American juror applied equally to non-challenged white jurors, and the prosecutor's demeanor at the time of the peremptory challenge.

The Court recognized in *Snyder* that, where more than a decade had passed between jury selection and the Court's decision, there was no "realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date."[134] Given the typical timing of the appellate review process and the sensitivity of the inquiry, the Court's observation in *Snyder* is also applicable to the run-of-the mill appeal that moves more quickly.[135] More often than not, it is unreasonable to expect trial judges to recall such subtle details months, if not years, after the fact. Other courts have recognized this as well, at least in cases involving delays of several years between the *Batson* challenge and the remand.[136]

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[132] Miller-El v. Dretke, 545 U.S. 231, 251 (2005) (emphasis added).

[133] Batson v. Kentucky, 476 U.S. 79, 93 (1985).

[134] Snyder v. Louisiana, 552 U.S. 472, 486 (2008).

[135] *See also* Jones v. Butler, 864 F.2d 348, 370 (5th Cir. 1988) ("Years after trial, the prosecutor cannot adequately reconstruct his reasons for striking a venireman. Nor can the judge recall whether he believed a potential juror's statement that any alleged biases would not prevent him from being a fair and impartial juror. Furthermore, any prosecutorial misconduct is easily remedied before trial simply by seating the wrongfully struck venireman. After trial, the only remedy is setting aside the conviction." (footnote omitted)).

[136] *See, e.g.*, People v. Snow, 746 P.2d 452, 458 (Cal. 1987) (In a case involving a six-year delay, court stated: "we believe it would be 'unrealistic to believe that the prosecutor could now recall in greater detail his reasons for the exercise of the peremptory challenges in issue, or that the trial judge could assess those reasons, as required, which would demand that he recall the circumstances of the case, and the manner in which the prosecutor examined the venire and exercised his other challenges.'") (quoting People v. Hall, 672 P.2d 854, 860 (Cal. 1983), a case involving a three-year delay).

B. AN INVITATION FOR POST HOC JUSTIFICATIONS

In addition to the unreasonableness of asking trial courts to make retroactive findings on *Batson* challenges, such requests invite post hoc justifications on remand from prosecutors for making peremptory challenges and from trial judges in allowing them. This is both a basic aspect of human nature and a phenomenon that numerous courts have recognized.[137]

As several Justices of the Supreme Court have acknowledged, peremptory challenges are often the product of "seat-of-the pants instincts" that defy articulation and that are based on reasons of which the prosecutor may not be fully aware.[138] As Justice Breyer put it in a concurring opinion in *Miller-El v. Dretke*, "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."[139] Justice Breyer also noted that the psychological literature confirms the subconscious nature of the sort of bias that the *Batson* procedure attempts to uncover.[140] Uncovering such unconscious bias is difficult even under normal circumstances at the time jury selection occurs.

However, if the task of second-guessing a prosecutor's instinctive judgment is "awkward" and sometimes "hopeless" just before trial, it is even more so during a remand proceeding that typically occurs more than a year later. As judges who were likely not paying sufficient attention during the first proceeding try to remember their perceptions of jury selection from more than a year earlier, and as prosecutors try to remember the reasons they challenged a juror in the first proceeding, the results are unlikely to be

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[137] *See, e.g.*, Gray v. State, 562 A.2d 1278, 1284 (Md. 1989) ("[W]here there has been the passage of considerable time between the event and the attempt at reconstruction, there may be present an increased danger of perfectly innocent confabulation."); United States v. Biaggi, 909 F.2d 662, 679 (2d Cir. 1990).

[138] *Batson*, 476 U.S. at 138 (Rehnquist, J., dissenting).

[139] 545 U.S. 231, 267–68 (2005) (Breyer, J., concurring); *see also Batson*, 476 U.S. at 106 (Marshall, J., concurring) (noting the potential effects of unconscious racism and stating that "[e]ven if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet").

[140] *Miller-El*, 545 U.S. at 267–68 (citing literature); *see also* Bennett, *supra* note 15, at 151–58 (surveying literature on implicit bias); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use Under the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007) (finding that a prospective juror's race can influence peremptory challenge use and that self-reported justifications are unlikely to be useful in identifying that influence).

reliable. It is difficult to imagine a situation in which a trial judge sustains a prosecutor's use of a peremptory challenge in the first instance, but decides months or years later that the prosecutor was, in fact, not credible and that the defendant should therefore get a new trial.

The Supreme Court noted the potential for unfairness under similar circumstances in *Miller-El v. Dretke*, where it rejected a prosecutor's after-the-fact reason for exercising a peremptory challenge that the prosecutor did not give during jury selection, stating that it "reek[ed] of afterthought,"[141] and noting that "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."[142]

The same concerns apply with even greater force where the prosecutor may be asked to explain the challenge months or years later and the trial court is forced to make findings long after the fact. The potential for post hoc rationalizations under such circumstances is great, particularly given that both the prosecutor and the trial court have a significant incentive to avoid a new trial. As the Second Circuit put it,

> [p]ostponing consideration of a *Batson* claim until the trial is in progress, or even completed, . . . risks infecting what would have been the prosecutor's spontaneous explanations with contrived rationalizations, and may create a subtle pressure for even the most conscientious district judge to accept explanations of borderline plausibility to avoid the only relief then available, a new trial.[143]

C. THE POSSIBILITY OF FURTHER EVIDENTIARY PROCEEDINGS

In some instances, trial courts have conducted evidentiary hearings on remand in an attempt to assist with the process of reconstructing memories of jury selection, but such hearings tend to exacerbate the burden on judges, prosecutors, and defense attorneys without much countervailing benefit. Often they lead to new disputes, and in the absence of "smoking gun" type evidence of racial bias by the prosecutor, such proceedings seldom illuminate the original reasons for the prosecutor's exercise of the peremptory challenge.

Batson explicitly declined to set forth any procedural requirements beyond the general three-step inquiry in which a trial court assesses the credibility of a prosecutor's race-neutral explanation for a peremptory

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[141] *Miller-El*, 545 U.S. at 246.

[142] *Id.* at 252.

[143] United States v. Biaggi, 909 F.2d 662, 679 (2d Cir. 1990).

challenge.[144] Where a court of appeals orders a limited remand under *Batson*, the issue of the peremptory challenge is in sharp focus, and months or years have typically passed. The defense and the prosecution predictably dispute what procedures should be followed on remand, such as whether the prosecutor who exercised the challenge should be required to testify under oath and subjected to cross-examination, whether the prosecutor will be permitted to offer additional reasons on remand beyond those given at jury selection, and whether the parties will be allowed to take discovery and submit new evidence.[145]

Notwithstanding the Supreme Court's statements in *Miller-El v. Dretke*,[146] some courts have allowed prosecutors to supplement their race-neutral explanations on remand. In *United States v. Taylor*, for example, the Seventh Circuit ordered remands to the district court twice to supply missing *Batson* findings. In the first remand, the trial court failed to supply the missing findings. Accordingly, in conjunction with ordering the second remand, the Seventh Circuit suggested that the trial court conduct an evidentiary hearing. On remand, the district court did so, and permitted the Government "to state reasons beyond [the] record for challenging or not challenging jurors in question."[147]

Moreover, the danger of post hoc rationalization on remand is perhaps even greater when there is an evidentiary hearing than when the trial court simply tries to make retroactive findings without taking additional evidence. Under such circumstances, the court is essentially inviting the prosecution to come up with new evidence that was not presented during the original trial, and potentially new theories, justifying the prior exercise

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[144] *Batson*, 476 U.S. at 99 ("We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges."). See generally Brett M. Kavanaugh, Note, *Defense Presence and Participation: A Procedural Minimum for* Batson v. Kentucky *Hearings*, 99 YALE L.J. 187 (1989), for a discussion of the questions raised by the Court's decision in *Batson* to decline to establish specific procedures for conducting the inquiry into a prosecutor's motives.

[145] A recent petition for certiorari asked the Supreme Court to address such questions and to require that the defendant be given an opportunity to cross-examine the prosecutor under oath and have access to the prosecutor's notes in connection with a *Batson* remand. *See* Petition for Writ of Certiorari, Drake v. Louisiana, No. 09-998 (Feb. 18, 2010), *available at* 2010 WL 638483. The Court denied the petition. 130 S. Ct. 3324 (2010).

[146] *See supra* Part IV.B.

[147] Minute Order, United States v. Taylor, No. 01-CR-73 (N.D. Ind. July 8, 2008) (Docket Entry No. 1032). The case is now pending before the Seventh Circuit in a third appeal, docketed as appeal No. 09-1291.

of a peremptory challenge.[148] And of course, the court is also inviting the defense to find and present further evidence that the prosecutor is prone to racial bias. In sum, conducting an evidentiary hearing on remand is as likely to lead to new disputes as it is to supply the basis for missing findings.

D. ENDLESS APPEALS AND OTHER PROCEEDINGS

As is apparent from the forgoing discussion, *Batson* remand proceedings often involve the expenditure of significant judicial resources. At the same time, given the sensitive and subtle nature of the *Batson* inquiry, the passage of time, the fallibility of human memory, and the subconscious nature of racial bias, such proceedings often fail to produce conclusions worthy of confidence. Thus, it is questionable whether on balance they further *Batson*'s purpose of "produc[ing] actual answers to suspicions and inferences that discrimination may have infected the jury selection process."[149]

In addition to being unreliable, such remand proceedings can often take on lives of their own and expend more judicial resources than a new trial.[150] One example of this phenomenon is the ongoing litigation in *United States v. Taylor*. In *Taylor*, the indictment issued in 2001, and jury selection and the jury's guilty verdict occurred in 2004. The case is now, in 2010, on its *third* appeal to the Seventh Circuit relating to the same *Batson* issues.

In 2004, during jury selection, the district court failed to make findings at the third step of the *Batson* procedure.[151] In 2007, on the first appeal, the Seventh Circuit ordered a remand "for the limited purpose of supplementing the record with [the district court's] findings about whether the government's stated reason for exercising a peremptory challenge against [the stricken juror] is credible, or whether the defendants met their burden of demonstrating discrimination."[152] On remand, the district judge

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[148] *Cf.* Whitsey v. State, 796 S.W.2d 707, 716 (Tex. Crim. App. 1989). Cross-examination of the prosecutor on remand showed that, after the remand, the prosecutor spent "six to eight hours" reviewing the transcript of jury selection and "that is when he came up with his explanations" for the challenged strikes. *Id.*

[149] Johnson v. California, 545 U.S. 162, 172 (2005).

[150] This risk is particularly acute in cases involving relatively minor crimes with relatively uncomplicated facts. For example, in *United States v. McMath*, 559 F.3d 657 (7th Cir. 2009), the defendant was charged with being a felon in possession of a firearm that had traveled in interstate commerce. The initial trial and jury selection lasted one day, and a new trial would likely have consumed the same amount of time.

[151] United States v. Taylor, 509 F.3d 839, 844–45 (7th Cir. 2007).

[152] *Id.* at 845–46.

reviewed transcripts and issued a short statement to the effect that he remembered jury selection (which had occurred nearly four years earlier) and concluded, based on his recollection of the prosecutor's demeanor and arguments, that the prosecutor was credible.[153]

On a second appeal, in 2008, the Seventh Circuit found the district court's findings still lacking and remanded again, ordering an evidentiary hearing so that the district court could "determine de novo whether the *Batson* challenge has merit."[154] On the second remand, the parties engaged in a lengthy dispute regarding the appropriate procedures. The district court allowed the prosecution to give new race-neutral explanations for its peremptory challenges, but it did not allow the defendants to cross-examine the prosecutors under oath or to have access to the prosecutors' contemporaneous notes of jury selection. After the evidentiary hearing, which was held more than four years after jury selection, the district court issued a twenty-one page opinion sustaining the peremptory challenge.[155] The case is on appeal to the Seventh Circuit for a third time, and among the defendants' arguments are challenges to the procedures used during the evidentiary hearing.[156] Had the Seventh Circuit simply ordered a new trial instead of a remand, it seems likely that fewer resources would have been expended.

As long as the law remains unclear regarding the consequences of a trial court's failure to make findings at the third step of the *Batson* procedure, such remands directed to reconstructing a procedure Justice Breyer described as "awkward" and "hopeless" will continue to tie up judicial resources, with little or no countervailing benefit.

E. EX ANTE INCENTIVES FOR DISTRICT COURT JUDGES AND PROSECUTORS

Finally, a bright-line rule requiring a new trial in every case in which a trial court fails to make sufficient *Batson* findings to permit appellate review would provide an ex ante incentive to trial judges and prosecutors to be more conscientious and would give effect to the principle underlying *Batson*. From an ex post perspective, when a trial court has not made the required findings, the appellate court is presented with a choice between

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[153] Statement, United States v. Taylor, No. 01-CR-73 (N.D. Ind. Jan. 17, 2008) (Docket Entry No. 1026).

[154] United States v. Taylor, 277 F. App'x 610, 613 (7th Cir. 2008).

[155] United States v. Taylor, 604 F. Supp. 2d 1210 (N.D. Ind. 2009).

[156] Defendants-Appellants' Joint Brief, United States v. Taylor, No. 09-1291 (7th Cir. filed June 16, 2009). The Court heard oral argument on April 27, 2010, and the case remains pending. Oral Argument, United States v. Taylor, No. 09-1291 (7th Cir. Apr. 27, 2010).

ordering a new trial and ordering a remand to see if the result of the initial trial can be salvaged, and the latter choice has an understandable appeal. But from an ex ante perspective, if trial judges know that insufficient *Batson* findings will lead to reversal on appeal and an automatic new trial, they will have an incentive to be more conscientious in discharging the task that *Batson* requires. Similarly, prosecutors will have a clearer incentive to ensure that an appropriate contemporaneous record is made whenever a defendant raises a *Batson* challenge during jury selection. A bright-line rule would thus provide a strong incentive to avoid the precise conduct that *Batson* was designed to remedy.

V. CONCLUSION

The foregoing analysis demonstrates that the Supreme Court should clarify its holding in *Snyder* and should—we suggest—adopt a clear rule that a new trial is required where the trial court fails to make the findings necessary to support the denial of a defendant's *Batson* challenge and where the prosecutor's race-neutral explanation cannot be confirmed or rejected on the basis of the record.

Such a rule will give trial courts a strong incentive to fulfill their "pivotal role" of supervising jury selection closely in the first instance. While the remedy of a new trial might be criticized as wasting the results of what may have been completely fair trials, it is fully consistent with *Batson* and in many instances it is the only practical way to give effect to the principle *Batson* announced, without discarding peremptory challenges. In *Batson*, the Court rejected the reasoning of *Swain* and held that even though peremptory challenges are traditionally immune from judicial scrutiny, trial courts should nonetheless be able to examine a prosecutor's reasons for exercising a peremptory challenge whenever there is a prima facie case of purposeful discrimination.

Moreover, the Court recognized in *Batson* that what the trial court was looking for would often be a subtle, subconscious bias on the part of the prosecutor rather than overt racism. Where a trial court fails to discharge that responsibility in the first instance in a way that permits appellate review, it is often neither feasible nor efficient to ask the trial court to do so retroactively. A bright-line rule requiring a new trial is the most effective and efficient means of enforcing the *Batson* rule, and would bring needed clarity to the Supreme Court's precedents.