

FOURTEENTH AMENDMENT, SECTION ONE — EQUAL PROTECTION CLAUSE — PROSECUTOR'S EXPLANATION FOR EXERCISING PEREMPTORY CHALLENGE NEED ONLY BE RACE-NEUTRAL, NOT PERSUASIVE OR PLAUSIBLE, WHERE INTENTIONAL RACIAL DISCRIMINATION IS ALLEGED — *Purkett v. Elem*, 115 S. Ct. 1769 (1995) (per curiam).

Last year, the United States Supreme Court delivered an opinion tampering with a significant portion of well-established law prohibiting race-based peremptory challenges. *Purkett v. Elem*, 115 S. Ct. 1769 (1995) (per curiam). The Court found that the *Batson v. Kentucky* prohibition against equal protection violations in jury selections is not violated where the prosecutor's exercise of peremptory challenges is supported by a race-neutral reason. *Id.* at 1771. Specifically, the Court concluded that a prosecutor's explanation does not have to be persuasive or plausible and will be considered race-neutral, so long as there is no inherent discriminatory intent in the explanation. *Id.* Thus, the Court's holding potentially weakens the once steadfast, resolute protection against state sponsored racial discrimination recognized under the Equal Protection Clause.

Jimmy Elem, an African-American, was charged with second-degree robbery. *Id.* at 1770. During the jury selection process in a Missouri trial court, the respondent asserted a *Batson*-based objection to the prosecutor's exercise of peremptory challenges excluding two out of three African-American men from a venire which comprised twenty-five persons. *Id.* (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)). Even though the trial court requested no basis for the strikes, the prosecutor volunteered that both jurors impressed him as unsuitable for purposes of the case to be tried. *Id.* (citation omitted). The prosecutor stated that juror number twenty-two would not be a good juror because he had long hair, a moustache and a goatee-type beard. *Id.* (citation omitted). Although juror number twenty-four also was noted for having facial hair, his exclusion from the panel had been premised on his prior experience as a robbery victim. *Id.* The trial court overruled the respondent's objection without explanation and proceeded to impanel the jury. *Id.* Thereafter, the respondent was convicted as charged. *Id.*

Mr. Elem renewed his *Batson* claim on direct appeal to the Missouri Court of Appeals. *Id.* (citing *State v. Elem*, 747 S.W.2d 772 (Mo. App. 1988)). In affirming the trial court, the appellate court believed that the state's rationale was based on "a legitimate hunch" and that there was no inference of racial discrimination. *Id.* (quoting *State v. Elem*, 747 S.W.2d at 775). Thus, the court of appeals found no error in the trial court's decision to reject the respondent's objection. *Id.*

Subsequently, the respondent filed a petition for *habeas corpus* in the United States District Court for the Eastern District of Missouri. *Id.* In denying the respondent's claim, the district court indicated that a state court's

factual findings are presumptively correct under 28 U.S.C. § 2254(d), and accordingly, adopted the report and recommendation of the magistrate judge. *Id.* (citing 28 U.S.C. § 2254(d) (1948)). Hence, the district court affirmed the Missouri state courts' findings of no discrimination in the jury selection process for Mr. Elem's criminal trial and denied relief. *Id.*

The United States Court of Appeals for the Eighth Circuit reversed and remanded. *Id.* (citing *Elem v. Purkett*, 25 F.3d 679 (8th Cir. 1994)). The circuit court regarded the state's rationale for the strikes as "“facially irrelevant”" and stressed the need for "“some plausible race-neutral reason”" to support a peremptory challenge. *Id.* (quoting *Elem*, 25 F.3d at 683). Concluding that the Missouri trial court had erred in finding no intentional discrimination, the Eighth Circuit surmised that the prosecution's elimination of juror number twenty-two was "“pretextual.”" *Id.* (quoting *Elem*, 25 F.3d at 684). The United States Supreme Court then evaluated the prosecution's explanation in light of the Court's *Batson* jurisprudence. *Id.* In a per curiam opinion, the Court held that the proponent of a peremptory challenge need not provide a persuasive or plausible reason to overcome an allegation of racial discrimination. *Id.* Accordingly, the Court found that the prosecution's rationale for striking juror number twenty-two was sufficiently race-neutral in response to Mr. Elem's objection, which, the Court commented, was "“arguably based on *Batson v. Kentucky*.”" *Id.*

The Court began its analysis by reviewing the three-part test of *Batson v. Kentucky*, which applies to alleged race-based peremptory challenges. *Id.* First, the opponent to the challenge must assert a *prima facie* case of racial discrimination by the state. *Id.* At the second step, the burden shifts to the state to offer a race-neutral reason for the strike. *Id.* Third, the trial court must determine whether the opponent to the challenge succeeded in proving purposeful discrimination. *Id.* at 1770-71 (citing *Hernandez v. New York*, 500 U.S. 352, 358-59, 375 (1991) (Kennedy, J., plurality) (O'Connor, J., concurring); *Batson*, 476 U.S. at 96-98).

Focusing on the second step of the *Batson* test, the Court proffered that, in response to the objection of a criminal defendant, the state need not give an explanation which is "“persuasive, or even plausible.”" *Id.* at 1771. The Court reasoned that the "“facial validity”" of the prosecutor's rationale will be considered race-neutral "“[u]nless a discriminatory intent is inherent”" *Id.* (quoting *Hernandez*, 500 U.S. at 360 (Kennedy, J., plurality)).

The Court found that the circuit court misapplied *Batson* by requiring an explanation that was neutral as well as plausible and, thereby, erred in combining the second and third steps. *Id.* The persuasiveness of the explanation, the Court stressed, is not relevant until the third step is reached. *Id.* (citing *Hernandez*, 500 U.S. at 359 (Kennedy, J., plurality); *Batson*, 476 U.S. at 98). Noting that a trial court will likely find "“implausible or fantastic justifications . . . to be pretexts for purposeful discrimination,”" the

Court distinguished that it is not until step three that such an analysis is made. *Id.* The Court stressed that “the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.” *Id.* (citation omitted).

In understanding the decision below, the Court posited that the Eighth Circuit strongly relied on *Batson*'s requirement for the state to furnish a reasonable and legitimate explanation for exercising the challenges. *Id.* (citing *Batson*, 476 U.S. at 98 n.20 (citation omitted)). Moreover, the Court continued, the explanation must also reflect upon the facts of the case. *Id.* (citing *Batson*, 476 U.S. at 98). Thus, it was regarded by the Court that the prosecution could not satisfy this standard by merely denying any discriminatory motive or affirming good faith. *Id.* Thereupon, the Court set forth that a legitimate reason, in this context, is not one which “makes sense,” but rather one which does not infringe upon the Equal Protection Clause. *Id.* (citations omitted).

Based on the foregoing, the Court concluded that the prosecutor's reason for striking juror number twenty-two was race-neutral and, therefore, met the burden of offering a nondiscriminatory explanation. *Id.* As such, the Court stated that the trial court correctly found that Mr. Elem failed to prove a *prima facie* case of purposeful discrimination by the prosecution. *Id.*

Finally, the Court criticized the circuit court's treatment of the facts. *Id.* Specifically, the Court explained that, in *habeas* proceedings, a federal court will adopt the factual findings of the state courts below unless the facts are not sufficiently supported by the record. *Id.* (citing 28 U.S.C. § 2254(d)(8) (1948)). The Court noted that the circuit court did not contend that a finding of no discriminatory intent by the state courts was lacking in the record. *Id.* Moreover, the Court proffered that the circuit court erred in evaluating the “*reasonableness*” of the state's explanation, and not the “*genuineness*” thereof. *Id.* at 1771-72 (emphasis in original). In reversing the decision below, the Supreme Court ruled that the Eighth Circuit failed to articulate a satisfactory basis for disagreeing with the state courts' determination of no discriminatory intent. *Id.* at 1772 (citations omitted). The Court remanded the case for further proceedings. *Id.*

In a dissenting opinion, Justice Stevens, joined by Justice Breyer, warned that the Court had overruled a critical portion of *Batson v. Kentucky* in announcing this “law-changing decision.” *Id.* at 1772 (Stevens, J., dissenting) (citing *Batson*, 476 U.S. at 79). Discussing the elements of the *Batson* test, Justice Stevens emphasized that, at the second step of the test, the prosecution must provide a reason which is specific and relates to the particular facts and circumstances of the charges. *Id.* (citing *Batson*, 476 U.S. at 98). The Justice noted that the equal protection doctrine prohibits a prosecutor's use of a peremptory challenge to eliminate a juror on the basis of race. *Id.* Thus, Justice Stevens asserted, the Court's determination that

the prosecution had provided a race-neutral reason in response to Mr. Elem's objection represented a departure from *Batson*. *Id.* Additionally, Justice Stevens remarked that the Court, in its decision, had unknowingly resolved a procedural issue. *Id.*

In analyzing the procedure followed by the Missouri trial court, the Justice recounted that, without further explanation, the trial court rejected Mr. Elem's objection for failing to state a *prima facie* case of racial discrimination. *Id.* Thereafter, Justice Stevens noted, the court chose not to confirm Mr. Elem's requested accounting for the record that the two venirepersons were African-American, nor did the court require the prosecutor to provide reasons for those challenges. *Id.* Consequently, however, when the prosecutor volunteered his rationale, it was not reviewed for credibility or sufficiency by the court. *Id.*

Justice Stevens acknowledged that when the case reached the federal level, the district court relied on the recommendation of a federal magistrate to deny the respondent's petition, since a state court is entitled to deference in its findings regarding purposeful discrimination. *Id.* at 1773 (Stevens, J., dissenting) (citation omitted). The Justice indicated that, regardless of the fact that the trial court made no disposition as to whether the peremptory challenges embodied racial discrimination, the magistrate supplanted the record with the Missouri appellate court's determination that the prosecution's explanation was based on "a legitimate hunch" for the purposes of step two of *Batson*. *Id.* (quoting *Elem*, 747 S.W.2d at 775).

In noting that the Eighth Circuit was dissatisfied with the state's explanation as to the peremptory challenge to juror number twenty-two, Justice Stevens explained that the circuit court had "faithfully applied" the *Batson* standard. *Id.* (citations omitted). Justice Stevens acknowledged that the circuit court's application of *Batson* was consistent with prior interpretations by the Missouri Supreme Court, as well as the United States Supreme Court. *Id.* (citing *State v. Antwine*, 743 S.W.2d 51 (Mo. 1987) (en banc); *Hernandez*, 500 U.S. at 352 (Kennedy, J., plurality)). Specifically, Justice Stevens reasoned that the Missouri Supreme Court has held that "*Batson* would be meaningless" if facially neutral reasons were deemed sufficient for these purposes. *Id.* (quoting *Antwine*, 743 S.W.2d at 65). Moreover, Justice Stevens explained, the United States Supreme Court has held that striking venirepersons of the same racial heritage "'without regard to the particular circumstances of the trial' might constitute a pretext for racial discrimination." *Id.* at 1774 (Stevens, J., dissenting) (quoting *Hernandez*, 500 U.S. at 371-72 (Kennedy, J., plurality)). Accordingly, Justice Stevens determined that the Court not only disregarded a critical portion of *Batson*, but also contradicted relevant case law adhering to the Court's three-part test. *Id.* In sum, Justice Stevens remarked that, at the very least, *Batson* set forth that the prosecution's explanation for using

peremptory challenges must consist of reasons which are not only race-neutral, but also relate to the particular facts of the case. *Id.* (citation omitted).

Furthermore, Justice Stevens posited that the Court's decision ignored a "tricky procedural problem." *Id.* While the trial court found that the respondent failed to assert a *prima facie* case, the court did not evaluate the sufficiency of the prosecutor's explanation. *Id.* at 1774-75 (Stevens, J., dissenting). Therefore, Justice Stevens proffered, this decision presents a legal question in that a state appellate court would be permitted to review, on its own, the sufficiency of the prosecution's explanation. *Id.* at 1775 (Stevens, J., dissenting).

Justice Stevens, in conclusion, expressed preference for adherence to *Batson* in conjunction with "meaningful judicial review." *Id.* Where no finding regarding discrimination exists in the trial court's record, the Justice would support a reviewing court's determination that the prosecution's explanation was "pretextual as a matter of law." *Id.* In all, Justice Stevens found the Court's "unnecessary tolerance" of unconvincing explanations to "demean[] the importance of the values vindicated . . . in *Batson*." *Id.* at 1775-76 (Stevens, J., dissenting).

Analysis

On its face, the standard proposed by the Court is a dubious one: the state's explanation in response to a *Batson*-based objection does not have to be logical, nor be related to the factual circumstances of the case for which the jury is impanelled. Accordingly, the position of Justice Stevens patently has greater appeal to the legal technician. For, in essence, if the use of peremptory challenges is to be protected under *Batson v. Kentucky*, then reasonable limitations must be imposed to eradicate the potential for intentional discrimination in the exercise of peremptory challenges. *See generally* Peter A. Gaudioso, *Batson's Incomplete Legacy: Gender Discrimination and the Peremptory Challenge*, 3 SETON HALL CONST. L.J. 475 (1993).

Perhaps, however, the Supreme Court's decision in *Purkett v. Elem* indicates a philosophical conflict as to whether the use of peremptory challenges should continue at all. While a jury is supposed to represent a fair cross-section of the community, few would dispute that peremptory challenges are often used to summarily exclude certain groups from a panel. On this very subject, the late Justice Thurgood Marshall admonished that, although *Batson* set forth a necessary standard, it would not cure racial discrimination in the jury selection process. *See Batson*, 476 U.S. at 102-03 (Marshall, J., concurring). The Justice suggested that the complete elimination of racial discrimination in jury selections can only be achieved

by banning peremptory challenges altogether. *Id.* at 103 (Marshall, J., concurring). In light of the holding of *Purkett v. Elem*, the Court reveals a retreat from its clear stance against equal protection violations. The standard set by the Court, if followed hereafter, has the potential to foster unjust practices and results in the selection of jurors. Accordingly, in the future, the Court may well follow the advice of Justice Marshall, rather than allow a standard which tolerates noncompliance with judicial precedent.

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