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Abstract

Justice White's prophetic statement in *Batson v. Kentucky'* that ''[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today **... .''** has been realized.

KEYWORDS: Batson, ability, bilinguals

Hernandez v. New York: Applying *Batson* to Peremptory Strikes of Bilinguals—Should Language Ability be a Surrogate for Race?

TABLE OF CONTENTS

I. INTRODUCTION

Justice White's prophetic statement in *Batson v. Kentucky*[1] that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today . . . ."[2] has been realized. Since the United States Supreme Court's landmark decision in *Batson*,[3] which prohibited the state's use of peremptory challenges to exclude members of the defendant's race from the jury on account of their race, hundreds of cases have come before appellate courts in an effort to clarify the nuances of that holding and obtain answers to sev-

1. 476 U.S. 79 (1986).
2. *Id.* at 102 (White, J., concurring).
3. 476 U.S. 79.

eral important questions left open by *Batson*.[4] For example, in *Hernandez v. New York*,[5] one of the more recent *Batson* cases to come before the United States Supreme Court,[6] the Court considered how

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4. Brief for Respondent at 46, Hernandez v. New York, 111 S. Ct. 1859 (1991) (No. 89-7645) [hereinafter Brief for Respondent]; *see* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2096 (1991) (Scalia, J., dissenting) ("Judging by the number of *Batson* claims that have made their way even as far as this Court . . . it is a certainty that the amount of judges' and lawyers' time devoted to implementing today's newly discovered Law of the Land will be enormous."); *see also* Bonnie L. Mayfield, *Batson and Groups Other than Blacks: A Strict Scrutiny Analysis*, 11 AM. J. TRIAL ADVOC. 377 (1988); Steven W. Fisher, *Racial Discrimination in Jury Selection: A "Batson Update"*, N.Y. L.J., July 17, 1990, at 1, col. 1. For one of the most recent comments on the deluge of *Batson* cases, see David O. Stewart, *Whither Peremptories?*, A.B.A. J., July 1991, at 38, 42 ("[W]ith many more [*Batson* cases] working their way through the lower courts, one state-court judge calls the possibilities for *Batson* claims 'absolutely limitless' . . . . [T]he notable feature of *Batson* is just how many additional issues it keeps spawning.").

The issues on those *Batson* cases working their way through the courts have been varied. *See, e.g.*, Mayfield, *supra* at 379-80 & n.24; *see also* Connecticut v. Gonzalez, 538 A.2d 210 (Conn. 1988); New York v. Jenkins, 554 N.E.2d 47 (N.Y. 1990) (stating what factors would be considered in determining whether a prima facie case of discrimination had been made); *Ex parte* Branch, 526 So. 2d 609 (Ala. 1987); Slappy v. Florida, 503 So. 2d 350 (Fla. 3d Dist. Ct. App. 1987), *aff'd*, 522 So. 2d 18, *cert. denied*, 487 U.S. 1219 (1988) (what would constitute an acceptable race-neutral explanation sufficient to rebut the inference of purposeful discrimination); United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990); New York v. Blunt, 561 N.Y.S.2d 90 (App. Div. 1990) (whether *Batson* should be extended beyond racial discrimination to bar gender discrimination); Powers v. Ohio, 111 S. Ct. 1364 (1991); *De Gross*, 913 F.2d at 1425; *Blunt*, 561 N.Y.S.2d at 92 (whether a defendant has third party standing to object to a race based peremptory challenge if the defendant is not of the same race as the challenged juror).

Edmonson, decided by the Supreme Court on June 3, 1991, presented the issue of whether *Batson* would prohibit parties in a civil case from exercising peremptory challenges to exclude jurors on the basis of race. *Edmonson*, 111 S. Ct. at 2079. It also triggered, indirectly, the question of whether *Batson* would prohibit the defense as well as the prosecution from using peremptory challenges to exclude jurors on the basis of race. *Id.* at 2096 (Scalia, J., predicting in his dissenting opinion that the effect of *Edmonson* will be to prevent defendants from using race-based peremptory strikes, a conclusion already reached by the New York Court of Appeals in New York v. Kern, 554 N.E.2d 1235, 1236 (N.Y.), *cert. denied*, 111 S. Ct. 77 (1990)). *See generally* James O. Pearson, Annotation, *Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R.3d 14 (Supp. 1990).

5. 111 S. Ct. 1859 (1991), *aff'g* 552 N.E.2d 621 (N.Y. 1990), *aff'g* 528 N.Y.S.2d 625 (App. Div. 1988).

6. In the six month period from January to June 1991, three *Batson* cases have been heard by the Supreme Court: *Powers*, 111 S. Ct. at 1364; *Hernandez*, 111 S. Ct.

broadly the concept of race should be defined for equal protection purposes.[7] The defendant, Hernandez, argued that the court should treat proficiency in Spanish as a surrogate for race,[8] in analyzing the question of "[w]hether a prosecutor's proffered explanation that prospective Latino jurors were struck from the venire because he suspected they might not abide by official translations of Spanish language testimony constitutes an acceptable "race neutral" explanation under *Batson v. Kentucky*?"[9] A secondary issue raised by *Hernandez* is the degree of deference owed by reviewing courts to a trial court's acceptance of the prosecutor's race neutral explanation.[10]

Justice Kennedy, speaking for the majority in *Hernandez*, held that the prosecutor offered a race-neutral basis for his peremptory strikes, because the prosecutor's stated reason did not include an intent to exclude Latino or bilingual jurors.[11] Furthermore, the prosecutor's stated reason for excluding the jurors was not based on stereotypical assumptions about Latinos or bilinguals.[12] Giving great deference to the factual findings of the trial court, the majority held that the trial court did not commit clear error in finding a lack of intent to discriminate and in accepting the prosecutor's explanation.[13] However, Justice Kennedy, in an attempt to limit the Court's holding to its facts, cautioned that the Court's decision "does not imply that exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases,"[14] and that a prosecutor who strikes all potential jurors who speak a given language, in the absence of any trial related circumstances or individual responses of the jurors, may be found to be in violation of the equal protection clause under *Batson*.[15] In a strongly worded dissent, Justice Stevens, joined by Justices Blackmun and Mar-

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at 1859; and *Edmonson*, 111 S. Ct. 2077.

7. *Hernandez*, 111 S. Ct. at 1872 (Justice Kennedy stating that this decision did not "resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes.").

8. *Id.* at 1866.

9. Brief for Petitioner at i, Hernandez v. New York, 111 S. Ct. 1859 (1991) (No. 89-7645) [hereinafter Brief for Petitioner]; *see also* Brief for Respondent, *supra* note 4, at i.

10. Brief for Petitioner, *supra* note 9, at i; Brief for Respondent, *supra* note 4, at i.

11. *Hernandez*, 111 S. Ct. at 1867.

12. *Id.*

13. *Id.* at 1869-71.

14. *Id.* at 1872.

15. *Id.* at 1873.

shall, set forth three reasons for the view that the prosecutor's explanation was insufficient to rebut the prima facie case of intentional discrimination: first, the disparate impact was evidence of discriminatory intent, rendering the prosecutor's explanation a pretext; second, less drastic means than excluding the bilingual jurors were available to accommodate the prosecutor's stated concern; and third, if the prosecutor's concern was legitimate and capable of being documented, a challenge for cause would have been warranted.[16] The impact on the public was immediately addressed as newspapers around the nation carried the day after the Supreme Court's ruling in *Hernandez*. Headlines in three major newspapers read: "Justices see no bias in trial barring bilingual jurors,"[17] "Supreme Court broadens exclusion of bilingual jurors,"[18] and "High court cites basis to reject bilingual jurors."[19] In all communities the *Hernandez* ruling has great impact, because a bilingual juror with proficiency in the language of the non-English speaking witness or defendant could be excluded on the basis of the explanation that he or she might not accept the official interpretation. But in heavily bilingual communities, such as South Florida, the impact is even greater because the jury pools in bilingual communities are more apt to be heavily bilingual, thus increasing the number of prospective jurors that could be excluded. Also, the probability is greater that a trial will involve one or more individuals who do not speak English and will re-

16. *Hernandez*, 111 S. Ct. at 1877 (Stevens, J., dissenting).

17. BOSTON GLOBE, May 29, 1991, (Nat'l/Foreign), at 10 (city ed.). Although the article as a whole was very objective, the initial impact on readers was the impression that the high court had given its approval to the barring of bilingual jurors. *Id.*

18. SEATTLE TIMES, May 29, 1991, at A2 (final ed.). The article characterized the 6-3 ruling as one which will give prosecutors greater power to "keep bilingual minorities off juries in criminal trials." *Id.*

19. MIAMI HERALD, May 29, 1991, at A1, col. 4 [hereinafter *High Court Cites Basis*]. The article began, "[i]n a ruling that could make it easier to bar bilingual people from juries, the Supreme Court Tuesday upheld a prosecutor's exclusion of Hispanics on grounds that they might not accept official English translations of testimony in Spanish." *Id.* Both the headline and the text carried the message that the increasingly conservative Court had found a legal basis to back its decision to deliver yet another blow to equal protection. *Id.* The article included an excerpt from the official trial transcript of United States v. Perez, 658 F.2d 654 (9th Cir. 1981), which the *Hernandez* majority had cited as representing what can go wrong when a juror does not accept the interpreter's official translation. *High Court Cites Basis*, *supra*, at A1, col. 5. In heavily Latino South Florida, where racial and ethnic tensions already run high, this message was viewed with alarm by some, *see infra* note 20, and with approval by others, *e.g.*, *The Language of Justice*, MIAMI HERALD, May 30, 1991, at A18, col. 1 (Broward ed.) (staff editorial declaring " 'Latino' Ruling is Right.").

quire an interpreter. A ruling which makes it easier to strike those prospective jurors would greatly alter the composition of the resulting jury.[20]

This comment examines the reasoning employed in deciding the *Hernandez* issue. Section II summarizes the facts of the case and the procedural history from the trial court to the New York Appellate Division, to the New York Court of Appeals. This section also discusses the majority, concurring and dissenting opinions of the New York Court of Appeals. Section III focuses on the decision of the Supreme Court of the United States, analyzing the majority, concurring and dissenting opinions, including those inquiries and policy considerations which the court did not address. Section IV concludes that the Court failed to recognize that the prosecutor's explanation was language-based,[21] but that this view was logically necessary to arrive at the Court's ultimate decision—that the prosecutor's explanation did not constitute a per se violation of the equal protection clause.[22] Also, despite the Court's initial error, its ultimate decision was justified for two reasons. First, to have declared the explanation a per se violation would have extended the concept of race to a level which would be overly broad. Second, the decision does not bar a trial court from finding a violation of the equal protection clause on the ground that a prosecutor's explanation was pretextual.[23] Regarding the secondary issue of the degree of deference to be accorded a trial court's finding, Part III concludes that the *Hernandez* decision to accord great deference,[24] even to trial court findings made in the absence of any mandated guidelines, was a failure to recognize the potential for abuse in exercising peremptory challenges against bilingual Latinos.

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20. *See High Court Cites Basis*, *supra* note 19, at A1, col. 4. "Miami defense lawyer Fred Schwartz called the ruling 'a terrible deprivation of a defendant's civil rights. I think that's terrible, particularly in our district, where half our population is Hispanic, and most of our jury pools are one-third or one-half bilingual.' " *Id.* Furthermore, "[l]awyers for Hispanic groups said the ruling could lead to abuses. 'Prosecutors could readily rely on the reason this prosecutor gave to exclude Latinos from many, many juries around the country,' said Kenneth Kimerling, a lawyer for the Puerto Rican Legal Defense and Education Fund in New York City." *Id.*

21. Hernandez v. New York, 111 S. Ct. 1859, 1868 (1991).

22. *Id.*

23. *Id.* at 1872-73.

24. *Id.* at 1869.

II. THE HISTORY OF *HERNANDEZ V. NEW YORK*

A. *Facts of the Case*

In December, 1985, on a Brooklyn street, the defendant, Dionisio Hernandez, fired several shots at his girlfriend[25] and her mother as they left a restaurant.[26] His girlfriend suffered two serious wounds, but the shots missed the mother, hitting instead two men in a nearby restaurant. All the victims survived the shooting. The defendant was criminally charged by the State of New York with two counts of attempted murder in the second degree, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree.[27]

During jury selection, defense counsel objected to the prosecution's exercise of peremptory challenges to exclude all four potential Latino jurors.[28] The defendant dropped his claim regarding two of the jurors after it was explained that they were excluded because each of them had a brother who had been convicted of a crime. Without waiting for a ruling by the court on whether the defendant had established a prima facie case of racial discrimination regarding the other two jurors, the prosecutor volunteered his explanation. The prosecutor stated that when the potential jurors were asked if they could disregard the Spanish language testimony of witnesses and accept only the interpreter's official English translation, they looked away from the prosecutor and hesitantly said that they would try to follow the interpreter.[29] The prosecutor continued that even though the jurors' final answers were that they could accept the interpreter's official translation, he "just felt from the hesitancy in their answers and their lack of eye contact that they would not be able to do it."[30] His concern was that if they could not accept the official interpretation, they "would have an undue impact on

25. The woman was alternately referred to as defendant's fiancee, *see* Brief for Petitioner, *supra* note 9, at 7, and "young woman friend," *see* New York v. Hernandez, 552 N.E.2d 621, 622 (N.Y. 1990).

26. New York v. Hernandez, 552 N.E.2d 621, 622 (N.Y. 1990); Hernandez v. New York, 111 S. Ct. 1859, 1864 (1991).

27. *Hernandez*, 111 S. Ct. at 1864; Brief for Respondent, *supra* note 4, at 2, 3; *see also* Brief for Respondent, *supra* note 4, at 7.

28. *Hernandez*, 552 N.E.2d at 622; *Hernandez*, 111 S. Ct. at 1864.

29. *Hernandez*, 552 N.E.2d at 622; *Hernandez*, 111 S. Ct. at 1864.

30. *Hernandez*, 111 S. Ct. at 1865 n.1.

the jury."[31] He also explained that no motive existed for him to exclude Latinos from the jury, since all of the parties—defendant, victims, and witnesses—were Latino. After stating that it was just as likely that a bilingual Latino juror would sympathize with the victim as with the defendant, thereby negating a motive for excluding Latinos from the jury, the trial judge denied defense counsel's motion for a mistrial.[32] The case was tried with no Latinos on the jury, and the defendant was convicted on two counts of attempted murder and two counts of criminal possession of a weapon.[33]

B. *Procedural History*

On appeal, the New York Supreme Court, Appellate Division, ruled that the defendant had made out a prima facie case of discrimination under *Batson*, since the prosecutor had challenged the only prospective jurors with Hispanic surnames.[34] However, the court ruled that the prosecutor had satisfied his burden of coming forward with a race neutral explanation sufficient to rebut the inference of intentional discrimination, and therefore unanimously affirmed the trial court's judgment.[35] The appellate division, although given factfinding power under New York statutes,[36] appeared to have simply accepted the explanation given by the prosecutor as being reasonable in light of the record, noting that it was not necessary for the explanation to rise to the level needed to justify a challenge for cause.[37]

In a four-to-two decision, the judgment of the lower courts was

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31. *Id.* at 1865; *Hernandez*, 552 N.E.2d at 622.

32. *Hernandez*, 111 S. Ct. at 1865 n.2.

33. *Id.* at 1864.

34. New York v. Hernandez, 528 N.Y.S.2d 625, 626 (App. Div. 1988).

35. *Id.*

36. *See* Brief for Respondent, *supra* note 4, at 7-8, 41 n.20 (citing N.Y. CRIM. PROC. LAW § 470.15 (McKinney, 1983)).

37. *Hernandez*, 528 N.Y.S.2d at 626. A challenge for cause must be *supported by documentation* which indicates that a juror holds a particular bias which may prevent him or her from impartially deciding the case, *see* New York v. Hernandez, 552 N.E.2d 621, 622 (N.Y. 1990), or that the juror is unable to follow the court's instructions regarding the law and the evidence to be considered, *see* Brief for Respondent, *supra* note 4, at 19. A peremptory challenge, on the other hand, does not require supporting documentation, but can be exercised if the prosecutor *merely suspects* that the juror may be biased or unable to follow the court's instructions. *Hernandez*, 552 N.E.2d at 622.

affirmed by New York's high court.[38] The court of appeals held that the prosecutor's explanation for challenging the jurors was facially race neutral.[39] The court of appeals then deferred to the lower courts' factual findings[40] that the prosecutor's facially neutral explanation was not pretextual[41] and was therefore acceptable.[42]

C. *Analysis of the New York Court of Appeals Decision*

1. The Majority Opinion

The majority reached its conclusion by applying the three-part test set forth in *Batson v. Kentucky*[43] to determine if the prosecutor had used his peremptory challenges to discriminate against the defendant's ethnic group.[44] The first part of the test, requiring the defendant to make a prima facie showing that peremptory challenges were used to discriminate on the basis of race,[45] was readily handled, since the prosecution did not dispute that a prima facie case of discrimination had been made out by the peremptory strikes of all Latino members of the venire.[46] The second part provides that once a prima facie case of discrimination has been established, the burden shifts to the prosecution to rebut the inference of discrimination by offering a race-neutral explanation for excluding the jurors in question.[47] In the only previous New York Court of Appeals opinion on point, *New York v. Scott*,[48] the court reversed without having to reach the issue of what constitutes a neutral explanation under *Batson*, because the state had never offered an explanation to rebut the defendant's prima facie case of purposeful

38. New York v. Hernandez, 552 N.E.2d 621, 625 (N.Y. 1990).
39. *Id.* at 623.
40. *See* Brief for Respondent, *supra* note 4, at 41 n.20 (explaining that the New York Constitution and statutes grant jurisdiction to the court of appeals only over questions of law in most criminal cases, and allow the court to review facts only in death penalty cases). This was not a death penalty case and, therefore, the court of appeals was precluded from reviewing the facts as a matter of law. *Id.*
41. *Hernandez*, 552 N.E.2d at 624.
42. *Id.*
43. 476 U.S. 79, 96-98 (1986).
44. New York v. Hernandez, 552 N.E.2d 621, 623 (N.Y. 1990).
45. *Batson*, 476 U.S. at 96-97.
46. *Hernandez*, 552 N.E.2d at 623.
47. *Batson*, 476 U.S. at 97-98 (construed in New York v. Hernandez, 552 N.E.2d 621, 623 (N.Y. 1990)).
48. 516 N.E.2d 1208 (N.Y. 1987).

discrimination.[49] Thus, this issue in *Hernandez* was a case of first impression for the court.[50]

Batson offers little guidance as to what constitutes a neutral explanation, other than to state that:

> [T]he prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgement—that they would be partial to the defendant because of their shared race . . . Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'[51]

Based on this loosely-stated guideline, the conclusion sought by the defendant—that the prosecutor's explanation was not neutral and, therefore, constituted a per se violation—would necessarily require two findings by the court. The court would first have to find that the challenge made by the prosecutor was, in fact, based on Spanish language ability, and would also have to find that Spanish language ability and Latino origin are so closely related that a challenge based on Spanish language ability is tantamount to a challenge based on ethnic

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49. *Id.* at 1211; *see also Hernandez*, 552 N.E.2d at 623, 626. When *Scott* was decided *Batson* had not yet been decided. *Scott*, 516 N.E.2d at 1209. The law governing peremptory challenges for discriminatory purposes at that time was Swain v. Alabama, 380 U.S. 202 (1965). *Swain* put the burden on the defendant to overcome the presumption that the prosecutor was not peremptorily striking jurors in a discriminatory manner. *Scott*, 516 N.E.2d at 1209-10. The defendant could carry this burden only by establishing that the prosecutor had routinely excluded jurors on the basis of race over a period of time. *Id.* at 1210. Since the defendant in *Scott* was not able to establish a pattern of discrimination over several cases, but could only point to his own case, the presumption carried that the prosecutor did not use his peremptory strikes to discriminate on the basis of race. *Id.* at 1211. Thus, the prosecutor never had to respond to the defendant's objections. While *Scott* was on appeal, *Batson* was decided. *Id.* at 1210. The new judge-made law, which required a showing of discrimination solely in the defendant's case in order to make out a prima facie case, overruled *Swain's* evidentiary burden, and was applied retroactively to *Scott*. *Id.* at 1211. It was held that the defendant had indeed established a prima facie case of discrimination. *Id.* Since the trial judge was no longer in the county and it was impossible to reconstruct a record because of the length of time that had elapsed, the court of appeals simply reversed Scott's conviction without the state ever coming forward with a statement to rebut the prima facie case of discrimination. *Id.* at 1211-12.

50. *Hernandez*, 552 N.E.2d at 626.

51. *Batson*, 476 U.S. at 97-98 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

grounds.[52] The majority did not deny the language-ethnic connection, but did not accept the proposition that the challenge was made on the basis on language ability.[53] While the court acknowledged that "[t]hese jurors . . . were challenged because they indicated *their knowledge of the Spanish language* might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony,"[54] the majority ultimately elected to decide the case on the basis that "the essence of this case [is] really about a prosecutor's court-accepted explanation concerning *the ability of these jurors*—or any sworn jurors no matter their race or ethnic similarities—*to decide a case on the official evidence before them* . . . ."[55] Having made the decision that the reasons were not grounded in Spanish language ability, the connection to ethnicity or race was moot, and the majority was thus able to conclude that the reasons offered by the prosecutor constituted a race-neutral explanation under *Batson*.[56] Therefore, a per se violation of the equal protection clause did not exist.

If part two of the *Batson* test indicates that the state carried its burden in coming forward with an explanation which was facially race-neutral, then the evaluation must proceed to the third part of the test, which involves a determination by the trial court whether or not the defendant has carried the ultimate burden of proving purposeful discrimination.[57] Essentially in part three, the trial court chooses whether or not to believe the facially race-neutral explanation given by the prosecutor based on the court's determination as to whether the prosecutor's explanation was a pretext, or was real and supported by the totality of factors surrounding the voir dire.[58] The majority gave great deference to the factual finding by the trial court that the prosecutor's explanation was not pretextual and was, therefore, acceptable as a legitimate ground for peremptorily striking the two jurors.[59] Relying on both federal[60] and state sources[61] as authority for deferring to the find-

52. *Hernandez*, 552 N.E.2d at 623.
53. *Id.*
54. *Id.* at 624 (emphasis added).
55. *Id.* (emphasis added).
56. *Id.*
57. Batson v. Kentucky, 476 U.S. 79, 98 (1986).
58. *Hernandez*, 552 N.E.2d at 623.
59. *Id.* at 623-24.
60. In *Batson*, the Court reiterated that
'a finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court. Since the trial judge's findings in

ings of fact of the lower courts, the majority noted that the United States Supreme Court adheres to the view that resolution of issues hinging on credibility is best made by trial courts that are in the best position to observe the parties and judge all the circumstances; appellate courts are best served by deferring to the credibility findings of those courts.[62] The court was careful to point out, however, that its ruling should not be taken to mean that all facially race-neutral explanations will be accepted.[63] Those that are clearly pretextual will, as a matter of law, be rejected as insufficient to overcome a defendant's claim of purposeful discrimination.[64]

The majority, having applied the three-part *Batson* test, thus concluded that the trial court did not err in its finding that the prosecutor's peremptory strikes of two bilingual Latino jurors was not an equal protection violation.[65]

2. The Concurring Opinion: A Discussion of the Peremptory Challenge System in Light of *Batson*

The question presented in *Hernandez* afforded Judge Titone the opportunity to discuss his "strongly held beliefs" regarding peremptory challenges in light of *Batson*.[66] The subject of "post-*Batson* peremptory challenges"[67] has been, and will continue to be, debated in an effort to find a balance between the peremptory challenge system and the anti-discrimination policy of the equal protection clause.[68] A challenge is

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> the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.

Batson, 476 U.S. at 98 n.21 (citing Anderson v. Bessemer City, 470 U.S. 564, 573, 575-76 (1985)) (citations omitted).

61. *See supra* note 40, which explains why the majority stated: "[W]e have no basis in law . . . to conclude that those courts erred in these essentially factual determinations." *Hernandez*, 552 N.E.2d at 624.

62. *Hernandez*, 552 N.E.2d at 623-24.

63. *Id.* at 624.

64. *Id.*

65. *Id.* at 625.

66. New York v. Hernandez, 552 N.E.2d 621, 625 (N.Y. 1990) (Titone, J., concurring).

67. *Id.*

68. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 102-08 (1986) (Marshall, J., concurring) (commenting on the "pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the Equal Pro-

either for cause, requiring an explanation, or is peremptory, requiring no explanation.[69] Conceptually, it is difficult to comprehend how a peremptory challenge can be "somewhat" explained.[70] It "either has to be explained or it does not . . . . [T]o permit inquiry into the basis for a peremptory challenge would force 'the peremptory challenge [to] collapse into the challenge for cause.' "[71] On the other hand, the solution is not to return to a system which permits suspiciously discriminatory peremptory challenges to go unexplained.[72]

The concurring justice recommended that finding a balance between *Batson* and the peremptory challenge system is a task for the courts or the legislatures.[73] Since efforts by the courts to find such a balance will necessarily yield even more "layers of inquiry and complex tests," Judge Titone calls for the legislatures to review and perhaps

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tection Clause . . . . The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."); Swain v. Alabama, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting) ("Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former."); *see also* Brian J. Serr and Mark Maney, *Racism, Peremptory Challenges and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 7-18 (1988); Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 244 (1986). For very recent comments made in light of the deluge of *Batson* cases, see Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2096 (1991) (Scalia, J., dissenting) ("[T]he States and Congress may simply abolish peremptory challenges, which would cause justice to suffer in a different fashion."), and Stewart, *supra* note 4, at 38 ("Many have begun to question whether *Batson* sounded the death knell for peremptory challenges in the American courts."). *See also* Marcia Coyle, *Not the Last Word on Juries (Not the Court's Final Judgment on Peremptories)*, NAT'L L.J., June 17, 1991, at 1, col. 4, & 28, col. 4 (discussing the effect of the recent decisions in *Batson* cases, and noting that "the high court's [sic] new law in this area also affects the long-term viability of peremptory challenges themselves").

69. *Batson*, 476 U.S. at 127 (Burger, C.J., dissenting).

70. *Id.*

71. *Id.*(quoting United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984)).

72. *Id.* at 107 (Marshall, J., concurring) (noting "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds . . . .").

73. *Hernandez*, 552 N.E.2d at 625 (Titone, J., concurring). *But cf.* Stewart, *supra* note 4, at 42 (discussing the views of Judge Charles E. Moylan, Jr., of the Maryland Court of Special Appeals that "[i]nevitably, whether it takes five years or 15 years, *Batson* has to bring down the peremptory challenge as we know it," and noting that Justice Marshall had made that prediction in *Batson*).

revamp the existing peremptory system.[74]

3. The Dissenting Opinion

The dissent focused on the third stage of the *Batson* inquiry—the determination by the trial court of whether or not the prosecutor's explanation should be accepted as sufficient to rebut the defendant's claim of purposeful discrimination.[75] Whereas the majority had deferred to the lower courts' judgment, the dissent felt that in order to protect the constitutional rights of defendants, the role of the court of appeals should be to articulate the standard by which the trial court makes its finding regarding purposeful discrimination, and then determine, as a matter of law, whether the state has satisfied that standard.[76] To simply defer to the findings of the lower court without an evaluation of whether those findings were made in the context of a clearly defined standard reduces the role of the court of appeals to a " 'rubber stamping' " function.[77] Although the dissent made the language-ethnic connection and went on to classify the prosecutor's challenge as language-based,[78] it failed to accept the defendant's argument that since an ethnic-based challenge would have been a per se violation, therefore the language-based challenge must also constitute a per se violation of *Batson*.[79] The dissent did conclude, however, that because of the intimate link between Spanish language and Latino ethnicity, the prosecutor's language-based challenge had a disparate impact on Latinos, even though it appeared facially race-neutral.[80] This disparate

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74. *Hernandez*, 552 N.E.2d at 626 (Titone, J., concurring).

75. New York v. Hernandez, 552 N.E.2d 621, 626 (N.Y. 1990) (Kaye, J., dissenting).

76. *Id.* at 627.

77. *Id.* Interestingly, a report issued subsequent to the New York Court of Appeals' review of *Hernandez* strengthened the dissent's opinion of what the role of the court of appeals ought to be. *See N.Y. Courts 'Racist'*, NAT'L L.J., June 17, 1991, at 6, col. 2 (quoting from the report issued by the New York State Judicial Commission on Minorities). The seventeen members of the New York State Judicial Commission on Minorities, appointed in 1988 by New York Court of Appeals Chief Judge Sol Wachtler, found the state's court system to be "infested with racism" and granting "basement justice" to minorities. *Id.* The recently issued report stated that there are "two justice systems at work in the courts of New York State, one for whites, and a very different one for minorities and the poor." *Id.*

78. *Hernandez*, 552 N.E.2d at 628 (Kaye, J., dissenting).

79. *Id.*

80. *Id.* at 627-28.

impact rendered the prosecutor's neutral explanation "inherently suspect" and as such, the dissent would require that the trial court examine the explanation under a standard of enhanced scrutiny.[81] Under this standard, a reason which appears to be based on an intuitive feeling, rather than on facts discovered during voir dire, should be rejected by the court.[82]

The dissent, referring to the record as quoted in the majority opinion,[83] concluded that the prosecutor's explanation was based on his *intuitive feeling* that the two jurors could not follow the court's instruction to accept only the interpreter's official English translation of Spanish language testimony.[84] Since the record reflected that ultimately both jurors did satisfy the court that they would accept the official court translation, the dissent could discern *no factual basis* for the prosecutor's stated reason.[85]

In addition, under the dissent's enhanced level of scrutiny, the trial court would have found other inconsistencies in the prosecutor's explanation. For example, the prosecutor's concern that the jurors decide the case on the basis of the same evidence could have been addressed by an instruction from the court that Spanish-speaking jurors are to accept only the English interpretation, and are to discreetly bring any discrepancies to the court's attention, but not to the attention of their fellow jurors.[86] Not only would this have been permissible, but it would have more rationally furthered the prosecutor's concern, for the state's interest would be better served by having all the jurors decide the case on the basis of not only the same evidence, but on the basis of the same,

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81. *Id.*

82. *Id.*

83. The record reflects the following:

> Assistant District Attorney: Your Honor, my reason for rejecting . . . these two is *I feel* very uncertain that they would be able to listen and follow the interpreter . . . . *I didn't feel*, when I asked them whether or not they could accept the interpreter's translation of it, *I didn't feel* that they could . . . .
>
> The Court: [H]e [Assistant District Attorney] said the reason that he did in fact remove these jurors is because *even though they said they could listen to what the interpreter said* and not let their own evaluation of what the witness says be the answer that they would utilize, he said [he had] grave doubts . . . .

Id. at 622 (some emphasis appears in the opinion, other emphasis added).

84. *Hernandez*, 552 N.E.2d at 628 (Kaye, J., dissenting).

85. *Id.*

86. *Id.* at 629.

non-erroneous evidence.[87] The dissent noted that other state courts, in construing their respective state constitutions, have held that a trial court cannot simply accept at face value the explanation offered by the prosecutor, but instead has a duty to examine certain types of evidence when making its determination as to whether or not a prosecutor's facially race-neutral explanation is pretextual or insufficient.[88] Had the

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87. *Id.* at 628-29.

88. *Id.* at 627. The dissent specifically cites Florida v. Slappy, 522 So. 2d 18, 22 (Fla.), *cert. denied*, 487 U.S. 1219 (1988). Other state courts with set guidelines have also reached similar conclusions. *See, e.g., Ex parte* Branch, 526 So. 2d 609, 624 (Ala. 1987); California v. Wheeler, 583 P.2d 748, 760-62, 765 (Cal. 1978); New Jersey v. Gilmore, 511 A.2d 1150, 1166 (N.J. 1986). In *Florida v. Slappy*, the Florida Supreme Court decreed that

> the presence of one or more of these factors [from the nonexclusive list of five factors] will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext: (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror [sic] who were not challenged.

Slappy, 522 So. 2d at 22.

Had the trial court in *Hernandez* applied the *Slappy* test, two of the factors would have indicated that the prosecutor's reasons were not supported by the record or were a pretext. Factor number three has significance because it might be expected that if a Latino is asked whether he or she can disregard what is heard in Spanish and accept only the English interpretation, the response will be a slight hesitation. Hernandez v. New York, 111 S. Ct. 1859, 1867 (1991). In addition, factor number five is applicable because the record does not show whether the prosecutor questioned non-Latino members of the venire regarding their Spanish language ability. New York v. Hernandez, 552 N.E.2d 621, 628 (N.Y. 1990). It is entirely possible that one or more of those individuals was indeed bilingual and therefore no less likely than the excluded jurors to have difficulty in following the court's instruction to disregard the Spanish language testimony. Similarly, in *California v. Wheeler*, the California Supreme Court held that the prosecutor's explanation for excluding a juror would be acceptable only if he could "satisfy the court that he exercised such peremptories . . . for reasons of specific bias . . . ." California v. Wheeler, 583 P.2d 748, 765 (Cal. 1978). The trial court in *Hernandez* viewed the lack of specific bias as *favorable* to the state's position, reasoning that if the defendant, the victim and the witness were each Latino, then the jurors were just as likely to sympathize with the victims as with the defendant, and hence the prosecutor had no motive to exclude the jurors. *Hernandez*, 111 S. Ct. at 1865 & n.2. But the same set of facts, if analyzed under *Wheeler*, would have been viewed as *unfavorable* to the state's position, since the prosecutor would have no justification for peremptorily challenging a juror who has no specific bias. Brief for Petitioner, *supra* note

dissent prevailed in this case, New York would be added to the list of states which set specific guidelines for trial courts to follow when making findings of fact relating to a prosecutor's use of peremptory challenges.[89] When such guidelines are established, appellate courts have a basis upon which to rule, as a matter of law, whether or not the trial courts clearly erred in making their findings of fact.[90]

Although the dissent did not discuss whether the appellate division erred by failing to apply the proper review power—legal sufficiency and weight of the evidence[91]—this area of inquiry would have provided yet another basis for the dissent to conclude that the court of appeals should have reversed the holding of the appellate division as a matter of law.[92] Since the appellate division's opinion in *Hernandez* manifested only an application of the legal sufficiency standard of review,[93] the New York Court of Appeals would have been justified in reversing and remitting the case to the appellate division for reconsideration of the case, including a weight of the evidence review.[94]

9, at 24-25; *see also Wheeler*, 583 P.2d at 765; *Gilmore*, 511 A.2d at 1166.

89. Florida, Alabama, California and New Jersey are among those states which have set guidelines. *See supra* note 88.

90. *Hernandez*, 552 N.E.2d at 626 (Kaye, J., dissenting) ("[T]he citizens of this State [sic] would be well served by the development of an authoritative body of State [sic] law instead of being held in suspense, case-by-case, over the next decade of litigation . . . .").

91. *See* People v. Bleakley, 508 N.E.2d 672, 673 (N.Y. 1987); *infra* note 92.

92. *Bleakley*, 508 N.E.2d at 673 (court held it reversible error when appellate division "avoids its exclusive statutory authority to review the weight of the evidence in criminal cases"). Under New York law, defendants are entitled to two standards of intermediate appellate review: legal sufficiency, which requires only a determination of whether it was reasonable, based on the record, for the trier of fact to have reached the conclusion at issue, *id.* at 674-75, and weight of the evidence, which requires that where, based on the record, a different finding would not have been unreasonable, the appellate division must weigh the evidence by performing a factual analysis and must make a determination whether the trier of fact accorded the proper weight to the evidence. *Id.* at 675. However, the appellate division must give great weight to the trial court's findings of fact when those findings turned on credibility. *Id.*

93. People v. Hernandez, 528 N.Y.S.2d 625, 626 (App. Div. 1988).

94. *Bleakley*, 508 N.E.2d at 675. Had the appellate division been required to apply a weight of the evidence review, a different finding—that the prosecutor's explanation was insufficient to rebut the defendant's prima facie case of intentional discrimination—might have been reached.

III. THE SUPREME COURT'S ANALYSIS

In its brief to the Supreme Court of the United States, defense counsel contended that the real issue in *Hernandez* is whether bilingual Latinos can ever be jurors in criminal cases in which there may be testimony in Spanish.[95] But the argument can be extended to whether bilinguals of *any* ethnic group can ever be jurors in criminal cases in which there may be testimony in the non-English language of that group.[96] It is logical to conclude that the greater the ethnic population of a given community, the greater the number of persons in that community for whom English is not the language generally spoken. Therefore, the greater the ethnic population of a given community, the greater the probability that a trial involving a member of that population will require the use of an interpreter.[97]

Defense counsel argued that if prosecutors are allowed to peremp-

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95. Brief for Petitioner, *supra* note 9, at 10.

96. Hernandez v. New York, 111 S. Ct. 1859, 1872 (1991).

97. As of 1975, 42% of all Latinos claimed Spanish as the language they usually speak. Brief for Petitioner, *supra* note 9, at 10 n.2 (citing Leobardo F. Estrada, *The Extent of Spanish/English Bilingualism in the United States*, 15 AZTLAN, INT'L J. CHICANO STUD. RES. at 381 (1984)); *see also* Brief for the Mexican American Legal Defense and Educational Fund and the Commonwealth of Puerto Rico, Department of Puerto Rican Community Affairs in the United States, as Amici Curiae in Support of Petitioner, app. D at 5, Hernandez v. New York, 111 S. Ct. 1859 (1991) (No. 89-7645) [hereinafter Brief for Amici Curiae](citing Estrada, *supra*, as its source). Defense counsel construed this data to mean that, in cases involving Latinos, there is a 42% probability (nationwide) that an interpreter will be used. Brief for Petitioner, *supra* note 9, at 10 n.2.

This is not necessarily a logical conclusion. For example, statewide in Florida, Spanish is the first language of 83% of all Latinos and the language of over 93% of all Cubans. *See* Brief for Amici Curiae, *supra* app. C at 4 (source: U.S. Bureau of the Census (1980, 1983)). This, however, does not necessarily mean that these individuals do not also speak their second language, English, well enough to testify at trial without an interpreter. For example, only 16% of all Latinos living in Florida (and 20% of all Cubans) reported they did not speak or understand English, while 18% of all Latinos (20% of all Cubans) described their ability to speak or understand English as "not well." Brief for Amici Curiae, *supra* app. A at 2 (source: U.S. Bureau of the Census (1980, 1983)). Thus, it is not 83% of Latinos and 93% of Cubans that would require an interpreter, but only 34% of Latinos and 40% of Cubans living in Florida that would require an interpreter if they were to give testimony. A full 66% of all Latinos, and 60% of all Cubans, would not require an interpreter. But the 83% and 93% figures do impact on juror status, since it is logical to conclude that many, who claim Spanish as their first language, are also part of the 66% and 60% who do not require an interpreter, and are therefore bilingual and at risk of exclusion from the jury.

torily challenge bilingual members of an ethnic group because of their ability to understand the testimony expected to be given in the language of their ethnic group, then very few juries will include bilingual ethnic jurors.[98] The impact on communities with large ethnic, bilingual populations with resulting jury pools that are significantly bilingual would be to exclude a large portion of the community from the jury, based on a prosecutor's concern that those jurors might not be able to disregard what they hear firsthand from the testimony.[99] It was defense counsel's strategy to integrally link the ability to speak a foreign language, Spanish, with ethnic background, Latino, so that to challenge for the former would be the equivalent of a challenge for the latter, and thus a per se violation of the equal protection clause, as interpreted in *Batson*.[100] For the defendant to prevail on this "per se" basis, it was

98. Brief for Petitioner, *supra* note 9, at 10-11.

99. *Id.*

100. *Hernandez*, 111 S. Ct. at 1866. In its reply brief, defense counsel conceded that there is one situation in which it would be proper and race-neutral to peremptorily challenge bilingual jurors on the basis of their Spanish language ability: when the substantive issue of the trial concerns conflicting translations of out-of-court statements and the jury's determination must turn on testimony from expert witnesses in the field of Spanish language. *See* Petitioner's Reply Brief at 15-16, Hernandez v. New York, 111 S. Ct. 1859 (1991) (No. 89-7645)[hereinafter Petitioner's Reply Brief]. In such a case, a juror's expertise in the Spanish language might cause him or her to have an undue influence on the jury in persuading its members as to the "correct translation" of the disputed statement. *Id.* But where there is no issue in which Spanish language expertise plays a role, in other words, where knowledge of Spanish language and all its nuances and dialects is not the substantive issue in the case, then a bilingual juror would not have an undue influence on the jury. *Id.*

The state's argument, conceded by the defense as applicable only in the previously mentioned situation, was that just as a doctor might be peremptorily struck from serving as a juror on a medical malpractice case, or a psychiatrist might be peremptorily struck from serving as a juror on a criminal case involving an insanity defense, so might a bilingual juror be struck from serving as a juror on a case involving Spanish language interpretation, because in all cases the juror's special expertise would enable him or her to unduly influence the jury. Brief for Respondent, *supra* note 4, at 18. In support of its argument, the state cited New Jersey v. Pemberthy, 540 A.2d 227 (N.J. Super Ct. App. Div.), *cert. denied*, 546 A.2d 547 (1988). In *Pemberthy*, which involved the disputed translation of out-of-court audio-taped conversations in Spanish, all jurors who spoke Spanish were peremptorily challenged. *Id.* at 232. The court found that because the substantive issue involved Spanish language translation, the state's explanation, which *on its face intended to discriminate based on Spanish language*, was race-neutral. *Id.* at 233-34. In contrast, defense counsel distinguished *Hernandez* from *Pemberthy* by noting that *Hernandez* contained no issue which required Spanish language expertise. Petitioner's Reply Brief, *supra* at 16.

critical for the Court to conclude that the prosecutor intentionally discriminated on the basis of language, a conclusion the majority did not reach.[101] Having failed to reach that threshold conclusion, it did not then matter whether or not the Court accepted the second premise that language and ethnicity were one and the same, although there were indications during oral arguments that the Court would not have made that connection.[102] At this point, the defendant's legal argument in support of a per se *Batson* violation was doomed, for if the prosecutor's challenge was not made on the basis of language, it did not matter whether language and ethnicity were one and the same, and therefore, the prosecutor's statement, at least on its face, was neutral.

A. *The Majority Opinion*

The Court rejected the defendant's argument that the jurors had been excluded not because of uniquely individual responses, but because of responses characteristic of *all* bilingual Latinos, in other words, because of a Latino trait—Spanish language ability.[103] Defense counsel reasoned that the jurors had been asked if they could block out and disregard what they would hear in Spanish and accept only the official English from the interpreter.[104] Because of the difficulty, if not the impossibility, of performing such a task[105] *all* bilingual Latinos

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101. *Hernandez*, 111 S. Ct. at 1867. *See infra* Part II, Section B, "The Majority Opinion," for the majority's rationale in reaching its conclusion.

102. During oral argument before the Court, Justice Souter questioned whether the correlation between bilingualism and national origin was as strong as had been suggested. *See Arguments Before the Court*, 59 U.S.L.W. 3591, 3592 (U.S. Mar. 5, 1991) (Supreme Court Proceedings).

103. Hernandez v. New York, 111 S. Ct. 1859, 1867 (1991).

104. *Id.*

105. Two major reasons exist for the difficulty. The first relates to a phenomenon known as code-switching, which is the alternating use of two languages by Hispanic bilinguals. Brief for Amici Curiae, *supra* note 100, at 11. Often the switch from one language to another is not made consciously. *Id.* at 12. Recent studies show "that when asked to recall the language in which certain information was received, bilinguals have no memory of the input language. They appear to have retained only the information itself. They have not tagged this information in memory according to the language in which it was obtained." *Id.* (citing Magiste, *The Competing Language Systems of the Multilingual: A Developmental Study of Decoding and Encoding Processes*, 18 J. VERBAL LEARNING BEHAVIOR, 79, 79-89 (1979)). "There is no evidence that bilingual individuals of any type have the ability to switch off one of their language systems." *Id.* at 13 (citing M. ALBERT & L. OBLER, THE BILINGUAL BRAIN (1975); Grosjean, *The Bilingual as a Competent but Specific Speaker-Hearer*, 6 J. MULTILINGUAL MUL-

would reflexively hesitate when asked what these jurors had been asked, even though they were willing to comply.[106] Thus, defense counsel contended that the prosecutor's doubts about the jurors' ability to comply with the court's instructions would have applied to the entire class of bilingual Latinos as a function of its Spanish language ability, since the hesitancy which prompted the prosecutor's doubts was a reflex which all bilingual Latinos would have exhibited.[107] This contention is logical only if one accepts the premise that the prosecutor's question will always be phrased to place bilingual jurors in the impossible position of having to respond that they can block out and disregard what they will hear in Spanish. It is true that if the prosecutor phrases the question in a "yes or no" manner, *most* bilingual Latinos would reflexively hesitate before answering that they could, in fact, comply with the court's instruction to disregard the Spanish language testimony, while *some* would hesitate before answering that they could not comply (and would therefore be excused for cause). But there might be *some*, who would immediately, and *without hesitation*, respond that they could comply with the court's instruction. Further, one does not have to accept defense counsel's premise that the prosecutor will pose the question in a manner which is designed to evoke a hesitant response. It is entirely possible that the prosecutor could ask a prospective juror if he or she will listen to the interpreter and accept the official translation, and further ask that should a discrepancy in the translation be noted, if he or she will discreetly bring it to the court's attention so as not to make the other jurors aware of the problem until it can be resolved by the court. If the question were phrased in this way, then very few, if any, bilingual Latinos would hesitate before answering that, "yes," they could comply. Thus, the responses of the jurors are a function of the way that the question is phrased. Even if

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TICULTURAL DEV., 467, 467-77 (1985)).

The second reason relates to the difficulty all jurors face when asked to follow instructions which require them to disregard evidence they have already heard. *See, e.g.*, Bruton v. United States, 391 U.S. 123, 132-33 (1968) (quoting excerpts from Judge Learned Hand's opinions: "[Instructing the jury to disregard evidence is a] recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932); "[I]t is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition." United States v. Delli Paoli, 229 F.2d 319, 321 (2d Cir. 1956) (subsequent history omitted)).

106. *Hernandez*, 111 S. Ct. at 1867.

107. *Id.* at 1868.

phrased in the manner most likely to evoke a hesitant response, there might still be some who will not hesitate. Therefore, it is conclusory to state that all bilinguals would react to the prosecutor's question in the same way. Based on defense counsel's contention, however, the defendant sought to have the Court conclude that the prosecutor's explanation for challenging the jurors was not a legitimate, neutral explanation based on difficulty in following the court's instructions, but was instead an explanation which clearly was language/ethnicity based.[108] By electing to accept the state's argument that the prosecutor's reason was based on considerations regarding ability to follow the court's instructions, the Court did not have to reach the question of whether language ability and Latino ethnicity were to be considered as interchangeable for purposes of equal protection analysis.[109] As Justice Kennedy explained,

> A neutral explanation . . . here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.[110]

Having found nothing in the prosecutor's statement that indicated an intent to discriminate on the basis of language ability or Latino ethnicity, the majority concluded that, under step two of the *Batson* analysis, the reason offered was race neutral.[111] Thus the majority found no per se violation of the equal protection clause.[112]

For the Court to have declared the prosecutor's statement a per se violation, it would necessarily have had to expand the concept of race to include language ability, so that every challenge based on language would be an "automatic" per se equal protection violation. Such a step would have expanded the concept of race too broadly for any sort of equal protection analysis. The Court did not declare the challenge to be a per se violation because the Court's initial premise, upon which its conclusion was based, was incorrect. The Court failed to recognize that the prosecutor's speculation regarding the bilingual jurors' inability to accept only the official interpretation of Spanish language testimony

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108. *Id.*
109. *Id.* at 1866-67.
110. *Id.* at 1866.
111. *Hernandez*, 111 S. Ct. at 1866-67.
112. *Id.* at 1867.

was, in reality, a language-based reason. The Court did not acknowledge that the prosecutor simply felt uncomfortable with the jurors' Spanish language ability, despite their stated willingness to comply with the court's instructions. Having committed to this incorrect premise, the Court then had no choice but to conclude that if the explanation was not based on language, it could not be a per se violation.[113] Had the Court recognized that, in this case, the challenge was language based, and logically gone on to hold that the challenge was a per se violation, the concept of race would have been expanded too broadly for any future equal protection analysis to be meaningful. It would have meant, for example, that if a prosecutor peremptorily challenged a bilingual *non-Latino* on the basis of his or her language skills, the court would deem the challenge to be language, and hence, race-based, and would declare the challenge a per se equal protection violation, even though the juror may not have been a member of any "cognizable racial group"[114] ordinarily thought to require protection under the equal protection clause. Foreseeing this possibility, perhaps the Court intentionally did not reach the first premise—that the prosecutor's explanation was language-based—in order to avoid reaching the conclusion that the explanation was a per se violation of the equal protection clause. Although language and ethnicity are closely intertwined, it would be overinclusive to declare *every* language-based challenge to be a race-based challenge. With many school districts mandating Spanish language instruction for English-speaking students, it is not uncommon to find bilingual individuals who are not members of an ethnic minority group. Therefore, the Court's ruling was a prudent one.

The Court's decision not to declare the challenge a per se violation is not harsh because it leaves open the possibility that, in part three of the *Batson* analysis, the challenge could still be found unconstitutional on grounds of pretext or insufficiency, in light of "the particular circumstances of the trial or the individual responses of the jurors . . . ."[115]

Under *Batson*, the analysis must continue to part three even if

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113. For the Court to declare the explanation a per se violation, it would have had to conclude first, that the explanation was language-based, and second, that language was a proxy for race/ethnicity. Having failed to reach the first conclusion, it was logically impossible to reach the ultimate conclusion that the explanation was a per se violation.

114. Batson v. Kentucky, 476 U.S. 79, 96 (1986).

115. *Hernandez*, 111 S. Ct. at 1873.

part two yields a finding that no per se violation had occurred.[116] However, unlike part two, where the only consideration is the facial validity of the prosecutor's explanation, in part three of the *Batson* analysis, all factors concerning the voir dire and the proceedings are to be considered by the trial court when determining if the explanation, though facially neutral, is really a pretext for purposeful discrimination.[117] For example, the disparate impact of the prosecutor's criterion on Latinos, though not proof of discriminatory intent, may be used by the court as evidence of such intent.[118] Similarly, the trial court could consider as evidence of discriminatory intent the fact that the prosecutor chose to exclude all bilingual jurors even after a method far less drastic was suggested to him.[119] It was the opinion of the majority that since the trial court had ample opportunity to explore these and other possibilities, and since the trial court was in the best position to observe the parties and make findings regarding their credibility,[120] then on appeal, great deference should be accorded to the trial judge's finding of fact that the prosecutor's explanation was non-pretextual and to be believed.[121] Furthermore, the majority flatly rejected defense counsel's contention that, because a *Batson* claim involves a racial/ethnic classification, review of a trial court's decision in such a case should receive independent appellate review.[122] The Court rested its decision on precedent holding that, unless "exceptional circumstances" existed, the Court would defer to factual findings of state courts, and even if those findings related to a constitutional issue it would not alter the Court's position based on deference.[123] Thus, a reversal of the trial court's finding of fact on the issue of discriminatory intent would be possible only if the Supreme Court was "convinced that the trial court's determination was clearly erroneous."[124]

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116. *Id.* at 1868.

117. *Id.*

118. Washington v. Davis, 426 U.S. 229, 242 (1976).

119. *Hernandez*, 111 S. Ct. at 1868. Interestingly, the majority noted that intent to discriminate would only be imputed to the prosecutor if defense counsel had first suggested the less burdensome means. *Id.* Thus, the burden was on the defendant to make such a suggestion.

120. *See* Wainwright v. Witt, 469 U.S. 412, 428 (1985).

121. *Hernandez*, 111 S. Ct. at 1871.

122. *Id.* In support of its position, the Court reiterated the explanation it had given in *Batson*. *See supra* note 60.

123. *Hernandez*, 111 S. Ct. at 1868-69.

124. *Id.* at 1871. "A finding is 'clearly erroneous' when although there is evi-

"[W]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[125] Here, there was sufficient evidence—the fact that the prosecutor had no motive to discriminate, since the victims, the defendant and the prosecution witnesses were all Latino[126]—for the trial judge to have believed the prosecutor's explanation.[127] Thus the judge's view, albeit not the only view that could have been taken, was permissible. Being a permissible view of the evidence, the majority found no clear error in the trial court's determination that the prosecutor did not intentionally discriminate on the basis of the jurors' ethnicity.[128]

In considering the degree of deference to be accorded a trial court's judgment on appeal, the majority seemed at a loss to understand the "nature of the review petitioner would have us conduct."[129] Defendant had stated that plenary federal review is required whenever "critical constitutional values are at stake that extend beyond the rights of the immediate parties involved . . . ."[130] In essence, because the constitutional rights of all bilingual Latinos were at stake, defense counsel sought some type of heightened scrutiny from the Court.[131]

The use of the term "scrutiny" was unfortunate,[132] for if heightened (strict) scrutiny was sought, it was not applicable in this case. Normally, when a state actor, such as the prosecutor, makes a classification based on race or ethnicity, an equal protection analysis employing strict scrutiny will be performed.[133] Under such an analysis, the classification will be permitted only if the state demonstrates a compelling interest and if the scheme is narrowly tailored and necessary to achieve that compelling state interest.[134] But under *Batson*, this type of equal protection analysis is impossible because the peremptory strike

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dence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 365 (1948).

125. Anderson v. Bessemer City, 470 U.S. 564, 574 (1985).

126. *Hernandez*, 111 S. Ct. at 1872, 1865 n.2.

127. *Id.* at 1872.

128. *Id.*

129. *Id.* at 1870.

130. Brief for Petitioner, *supra* note 9, at 34.

131. *Id.* at 41-42.

132. *See infra* note 144.

133. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986).

134. *See id.* at 274; Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

based on race or ethnicity is *never* allowed to stand, *even if the state's interest is extremely compelling.*[135] It cannot be conceded on the one hand that the prosecutor used a peremptory challenge to exclude a juror based on race or ethnicity, and then be claimed on the other that the peremptory strike withstands strict scrutiny under the equal protection clause because the state had a compelling interest and the means chosen—excluding the juror—were narrowly tailored to achieve that goal.[136]

Additionally, strict scrutiny was not applicable because the prerequisite to this level of scrutiny is the establishment of invidious, intentional discrimination, in other words, the establishment that the classification was made with the intent to discriminate based on race.[137] But in *Batson* type cases, this prerequisite cannot be satisfied prior to the inquiry because the establishment of intentional discrimination is precisely the issue to be decided at the third level of inquiry.[138] Furthermore, under *Batson*, in order to progress to the third level of inquiry—whether the stated reason for the peremptory challenge was a pretext for intentional discrimination—it must have already been established at the second level that, at least facially, the defendant's prima facie case of invidious discrimination had been rebutted.[139] Thus, the most that could exist at the third stage of inquiry was a "suspicion" of intentional discrimination. A mere suspicion of intentional discrimination is insufficient to satisfy the prerequisite establishment of intentional discrimination which is necessary to mandate an inquiry on appeal under strict scrutiny.[140]

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135. *Batson*, 476 U.S. at 97-99.

136. *Id.*

137. *Washington*, 426 U.S. at 242.

138. *Batson*, 476 U.S. at 98.

139. *Id.* at 97. The inquiry would never proceed to the third level if a per se violation of the equal protection clause had been found at the second level.

140. *Washington*, 426 U.S. at 242. The term "scrutiny," as used in constitutional law, is often associated with an equal protection means-ends analysis. If state action is analyzed under strict [a form of heightened] scrutiny, the action will be held violative of the equal protection clause, and therefore unconstitutional, unless the means chosen by the state are *narrowly tailored* to achieve a *compelling state interest* or objective. *See Wygant*, 476 U.S. at 274; *Cleburne*, 473 U.S. at 440.

It appears that despite the use of the phrase "heightened [strict] scrutiny" in Petitioner's Brief, Brief for Petitioner, *supra* note 9, at 42, defense counsel was not referring to a means-ends analysis, *i.e.*, level of scrutiny, at all, but was referring to the *level of factual analysis* that he thought should be employed by the appellate courts. *Id.* at 42-46. In order to determine if the trial court's finding of no intentional discrimination

However, if what the defendant sought was independent, de novo factual review, that type of review is not only reasonable when constitutional issues are involved, but is also reconcilable with the majority's view regarding deference to the trial court's factual findings that turn on credibility.[141] If the appellate court determined, after weighing the facts and taking into consideration the deference to be accorded the

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was clearly erroneous, an appellate court's review of how that finding was made can range from a de novo factual analysis all the way to extreme deference. *Id.* at 29. When performing a de novo factual analysis to review for clear error, the appellate court will analyze the method by which the trial court arrived at its decision and ascertain that the facts in the record are sufficient to support that finding. *Id.* at 32. But if, after weighing the evidence, the appellate court disagrees with the finding of the trial court, it will overturn the trial court's finding. *Id.* Under a less stringent level of factual analysis, if the appellate court is satisfied with the method used and the sufficiency of the record, then even if it disagrees with the trial court's factual finding, it will conclude that the trial court reasonably could have found as it did and, therefore, that the finding was not clearly erroneous. *See* People v. Bleakley, 508 N.E.2d 672, 674-75 (N.Y. 1987). However, at the other extreme, the appellate court will not make any inquiry into the method used by the trial court, but will instead simply defer to the trial court's finding, provided there is some shred of support in the record. Brief for Petitioner, *supra* note 9, at 36.

In the present case, defense counsel sought to have the lower court's finding of non-discrimination reviewed under a stringent, de novo factual analysis, whereby the trial court's finding of non-discrimination would be held clearly erroneous unless firmly supported by the record both as to weight and sufficiency. *Id.* at 36-39. In fact, though, the trial record was incomplete, containing neither a voir dire record nor specific factual findings, *see id.* at 47, and thus, could not have supported the trial court's finding under a de novo review for clear error. Therefore, the appellate court would have had to discern clear error.

141. In satisfying both the defendant's request for de novo factual review and the majority's insistence on deference to the trial court, the appellate court would first examine the record to ascertain that the evidence was sufficient to support the trial court's finding. This would be accomplished if a determination was made that it was reasonable, based on the record, for the trial court judge to have made the finding at issue. *See Bleakley*, 508 N.E.2d at 674-75. But then the appellate court would be required to go one step further in performing a weight of the evidence review. *See supra* note 92.

In performing this appellate review, the court would determine if a different factual finding would not have been unreasonable, and then, by a de novo factual analysis, would weigh the facts to determine whether the trial court judge had correctly weighed the facts. *Bleakley*, 508 N.E.2d at 675. However, in weighing the facts, the appellate court must assign great weight to the trial court's findings if those findings turned on credibility. *Id.*

Thus, deference would be accorded those findings, but not to the exclusion of de novo factual review.

trial court, that the finding could not be supported by the weight of the evidence—even after giving great weight to the trial court—then the appellate court must conclude that the trial court's finding was clearly erroneous. Thus, the defendant's request for independent plenary review is entirely consistent with deference to a trial court's findings of fact.

Of course, had the Court formulated specific guidelines by which trial courts are to make findings of intentional discrimination in *Batson* type cases, then the appellate review might be limited to a determination, as a matter of law, whether the trial court had reached its finding by applying those guidelines.

B. *The Concurring Opinion*

The concurring justices viewed the defendant's case as an argument for establishing intentional discrimination on the basis of disparate impact,[142] clearly an argument which the Court has never accepted.[143] In the view of the concurrence, all that *Batson* requires to dispel the defendant's prima facie case of purposeful discrimination is an explanation other than race.[144] Since the prosecutor's explanation did not make any mention of race, it succeeded in rebutting any inference of purposeful discrimination, and thus the peremptory strike was not a violation of the equal protection clause.[145]

In reaching this conclusion, the concurring justices interpreted *Batson* in a purist light. According to the concurrence, the peremptory strikes "may have acted like strikes based on race, but they were not based on race. No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race."[146] Under this reasoning, a prosecutor can avoid a per se equal protection violation if he or she is careful to word the explanation in a manner which does not mention race.[147] An analysis of the purist approach

142. Hernandez v. New York, 111 S. Ct. 1859, 1873 (1991) (O'Connor, J., concurring).

143. Washington v. Davis, 426 U.S. 229, 239-40 (1976); *see also* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977); Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 198 (1973).

144. *Hernandez*, 111 S. Ct. at 1873 (O'Connor, J., concurring).

145. *Id.* at 1874.

146. *Id.*

147. *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring)

leads one to conclude that it is overly simplistic and invites deception by encouraging prosecutors to play the game so that the "race words" are never mentioned. "[A]ny prosecutor's office could develop a list of 10 or 15 standard reasons for striking a juror; the juror was 'inattentive' or dressed poorly and thus 'did not seem to respect the system of justice.' "[148] Surely, when *Batson* was decided the majority could not have intended that the requirement of a facially race-neutral explanation to rebut a prima facie case of purposeful discrimination be fulfilled by the meaningless recitation of empty words.

The concurrence did state, however, that the trial court retained the right to disbelieve the prosecutor if the court considered disproportionate effect as evidence of intentional discrimination.[149] But if the trial court chooses to believe the explanation, "and that finding is not clearly erroneous, that is the end of the matter."[150] Thus, even though the trial court's findings of fact might have been arbitrary, made without benefit of any clear set of guidelines, the concurrence, like the majority, would have those findings of fact reviewed on appeal for clear error under a standard of extreme deference.[151]

C. *The Dissenting Opinion*

Justice Stevens wrote the dissenting opinion in which Justice Marshall joined, and Justice Blackmun joined in part. The thrust of their opinion centered on the insufficiency of the prosecutor's explanation to rebut the prima facie case of invidious discrimination.[152] In the dissent's view, the prima facie case made by the defendant could not have been established without a preliminary showing of invidious, purposeful intent to discriminate.[153] Once this is shown, the burden then shifts to the prosecutor to offer an explanation *sufficient to rebut* that prima facie case, and does not mean that *any* facially neutral explanation

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("Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.").

148. Brief for Petitioner, *supra* note 9, at 42 (quoting David O. Stewart, *Court Rules Against Jury Selection Based on Race*, A.B.A. J., July 1986, at 68, 70.

149. *Hernandez*, 111 S. Ct. at 1874-75 (O'Connor, J., concurring).

150. *Id.* at 1875.

151. *Id.*

152. Hernandez v. New York, 111 S. Ct. 1859, 1875-77 (1991) (Stevens, J., dissenting).

153. *Id.* at 1875-76; *see supra* note 49.

which is not pretextual is sufficient.[154] It is entirely possible that an explanation which is facially race-neutral and not pretextual could simply be *insufficient* to dispel the defendant's prima facie case of invidious discrimination.[155] In that event, the defendant would have carried his burden of proving that the state peremptorily challenged a juror in a manner which violated the equal protection clause.[156] The dissent felt, therefore, that the majority had erred "in focusing the entire inquiry on the subjective state of mind of the prosecutor" rather than on objective evidence,[157] since discriminatory purpose may exist even if a prosecutor believes his motive to be pure.[158]

In this case, the justification given by the prosecutor, though facially race-neutral, would nonetheless result in the disproportionate exclusion of bilingual Latinos from the jury.[159] Since such disparate impact is evidence of discriminatory purpose,[160] it was the opinion of the dissent that an explanation which leads to evidence of discriminatory purpose would be insufficient to rebut the prima facie case.[161] The dissent would reject the prosecutor's explanation, calling it "a proxy for a discriminatory practice."[162]

The prosecutor's explanation could also be rejected based on precedent indicating that the state cannot use discriminatory means to accommodate its concern when a nondiscriminatory alternative exists.[163]

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154. *Id.* at 1876.

155. *Id.*; *see infra* text accompanying notes 159-164, 188-190.

156. *Hernandez*, 111 S. Ct. at 1876 (Stevens, J., dissenting).

157. *Id.*

158. It is important to note that the defendant and his counsel did not accuse the prosecutor of being racially motivated or intending to exclude Latinos because of their national origin. Their only contention was that *he intended to exclude bilinguals*. The prosecutor believed his motive to be pure, race-neutral and based on the case at bar. Defense counsel never doubted the prosecutor's good faith, but merely made the point that an intent to discriminate on the basis of language, even though seemingly neutral, is tantamount to an intent to discriminate on the basis of ethnic origin. Brief for Petitioner, *supra* note 9, at 20-22.

159. *Hernandez*, 111 S. Ct. at 1877 (Stevens, J., dissenting).

160. *Washington*, 426 U.S. at 242.

161. *Hernandez*, 111 S. Ct. at 1876 (Stevens, J., dissenting).

162. *Id.* at 1877.

163. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the . . . efficacy of alternative remedies . . . .") (*construed in* Richmond v. J. A. Croson Co., 488 U.S. 469, 507 (1989), to stand for the proposition that the state cannot make distinctions on the basis of race if there are nondiscriminatory alternatives which are just as effective).

In the present case, if the prosecutor was concerned that the bilingual jurors might hear different evidence than the other jurors and might then have an undue influence upon the other jurors, the problem might easily have been resolved by an instruction to the jury that the official translation, and not the firsthand testimony, shall be evidence.[164] It is interesting that in support of this proposition, the dissent cited *United States v. Perez*,[165] the same case cited by the majority as an "[illustration of] the sort of problems that may arise where a juror fails to accept the official translation of foreign-language testimony."[166] In *Perez*, the juror interrupted the proceedings to dispute the interpreter's translation of a word.[167] The judge advised the juror it was improper for her to question the interpreter directly in the presence of the other jurors, declaring that if she had a question she must phrase it privately to the judge. When the juror persisted, the interpreter responded by defending her qualifications as an interpreter. To this, the juror responded, "it's an idiom,"[168] which was incorrectly recorded by the court reporter as "you're an idiot."[169] It was only after this public interchange that the judge instructed the jurors, apparently for the first time, that they were to rely only upon the official English translation, and that should they have questions they were to bring those questions discreetly to the attention of the judge.[170] The judge then had the interpreter question the witness as to the juror's doubts, and it was established that the interpreter's translation had, after all, been what the witness intended, and not what the juror claimed.[171] But based on the juror's behavior, the judge concluded the juror was angry and opinionated, and the

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The majority opinion indicated that had the defendant suggested such an alternative to the prosecutor, and the prosecutor then refused the alternative, the trial court could have considered the refusal to be evidence of intent to discriminate. *Hernandez*, 111 S. Ct. at 1868. The dissent, however, makes no such requirement that the prosecutor first be apprised by the defendant of such an alternative. *Id.* at 1876 (Stevens, J., dissenting). The fact that the alternative exists and is one of which the prosecutor should be aware, without the urging of the defendant, is sufficient. *Id.*

164. *Hernandez*, 111 S. Ct. at 1877 (Stevens, J., dissenting).

165. 658 F.2d 654 (9th Cir. 1981).

166. *Hernandez*, 111 S. Ct. at 1867 n.3. Excerpts from *Perez* appeared on the front page of The Miami Herald on May 29, 1991, to emphasize the basis for the Court's ruling in *Hernandez*. *See supra* note 19.

167. *Perez*, 658 F.2d at 662.

168. *Id.* at 663.

169. *Id.* at 662, 663.

170. *Id.* at 662-63.

171. *Id.* at 663.

judge feared that the juror's attitude might infect the jury.[172] As a result, the judge dismissed her from the jury.[173]

By citing *Perez* as support for their proposal, the dissent in *Hernandez* apparently did not view *Perez* as standing for the proposition which the majority had suggested.[174] The problem in *Perez* was not the juror's failure or inability to accept the translation, but rather the failure of the court to instruct the jury *before* the Spanish language testimony had begun.[175] As the dissent suggests, proper instructions given to the jury prior to the commencement of any Spanish language testimony would avoid any problem relating to how a juror should resolve a translation discrepancy, and the level of confidentiality he or she must maintain with respect to the other jurors.[176]

Not only would this procedure be a non-discriminatory alternative to the practice of excluding all bilingual Latinos, but logic dictates that it would also further the state's interest in promoting fair trials.[177] As the dissenting opinion in the New York Court of Appeals noted, "[s]urely, the majority does not intend to suggest . . . that if the translator is rendering a witness' testimony inaccurately into English, the State has a valid interest in permitting the errors to go unnoticed."[178] To the contrary, the state's interest should be to ensure that jurors do not make decisions based on erroneous evidence, a proposition exemplified in *Santana v. New York City Transit Authority*.[179] *Santana* illustrates that justice is best served when bilinguals are seated as jurors in cases involving Spanish language testimony and are permitted to discreetly question the interpreter through the judge.[180] In this case, a juror who spoke Spanish believed that the plaintiff's testimony had not

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172. *Perez*, 658 F.2d at 663.

173. *Id.* During the pre-dismissal meeting, the juror admitted to the judge that she had always had a problem "keeping [her] mouth shut." *Id.*

174. *Cf. Hernandez*, 111 S. Ct. at 1877 (Stevens, J., dissenting) (citing *Perez* as a *good example* of non-discriminatory means which the prosecutor could have taken) *with Hernandez*, 111 S. Ct. at 1867 n.3 (citing *Perez* as an illustration of the *harm that can result* when a bilingual juror has a problem with the official interpretation.)

175. *Perez*, 658 F.2d at 662-63. In addition, the difficulties that arose were attributable to the individual juror's self-admitted emotional problem. *Id.* at 663.

176. *Hernandez*, 111 S. Ct. at 1877 (Stevens, J., dissenting).

177. *See* New York v. Hernandez, 552 N.E.2d 621, 628-29 (N.Y. 1990) (Kaye, J., dissenting).

178. *Id.*

179. 505 N.Y.S.2d 775 (Sup. Ct. 1986).

180. *Id.* at 777-78.

been correctly translated by the interpreter.[181] He passed a note to the court officer requesting permission to confer with the judge during a recess. The judge first determined that since no other jurors had been apprised of the matter, the juror would not have an undue influence on the jury.[182] The court then instructed counsel to re-call the witness to the stand, and upon further questioning, it was established that the juror, and not the interpreter, had been correct.[183] Thus, the jurors had the benefit of deliberating and making their determination on the basis of correct evidence.[184]

Ideally, such a discrepancy between jurors and interpreters should not exist, for "[i]f the interpreters employed by our criminal courts are as accurate as they should be, given that the defendant's liberty may depend upon the translator's words, then there should be no disagreement between the translator and jurors fluent in Spanish."[185] The fact that this proposition may be only an ideal was recently pointed out by Florida's Racial and Ethnic Bias Study Commission, appointed in 1989 by the Florida Supreme Court.[186] The commission's findings, which were scheduled to be formally disclosed in December 1991, in a report to the Florida Supreme Court, indicate that "trained and certified interpreters are rare, and many judicial circuits have no standards . . . . It's often left to individual judges and court administrators to find capable translators."[187] Given the lack of qualified interpreters in Florida, it would not serve the state's interest in promoting fair trials to exclude bilingual jurors, nor would it serve the state's interest to seat bilingual jurors with a proviso that they totally disregard the witness' testimony in Spanish in favor of the interpreter's translation. Particularly where there is concern over the quality of the interpreters, it is essential to seat bilingual jurors, who will listen to both the witness' testimony and the interpreter's translation, so that discrepancies can be brought to the court's attention in an effort to serve justice by having the jury decide

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181. *Id.* at 777.

182. *Id.* at 778.

183. *Id.*

184. *Id.* at 779 ("Inevitably, due to the spontanaeity [sic] of an interpreter's translation or the lack of an exact translation of a word, it is possible that the interpreter may not choose the best word possible, thus causing a deviation in the intended communication to the jury.").

185. *Hernandez*, 552 N.E.2d at 628 (Kaye, J., dissenting).

186. *See Study: Race Bias Pervades Courts*, MIAMI HERALD, Nov. 14, 1991, at A1, col. 5.

187. *Id.* at A25, col. 1.

on the basis of non-erroneous evidence.

The dissent in *Hernandez* also noted a third reason why the prosecutor's statement was insufficient to rebut the prima facie case: if the prosecutor's concern regarding the jurors' ability to follow the court's instructions was valid, a challenge for cause could have been made.[188] The dissent reasoned that since the prosecutor did not make such a challenge, he must have been unable to document his concern.[189] The dissent further reasoned that if the prosecutor's concern could not be documented by the record, it amounted to a "frivolous or illegitimate [justification which] should not suffice to overcome the prima facie case."[190]

The dissent conceded that each reason, considered separately, might not be grounds for rejecting the prosecutor's facially race-neutral explanation as being insufficient.[191] The concession, however, was not due to the lack of strength or validity of each reason, but rather to the dissent's acknowledgement that the positions advanced by its opinion were not acceptable to the majority. For example, on the issue of disparate impact on Latinos, the dissent focused on the objective result, the disparate impact, to conclude that the prosecutor's facially race-neutral explanation was simply "a proxy for a discriminatory practice,"[192] therefore, insufficient to rebut the prima facie case of purposeful discrimination.[193] Although a valid argument, the dissent recognized that the majority would not accept its reasoning, based on the Court's long-standing position that *disparate impact alone is insufficient* to establish a violation of the equal protection clause.[194] Thus, the dissent's first reason, by itself, would not be grounds for rejecting the state's explanation.

Similarly, the dissent conceded its second argument, regarding nondiscriminatory alternatives, because the Court has continued to hold that the availability of nondiscriminatory means is *but one factor* to be taken into account when determining whether or not the state intended to discriminate.[195] The third argument, that if the prosecutor's reason was valid it could have supported a challenge for cause, is gain-

188. *Hernandez*, 111 S. Ct. at 1877 (Stevens, J., dissenting).
189. *Id.*
190. *Id.* at 1876-77.
191. *Id.* at 1877.
192. *Id.*
193. *Id.*
194. Washington v. Davis, 426 U.S. 229, 239 (1976).
195. *See supra* note 163.

ing strength in the movement to do away with peremptory challenges in the wake of *Batson*.[196] It is a powerful argument, and perhaps in the final analysis, it will be the solution to the "*Batson* dilemma," for despite the oft-quoted phrase from *Batson* that "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause,"[197] most judges and lawyers are still struggling to understand *Batson*'s requirement of a quasi explanation. But for now, as long as the peremptory system still exists, the dissent's third reason cannot prevail, because it directly contradicts the lighter requirements set forth in *Batson* to examine the prosecutor's statement.[198]

Although each of the reasons advanced by the dissent might not, on its own, be grounds for rejecting the prosecutor's explanation, the dissent concluded that the combined weight of the reasons supports a rejection as a matter of law.[199]

IV. CONCLUSION

Using the *Batson* analysis, there are two ways in which a peremptory challenge could be declared a violation of the equal protection clause: either the challenge is a per se violation, *i.e.*, *on its face* the prosecutor's explanation is that he or she *intended to discriminate* based on the juror's race or national origin, or it is a violation because it fails, *by way of pretext or insufficiency*, to overcome a prima facie case of purposeful discrimination.[200] The ruling on the per se issue was a thoughtful, sensitive one, which attempted to find a middle ground between equating race with language on one extreme for purposes of equal protection analysis, and on the other extreme, signalling that the Court would condone discrimination based on language.

However, its decision on whether the trial court erred in determining that the explanation was not pretextual, nor insufficient, and was thus not a violation of the equal protection clause under part three of the *Batson* analysis, was questionable. This decision involved a ruling on the other issue in the case—the amount of deference to be accorded the trial court in deciding whether or not it erred in accepting the prosecutor's explanation. The Court's ruling on this issue was not as astute

196. *See supra* notes 68, 72, and 73.
197. Batson v. Kentucky, 476 U.S. 79, 97 (1986).
198. *See supra* text accompanying note 197.
199. *Hernandez*, 111 S. Ct. at 1877.
200. Batson v. Kentucky, 476 U.S. 79, 97-98 (1986).

as its per se ruling. When the Court ruled that a trial court's finding of fact on the ultimate question of discriminatory intent should be accorded great deference on appeal,[201] it failed to recognize the potential for abuse in exercising peremptory challenges against bilingual Latinos. Had the Court decided this case on the basis of whether or not the trial court took into account all relevant factors, it might have arrived at the conclusion reached by the dissent.

However, the import of this decision is for future cases. Until the United States Supreme Court sets guidelines similar to those set by some states,[202] cases tried in federal district courts and in state courts not having such guidelines will be reviewed on appeal under the clearly erroneous standard, but with very little analysis regarding the trial court's finding of fact as to discrimination in the use of peremptory challenges. The effect will be rulings which are inconsistent because each was a "rubber stamp" given in deference to a trial court which was not obliged to make its findings under any consistent set of guidelines. Worse, by simply deferring, rather than analyzing for clear error according to an authoritative body of law, the Supreme Court or state appellate courts could be setting legal precedent which has no basis in fact or in law.

Fortunately, cases arising in Florida are governed by *Florida v. Slappy*,[203] which gives direction to the trial court and gives the appellate courts a basis upon which to review for clear error. In addition, Justice Kennedy's warning that, in some cases, language proficiency will be treated as a surrogate for race,[204] should serve as notice that the Court by no means gave blanket approval to peremptory challenges of bilinguals in cases involving testimony given through an interpreter.[205]

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201. Hernandez v. New York, 111 S. Ct. 1859, 1869 (1991).

202. *See, e.g., Ex parte* Branch, 526 So. 2d 609, 624 (Ala. 1987); Florida v. Slappy, 522 So. 2d 18, 22 (Fla.), *cert. denied*, 487 U.S. 1219 (1988).

203. 522 So. 2d at 22.

204. *Hernandez*, 111 S. Ct. at 1872-73; *see infra* note 205.

205. The Court went to great lengths to emphasize that its holding was limited to the facts of the *Hernandez* case, stating explicitly that each case must be reviewed on its own merits based on all the circumstances of that case. *Hernandez*, 111 S. Ct. at 1873. Justice Kennedy was referring to this case-by-case method when he stated,

> [o]ur decision today does not imply that exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases . . . . It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.

Id. at 1872.

Thus, there are sufficient safeguards in Florida, at least, so that the abuses feared by defense attorneys and Latino groups in the wake of the *Hernandez* decision, will not come to pass.

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Thus, the ultimate message of the Court was that race would not be expanded to include language proficiency as a general rule, but that if the circumstances of a particular case indicated, *for that case*, that language should be treated as a surrogate for race, then the exclusion of a bilingual juror for a language-based reason would be unconstitutional as a violation of the equal protection clause.