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2002]

RACIAL PROFILING IN JURY SELECTION: THE THIRD CIRCUIT
REVISITS THE *BATSON* INQUIRY IN *RILEY v. TAYLOR*

I. INTRODUCTION

A disturbing reality of the American judicial system is the role race plays in the criminal system, particularly in the use of peremptory challenges.¹ The American legal system has long depended on peremptory challenges, a tool that allows the attorney to remove a juror for no articulated reason, in order to obtain an impartial jury.² Problems arise, however, when attorneys abuse the use of peremptory challenges.³ One specific form of abuse is the striking of African-American jurors from the

1. See *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) (discussing influence of race in *voir dire* and jury selection). The Supreme Court was very candid in its admission of the existence of racial discrimination in the trial process. See *id.* (recognizing that peremptory challenges have, at times, been used to discriminate against African-American jurors). See generally SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA* (2000) (discussing effect of race of both defendant and victim during criminal trials and sentencings). The *Batson* Court made a distinction between the use of peremptory challenges in theory and in practice, noting that despite theoretical ideals, state and federal court opinions demonstrate that peremptory challenges have been used to discriminate against African-American jurors. *Batson*, 476 U.S. at 99 (analyzing practical realities of trial practice). Studies have shown evidence that race impacts several phases of the criminal process including charging, sentencing and capital punishment, with minorities receiving harsher treatment in most stages. See WALKER ET AL., *supra*, at 242 (overviewing study results); see also CENTER FOR EQUAL OPPORTUNITY, RACE AND THE CRIMINAL JUSTICE SYSTEM: HOW RACE AFFECTS JURY TRIALS, 38 (1996) (discussing widely held belief among attorneys that “the racial composition of a jury can affect the outcome of a trial”).

2. See *Batson*, 476 U.S. at 91 (discussing historical importance of peremptory challenges free of judicial control in “assuring the selection of a qualified and unbiased jury”); see also Brian J. Serr & Mark Maney, *Criminal Law: Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 2 (1988) (emphasizing traditional significance of peremptory challenge in American history by describing it as “[a] venerable institution” and “[a] time-honored prosecutorial libert[y]”). The peremptory challenge is a highly protected prosecutorial tool. See Serr & Maney, *supra*, at 11 (“Because of the historical credentials of peremptory challenges and the widespread belief that the strikes are a necessary aspect of trial by jury, their exercise is considered one of the accused’s most important rights.”). The peremptory challenge allows the attorney to strike jurors for most any reason including inattentiveness, poor attitude, boredom and indifference. See TED A. DONNER & RICHARD K. GABRIEL, *JURY SELECTION: STRATEGY AND SCIENCE*, § 23:2, 23-11 (2000) (describing cases in which courts permit peremptory challenges on seemingly irrelevant reasons). Attorneys are instructed to follow their “instincts” and “hunches” when exercising their peremptory strikes. See *id.* § 23-11, 23-12 (finding that courts allow peremptory challenges based on attorney’s inclinations).

3. See *Batson*, 476 U.S. at 101 (White, J., concurring) (encouraging judicial inquiry into potential abuses of peremptory strikes by attorneys). Justice White stated in concurrence, “[T]he practice of peremptorily eliminating blacks from

jury pool, solely because of their race.⁴ The Supreme Court has ruled that such race-based strikes violate the Equal Protection Clause of the Constitution.⁵ In a series of cases, the Supreme Court noted the egregiousness of racially-motivated peremptory strikes, and moved to remedy the problem.⁶ *Batson v. Kentucky*⁷ is the most recognized of these cases.⁸

In *Batson*, the Supreme Court held that a defendant, using only the facts in his case, could successfully challenge a prosecutor's discriminatory use of peremptory strikes.⁹ In addition, the Court established the *Batson* three-part test.¹⁰ First, a defendant must prove a prima facie case of discrimination by the prosecutor.¹¹ Second, the prosecutor must disprove this accusation by providing race-neutral reasons for striking the African-American juror(s) in question.¹² Third, the trial court must assess the facial validity of the prosecutor's reasons, and decide, based on evidence

petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs." *Id.*

4. *See id.* at 103 (Marshall, J., concurring) (indicating peremptory challenges as "more subtle way[] of keeping blacks off jury venires"); Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 598 (supporting proposition that "[m]isuse of the peremptory challenge to exclude blacks has become both common and flagrant.") (quoting *Batson*, 476 U.S. at 103).

5. *See Swain v. Alabama*, 380 U.S. 202, 222-24 (1965) (holding that states must abide by equal protection clause when making peremptory strikes), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986).

6. *See id.* at 224-28 (holding that it is impermissible for states to exercise their peremptory challenge in racially discriminatory manner). *Swain* is most noted for establishing the evidentiary burden of systematic discrimination. *See id.* at 222-23 (noting that there is presumption that prosecutor uses challenges to obtain fair and impartial juries). This burden required the defendant to prove a practice of systematic discrimination against black jurors using evidence obtained from a series of cases. *See id.* at 225-27 (holding that declarant had not met his burden of proof); *see also Norris v. Alabama*, 294 U.S. 587, 599 (1935) (holding that Equal Protection Clause is violated when minority members are excluded from jury based on assumption that they are not qualified to serve as jurors); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (holding that state violates Equal Protection clause when it purposefully excludes minorities from jury).

7. 476 U.S. 79 (1986).

8. *See Brand, supra* note 4, at 522 (noting that in *Batson*, Supreme Court defines current standards for dealing with racially motivated peremptory challenges). "The Court's opinion in *Batson* established the tone and framework for the [peremptory challenge] decisions which would follow." *Id.* at 575.

9. *See Batson*, 476 U.S. at 95 (reasserting Supreme Court's position that "a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*").

10. *See id.* at 96-99 (setting forth *Batson* test elements).

11. *See id.* at 96 (pointing out prima facie discrimination element that defendant must establish for successful *Batson* claim).

12. *See id.* at 97 (explaining that burden shifts to prosecutor to prove that challenges were not racially motivated).

from the case at hand, if there has been an unconstitutional use of peremptory strikes.¹³

The United States Court of Appeals for the Third Circuit recently reviewed the application of *Batson* at the trial court level in *Riley v. Taylor*.¹⁴ This Casebrief tracks the Third Circuit's application of the *Batson* test over several years, concluding with an analysis of how these decisions influenced *Riley*.¹⁵ Part II discusses the goals, scope and limitations of the *Batson* test.¹⁶ Part II also assesses other circuits' interpretation of the *Batson* test, and how the limitations of *Batson* affect the test's purported goals.¹⁷ Part III closely analyzes the Third Circuit's application of *Batson* by reviewing its most recent decision in *Riley*.¹⁸ Furthermore, Part III contemplates *Riley's* outcome in light of the more restrictive appellate review standards recently adopted by Congress.¹⁹ Finally, Part IV discusses the overall impact of *Batson* in the Third Circuit despite its limitations.²⁰

II. BACKGROUND: THE SUPREME COURT'S ESTABLISHMENT AND APPLICATION OF THE *BATSON* TEST

The exclusion of African-Americans from participation in mainstream political and community events in the 1960s is well documented.²¹ Al-

13. See *id.* at 96-99 (discussing trial court's discretionary role in determining whether defendant has made prima facie case of discrimination and whether prosecutor has satisfied race-neutral explanation requirement).

14. 277 F.3d 261, 273-94 (3d Cir. 2001) (addressing petitioner's claim that state's peremptory challenges violated Equal Protection clause).

15. For further discussion of the Third Circuit's *Batson* application, see *infra* notes 87-146 and accompanying text.

16. For further discussion of the goals, scope and limitations of *Batson* test, see *infra* notes 21-86 and accompanying text.

17. For further discussion of how circuit courts apply the *Batson* test, see *infra* notes 40-86 and accompanying text.

18. For further discussion of the way the Third Circuit applies the *Batson* test, see *infra* notes 86-146 and accompanying text.

19. For comparison of Third Circuit application of the *Batson* test with application of newly adopted Congressional standards under Antiterrorism and Effective Death Penalty Act, see *infra* notes 147-58 and accompanying text.

20. For further discussion of *Batson's* impact on racial strikes in the criminal system, see *infra* notes 159-70 and accompanying text.

21. See Tanya E. Coke, Note, *Lady Justice May Be Blind, But Is She a Soul Sister? Race-neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 334 (1994) (discussing how poll taxes and subjective registration were intended to keep African-Americans from participating in political systems); see also Richard Saks, Note, *Redemption Or Exemption?: Racial Discrimination in Judicial Elections Under the Voting Rights Act*, 66 CHI.-KENT. L. REV. 245, 245 (1990) (acknowledging various procedures implemented to disenfranchise African-American voters). After the Voter's Rights Act was enacted, voting-rights activists hoped to end discriminatory practices such as poll taxes and literacy requirements that had traditionally disenfranchised African-American voters. See *id.* (noting methods used to disenfranchise African-American voters). Furthermore, African-Americans have historically been barred from participating in business transactions. See Robert E. Suggs, *Racial Discrimination in Business Transactions*, 42 HASTINGS L.J. 1257, 1261-62 (1991) (noting discriminatory history against African-Americans attempting to par-

though the Supreme Court and Congress attempted, through various reforms, to equalize the status of African-American citizens in American society, their efforts fell short of actual application, instead being relegated to theoretical words on paper.²² This phenomenon was particularly apparent in the trial court system.²³ Although the trial system was supposedly “a level playing field, fully capable of operating to insure a fair trial[,]”²⁴ African-Americans were routinely excluded from participating in both the jury pool and subsequently seated jury through various means, including the peremptory challenge.²⁵ The Supreme Court responded to

ticipate in business opportunities). In addition to limits on business activity, certain state legislation also limited community participation: “Jim Crow legislation circumscribed the general social and legal rights of blacks.” *Id.*

22. See Serr & Maney, *supra* note 2, at 2 (explaining difficulty in implementing successful protections against discrimination due to “subtle and often unconscious” nature of racism); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1615 (1985) (asserting failure of Equal Protection Clause in “ferreting out racial discrimination in criminal trials”).

23. See Jones v. Ryan, 987 F.2d 960, 968 (1993) (conceding that historically “blacks and other minorities are the usual victims of the stigmatization that accompanies being excluded in open court on the assumption that their race makes them uniquely incapable of being fair and impartial.”); see also WALKER ET AL., *supra* note 1, at 157 (noting, “[s]ince the mid-1930s, the Supreme Court has made it increasingly difficult for court systems to exclude African-Americans or Hispanics from the jury pool.”). Although the Supreme Court’s decisions often support anti-discrimination practices and legislation, it is difficult to enforce these decisions in state and local courtrooms. See *id.* at 156 (explaining failure of Supreme Court anti-discrimination decisions to change practice within many jurisdictions); see also Coke, *supra* note 21, at 333-50 (arguing that Court’s attempt will fail to increase minority participation in criminal trial system).

24. Brand, *supra* note 4, at 566.

25. See Batson v. Kentucky, 476 U.S. 79, 101 (1986) (White, J., concurring) (citing peremptory challenges as widely used means of keeping African-Americans from serving as jurors on cases involving African-American defendants). For discussion of further means, besides peremptory challenges, used to exclude African-Americans from jury service, see WALKER ET AL., *supra* note 1, at 156. After realizing that legislatures could not constitutionally exclude African-Americans from the jury pool, courts found more inventive ways to keep African-Americans from serving. See *id.* (noting that southern states often tried to prevent African-Americans from serving). One system used to prevent African-Americans from sitting on juries was to select a list of “sober and judicious” citizens from the jurisdiction’s taxpayer list. See *id.* (explaining Delaware jurisdiction’s attempt to circumvent Supreme Court). This practice was soon found unconstitutional because jurisdictions were using it to exclude potential African-American jurors because “few . . . were intelligent, experienced, or moral enough to serve as jurors.” *Id.* Other common practices used by various jurisdictions included putting jurors names on different colored cards according to race, and “randomly” drawing the cards to obtain a seated jury; “random” selection of names from taxbooks in which names of citizens were categorized according to race; and including “a token number of racial minorities in the jury pool in an attempt to head off charges of racial discrimination.” *Id.* at 157 (describing racially motivated techniques American jurisdictions used in jury selection). Despite the gains the Supreme Court accomplished, racially influenced means are still being used today to prevent African-Americans from sitting on juries. See *id.* (describing continued practice of racially-motivated techniques).

this problem in *Batson* by allowing the defendant to use the circumstances and the evidence from his individual case to prove discrimination in jury selection.²⁶

A. *The Batson Case*

In *Batson*, an African-American man was on trial for second-degree burglary and receipt of stolen goods.²⁷ During the trial, the prosecutor used his peremptory challenges to strike every black juror from the jury pool, resulting in the seating of an all-white jury.²⁸ Although the defense counsel objected to these challenges, the trial judge dismissed the objection, stating that prosecutors could “strike anybody they want to.”²⁹ The defendant was subsequently convicted of the charges.³⁰ In reviewing the case, the Supreme Court reversed the conviction and introduced a method that allowed a defendant to successfully challenge a prosecutor’s discriminatory use of peremptory strikes using only the facts in the defendant’s case.³¹

The Court held that in order to establish a prima facie case of discrimination, a defendant must show: (1) he is a member of a cognizable racial group; and (2) the prosecutor has struck members of that racial group from the jury venire.³² A prima facie showing gives the defendant, as a matter of course, a presumption that the peremptory strike permits

26. See *Batson*, 476 U.S. at 95 (holding that defendants may use facts and circumstances of their own case to establish inference of discriminatory use of peremptory challenges). Previous to the *Batson* holding, *Swain v. Alabama* was the reigning precedent on discriminatory peremptory challenges. See generally 380 U.S. 202 (1965) (demonstrating that twenty-two years passed before *Batson* overruled *Swain*), overruled by *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Swain*, the defendant was convicted of rape by an all white jury, and sentenced to death. See 380 U.S. at 203 (describing facts of case). The defendant attempted to prove that the jury selection was undermined by invidious discrimination. See *id.* (same). The defendant’s appeal was denied, and the Court held that “the defendant must . . . show the prosecutor’s systematic use of peremptory challenges against Negroes over a period of time.” *Id.* at 227. The Supreme Court later admitted that the evidentiary burden in *Swain* was too difficult for defendants to meet, and thus rendered no real impact on discriminatory peremptory challenge use. See *Batson*, 476 U.S. at 92 (recognizing inherent difficulty in proving repeated striking of African-American jurors over numerous cases required to prevail under *Swain*). “Since this interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors’ peremptory challenges are now largely immune from constitutional scrutiny.” *Id.* at 92-93.

27. See *Batson*, 476 U.S. at 82 (articulating facts of case).

28. See *id.* at 83.

29. See *id.*

30. See *id.*

31. See *id.* at 95 (holding that defendant may make purposeful discrimination showing using only circumstances from his present case).

32. See *id.* at 96-98 (announcing requirements necessary for prima facie showing of purposeful discrimination).

the prosecutor to discriminate if he so desires.³³ Additionally, the defendant must show, using the circumstances surrounding his case, that the prosecutor's decision to use peremptory strikes in the selected manner was based on race.³⁴

Next, the trial court must determine if the defendant has satisfied his prima facie burden of showing discrimination.³⁵ If the trial court finds the defendant has made a prima facie showing, the burden shifts to the state to present a neutral explanation for striking black jurors.³⁶ The Court, to preserve the revered tradition of the peremptory challenge, held that the prosecutor's explanation does not have to rise to the level justifying a challenge for cause.³⁷ Ultimately, the trial court must determine whether the state is, in fact, purposefully discriminating against African-American jurors.³⁸ In deciding *Batson*, the Court promoted several important social policies, including, most importantly, the need for an Equal Protection Clause that is an effective tool in both words and application.³⁹

B. *Limits of Batson Application*

Although groundbreaking at the time, *Batson* does not seem to be the powerful tool it first appeared to be.⁴⁰ The impact of *Batson* has waned at

33. *See id.* at 96 (discussing presumption granted defendant due to discretionary nature of peremptory challenges).

34. *See id.* (acknowledging defendant's final element required to prove prima facie case of discrimination).

35. *See id.* at 96-97 (asserting that trial court should consider all relevant circumstances when determining whether defendant has made prima facie showing of purposeful discrimination).

36. *See id.* at 97 (announcing second prong of test).

37. *See id.* at 97 (acknowledging and addressing possible limitations on full peremptory nature of challenges).

38. *See id.* at 98 (establishing third prong of test, Supreme Court stated that "[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination.").

39. *See id.* at 86-87 (realizing harm inflicted by discriminatory use of peremptory challenges). First, the Court emphasized that discriminatory use of peremptory challenges violates the defendant's right to equal protection because it denies the fair trial that can only be afforded him by a jury that is objectively chosen. *See id.* (addressing potential disservices to defendant that *Batson* ruling was designed to eliminate). Next, the Court set out to protect the equal protection rights of the juror who is unjustly removed from the venire because of an incorrect assumption that he/she will be unable to impartially consider the evidence solely because he/she is of a particular race. *See id.* (acknowledging rights of jurors that Court attempts to protect in implementing *Batson* holding). The Court stated, "A person's race simply is unrelated to his fitness as a juror." *Id.* at 87 (internal quotes omitted). Finally, the Court set out to protect the entire community from harm brought about by equal protection violations because "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.*

40. *See id.* at 106 (Marshall, J., concurring) (expressing doubt as to usefulness of *Batson* in combating practice of racial discrimination in jury selection).

the trial and appellate levels.⁴¹ While *Batson* hearings often seem fairly applied, the claims are usually unsuccessful.⁴² Several reasons may be impeding the effectiveness of *Batson*, including the presumption of proper discretionary use of the peremptory privilege by attorneys and blithe acceptance of doubtful race-neutral reasons by trial courts.

1. *Presumption of Proper Use of Peremptory Strikes*

The peremptory challenge is a historically established attorney privilege that is purported to ensure fair trials.⁴³ Although not a constitutionally established right, it is given great accord and respect in the legal community.⁴⁴ The Supreme Court, in *Batson*, was forced to cut into the peremptory challenge privilege by requiring that attorneys give a reason for their strike.⁴⁵ This requirement cut against the very nature of the peremptory challenge.⁴⁶ In trying to balance the attorney's established privi-

41. See Brand, *supra* note 4, at 584-88 (analyzing extremely low rate of success of *Batson* claims in district and circuit courts); WALKER ET AL., *supra* note 1, at 161 (addressing continuing practice of using racially motivated peremptory strikes despite *Batson* ruling). "Prosecutors continue to use the peremptory challenge to exclude African-American jurors from cases with African-American defendants, and appellate courts continue to rule that their racially neutral explanations adequately meet the standards articulated in *Batson*." *Id.*

42. See Brand, *supra* note 4, at 586-88 (noting 5.6% success rate of *Batson* claims in federal courts).

43. See Swain v. Alabama, 380 U.S. 202, 222 (1965) (articulating importance of peremptory challenges in jury selection), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

In light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, . . . [t]he presumption . . . must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court.

Id.; see also Serr & Maney, *supra* note 2, at 11 (noting historical nature of peremptory challenge and pervasive belief that peremptory challenges are integral to American criminal justice system).

44. See Georgia v. McCollum, 505 U.S. 42, 57 (1992) (analyzing importance of peremptory challenge, despite lack of constitutional protection). "[P]eremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial." *Id.*

45. See *Batson*, 476 U.S. at 97 (holding that prosecutors must give racially neutral reasons for peremptory challenges in certain cases). *But see id.* at 134-39 (Burger, J., dissenting) (criticizing Court's ruling as undercutting prosecutor's privilege of peremptory challenges). For further discussion of the *Batson* case and its holding, see *supra* notes 27-39 and accompanying text.

46. See Swain, 380 U.S. at 222 (addressing inviolate nature of peremptory challenge: "[W]e cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case."); see also Serr & Maney, *supra* note 2, at 17 (describing nature of peremptory strikes as irrational and instinctual). In their article, authors Serr & Maney assert that the very nature of peremptory challenges is to strike jurors without a rational basis. See *id.* For further discussion of inviolate nature of peremptory challenge, see *supra* notes 43-45 and accompanying text, and *infra* notes 47-64 and accompanying text.

lege against constitutional requirements, the Supreme Court held the attorney's race-neutral reason to a very low threshold.⁴⁷ Furthermore, the Court afforded the attorney the presumption of proper use of the strike.⁴⁸

Given this established presumption towards non-discrimination, courts are more likely to accept an explanation when counsel inevitably offers a "neutral" reason for striking a juror.⁴⁹ Consequently, courts have found many reasons facially valid such as age, life experience, type of employment and demeanor.⁵⁰ Other acceptable "neutral" reasons include: a juror's low-income neighborhood;⁵¹ a juror's ability to speak a foreign lan-

47. See *Batson*, 476 U.S. at 97 (establishing level of reasoning prosecutor must meet in refuting racial discrimination charge).

48. See *id.* at 99, n.2 (asserting Court's faith in prosecutors' legitimate use of peremptory challenge); see also Johnson, *supra* note 23, at 1613 (criticizing Supreme Court's "lenient standard" regarding prosecution's race-neutral reason for utilizing strike). "The Court has applied a fairly lenient standard for proof of discrimination in the selection of jury venires, but its insistence on nondiscriminatory selection of the venire sharply contrasts with its laxity concerning the selection of the panel that will try a particular defendant." *Id.* at 613-14.

49. See *Batson*, 476 U.S. at 106 (Marshall, J., concurring) (criticizing *Batson* protection as "illusory," in part because "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons"); *United States v. Clemmons*, 892 F.2d 1153, 1162 (3d Cir. 1989) (Higginbotham, J., concurring) (asserting that due to low standards applied when judging race-neutral reasons, superficial reasons are constantly accepted as valid). In his concurrence, Justice Higginbotham expressed his apprehensions that "the principles enunciated in *Batson* are being undermined by excuses that have all form and no substance." *Id.*; see also Brand, *supra* note 4, at 592 (criticizing "federal judiciary's expansive definition and indiscriminate acceptance of 'race-neutral reasons'"). The unquestioning acceptance of "[h]ighly subjective, vague and unsubstantiated" reasons has been blamed for so few findings of *Batson* violations. See *id.* (highlighting shortcomings of *Batson* ruling).

50. See *Jordan v. Lefevre*, 206 F.3d 196, 200 (2d Cir. 2000) (listing examples of several race-neutral reasons courts found acceptable in various cases).

51. See *United States v. Uwaezhoke*, 995 F.2d 388, 391 (3d Cir. 1993) (holding that prosecutor's race-neutral reason, that stricken juror lived in low-income neighborhood and, thus, could be "involved with a drug situation where she lives," was acceptable) (citing trial transcript). In his dissent, Justice Pollak made the point that striking jurors based on low-income living situations was suspect because low-income "correlates closely with race[.]" and concluded that this correlation results in the disproportionate representation of blacks in the jury. See *id.* at 400-01 (Pollack, J., dissenting) (quoting statistics that in northeast America "9.2% of whites and 28.9% of blacks are below the poverty level").

guage;⁵² a juror's habits and associations;⁵³ and the prosecutor's failure to recognize a juror as African-American.⁵⁴ Although these reasons rarely relate to a juror's ability to judge the case impartially, with some being candidly referred to as "patently absurd," the courts have found them all acceptable.⁵⁵

Taking into account the varied range of acceptable reasons, courts should be alert to a prosecutor's use of neutral reasons as a pretext for

52. See *Pemberthy v. Beyer*, 19 F.3d 857, 858-62 (3d Cir. 1994) (discussing facts of case). In *Pemberthy*, the court found that the state did not violate *Batson*, although it struck six Spanish-speaking jurors who would be able to translate a highly contested tape recorded in Spanish. See *id.* (detailing facts and holding of case). The court acknowledged that allowing such language-based challenges could negatively affect representation of minorities who speak the language. See *id.* at 869 (emphasizing that holding should not be interpreted as allowing attorneys to strike Latino jurors based on ethnicity). The court stated, however, "that an equal protection violation cannot be established simply by showing that Latinos are disproportionately affected by peremptory challenges of jurors who can speak . . . Spanish." *Id.*

53. See *Coulter v. Gilmore*, 155 F.3d 912, 920 (7th Cir. 1998) (finding peremptory challenge valid). In *Coulter*, the state used nine of its fourteen peremptory challenges to strike potential African-American jurors during jury selection. See *id.* at 914 (discussing state's use of peremptory challenges). The Seventh Circuit felt the prosecutor's reason for striking a particular prospective juror—that his three children were not by the same woman, and he was unemployed—seemed ridiculous and a pretext. See *id.* The court did not find a *Batson* violation, however, because the state's explanations did not have to be "persuasive, or even plausible," and substantial deference must be accorded to the trial court's findings. See *id.* at 920 (citations omitted) (discussing whether state's explanations are plausible). The court stated that "[t]he presumption of correctness . . . for state court fact findings requires us to defer to the appellate court's acceptance at the individual level of even the State's flimsier explanations. . . ." *Id.*; see also *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir. 1987) (holding that it is permissible for prosecutor to strike jurors whose impartiality he questions due to their "habits and associations"). In *Vaccaro*, the prosecutor struck two African-American jurors because one had a brother in prison, and the other had a "poor attitude." *Id.* at 457 (articulating reasons for striking prospective jurors). The court held that a prospective juror's habits and associations were adequate reasons for using peremptory challenges. See *id.* (holding that prosecutor's reasons did not raise inference of discrimination).

54. See *Clemmons*, 892 F.2d at 1157 (holding that since prosecutor did not know prospective juror was African-American, he did not engage in intentional discrimination and *Batson* claim must fail). Although prosecutor did not recognize potential juror as African-American, he recognized that he was a minority and struck the juror based on the fear that this minority, whom he believed to be Hindu, "may have religious beliefs that may affect his thinking." *Id.* at 1156. In his concurrence, Judge Higginbotham commented on this view, stating that "[t]he more disturbing aspect of the prosecutor's comments . . . is his apparent suspicion that because members of a particular ethnic group look different or have different beliefs, they are not real 'Americans,' and thus cannot be trusted to serve as jurors or to perform other duties of citizenship." *Id.* at 1160.

55. See *Coulter*, 155 F.3d at 920 (stating that reasons offered by state "seemed to verge on the 'patently absurd'"); see also WALKER ET AL., *supra* note 1, at 160 ("Trial and appellate courts have also been willing to accept virtually any explanation offered by the prosecutor to rebut the defendant's inference of purposeful discrimination.") (footnote omitted).

discrimination.⁵⁶ Trial courts, however, are unwilling to investigate reasons for pretext, and the record usually supports the facial validity of these reasons.⁵⁷ The result, then, is that when parties are able to “justify their challenges on non-racial grounds, they can continue to use race-based stereotypes as an unstated basis for peremptory challenges. Objecting parties can only hope that the stated justification will explicitly mention race or expose a racial bias. Otherwise, the justification likely will be accepted as neutral.”⁵⁸ Under these standards, it would seem that the *Batson* inquiry works primarily when the discrimination is most obvious.⁵⁹

This situation is exemplified in *Harrison v. Ryan*.⁶⁰ In *Harrison*, the Third Circuit found a *Batson* violation because the prosecutor, who had

56. See *Batson v. Kentucky*, 476 U.S. 79, 106 (Marshall, J., concurring) (discussing difficulty of uncovering pretext because of possibility that prosecutor’s neutral reasons are driven by subconscious racism); see also *Pemberthy*, 19 F.3d at 872 (enumerating specific factors for courts to consider when investigating pretext for language-based peremptory challenges). The *Pemberthy* court realized the necessity of inquiring into the attorney’s pretext because language is closely related to ethnicity. See *id.* (discussing heightened scrutiny needed in determining prosecutor’s motive when language is offered as race-neutral reason).

57. See *Batson*, 476 U.S. at 106 (Marshall, J. concurring) (discussing role trial court judges have in applying *Batson*). Justice Marshall relates his fears that *Batson* will prove to be an “illusory” protection, in part because “[a] judge’s own conscious or unconscious racism may lead him to accept such an explanation as well supported.” *Id.*; see also *Johnson v. Vasquez*, 3 F.3d 1327, 1330-31 (9th Cir. 1993) (discussing rationale behind granting defendant’s *Batson* claim because trial court failed to investigate prosecutor’s “neutral” reasons where prosecutor blatantly lied about reasons for striking potential African-American juror). In some instances judges feel that it is not their responsibility to question the prosecutor’s peremptory challenges at all. See *Galarza v. Keane*, 252 F.3d 630, 634 (2d Cir. 2001) (remanding due to judge’s failure to make any determination at all); see also *McClain v. Prunty*, 217 F.3d 1209, 1223 (9th Cir. 2000) (discussing judge’s abdication of responsibility where judge stated, “I’m not here to second guess [the prosecutor’s] reasons”) (internal quotes omitted). Other judges have demonstrated that they feel consideration of the *Batson* claim is a waste of the court’s time. See *Jordan v. Lefevre*, 206 F.3d 196, 199 (2d Cir. 2000) (referring to judge’s attitude that considering *Batson* challenge was unnecessary, untimely and not required).

58. Brand, *supra* note 4, at 584. Circuit courts often confirm this premise, as did the Third Circuit in *United States v. Uwaezhoke*. See 995 F.2d 388, 392-93 (3d Cir. 1993) (reporting low prosecutorial standard that Supreme Court set for admitting race-neutral reason). In *Uwaezhoke*, the court stated that “if the government’s explanation does not, on its face, discriminate on the basis of race, then we must find that the explanation passes *Batson*. . . .” *Id.* at 392.

59. See *Batson*, 476 U.S. at 105 (Marshall, J., concurring) (discussing high burden *Batson* establishes because “defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case”). Marshall insists that applying *Batson* will invite racial discrimination “provided that they [prosecutors] hold that discrimination to an ‘acceptable’ level.” *Id.*; see also *Harrison v. Ryan*, 909 F.2d 84, 87-88 (3d Cir. 1990) (holding that prosecutor failed to pass *Batson* requirement when, inter alia, he failed to recall reason for striking African-American prospective juror).

60. 909 F.2d 84 (3d Cir. 1990); see also *Uwaezhoke*, 995 F.2d at 392 (adopting Supreme Court’s simplistic standard for attorneys when asserting that their reason for striking was race-neutral).

used a large number of strikes against African-Americans, forgot his reason for striking the sixth juror.⁶¹ Although all factors were considered, his failure to remember the reason for striking the sixth juror was the deciding determinant.⁶² The court held that failing to articulate a clear reason for striking the juror constituted a failure to satisfy the *Batson* test prong requiring parties to specify a neutral explanation.⁶³ This case illustrates that *Batson* protection operates primarily where the inference of discrimination is obvious or unavoidable.⁶⁴

2. *Cursory Review of Batson Claims by Trial Courts.*

A second impediment to applying *Batson* effectively is the trial court's cursory review of the attorney's use of peremptory challenges. It is the trial judge's duty to determine whether the "circumstances surrounding the peremptory challenges give rise to an inference of discrimination."⁶⁵ While the Supreme Court cited two examples of such a determination in *Batson*, it largely left the decision to the hearing judge as to how to fashion this determination.⁶⁶ Because of the broad discretion the Supreme Court affords, judges may utilize multiple sources of evidence and circumstances

61. See *Harrison*, 909 F.2d at 87-89 (discussing court's holding).

62. See *id.* at 87 (stating that "prosecutor's failure to recall his reason for using a peremptory challenge to strike the juror was insufficient to satisfy the *Batson* requirement").

63. See *id.*

64. See *id.* at 86 n.2 (noting magistrate's finding that although prosecutor's race-neutral reasons for striking several African-American jurors were not strong, they were still satisfactory under *Batson*). For further discussion of success of weak race-neutral reasons, see *supra* notes 43-63 and accompanying text.

65. See *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (discussing trial court's responsibility to determine likelihood of discrimination based on evidence and circumstances of case); see also *United States v. Clemmons*, 892 F.2d 1153, 1155 (3d Cir. 1989) (defining circumstances as "any unusual pattern of strikes or other suggestive comments or acts by prosecutors").

66. See *Batson*, 476 U.S. at 96-97 (articulating examples of relevant circumstances to consider in determining *Batson* violation). The Supreme Court related circumstances such as habitual striking of African-Americans and the prosecutor's questioning methods as examples. See *id.* at 97 (identifying relevant circumstances for *Batson* violation). Other than these examples, the Supreme Court offered no further guidance to determine whether *Batson* is violated, except to assert their "confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if . . . the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Id.*

to interpret this third prong.⁶⁷ More often, however, their discretionary finding is superficial and cursory.⁶⁸

The Third Circuit, following the Supreme Court, has expressed a genuine belief that trial judges will recognize and correct discriminatory uses of peremptory challenges. In *Pemberthy v. Beyer*,⁶⁹ the court stated, "Nor do we have any doubt that both the federal and state trial judges in this circuit will make a sincere and vigilant effort to prevent discrimination against . . . [minority] jurors."⁷⁰ More recently, the court was forced to recognize that not all trial and appellate court judges live up to this standard.⁷¹ In *Riley*,

67. See *Riley v. Taylor*, 277 F.3d 261, 281-87 (3d Cir. 2001) (describing Third Circuit's various means used to examine prosecutor's race-neutral reasons). The Third Circuit used several means of examining the prosecutor's race-neutral reasons for pretext including comparison of stricken and seated jurors, referral to prosecutor's briefs and review of trial transcripts. See *id.* (discussing trial court's failure to use stated methods to determine racial pretext). Other circuits have also employed the comparison method whereby it is determined whether any seated white jurors have characteristics for which the prosecutor claims to have struck black jurors. See *Jordan v. Lefevre*, 206 F.3d 196, 200-01 (2d Cir. 2000) (describing Second Circuit's method of comparing seated white jurors to stricken black jurors to determine whether characteristics were pretext for discrimination); *McClain v. Prunty*, 217 F.3d 1209, 1220-21 (9th Cir. 2000) (describing Ninth Circuit's method of comparing characteristics of seated white jurors and stricken black jurors to determine whether prosecutor's race-neutral reasons were pretext for discrimination). Another common method is circuit courts' examining transcripts and trial records. See, e.g., *United States v. Blanding*, 250 F.3d 858, 859-60 (4th Cir. 2001) (describing Fourth Circuit's examination of trial transcripts to determine whether there were race-based reasons for peremptory challenges); *United States v. Jones*, 224 F.3d 621, 624-26 (7th Cir. 2000) (describing Seventh Circuit's use of trial transcripts to determine improper reasons for peremptory challenges); *Johnson v. Vasquez*, 3 F.3d 1327, 1330 (9th Cir. 1993) (discussing Ninth Circuit's examination of *voir dire* transcript, evidentiary hearing transcript and prosecutor's jury panel sheet to determine whether prosecutor's race-neutral reasons were pretext for discrimination).

68. For further discussion of trial courts' insufficient investigation of *Batson* claims, see *infra* notes 68-85 and accompanying text.

69. 19 F.3d 857 (3d Cir. 1994).

70. *Pemberthy*, 19 F.3d at 872-73. In *Pemberthy*, the prosecutor used his peremptory challenges to strike five Spanish-speaking jurors. See *id.* at 859-63 (reviewing *voir dire* transcript). Both the trial and the appellate court found these strikes to be race-neutral, even though three of the jurors were Latino. See *id.* at 858 (discussing holding of trial). The court recognized that there is a close relationship between foreign language-speaking ability and race. See *id.* at 869 (discussing relationship between ethnicity and language). It asserted its faith in the courts, however, to keep a watchful eye on prosecutors' true motive behind their use of peremptory challenges to strike jurors based on their language ability. See *id.* at 872-73 (asserting faith in trial court's ability to discern between pretext and valid strikes based on language).

71. See *Riley*, 277 F.3d at 282-87 (finding that state court did not perform third step of *Batson*).

Here, the state courts failed to examine all of the evidence to determine whether the State's proffered race-neutral explanations were pretextual. Not only is there no indication on the record that the hearing judge engaged in the required analysis, but there is no indication that the Delaware Supreme Court did so

the Third Circuit's most recent *Batson* case, the defendant raised his *Batson* claim in six state and appellate trials before the circuit court granted him a writ of habeas corpus.⁷² The Third Circuit's decision to reverse the previous courts' rulings was primarily based on the lack of careful review of the prosecutor's neutral reasons, the circumstances contained in the case and evidence of systematic discrimination by the lower courts.⁷³

Other circuits similarly require trial courts to conduct a more probing inquiry into *Batson* claims. For example, the Second Circuit has expressed disapproval of courts' acting on "a *Batson* application with undue haste and ruling in a summary fashion."⁷⁴ The Second Circuit imparts upon the hearing judge a duty "at the third stage to determine the *credibility* of the proffered explanations."⁷⁵ The Ninth Circuit allows the hearing judge to "second-guess" the prosecuting attorney.⁷⁶ The Seventh Circuit emphasizes the importance of a "final look at the record as a whole," instead of the trial judge's "juror-by-juror inquiry that . . . practically guaranteed the

Id. at 286 (citing *Sumner v. Mara*, 449 U.S. 539, 547 (1981)).

72. *See id.* at 270-73 (discussing procedural history of defendant's case). Raising the *Batson* violation claim in the original trial allowed Riley to address the issue on direct appeal, nevertheless the Delaware Supreme Court affirmed his conviction. *See id.* at 271-72 (detailing Riley's first review of *Batson* issue). Riley then filed a motion for post-conviction relief based on ineffective assistance of counsel in Kent County Superior Court before his original trial judge, but the motion was denied. *See id.* at 272 (outlining procedural history of case). In short, Riley's case was reviewed and his conviction affirmed approximately six times, before the trial record and circumstances of the case were reviewed and found to violate *Batson*. *See id.* at 270-73 (discussing procedural history of case).

73. For further discussion of the Third Circuit Court's analysis of the *Riley* case, see *infra* notes 94-154 and accompanying text.

74. *See Jordan v. Lefevre*, 206 F.3d 196, 200 (2d Cir. 2000) (pointing to disapproval of trial court's actions in *United States v. Stavrovlakis*, 952 F. 2d 686, 696 (2d Cir. 1992)).

75. *Id.* at 200 (emphasis added) (citing *Barnes v. Anderson*, 202 F.3d 150 (2d Cir. 1999)). In *Jordan*, the defendant raised a *Batson* claim because the prosecutor used his peremptory challenges to strike three African-American prospective jurors. *See id.* at 199 (discussing facts of jury selection). Without examining them for pretext, the trial court judge hurriedly ruled that the reasons were race-neutral. *See id.* (discussing judge's ruling on *Batson* claim). The Second Circuit held that the trial court judge failed to perform the third *Batson* step because of his haste and, therefore, did not adequately consider "whether the race-neutral reasons given were credible and nonpretextual." *Id.* at 201.

76. *See McClain v. Prunty*, 217 F.3d 1209, 1223 (9th Cir. 2000) (finding that trial court failed to perform third prong of *Batson* test by refusing to "second-guess" prosecutor). In *McClain*, the defendant raised a *Batson* violation claim because the prosecutor used challenges to strike all three potential black jurors in the jury pool. *See id.* at 1214 (outlining facts pertaining to jury selection). The trial court refused to investigate the prosecutor's race-neutral reasons, and found that *Batson* was not violated. *See id.* at 1223 (rejecting judge's ruling on *Batson* claim). The Ninth Circuit court reversed the trial court's ruling, concluding that "the trial court abdicated its duty to make an ultimate determination on the issue of discriminatory intent based on all the facts and circumstances." *Id.*

conclusion that the prosecution was acting race neutrally.⁷⁷ As many commentators note, a court's lax inquiry into the prosecutor's reasons is largely influenced by the presumption that the prosecutor's use of peremptory challenges was correct and non-discriminatory.⁷⁸

Given trial courts' tendency to conduct a cursory examination of most *Batson* claims, enacting the Antiterrorism and Effective Death Penalty Act (AEDPA) was a sincere cause for concern among opponents.⁷⁹ Before the AEDPA was enacted, appellate courts possessed plenary review over questions of law and mixed questions of law and fact.⁸⁰ Under the AEDPA, an appellate court can now intervene only when the trial court has committed a "clear error" or an "unreasonable application" of the circumstances of the case to the applicable law.⁸¹ Implementing the AEDPA significantly

77. *Coulter v. Gilmore*, 155 F.3d 912, 921 (7th Cir. 1998). In *Coulter*, the defendant raised a *Batson* claim because the prosecutor used nine of his fourteen peremptory strikes to strike prospective African-American jurors. *See id.* at 914 (noting prosecutor's use of peremptory strikes). The trial court required both the defense and state to give reasons as each peremptory challenge was exercised. *See id.* at 915 (discussing trial court *voir dire* method). Using this method, the trial judge found that the defendant had not established a prima facie case and that the prosecutor had already offered race-neutral reasons for his challenges. *See id.* at 916 (summarizing judge's ruling on *Batson* claim). The Seventh Circuit criticized the trial court's method, stating that "a procedure that omits the totality inquiry would exonerate the user of peremptories in virtually every case, unless the lawyer was foolish enough to announce her discriminatory purpose in so many words." *Id.* at 921.

78. *See* WALKER ET AL., *supra* note 1, at 160 (noting judges' tendency to "give the benefit of the doubt to the prosecutor" (quoting RANDALL KENNEDY, RACE, CRIME, AND THE LAW 211 (1997)); Samuel Sommers & Phoebe Ellsworth, *Jury Decision Making: White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 207 (2001) ("[I]n the wake of *Batson*, today's judges continue to give prosecutors the benefit of the doubt when they offer race-neutral justifications for the exclusion of Blacks from juries."); *see also* Barat S. McClain, *Turner's Acceptance of Limited Voir Dire Renders *Batson's* Equal Protection a Hollow Promise*, 65 CHI.-KENT. L. REV. 273, 300 (1989) (noting that courts give prosecutor presumption of non-discriminatory use of peremptory challenges when prosecutor may not be furnished with full data on jury pool).

79. *See* 28 U.S.C. § 2254 (d) (1994) (setting out circumstances under which appellate courts may grant relief from state court findings).

80. *See* 28 U.S.C. § 2254 (d)(8) (1992) (providing old version of AEDPA). This section provides in part:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgement [sic] of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear . . . that part of the record of the State court proceeding . . . is not fairly supported by the record.

Id.

81. *See* 28 U.S.C. § 2254 (d)(1) (2001) (providing current version of AEDPA). This section provides in part:

[A]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement [sic] of a State court shall not be

limited the appellate courts' ability to review and correct capital cases where necessary.⁸²

In effect, the AEDPA makes it more difficult for defendants to bring their capital case before appellate courts, introducing yet another barrier to properly applying the *Batson* test.⁸³ The result of the AEDPA on the ability to challenge capital convictions has had a significant impact on minority defendants.⁸⁴ As the data reveal, all-white juries are more likely to convict and hand down harsher sentences to minority defendants than white defendants.⁸⁵ Considering the negative implications of these statis-

granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

Id.

82. See Kenneth Williams, *The Deregulation of the Death Penalty*, 40 SANTA CLARA L. REV. 677, 728 (2000) [hereinafter Williams, *Deregulation*] ("[T]he Supreme Court and Congress sacrifice fairness, accuracy, and principles, in order to advance the death penalty.").

Prior to 1996, state court conclusions of law, as well as mixed questions of law and fact, could be reviewed de novo by a federal court. . . . [F]ederal courts are now required to give some deference to state court conclusions of law . . . [and] no longer have the authority to correct erroneous state court decisions.

Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It*, 33 CONN. L. REV. 919, 926 (2001) [hereinafter Williams, *Antiterrorism*].

83. See Williams, *Antiterrorism*, *supra* note 82, at 925 (discussing difficulty AEDPA places upon defendants by making it more difficult to get claims of innocence reviewed).

84. See *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) ("It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."); see also *Coke*, *supra* note 21, at 344 (addressing widespread belief among criminal defense counsel that white juries are more likely to convict than integrated juries).

85. See Geoffrey Cockrell, Note, *Batson Reform: A Lottery System of Affirmative Selection*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 351, 353-54 (1997) (highlighting paucity of minorities in jury pools). Statistics reveal that even when no peremptory strikes are used, juries tend to be almost entirely devoid of minorities. See *id.* (noting that minorities are not represented in jury pools in accordance with their percentage in general community); see also WALKER ET AL., *supra* note 1, at 157 (outlining how current procedures used to obtain jury pools such as registered voter lists and property tax rolls tend to produce jury pools that consist primarily of white, middle and upper class residents); Johnson, *supra* note 22, at 1616 (attributing fact that most juries are all white to racial proportions of population). When prosecutors employ discrimination in jury selection, the result is a complete lack of minorities on the jury. See Cockrell, *supra*, at 354 ("With a venire already thin on minorities, few peremptories are needed to eliminate the remaining potential minority jurors and seat an all-white jury.").

Taking into account the racial makeup of most juries, several studies reveal that minorities receive disproportionately harsher sentences. One such study, conducted in Philadelphia County, which has the highest number of African-Americans on death row, found that African-American defendants' odds of receiving the

tics, as further illustrated by *Riley*, it is essential that appellate courts receive the opportunity to review state cases.⁸⁶

III. ANALYSIS

A. *Facts and Procedural Background of Riley*

James W. Riley was sentenced to death for a liquor store robbery resulting in the death of the storeowner.⁸⁷ On February 8, 1982, Riley and two friends stopped at a liquor store with the intent to rob the store.⁸⁸ During the robbery, the storeowner resisted and was shot in the leg.⁸⁹ While the robbers were leaving the store, the storeowner shouted racial slurs and threw a bottle at them.⁹⁰ At that point, Riley turned around and shot the owner, killing him.⁹¹ Riley was indicted on numerous grounds including intentional murder and felony murder, and subsequently sentenced to death.⁹²

death penalty were four times as great as white defendants charged with similar crimes. See Robert Dunham, *Death Penalty and Race: Partners in Injustice*, LEGAL INTELLIGENCER, Nov. 30, 2001, at 7 (setting forth study results). Furthermore, studies conducted in Florida and Georgia found that race of the defendant and race of the victim were the most significant factor in determining whether the defendant received the death penalty. See Johnson, *supra* note 22, at 1623 (discussing effect of defendant's race on imposition of death penalty); see also WALKER ET AL., *supra* note 1, at 245 (noting research illustrating that greatest number of death sentences are imposed when black defendants kill white victims). "African-Americans who killed whites faced the greatest odds of a death sentence. . . . These racial disparities did not disappear when [the researchers,] Gross and Mauro[,] controlled for other legally relevant predictors of sentence severity." *Id.* Conversely, this same research has revealed that minority defendants who kill minority victims rarely receive the death penalty. See *id.* (noting that less than 1% of African-American defendants who killed African-Americans were sentenced to death). Mock juror studies, which ask the participants to determine whether a minority or white defendant, given identical circumstances, is guilty, have revealed that "[w]hite subjects . . . were more likely to find a minority-race defendant guilty than they were to find an identically situated white defendant guilty." Johnson, *supra* note 22 at 1626.

86. See Williams, *Antiterrorism*, *supra* note 82, at 922-23 (discussing positive effect of defendant's cases appellate review). Habeas corpus review is responsible for the reversal of approximately half of all death-sentence cases. See *id.* (discussing impact of habeas corpus review). The harm imposed by racially selected jurors to defendant's right to a fair trial has been replaced by concern with equal protection rights of jurors. See Cockrell, *supra* note 85, at 363 (discussing negative effect of shift of Supreme Court's focus to equal protection rights of juror). "The effect of this shift has been in many instances to reduce the ability of the *Batson* system to produce racially mixed juries." *Id.*

87. See *Riley v. Taylor*, 277 F.3d 261, 270-71 (3d Cir. 2001) (discussing details of crime).

88. See *id.*

89. See *id.*

90. See *id.*

91. See *id.*

92. See *id.* at 271 (discussing trial).

Riley appealed his conviction and sentence on several grounds, most notably that “the prosecution had exercised its peremptory challenges in a racially discriminatory manner”⁹³ After several hearings in both state and federal courts, all of Riley’s *Batson* claims were denied. Eventually, the Third Circuit granted Riley’s petition for a rehearing *en banc*, found that *Batson* was violated and reversed the conviction.⁹⁴

B. *The Third Circuit’s Decision in Riley*

1. *Neutral Reasons Are Not Supported by the Record*

In determining a *prima facie* case for discriminatory challenges, courts should look to facts and circumstances particular to each defendant’s present case.⁹⁵ There was no question as to whether a *prima facie* case was established here.⁹⁶ At trial, the state utilized peremptory challenges to strike all prospective African-American jurors.⁹⁷ The state’s action resulted in an all-white jury deciding a first-degree murder prosecution of an African-American defendant for the murder of a white victim.⁹⁸ Having satisfied the *prima facie* requirement, the court then turned to the prosecutor’s race-neutral reasons for striking the three minority jurors.⁹⁹ The prosecutor stated that he struck the first juror because he gave a “significant” pause, indicating uncertainty, when asked about his ability to return a death sentence; the second juror was struck because he requested to be excused from jury service because of work; and the third juror was struck because she testified that she could not impose the death penalty.¹⁰⁰ The court accepted the third reason as a valid basis to strike the juror, but found inconsistencies with the first two reasons.¹⁰¹

First, the court questioned whether Nichols, the first juror, had paused significantly during his testimony, because it was not contained in the trial transcripts.¹⁰² It reasoned that were such a pause as significant as the prosecutor suggested, then it would certainly have garnered enough

93. *See id.* at 272 (addressing Riley’s *Batson* claim).

94. *See id.* at 273 (issuing case holding).

95. *See Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (illustrating requirements to establish *prima facie* case).

96. *See Riley*, 277 F.3d at 276 (noting that there is no contest to fact that defendant established *prima facie* case).

97. *See id.* (discussing state *voir dire* practices).

98. *See id.* (examining *prima facie* case establishment).

99. *See id.* (detailing prosecutor’s proffered race-neutral reasons for striking potential African-American jurors).

100. *See id.*

101. *See id.* at 276-77 (identifying circumstances and evidence that contradict state’s race-neutral reasons).

102. *See id.* at 279 (observing absence of evidence that juror was struck for attitude toward death penalty). The court noted that there was no record of the state’s concern in the trial record, in the independent expressions by the court or in the prosecutor’s notes. *See id.* (noting extent of lack of evidence).

attention to appear in the transcript.¹⁰³ Turning to the trial transcripts, the court noted the clarity and conciseness of the prospective juror's answers.¹⁰⁴ The court also noted that there was no "pause" or indication of hesitation.¹⁰⁵

Second, during *voir dire*, most prospective jurors who expressed an inability to invoke the death penalty were removed for cause.¹⁰⁶ The court noted that the prosecutor had not requested that Nichols be removed for cause, throwing further suspicion on whether the "significant pause" existed.¹⁰⁷

Finally, the court compared the struck juror's answers in the record to that of another white juror who was subsequently seated on the final jury.¹⁰⁸ The court could find no difference between the two jurors' attitudes based on their answers in the trial record.¹⁰⁹ When asked whether they believed they would be able to impose the death penalty, they both replied, "I think so."¹¹⁰ In Nichols' case, the court performed a thorough investigation of the record that included comparing the stricken juror's answers with those of the other seated jurors.¹¹¹ This method helped to determine whether the prosecutor's race-neutral reasons were just a pretext for discrimination.¹¹²

The court used the comparison method again to determine the prosecutor's credibility in his reason for striking the second African-American

103. *See id.* (noting absence of indication of pause or hesitation in trial record).

104. *See id.* (discussing question and answer period during *voir dire* procedure).

105. *See id.* ("[T]he record reflects no such pause and no such uncertainty on Nichols' part.").

106. *See id.* (describing removal for cause procedure). During the for cause proceedings, the court allowed the state to remove six prospective jurors because the jurors felt they could not impose the death penalty. *See id.* (describing removal for cause procedure).

107. *See id.* (noting state's failure to remove juror for cause as it did others who were unwilling to impose death penalty). Furthermore, the court noted that "prosecutors did not . . . inquire further into his willingness to award the death penalty," despite their stated misgivings. *Id.*

108. *See id.* (discussing similarities between prospective jurors' answers to *voir dire* questions).

109. *See id.* at 279 ("The record provides no basis for distinguishing Nichols [the black prospective juror] from LePore [the white prospective juror].").

110. *See id.* (comparing similarities between jurors' answers to *voir dire* questions).

111. *See id.* at 278-80 (describing review of prosecutor's race-neutral explanation to determine whether it was pretext).

112. *See id.* at 282-83 (discussing need to compare similarly-situated jurors). "A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." *Id.* (quoting *Turner v. Marshall*, 121 F.3d 1248, 1251-52 (9th Cir. 1997)).

juror, McGuire.¹¹³ The court determined that McGuire was as similarly situated as a white juror who was subsequently seated.¹¹⁴ In determining whether jurors of different races were similarly situated, the court examined whether the struck juror had the same characteristics as the seated juror, and whether the prosecutor struck one but not the other.¹¹⁵ In this case, both jurors requested to be relieved of jury duty, yet only the African-American juror was stricken.¹¹⁶

Careful examination of the state's reasoning demonstrates the Third Circuit's evolution from its original position in *Harrison* and *United States v. Uwaezhoke*. In *Harrison* and *Uwaezhoke*, the court set the bar for prosecutorial reasons relatively low, deeming only the most obvious race-based reasons unconstitutional.¹¹⁷ Alternatively, in *Riley*, the Third Circuit held both the prosecution and the defense counsel to a significantly higher standard.¹¹⁸

2. Trial Court's Failure To Adequately Carry Out the Third Prong of the Batson Test

Next, the Third Circuit focused its attention on the trial court's analysis of the evidence presented to support or refute the *Batson* claim.¹¹⁹ As previously discussed, the third prong of the *Batson* test requires the trial court to rule on the validity of the lawyers challenges based on evidence obtained from trial and the circumstances of the case.¹²⁰ The Supreme Court did not offer any specific guidance to aid trial courts in their deter-

113. *See id.* at 282 (examining prosecutor's reason for striking prospective African-American juror). The prosecutor stated he struck McGuire because he requested to be excused from jury duty to attend work. *See id.* (examining prosecutor's reason for striking prospective African-American juror).

114. *See id.* at 280 (pointing out lack of distinction between stricken juror and seated juror who both requested jury relief due to work).

115. *See id.* at 282-83 (discussing circumstances when jurors are similarly-situated).

116. *See id.* at 280 (observing state's use of peremptory challenges). In its defense, the state claimed that "McGuire's desire to be excused from jury service was stronger than Reed's desire because McGuire's employer had intervened to seek his release . . ." *Id.* The court found, however, that this explanation was without merit. *See id.* (rendering validity of state's use of peremptory challenges).

117. *See United States v. Uwaezhoke*, 141 F.3d 1155 (3d Cir. 1998) (addressing low standard for prosecution when setting forth race-neutral decision to strike prospective jurors); *Harrison v. Ryan*, 909 F.2d 84 (3d Cir. 1990) (asserting prosecutor failed to meet low standard primarily by failing to come up with race-neutral reason).

118. *See Riley*, 277 F.3d at 282-83 (applying high standard to find proffered reasons for peremptory challenges invalid).

119. *See id.* at 286 (addressing trial court's duty to perform *Batson* inquiry into prosecutor's race-neutral reasons). The Third Circuit, upon reviewing the trial record, will then "decide whether the state courts' acceptance of the State's explanation has been made after consideration of all the evidence on the record." *Id.* at 279.

120. For further discussion of the third prong of the *Batson* test, see *infra* notes 121-43 and accompanying text.

mination of fair *voir dire* procedures, stating that “we make no attempt to instruct these courts how best to implement our holding today.”¹²¹ Consequently, the appellate courts have discretion to rule on whether a trial courts’ methods are sufficiently adequate to satisfy the third prong of the *Batson* test.¹²²

In *Riley*, the Third Circuit used this discretion to admonish the trial court for failing to perform several specific tasks germane to the case that would aid in determining whether there was an inference of discrimination.¹²³ The trial court’s shortcomings included its failure to: (1) “compar[e] the stricken black jurors with the sitting white jurors;” (2) “acknowledg[e] the statistical evidence of striking black jurors with the sitting white jurors;” and (3) “recognize the State’s position . . . that use of peremptoriness for racial reasons was constitutional and socially beneficial.”¹²⁴

First, the Third Circuit corrected the trial court for not incorporating the comparison method into its review of trial circumstances.¹²⁵ The Third Circuit concluded that comparing prospective jurors in the *Riley* case “strongly suggests use by the State of race-based peremptory challenges.”¹²⁶ This conclusion is supported by the fact that several other circuit courts have found that comparing similarly-situated jurors can uncover a pretext for discrimination.¹²⁷ The Ninth Circuit, for example, has held that “[a] prosecutor’s motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge.”¹²⁸

121. *Batson*, 476 U.S. 79, 99, n. 24 (1986). The Court specifically declined to specify procedures for courts to follow because of its deference to the variety of jury venire procedures in state and federal courts. *See id.* at 99 (explaining limit of Court’s decision).

122. *See Williams, Antiterrorism, supra* note 82, at 927 (recognizing appellate court’s role in establishing uniformity in applying and complying with federal law). “[F]ederal judges are believed to have greater expertise on federal law and therefore have the primary responsibility for interpreting that law.” *Id.*

123. *See Riley*, 277 F.3d at 281-85 (setting forth several elements trial court overlooked in assessing *Batson* claim validity).

124. *Id.* at 286-87.

125. *See id.* at 282-83 (noting trial court’s failure to compare seated jurors with stricken African-American jurors). The prosecutor claimed that he struck the prospective African-American juror because he requested relief from jury duty. *See id.* at 280 (providing similar requests by white jury members). Yet, in his notes, the prosecutor entered that a white juror that was subsequently seated also wanted relief. *See id.* (explaining rationale behind peremptory challenge).

126. *Id.* at 282.

127. *See Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000) (discussing discriminatory inference gleaned by examining similarly-situated jurors); *McClain v. Prunty*, 217 F.3d 1209, 1220 (9th Cir. 2000) (same); *Coulter v. Gilmore*, 155 F.3d 912, 921 (7th Cir. 1998) (same).

128. *McClain*, 217 F.3d at 1220.

Next, the Third Circuit criticized the trial court's failure to notice the state's discriminatory pattern of strikes over the course of the year.¹²⁹ This pattern revealed that the state had used its peremptory strikes to remove every potential African-American juror in the three previous capital murder cases that year.¹³⁰ Furthermore, though the state requested and was given four weeks to produce evidence to the contrary, it never produced such evidence.¹³¹ Thus, the Third Circuit drew the conclusion that such evidence did not exist.¹³² The Third Circuit imparted upon the trial court the duty to determine whether discrimination existed based on the whole of the circumstances, and not just the sum of its parts.¹³³ Imposing this duty on the trial court illustrates the Third Circuit's devotion to a thorough *Batson* inquiry.¹³⁴

Finally, the Third Circuit criticized the trial court for failing to recognize the state's pro-racist position.¹³⁵ In this section of the analysis, the Third Circuit referred to the state's admission of incorporating race into its peremptory challenges in Riley's previous trials.¹³⁶ Riley's direct appeal was tried and ruled upon in 1984, three years before *Batson* was decided.¹³⁷ During the appellate hearing, Riley objected to the state's use of its peremptory challenges in a racially-discriminatory manner.¹³⁸ In re-

129. *See id.* at 283-84 (outlining court's considering systematic discrimination evidence).

130. *See id.* at 280 (reviewing statistical evidence of peremptory strikes exercised against African-American jurors). The court noted that "[i]n these four trials (including Riley's), the prosecution struck all 8 prospective black jurors who were called, i.e. 100%. By contrast, the prosecution used its peremptory challenges to strike only 23 of the 71 prospective white jurors, or 32%." *Id.*

131. *See id.* at 278 (noting failure of state to produce evidence rebutting Riley's systematic discrimination claim). The court further noted that the "State has never sought to explain the data by variables other than race." *Id.* at 281.

132. *See id.* at 283 (analyzing inference drawn from state's failure to provide promised evidence). "The failure of the State to produce evidence from other trials is significant because it was the State, not Riley, that would have had access to such evidence, it was the State that asserted that such evidence was available and forthcoming, and it was the State, not Riley, that failed to provide it." *Id.* at 281.

133. *See id.* at 283 (noting importance of viewing evidence in totality).

134. *See id.* at 281 (imposing duty on hearing judge to discuss statistics and "State's failure to explain them[]"). The court views the presentation of peremptory challenge practices in past cases as a "significant segment of Riley's evidence." *Id.* The hearing judge's failure to consider such evidence was another indication that he abdicated his duty to perform the third *Batson* prong. *See id.* (questioning state courts' failure to consider evidence).

135. *See id.* at 286 (questioning state courts' failure to consider state's position in previous trial).

136. *See id.* at 284 (referring to state admitting it struck jurors based on "group association," then permissible under *Swain v. Alabama*, 380 U.S. 202 (1965)).

137. *See id.* (stating date of Riley's direct appeal hearing).

138. *See id.* (noting that defendant asserted *Batson* claim).

sponse, the state could not offer race-neutral reasons in its defense.¹³⁹ In fact, the state claimed that its exclusion of jurors based on their “group association” was permissible.¹⁴⁰ Even the Delaware State Supreme Court acknowledged that “group association” was a recognized euphemism for race.¹⁴¹ Only in future appeals, after *Batson* was decided, did the state produce race-neutral reasons for striking the jurors.¹⁴² The Third Circuit, accordingly, refused to credit the state courts’ denial of the defendant’s *Batson* claim, finding that the prosecutor’s race-neutral reasons were “incredible, contradicted, and implausible. . . .”¹⁴³

Clearly, the state courts disregarded their duty to perform a thorough examination as to whether the defendant established a prima facie case and the validity of the state’s proffered race-neutral reasons.¹⁴⁴ The Third Circuit court, in reversing Riley’s conviction, emphasized the state court’s responsibility to determine the *Batson* inquiry based on “all the facts and circumstances.”¹⁴⁵

C. *New AEDPA Standards and Impact on Success of Batson Claims*

Fortunately for Riley, the Third Circuit was allowed to review his case under the old appellate review standard.¹⁴⁶ The old standard held that the facts in the record must support the findings of the state court.¹⁴⁷ As previously shown, the Third Circuit found that the record did not support the findings of the state court.¹⁴⁸ Had the Third Circuit’s review of Riley’s case occurred under the new AEDPA standard though, the court may have reached a different result. The new AEDPA standard holds that, in order to reverse a conviction, the factual findings of the state court must amount

139. *See id.* (“On . . . the State’s first opportunity to defend the use of its peremptory challenges in Riley’s trial, the State did not offer a single race-neutral explanation . . .”).

140. *See id.* (observing state’s admitted willingness to exercise discriminatory peremptory challenges based on juror’s group associations).

141. *See id.* (noting that Delaware Supreme Court recognized term as substitution for race).

142. *See id.* at 279 (recognizing post conviction hearing as first instance in which state offered race-neutral reasons).

143. *Id.* at 285.

144. *See id.* at 286 (questioning failure of both trial and Delaware Supreme Court judges in performing prong three of *Batson* test).

145. *See id.* (setting forth particulars required for satisfactory execution of third prong of *Batson* test).

146. *See id.* at 278 (examining habeas corpus standard of review applied to Riley’s case).

147. For a summary of the old standard of review, see *supra* note 79 and accompanying text.

148. *See Riley*, 277 F.3d at 285 (discussing refusal to grant presumption of correctness to state court’s findings because record gave no support). For further discussion of the inadequacy of state court’s holdings, see *supra* notes 64-80 and accompanying text.

to clear error and an unreasonable application to the facts.¹⁴⁹ This presents a much higher standard of review and limits those cases the circuit courts may hear and correct.¹⁵⁰

Although the Third Circuit was allowed to review Riley's case to correct obvious trial and appellate court errors, this may not be the case in future criminal trials. The AEDPA review standard has come under criticism from commentators because it imposes harsh review standards on appellate courts.¹⁵¹ For instance, opponents are skeptical that state courts' review of habeas cases will be thorough enough to dispose of analysis by appellate courts.¹⁵²

Another common criticism is that, presently, federal courts may review only the most obvious cases of egregious error.¹⁵³ In fact, proponents of the new standard are of the view that habeas review should only "remedy extraordinary injustice."¹⁵⁴ The error must be extraordinary indeed, because the new standard only allows correction of state holdings that are both erroneous *and* unreasonable.¹⁵⁵ In other words, even when

149. See 28 U.S.C. § 2254 (d)(1) (2001) (defining when application for writ of habeas corpus is permissible).

150. See *Coulter v. Gilmore*, 155 F.3d 912, 922 (7th Cir. 1998) (noting that court may not have been allowed to grant relief to defendant had it reviewed the case under more deferential rules of AEDPA); see also Williams, *Antiterrorism*, *supra* note 82, at 923 (asserting that unstated goal of AEDPA was "to restrain the federal courts' ability to review death sentences," and effectively "hamper[ed] death row inmates' ability to receive a meaningful substantive review of their claims").

151. See Williams, *Deregulation*, *supra* note 82, at 692 (2000) (criticizing irrationality of requiring federal courts to defer to state courts "despite the fact that the writ of habeas corpus exists to correct unconstitutional state convictions[]"). For further discussion of criticisms of AEDPA, see *supra* notes 144-51 and accompanying text, and *infra* notes 153-59 and accompanying text.

152. See Williams, *Antiterrorism*, *supra* note 82, at 927-28 (describing many states' review of habeas claims as "perfunctory" and superficial); Williams, *Deregulation*, *supra* note 82, at 682-83 (discussing primary reason defendants are unlikely to prevail on direct appeal). The author notes several reasons state appeals are often ineffective including incompetent counsel for appeal, frequent use of harmless error doctrine and state judge's elected position. See Williams, *Deregulation*, *supra* note 82, at 682-83 (explaining causes of defendants losing on direct appeal).

153. See Williams, *Deregulation*, *supra* note 82, at 690-95 (illustrating several ways AEDPA restricts defendant's ability to bring habeas petitions in front of court, which effectively guarantees that only exceptional cases will be heard by appellate courts). The restrictions AEDPA imposes on defendants include narrow time limits on filing of habeas petition, enhanced deference to state court findings and limited appellate review of findings of district courts. See *id.* (overviewing AEDPA restrictions).

154. Williams, *Antiterrorism*, *supra* note 82, at 927. Proponents of the new AEDPA standard also argue that reversal of state holdings "undermines the criminal justice system." See Williams, *Deregulation*, *supra* note 82, at 685-86 (criticizing liberal use of writs of habeas corpus to vacate federal criminal prosecutions).

155. See *Williams v. Taylor*, 529 U.S. 362, 411 (2000) (O'Connor, J., concurring) (emphasizing importance of state court's holding being both incorrect and unreasonable). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather,

the state court makes an obvious error, the holding will be allowed to stand.¹⁵⁶ This standard has prompted defendants and appellate courts to begin focusing their attention on establishing elements of unreasonableness of the state court holdings.¹⁵⁷ Currently, however, the AEDPA standard only prohibits correction of such error in the future.

IV. CONCLUSION

Although *Batson* gave rise to a period of change in criminal jury selection, it has since been narrowed by procedural and legislative restraints.¹⁵⁸ The goals *Batson* has purported to accomplish, primarily to assure defendants and the community that criminal judgments are not tainted by invidious discrimination, are commendable.¹⁵⁹ Unfortunately, due to the many restrictions imposed on equal protection cases dealing with race, many defendants continue to slip through the cracks, and contribute to the statistics that support the inference that race still matters in America's judicial system.¹⁶⁰

Batson's most profound restriction, also receiving the most criticism, is that only where there is a blatant racial inference is the standard allowed to accomplish its goals.¹⁶¹ Additionally, it is difficult for *Batson* to have any impact when trial and review courts do not correctly perform the third prong of the *Batson* test.¹⁶² Finally, the new AEDPA standards make it

that application must also be unreasonable." *Id.*; see also Williams, *Antiterrorism*, *supra* note 82, at 926 (describing unreasonableness requirement utilized to provide "finality of state court criminal convictions[]").

156. See Williams, *Deregulation*, *supra* note 82, at 691 (expressing that standard tolerates unconstitutional convictions). The author expresses concern that "the very courts that may have unconstitutionally convicted and sentenced an inmate are now given great deference . . ." *Id.* But see Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1428 (2001) (recognizing circuit split regarding standard of review for mixed questions of law and fact). While the Seventh Circuit applies a de novo standard of review, the Ninth Circuit has determined that the question should be viewed with a view toward deference to the state court's finding. See *id.* (explaining differing review standards).

157. See Williams, *Deregulation*, *supra* note 82, at 682 (discussing work of death row inmate advocates). Attorneys from such organizations as NAACP Legal Defense and Educational Fund and the American Civil Liberties Union offer "brilliant, dedicated representation" in order to gain habeas review. See *id.* (discussing work of death row inmate advocates).

158. For a discussion of *Batson's* limitations, see *supra* notes 40-86 and accompanying text.

159. For a discussion of *Batson's* policy goals, see *supra* note 39 and accompanying text.

160. For a discussion of disparate conviction rates and sentencing of minority defendants by white jurors, see *supra* notes 84-85 and accompanying text.

161. For a discussion of *Batson's* propensity to allow race-neutral challenges that are subtly racial in nature to stand, see *supra* notes 43-64 and accompanying text.

162. For a discussion of trial courts' failure to adequately perform *Batson's* third prong, see *supra* notes 65-78 and accompanying text.

even more difficult for appellate courts to review and correct *Batson* violations in capital cases.¹⁶³

In its past dealings with *Batson* claims, the Third Circuit, like many others, fell victim to these limitations.¹⁶⁴ The court's most recent decision in *Riley*, however, effectively overcomes the systematic limits common to all *Batson* inquiries.¹⁶⁵ Although the state's neutral reasons for striking the African-American jurors were plausible, the court refused to accept them at face value.¹⁶⁶ The court instead performed a thorough examination of the reasons, as required by the third prong of the *Batson* test.¹⁶⁷ Had the court been required to review the case under the new AEDPA standards, however, its decision may have turned out differently.¹⁶⁸ As it stood, the court was only required to find a lack of support in the evidence, a deficiency that was firmly established in the trial record.¹⁶⁹ In the *Riley* case, the Third Circuit provided a prime example of how courts should apply the *Batson* test to ensure fair trials for defendants.

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163. For a discussion of negative impact of AEDPA review standards on success of *Batson* claims, see *supra* notes 79-86 and 150-58 and accompanying text.

164. See *United States v. Clemmons*, 92 F.2d 1153, 1159 (3d Cir. 1989) (Higinbotham, J., concurring) (highlighting trend of Third Circuit cases to allow peremptory challenges that may be racially motivated).

165. For a discussion of the Third Circuit's decision in *Riley v. Taylor*, see *supra* notes 95-158 and accompanying text.

166. For a discussion of the state's proffered race-neutral reasons in *Riley*, see *supra* notes 95-119 and accompanying text.

167. For a discussion of Third Circuit analysis of *Batson*'s third prong, see *supra* notes 120-46 and accompanying text.

168. For a discussion of the requirements and effect of new AEDPA standards, see *supra* notes 79-85 and accompanying text.

169. See *Riley v. Taylor*, 277 F.3d 261, 285 (3d Cir. 2001) (discussing refusal to grant presumption of correctness to state court's findings because record gave no support). For a summary of the old standard of review, see *supra* note 79 and accompanying text.

