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Brief of Appellant, Davon Jones v. State of Maryland, No. 547

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In the Court of Special Appeals

No. 547

DAVON JONES,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

Appeal from the Circuit Court for Baltimore City
(The Honorable David B. Mitchell, presiding)

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On April 6, 2006, Mr. Davon Jones was arraigned in the Circuit Court for Baltimore City, Maryland for attempted murder. (T^1.4).[1] The State obtained two postponements. The first on July 13, 2006, due to the prosecutor's engagement in an unrelated trial, and, the second on January 11, 2007, due to the prosecutor falling ill. (T^2. 4); (T^3. 3). Mr. Jones' trial counsel objected to the first postponement. (T^2. 4–5).

The matter next convened for trial on January 19, 2007—a Friday. (T^4. 3). After the jury was selected and sworn, the matter was recessed due to the lateness of the hour. (T^4. 106). The following Monday, January 22, 2007, the case resumed. (T^5. 3). At that time, the State moved for a mistrial based on the unavailability of one of its witnesses. (T^5. 4–5). Defense counsel vigorously objected, arguing manifest necessity did not exist. (T^5. 5). Notwithstanding counsel's protests, the trial judge declared a mistrial. (T^5. 15).

Mr. Jones' second trial commenced on February 8, 2007, and lasted until February 12, 2007. At the close of evidence, Davon Jones was found guilty by jury verdict (case no.: 106069033). (T^8. 125). On March 27, 2007, a thirty-year sentence was imposed on

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[1] Citations to the trial transcript are as follows:

- T^1 = arraignment, Apr. 6, 2006;
- T^2 = hearing, July 13, 2006;
- T^3 = hearing, Jan. 11, 2007;
- T^4 = first trial, day one, jury selection, Jan. 19, 2007;
- T^5 = first trial, day two, State's Motion for Mistrial, Jan. 22, 2007;
- T^6 = second trial, day one, jury selection, Feb. 8, 2007;
- T^7 = second trial, day two, Jerome Smith testifies, Feb. 9, 2007;
- T^8 = second trial, day three, Detective Williams testifies, Feb. 12, 2007;
- T^9 = sentencing, Mar. 27, 2007.

Mr. Jones. (T^9. 15). On April 27, 2016, the Honorable Michael A. DiPietro granted Mr. Jones permission to file a belated notice of appeal. On April 28, 2016, Mr. Jones filed a notice of appeal from his criminal convictions and sentences in this case. This appeal follows.

QUESTIONS PRESENTED

1. Whether a mistrial over defense objection was manifestly necessary due to the unavailability of Detective Williams despite the existence of reasonable alternatives, such as a stipulation to Detective Williams' testimony or the State's presentation of other witnesses whose testimony would have mimicked Detective Williams' testimony?

2. Whether the trial court erred in refusing to recognize a prima facie case of racial discrimination during jury selection after the prosecutor used at least four of his seven strikes to remove black jurors from the panel?

STATEMENT OF FACTS

On January 10, 2006, Mr. Jerome Smith was shot twice—once in his shoulder and once in his arm—over a seventy dollar ($70.00) drug debt. (T[6]. 95); (T[7]. 10). He survived the shooting and told the police, while still at the scene, he did not know who shot him. (T[7]. 53). Mr. Smith received medical attention at Sinai Hospital. (T[7]. 7). He was treated with penicillin and was released the following morning at 9:30 a.m. (T[7]. 54).

The Investigation

After the shooting, Mr. Smith provided two distinct accounts of who shot him. (T[8]. 90). He provided his first account to the Baltimore Police Department's Detective Division during two interviews in the days and weeks after the incident.

On January 11, Detectives Williams and Diggs conducted Mr. Smith's first recorded interview, which lasted approximately thirty minutes. (T[8]. 12–13). At the time, Mr. Smith had just returned home from the hospital after being shot. (T[7]. 55). Still, the detectives showed up at Mr. Smith's home and arrested him on a Failure to Appear warrant. T[8]. 10–11. They did not provide Mr. Smith with any pain medications although they were aware that he had been shot twice the day before. (T[7]. 56); (T[8]. 12). The interview concluded when Mr. Smith was not able to identify any person who may have shot him. (T[8]. 14). Nonetheless, Detective Williams testified that he developed a list of suspects based on this interview. (T[8]. 14).

A month later, the detectives spoke with Mr. Smith a second time. (T[8]. 14). On February 15, Mr. Smith was in Central Booking after having been picked up on February 14 for violating his probation. (T[8]. 15). Detectives Williams and Henry transported Mr.

Smith from Central Booking to the Northwestern District Police Station (hereinafter referred to as "stationhouse") for questioning. (T[8]. 15). At the time, Mr. Smith was still experiencing pain but, again, was offered no medication by the detectives. (T[7]. 61). The detectives did, however, give him fast food ("maybe Burger King, McDonald's") and permitted him to make personal telephone calls. (T[8]. 18–19). The February 15 interview spanned approximately five hours and proceeded from the stationhouse to the street and back to the stationhouse. (T[7]. 60).

Beginning at five o'clock in the afternoon, Detectives Williams and Henry conducted a two-hour tape-recorded interview of Mr. Smith at the stationhouse. (T[8]. 17–18). During the interview, Mr. Smith was shown four photo arrays but did not make an identification. (T[8]. 17); *see also* (T[8]. 23). Towards the close of the interview, however, Mr. Smith did provide the detectives with what he thought might be the location of one of his shooters, "Baby." (T[8]. 19–20). Around 7:00 p.m., Detectives Hamilton and Williams drove Mr. Smith around in an unsuccessful attempt to locate "Baby." (T[8]. 21–22). The trio returned to the stationhouse at 9:30 p.m. (T[8]. 22).

Back at the stationhouse, Detective Williams showed Mr. Smith three additional photo arrays—for a total of seven that evening. (T[8]. 26). The first and second photo arrays [State's Exhibit 9 and 10 respectively] were conducted between 10:05 and 10:20 p.m., and were negative. (T[8]. 26–28). The final photo array [State's Exhibit 11] conducted at 10:37 p.m. was positive. (T[8]. 28). After identifying Davon Jones as one of his shooters, Mr. Smith was allowed to "[call] his girlfriend one last time" and was returned to Central Booking. (T[8]. 31).

At trial, however, Mr. Smith fully recanted his previous statement to the police. (T^7. 74). Mr. Smith testified he did not know Mr. Jones or his co-defendant and that he had only cooperated with the police during his interviews to obtain the calls to his girlfriend and mother, as well as for the food. (T^7. 74).

The Mistrial

On January 19, 2007, a Friday, Mr. Jones' first jury was selected and sworn. (T^4. 105). On January 22, 2007, the following Monday, the State moved for a mistrial prior to opening arguments. (T^5. 5). The State acknowledged that the jury had been sworn, and that jeopardy had attached. (T^5. 3). But, the State argued a mistrial was manifestly necessary because one of its witnesses—Detective Williams—was unavailable to testify due to a car accident. (T^5. 3–5).

Defense counsel "strenuously" objected to the State's mistrial motion. (T^5. 5). Counsel noted that the case was "for all practical purposes, a single eyewitness case" and that "[Detective Williams could not] really add anything." (T^5. 5). In response, the State argued it could not proceed with the trial because Detective Williams' testimony "[was] vital to hear the circumstances, not only of the taped statement, but also the investigation, as well." (T^5. 9). After hearing from the State, the court inquired whether the State could proceed under a stipulation that "the entire investigation...was stellar." (T^5. 10). The State answered, "Yeah." (T^5. 10).

Defense counsel agreed to stipulate that the "police officers behaved in an appropriate and constitutional manner and followed the rules and regulations of the department and did nothing improper such as point out the picture of the person they

wanted to have arrested." (T^5. 11). Defense counsel also reminded the court "there were other persons present at...each of these taped statements." (T^5. 12). However, when the prosecution insisted that the parties would have to "essentially...script [Detective Williams'] testimony" for any such stipulation, the agreement fell apart. (T^5. 12). The trial judge thereafter determined that manifest necessity existed and granted the State's motion for a mistrial over Mr. Jones' continued objection. (T^5. 15).

***The Second Trial and* Batson**

Mr. Jones's second trial began on February 8, 2007. (T^6. 3). Defense counsel submitted a Motion to Dismiss on double jeopardy grounds. (T^6. 6). This motion was denied and the case proceeded to jury selection. (T^6. 10). During jury selection, defense counsel twice objected to the State's use of peremptory challenges. (T^6. 82–90).

The record reflects that the State struck Jurors 208, 178, 270, 134, and 215, in that order. (T^6. 78–82). Upon Juror 215's striking, defense counsel immediately objected. (T^6. 82–83). Counsel noted to the court that the State had exercised peremptories on "three of the four black men that [were] seated" in an attempt to "change the complexion literally of the jury." (T^6. 83). The court concluded a prima facie case of discrimination had not been made because in the court's words,

> One was an African-American gentleman who happened to sit in seat number 1 [Juror 134] was a challenge worth making. And number 2 was announced as acceptable by [defense counsel] because you were the last one to address it. And at the initial presentation caused him to make an audible sign of displeasure. So I don't count that one as being against the State...The second [, Juror 270, was]...to, you know, a Caucasian female and I don't count that against the government under the circumstances. So your challenges

> apply to three and while you're not raising an issue as to them individually, you're raising the question of the process as a pattern.

(T[6]. 83–84). The court did not address the removal of Jurors 208, 178, and 215, and the State did not proffer explanations for its use of any of its peremptory challenges. (T[6]. 82–84).

During alternate juror selection, the State exercised two additional peremptory challenges on Jurors 341 and 343. (T[6]. 87–88). Defense counsel renewed her allegation of purposeful discrimination. (T[6]. 88–90). Counsel argued,

> (Indiscernible) need to challenge the State's use of its peremptory challenges on the basis of (indiscernible) established the practice (indiscernible) black men were challenged but one. And I believe probably (indiscernible) to suggest one remains (indiscernible). There's no good reason that there should not be a single (indiscernible) a single black man on that jury.

(T[6]. 88–89). Counsel also challenged as unsound the court's prior justification for the prosecutor's removal of Juror 134—"if we eliminated people from jury service every time they made a face or a funny sound, we'd never get anybody in the box." (T[6]. 89). The court disagreed and summarily dismissed counsel's renewed claim with a single word, "Denied." (T[6]. 90).

Sentencing

Mr. Jones was nineteen-years old when he was sentenced to twenty years for attempted murder followed by a consecutive ten-year sentence for the use of a handgun in the commission of a crime of violence. (T[9]. 3); (T[9]. 13–14).

ARGUMENT

I. THERE WAS NO MANIFEST NECESSITY FOR A MISTRIAL, DECLARED OVER DEFENSE OBJECTION, WHERE THERE WERE REASONABLE ALTERNATIVES TO DETECTIVE WILLIAMS' TESTIMONY INCLUDING AN AGREED-TO STIPULATION BY THE PARTIES AND THE AVAILABILITY OF ALTERNATE WITNESSES.

On Monday, January 22, 2007, Davon Jones' trial judge declared a mistrial was manifestly necessary upon learning that one of the State's future witnesses, Detective Wayne Williams of the Baltimore City Police Department, had been in an automobile accident and was unavailable to testify that day. (T[5]. 3–4). A trial court's declaration of a mistrial in a criminal case is a momentous decision that implicates the accused's Fifth Amendment rights to (1) have his trial completed by a particular tribunal and (2) not be put twice in jeopardy for the same offense. The importance of these two constitutional rights require appellate courts to ensure that a trial court exercised "sound discretion" when declaring a mistrial. As analyzed in detail below, the trial judge in the instant case failed to exercise sound discretion because he (1) wrongly concluded that manifest necessity existed and (2) declared a mistrial without addressing the available alternatives. Because Davon Jones' Fifth Amendment rights were violated, reversal is required.

The Fifth Amendment to the United States Constitution provides, "[No person] shall…be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The double jeopardy prohibition is incorporated against the States through the Fourteenth Amendment because the afforded protection represents a "fundamental ideal in our constitutional heritage." *Benton v. Maryland*, 395 U.S. 784, 794

(1969). Indeed, our American scheme of justice recognizes "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal...as well as enhancing the possibility that even though innocent he may be found guilty." *Benton*, 395 U.S. at 796 (citing *Green v. United States*, 355 U.S. 184, 187–88 (1957)).

Nonetheless, mistrials do occur in our justice system in a variety of circumstances that may permit subsequent retrial. *See United States v. Perez*, 22 U.S. 579, 580 (1824); *Downum v. United States*, 372 U.S. 734, 736 (1963); *Arizona v. Washington*, 434 U.S. 497, 505 (1978). The circumstances that warrant retrial are limited to those that further the administration of justice. *Wade v. Hunter*, 336 U.S. 684, 688–89 (1949); *Gori v. United States*, 367 U.S. 364, 368 (1961). When the defense objects to a mistrial, the interests of justice instruct that a retrial is permitted only when the trial court finds it is manifestly necessary to subordinate the accused's "valued right to have the trial concluded by a particular tribunal...to the public interest in affording the prosecutor" a full opportunity to try the accused. *Washington*, 434 U.S. at 505. The prosecution bears the heavy burden of demonstrating manifest necessity. *Id.*

Maryland courts have joined the Supreme Court in explaining that the process of finding manifest necessity is a matter of degree for which no rigid formula exists. *Hubbard v. State*, 395 Md. 73, 90 (2006) (citing *United States v. Jorn*, 400 U.S. 470, 480 (1971)). Indeed, manifest necessity is dependent "upon the unique facts and circumstances of each case." *Hubbard*, 395 Md. at 90.

Given that a trial judge's inquiry into manifest necessity turns on perceived degrees, appellate courts have fashioned different standards for reviewing a trial judge's decision to abort a criminal trial mid-stream. *See Washington*, 434 U.S. at 506–10. "The strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence...[But a] trial judge's decision to declare a mistrial when he considers the jury deadlocked is...accorded great deference by a reviewing court." *Id.* at 508–10.

This Court has interpreted strictest scrutiny to mean that the trial judge must have exercised "limited discretion" in finding manifest necessity. *McCorkle v. State*, 95 Md.App. 31, 61 (1993). The exercise of limited discretion does not permit re-prosecution "so as to afford the prosecution a more favorable opportunity to convict." *Cornish v. State*, 272 Md. 312, 320 (1974) (quoting *Downum*, 372 U.S. at 736). The Court of Appeals has found this to be true because ordinarily the lack of prosecutorial evidence, regardless of fault, does not constitute manifest necessity. *In re Mark R.*, 294 Md. 244, 262 (1982) ("A deficiency in the prosecution's evidence ordinarily...does not constitute 'manifest necessity' justifying an unconsented mistrial."). Rather, a mistrial based on a witness's unexpected absence is most appropriate when the parties use their opening arguments to relay to the jury the importance of the later absent witness. *McCorkle*, 95 Md. App. at 61 (explaining both parties' extensive discussion of a later absent witness in opening created the potential for prejudice justifying a mistrial); *see also United States v. Gallagher*, 743 F.Supp. 745, 749 (D.Or. 1990) (explaining manifest necessity existed when counsel for both parties indicated in opening arguments that an anticipated witness, who later refused to testify, was a critical witness to the case).

The Court of Appeals has confirmed that a trial judge operates within tightly proscribed boundaries when granting a mistrial due to the absence of prosecution evidence. In *Hubbard*, the Court of Appeals held in such cases, "the trial judge must engage in the process of exploring reasonable alternatives and determine that there is no reasonable alternative to the mistrial" prior to declaring manifest necessity. 395 Md. at 92. Additionally, the fact that a trial court explores whether reasonable alternatives exist does not shelter the trial judge's mistrial declaration from review. *Id.* at 93 ("We acknowledge that the trial court did explore other various alternatives to a mistrial. Nevertheless, his exploration was only part of the equation, because there was a reasonable alternative to the decision to declare a mistrial.").

Finally, in a line of unbroken cases, it has been determined that any doubt as to whether manifest necessity exists must be "resolved in favor of the liberty of the citizen." *McCorkle*, 95 Md. App. at 47 (citing *Downum*, 372 U.S. at 737–38); *Hubbard*, 395 Md. at 93. For example, in *In re Mark R.* a mistrial was declared because "[the State's complainant] did not have a satisfactory comprehension and ability to communicate in the English Language" and could therefore not be understood by the Master during cross-examination. 294 Md. at 246. The Court of Appeals reversed and reasoned that even if the Master was justified in determining that the Complainant was unable to communicate, "the problem was a failure of the prosecution to have another witness present, namely an interpreter." *Id.* at 264. At bottom, the Master's decision to grant the severe remedy of a mistrial was improper when other favorable alternatives, such as "a short continuance for the purpose of obtaining an interpreter," were available. *Id.* at 264–65.

More recently, the Court of Appeals in *State v. Hart* found that a trial court's mistrial declaration on a specific count after receiving a partial verdict from a deadlocked jury unfairly prejudiced the defendant who was involuntarily absent due to a medical emergency. 449 Md. 246, 254 (2016). The *Hart* Court equated a defendant's right to receive a verdict with a defendant's right to be present at the declaration of a mistrial because "the mere face-to-face contact may cause some of the jurors to change their position." *Id.* at 280. Consequently, the interests of justice would have been better served if the trial court had announced a continuance during which it could have determined the extent of Mr. Hart's absence. *Id.* at 282.

At trial in the instant case, based on testimony at an earlier hearing, the State anticipated that Mr. Smith would recant his claim that Davon Jones was one of the people who shot him, and would otherwise cast doubt on the propriety of the police department's investigation. (T^5. 6). Therefore, the State's chief argument in support of a mistrial was that, "Detective Williams [was] a critical witness because the critical issue in this case [was] the reliability of [Mr. Smith's] taped statements." (T^5. 4). However, the court, under the strictest scrutiny test, had limited authority to grant a mistrial on that basis alone—indeed, unlike in *McCorkle* and *Gallagher*, Detective Williams' unexpected absence did not prejudice the State because at the time the State moved for a mistrial, it had not yet made any presentation to the jury. (T^5. 3–5). Thus, the State's sole basis for the mistrial is reducible to an attempt to preserve a more favorable opportunity to convict. Consequently, the court was obligated to pursue reasonable alternatives to declaring a mistrial.

The record shows the trial court singularly focused on whether the parties could stipulate to Detective Williams' testimony as a way of avoiding a mistrial. (T^5. 9–10). The State agreed that the trial could continue if the defense agreed to stipulate that Mr. Smith's earlier statements were reliable. (T^5. 10–11) (reflecting the State replied "Yeah" when asked by the trial judge if it could proceed to trial if "the defense agreed that the entire investigation...was stellar"). Defense counsel immediately indicated that Mr. Jones was willing to stipulate with respect to Mr. Smith's earlier cooperation that "[Detective Williams and other involved police officers] behaved in an appropriate and constitutional manner and followed the rules and regulations of the department and did nothing improper." (T^5. 11). Given that the parties were in agreement that a stipulation resolving the State's basis for a mistrial was possible, a reasonable alternative existed. (T^5. 11). Ultimately, however, a stipulation was not reached because the prosecution insisted that the stipulation contain concessions encompassing not just the Smith interrogations, but also the entire police investigation. (T^5. 12–14).

Assuming arguendo that the trial court concluded correctly that stipulation was unlikely, multiple alternatives existed to the trial court's declaration of a mistrial that may have addressed the prosecution's concerns. There were numerous witnesses who might have provided testimony about the questioning of Mr. Smith and the broader police investigation.

For example, the record reflects that Detective Williams was not the only detective present when Mr. Smith recorded his statements. (T^5. 12). Counsel for Mr. Jones' co-defendant timely reminded the court of two detectives' presence at Mr. Smith's recorded

interviews. (T^5. 12) (showing Detective Diggs was present for the January 11th taped statement and that Detective Henry was present for the following two taped statements). The court responded, "How extraordinary. But...one of the things it does not address is [Detective Williams'] testimony on the nature of the investigation that went beyond just speaking to the victim." (T^5. 12). At trial, however, Detective Williams testified that he worked in the field with Detective Hamilton when carrying out his investigation. (T^8. 22). Consequently, the record reflects that the trial judge's concerns discussed above were unfounded.

As such, the trial judge had a number of alternatives to a mistrial before him. He could have found (1) that a stipulation was reached between the parties regarding Detective Williams' testimony, (2) that Detective Diggs could have testified regarding Mr. Smith's January 11 statement, (3) that Detective Henry could have testified regarding Mr. Smith's February 15 statements, (4) that Detective Hamilton could have testified regarding the nature of the investigation on February 15, or (5) the trial judge could have found that a stipulation was reached and that Detectives Diggs, Henry, and Hamilton could have all testified in part to areas the stipulation did not reach. Because the record demonstrates that a mistrial was not manifestly necessary, the prosecution was barred from re-trying Mr. Jones by the Fifth Amendment's double jeopardy prohibition.

II. THE TRIAL JUDGE CLEARLY ERRED BY FAILING TO FIND A PRIMA FACIE CASE OF RACIAL DISCRIMINATION AFTER THE STATE EXERCISED PEREMPTORY CHALLENGES ON THREE OF THE FOUR AFRICAN AMERICAN MALES ALREADY SEATED AS WELL AS ON TWO ALTERNATE JURORS.

On February 8, 2007, Mr. Jones' second trial began. During jury selection, the State exercised a total of seven peremptory challenges—five on potential primary jurors and two on prospective alternate jurors. Defense counsel objected twice and argued that the State had used its peremptories with a racially discriminatory purpose. Peremptory challenges are central to our criminal justice system but their use must not violate a potential juror's constitutional rights to equal protection under the law and the defendant's constitutional right to a fair trial. Here, because the trial court refused to acknowledge that a prima facie case of discrimination had been established, reversal is required.

The Equal Protection Clause of the Fourteenth Amendment prohibits the State from purposefully excluding prospective jurors from the jury box on the basis of race. *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Swain v. Alabama*, 380 U.S. 202 (1965). Indeed, racial discrimination during jury selection serves as "a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson v. Kentucky*, 476 U.S. 79, 85 (1986); *see also* U.S. CONST. amend. XIV.

In order to give full effect to the Fourteenth Amendment, the Supreme Court has concluded that a party's privilege to peremptorily challenge a prospective juror "is subject to the commands of the Equal Protection Clause." *Batson*, 476 U.S. at 89; *Gilchrist v. State*, 340 Md. 606, 624–25 (1995) ("A peremptory challenge based on race cannot be squared with equal protection principles."). To that end, the *Batson* Court announced a

three-step framework for evaluating whether a peremptory challenge has been exercised in a discriminatory manner. *Batson*, 476 U.S. at 96–98.

A trial court's adherence to this three-step framework helps to preserve the integrity of our criminal justice system. *Edmonds v. State*, 372 Md. 314, 329 (2002) ("The underlying purpose of *Batson* and its progeny is to protect the defendant's right to a fair trial, to protect the venireperson's right not to be excluded on an impermissible discriminatory basis, and to preserve public confidence in the judicial system."). As the Supreme Court has noted "[t]he *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson v. California*, 545 U.S. 162, 172 (2005).

The *Batson* framework proceeds in three distinct phases. First, the opponent of a peremptory strike must demonstrate a prima facie showing of racial discrimination in selection of the venire. *Stanley v. State*, 313 Md. 50, 59 (1988). "No particular form of words is necessary" when invoking a *Batson* challenge. *Hershey v. Maryland*, No. 1912, 2015 WL 6110454, at *6 (Md.App. July 9, 2015). Second, once a prima facie case has been made, the burden shifts to the proponent of the strike to offer a race neutral explanation for its peremptory challenge. *Batson*, 476 U.S. at 97. "A new trial will be required if the State cannot produce satisfactory nondiscriminatory reasons for every peremptory challenge exercised to exclude a black juror." *Stanley*, 313 Md. at 92. Third, the trial judge must determine whether the defense has established purposeful discrimination. *Batson*, 476 U.S. at 98.

The Court of Appeals recently reaffirmed that establishing a prima facie showing at Step One of *Batson* is not an especially high threshold or onerous task. *Ray-Simmons v. State*, 446 Md. 429, 436 (2016). A prima facie case exists when the "totality of the relevant facts" allows the inference that a member of a cognizable racial group has been discriminated against. *Batson*, 476 U.S. at 93–94. Thus, the facts must show the stricken juror is a member of a cognizable racial group. *Mejia v. State*, 328 Md. 522, 534 (1992). Membership alone may establish a prima facie case "depending on 'how, if at all, the [proponent responds] to the proffer or assertion' that the [juror] struck [is a member] of that [cognizable racial] group." *Elliott v. State*, 185 Md.App. 692, 714 (2009) (quoting *Mejia*, 328 Md. at 534). To that point, "if there is no disagreement as to the issue of group membership" then "the fact will be deemed established." *Mejia*, 328 Md. at 535–36.

Purposeful racial discrimination may be established as a prima facie matter when a party exercises its peremptory challenges on just one juror belonging to a cognizable racial group. For example, in *Mejia* the State's striking of a juror who happened to be the only Hispanic in the jury panel was sufficient to show a prima facie case of racial discrimination. *Mejia*, 328 Md. at 539 ("Where the record reveals that but one person with an Hispanic background was in the venire and the State struck that person, it may be concluded that a prima facie case of purposeful discrimination has been proven."). Importantly, *Mejia* recognizes that a peremptory challenge may invidiously effect more than just the subject of the challenge—i.e., the strike may have rippling effects on the venire's racial composition. *Id.* ("By that one strike, one hundred percent of the Hispanics in the venire were stricken.").

A party's use of peremptory challenges on multiple prospective jurors belonging to a cognizable racial group may also establish the inference as a prima facie matter. Indeed, the *Batson* Court instructed that peremptory challenges having a disproportionate impact on a cognizable racial group may circumstantially show "discriminatory impact... 'because in various circumstances the discrimination is very difficult to explain on nonracial grounds.'" *Batson*, 476 U.S. at 93 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). In *Batson,* the Supreme Court found "a pattern of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." 476 U.S. at 97. Maryland agrees. *Ray-Simmons*, 446 Md. at 436.

In *Ray-Simmons*, the Court of Appeals noted a prima facie case had been established once the defendant explained that the State had exercised each of its five total peremptory challenges to remove African American men from the jury, *i.e.*, one hundred percent of its peremptories were used to exclude black jurors. *Id.* at 443. But, Maryland has also found that a prima facie case of discriminatory purpose may be established when less than one hundred percent of a party's peremptories are used on black jurors. *Stanley*, 313 Md. at 72–74 (1988) (explaining an inference of racial discrimination was established when "[the State] used 80 percent of its strikes to remove blacks who constituted less than 25 percent of the venire").

In the instant case, defense counsel's first objection to the State's peremptory challenges focused on Jurors 134, 215, and either 178 or 208 as constituting a "pattern and practice of eliminating the non-white perspective juror." (T^6. 82–90). Counsel specifically noted that the State had removed "three of the four black men that [were] seated." (T^6. 83).

At the trial judge's prompting, the State clarified it had to that point used five strikes in total. (T[6]. 83). Consequently, at this stage of jury selection, defense counsel had already demonstrated that the State had used three of its five (sixty percent) peremptory challenges on African American men. (T[6]. 83). Moreover, defense counsel showed that the State had removed seventy-five percent of the African American men from the jury panel. Therefore, the case at bar is similar to *Ray-Simmons* and *Stanley*. Yet, the trial judge stated defense counsel had not established a prima facie showing based on a pattern of purposeful discrimination. (T[6]. 84).

Even assuming the State's use of sixty percent of its challenges on black veniremen was insufficient, its continued removal of jurors of color over defense counsel's objection should have changed the calculus. (T[6]. 88–90) (reflecting defense counsel's argument that the State's challenges to two alternates further established its practice of eliminating the non-white prospective juror). Defense counsel argued, "There's no good reason that there should not be a single (indiscernible) a single black man on [the] jury." (T[6]. 89). Again, however, the lower court erred by not proceeding to *Batson's* second step. (T[6]. 90); *see Stanley v. State*, 313 Md. 50, 87 (1988) ("We believe that when the State uses peremptories in a manner that assures no blacks will serve on a jury that is to try a black defendant, it is at least permissible to conclude that a prima facie case of discrimination has been made out.").

Maryland first considered the appropriate remedy for a *Batson* violation in *Stanley v. State*. 313 Md. 50 (1988). In the years since *Stanley,* Maryland courts have determined that while a limited remand is generally the appropriate remedy, a new trial

should be granted when a limited remand would not allow for the circumstances surrounding the *Batson* violation to be fairly reconstructed. *See Mejia*, 328 Md. at 540; *Edmonds*, 372 Md. at 341. With respect to Mr. Jones' case, nearly ten years have passed since his second trial. T[6]. 3. Consequently, it would be a nearly impossible task for the State to explain its peremptories and a new trial is warranted. *Ray-Simmons*, 446 Md. at 447 (observing that a period of four years since the established *Batson* violation was too great to overcome).

CONCLUSION

For the forgoing reasons, Mr. Jones respectfully requests that his conviction be vacated, and his case dismissed, or at a minimum, that his case be remanded for a new trial consistent with *Batson v. Kentucky*.

Respectfully Submitted,

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TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The Constitution of the United States of America

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV

§1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§2: Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§3: No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

§4: The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT PURSUANT TO RULE 8-112

1. This brief contains 5,351 words, excluding the parts of the brief exempted from the word count by Rule 8-112.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

DAVON JONES,	*	IN THE
	*	
Appellant,	*	COURT OF SPECIAL APPEALS
	*	
v.	*	OF MARYLAND
	*	
STATE OF MARYLAND,	*	September Term, 2016
	*	
Appellee.	*	No. 547
	*	

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18 day of November, 2016, three copies of the Brief of Appellant were mailed, first class, postage pre-paid, to the Office of the Attorney General, Criminal Appeals Division, 17th Floor, 200 St. Paul Place, Baltimore, Maryland 21202.

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