IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS, Plaintiff-Appellee, vs. JONATHAN D. CARR, Defendant-Appellant.	)	Case No. 03-90198-S

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF DEFENDANT-APPELLANT

Appeal from the District Court of Sedgwick County, Kansas,
Honorable Paul Clark, Judge,
District Court Case No. 00 CR 2979

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Oral Argument: May 24, 2021

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INTEREST OF *AMICUS CURIAE*

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that deny Black people their basic civil and human rights. LDF has long challenged the death penalty's unconstitutional imposition, including its discriminatory application against Black people. *E.g.*, *Furman v. Georgia*, 408 U.S. 238 (1972); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Buck v. Davis*, 137 S. Ct. 759 (2017).

LDF therefore has a strong interest in this case and the questions it raises about the infringement of fundamental rights protected by Sections 1 and 5 of the Kansas Bill of Rights in relation to the State's death-sentencing scheme.

INTRODUCTION

LDF, as *amicus curiae*, joins Defendant-Appellant in respectfully urging this Court to uphold the Kansas Constitution's right to life by ruling that the death penalty is unconstitutional under Section 1 of the Kansas Bill of Rights.

In addition, LDF respectfully urges the Court to hold that the practice of "death qualification" in modern Kansas capital trials—whereby eligible jurors are struck for cause if their views toward the death penalty are deemed to substantially impair them from ultimately voting to impose a death sentence—unjustifiably infringes on the fundamental jury right protected by Section 5. Death qualification also unjustifiably excludes Black jurors, who disproportionately oppose the death penalty, and its modern application cannot be reconciled with the common-law jury principles recognized by Section 5.

Under Kansas law, both questions are properly before this Court. Kan. Stat. Ann. § 21-6619. For the reasons set forth herein, and because "the ends of justice would be served thereby," the Court should rule in this appeal that death qualification violates Section 5. *Id.*

ARGUMENT

Section 5 of the Kansas Bill of Rights guarantees Kansans that "[t]he right of trial by jury shall be inviolate." The rights protected by Section 5's "uncompromising" language are independent from, and broader than, the jury rights protected by the Sixth and Fourteenth Amendments to the United States Constitution.

Under common-law principles recognized as of the Wyandotte Constitution's adoption in 1859, which Section 5 incorporated, there was only one accepted rationale for excluding prospective jurors for their views about capital punishment: if such prospective jurors were unable to follow the law and evidence in determining culpability. Specifically, courts could properly exclude jurors who, because a guilty verdict would automatically condemn the defendant to death, were incapable of finding a capital defendant guilty—no matter what the law required or the evidence showed beyond a reasonable doubt. Prospective jurors could not be excluded for cause based on opposition to the death penalty unless they categorically refused to convict the defendant of the underlying offense.

Kansas's current "death qualification" system goes well beyond this narrow common-law justification for excluding jurors in capital cases, and thereby violates the right to trial by jury in Section 5. The bifurcated process used in Kansas capital trials today divides the determination of culpability and sentencing into separate phases; any sentence of death must be based on an individualized assessment and weighing of enumerated

aggravating circumstances against any relevant mitigating circumstances. But "death qualification" excludes any jurors whose conscientious objections to capital punishment would substantially impair them from voting for death in the bifurcated trial's sentencing phase—even if those jurors would follow the law and evidence and vote to convict the defendant, if warranted, in the earlier culpability phase.

As applied to modern capital trials, death qualification cannot be justified under any principle recognized in the common law at the time of Section 5's adoption. Thus, its use unjustifiably infringes on the fundamental rights connected to jury service. And, as an integral component of the death-sentencing regime, death qualification undermines the right to life, which the Kansas Constitution seeks to protect. It also leads to the disproportionate exclusion and underrepresentation of eligible Black jurors, who disproportionately oppose the death penalty, thus undermining yet another component of the jury rights protected as "inviolate" by Section 5. For these reasons, death qualification violates the Kansas Constitution.

I. Section 5's Right to a Jury Trial is a Unique, Fundamental Interest Expressly Protected by the Kansas Constitution.

Section 5 of the Kansas Constitution's Bill of Rights states: "The right of trial by jury shall be inviolate." Kan. Const. B. of Rts. § 5. These words "expressed the people's choice to elevate the common-law right to jury trial to enumerated constitutional status," protecting it from subsequent infringement or abrogation. *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1136, 442 P.3d 509, 516 (2019). The Constitution's framers described Section 5's purpose as securing a "very valuable right" for the people of Kansas by "retaining the

right of trial by jury, intact," in the form they knew and valued it. *See id.* at 1136 (quoting Wyandotte Const. Convention 462-63 (July 25, 1859)).

This Court has described the language the framers chose for Section 5 as "uncompromising." *Id.* The word "inviolate," as this Court explained in *Hilburn*, carries the meaning of "not 'disturbed or limited'"; "[n]ot violated; unimpaired; unbroken; unprofaned"; "free from change or blemish, pure, unbroken"; and "deserving of highest protection, free from assault, trespass, untouched, intact." *Id.* (internal citation omitted). Section 5 therefore imposes "a 'clear, precise, and definite limitation[]'" on governmental power to diminish or infringe a right long seen as fundamental to liberty. *Id.*

This Court recently affirmed that the Section 5 jury right is a fundamental interest under the Kansas Constitution. *Id.* at 1132, 513. Thus, any statute or framework that infringes on the Section 5 right is not entitled to a presumption of constitutionality. *Id.* This Court's review in such cases is at its most searching. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 663, 440 P.3d 461, 493 (2019).

II. Section 5's Jury Right Is Distinct from—and Broader than—the Rights Protected by the Sixth and Fourteenth Amendments.

The Kansas Constitution, through its Bill of Rights, "affords separate, adequate, and greater rights than the federal Constitution." *Id.* at 622 (quoting *Farley v. Engelken*, 241 Kan. 663, 671, 740 P.2d 1058, 1063 (1987)). This Court has recently explained that unequivocal constitutional language that goes beyond the text of the federal Constitution is indicative of independent and potentially greater protection under the Kansas Constitution. *Hodes*, 309 Kan. at 623–27 (noting significant textual differences in a side-

by-side comparison of Section 1 of the Kansas Constitution's Bill of Rights and the Fifth and Fourteenth Amendments to the U.S. Constitution).

Section 5 has no direct counterpart in the federal Constitution. Its guarantee of an "inviolate" jury right does not appear in the Sixth Amendment or any other federal source. And no provision in the federal Constitution performs the same function as Section 5. These departures are significant—particularly when contrasted with the Kansas Bill of Right's other jury-trial protection, Section 10. The language and function of that provision follows the Sixth Amendment closely. *Compare* Kan. Const. B. of Rts. § 10 ("a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed") *with* U.S. Const. amend. VI ("a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"). By contrast, in Section 5, the framers adopted a right that is independent from, and broader than, the federal jury-trial rights protected by the Sixth and Fourteenth Amendments to the U.S. Constitution. A challenge under Section 5 should therefore be reviewed under Kansas constitutional principles. *See Hodes*, 309 Kan. at 638.

In undertaking this review, the Kansas Supreme Court has the authority to interpret its constitution independent of the manner in which corresponding provisions of the U.S. Constitution have been interpreted by federal courts. As this Court has held, the Kansas Constitution's Bill of Rights ultimately protects the rights of Kansans more robustly than would the federal Constitution. *Id.* at 621.

III. The Use of Death Qualification in Modern, Bifurcated Capital Trials with Non-Mandatory Death Sentences Violates Section 5.

A. Death Qualification's Common-Law Rationale Applied Only to a Form of Capital Trial No Longer In Use.

Section 5 of the Kansas Constitution's Bill of Rights gives constitutional force to the jury right as it was understood by the delegates to the Wyandotte Convention and the people of Kansas who ratified their work. Its "uncompromising" language preserves the "ample and complete" constellation of jury rights Kansans of 1859 knew and valued against any subsequent infringement or abrogation. *Hilburn*, 309 Kan. at 1136. Evaluating that right's scope thus requires analysis of the common-law principles surrounding the jury right as conceived by the Kansan framers and ratifiers of 1859.

The use of "death qualification" in modern, bifurcated capital trials with separate, individualized sentencing proceedings finds no support in common-law jury principles. Service on a jury, then as now, was an essential duty and a right of citizenship. In the early American republic, jury service was "a valued civil and political right" that held "parallel importance to the other democratic rights of voting and serving as an elected official." Andrew Guthrie Ferguson, *The Jury As Constitutional Identity*, 47 U.C. Davis L. Rev. 1105, 1116–19 (2014); *see Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019) ("Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."). Accordingly, "citizens called for jury duty have a constitutional right to serve if they are otherwise qualified." *State v. Peterson*, 427 P.3d 1015 (Kan. Ct. App. 2018) (unpublished). Excluding eligible jurors from jury service is a significant abrogation on a fundamental right that must be justified by a compelling state interest and be narrowly tailored to serve that interest. *Hodes*, 309 Kan. at 669.

At the time of the Kansas Constitution's adoption, the only accepted rationale for excluding a juror who opposed the death penalty was particular to the then-existing structure of capital trials. Capital trials were conducted in a single phase resulting in an automatic death sentence upon conviction. To avoid this result, some prospective jurors would refuse to convict the defendant of the underlying offense entirely. In light of these circumstances, the American common law developed a narrow exception to the general rule that any qualified citizen was eligible for jury service by permitting the exclusion of jurors in capital cases who—regardless of the law or the evidence—would categorically refuse to convict a defendant. Thus, in excluding conscientious objectors to capital punishment from service on capital juries, the common law as of 1859 was concerned with safeguarding the jury's faithful performance of its fact-finding duties with respect to guilt or innocence. A juror who refused to reach a guilty verdict, ignoring the law and evidence, was seen as usurping the court's law-stating role or miscarrying its own fact-finding role.

By 1859, courts in several states had issued decisions recognizing this narrow ground for excluding individuals who opposed the death penalty from capital juries. For example, in the 1827 case of *Commonwealth v. Lesher*, the Pennsylvania Supreme Court ruled that a juror could be challenged for cause if he expressed "his inability from the dictates of conscience, to find this defendant, or any other defendant, guilty of murder in the first degree, *no matter what the law might direct*, or *what the evidence and the facts might turn out to be*." 1827 WL 2776, at *3 (Pa. 1827) (emphasis added).

New York's highest court reached a similar decision nine years later, reasoning that a death-scrupled juror was unfit to serve "because his conscience *will not permit him to*

find the defendant guilty, when death will be the consequence of the verdict, *however conclusive the evidence may be*." *People v. Damon*, 1835 WL 2512, at *3 (N.Y. Sup. Ct. 1835) (emphasis added). If such a person serves on a jury, the New York court added, "The prisoner is sure to be acquitted independent of the question of guilt or innocence." *Id.*

And the High Court of Errors and Appeal of Mississippi, in *Williams v. State*, confirmed that a juror's inability to return a guilty verdict due to their objections to capital punishment was the doctrine's overarching concern. 32 Miss. 389, 394 (Miss. Err. & App. 1856). According to the Mississippi court, it was a settled rule that a juror could be struck for holding "conscientious scruples . . . which would prevent him from assenting, or agreeing to a verdict, which would subject the accused to capital punishment, although justified by the evidence." *Id.* at 392.

Legislating along these lines in early 1859, the Kansas Territorial Legislature passed a Code of Criminal Procedure that called for the exclusion, in capital trials, of "any person entertaining such conscientious opinions as would *preclude his finding the defendant guilty.*" Gen. Laws of the Terr. of Kan., Vol. 1 208 (1859) (emphasis added). Throughout, the concern motivating courts and legislatures was that some jurors would refuse to find the defendant guilty if conviction would lead to a mandatory death sentence.

Decisions and statutes such as these were controversial even at the time—and drew spirited dissent. As one Pennsylvania judge argued, empowering prosecutors to exclude jurors for holding unpopular opinions on matters of conscience was unfounded in the common law of England, smacked of the "horror of judicial legislation," and tipped the

scales of adversarial justice dangerously against "a prisoner on trial for his life." *Commonwealth v. Lesher,* 1827 WL 2776, at *9 (Pa. 1827) (Gibson, C.J., dissenting).

Another outspoken opponent was Lysander Spooner, a legal theorist who was widely read by abolitionists of the Wyandotte framers' generation. In 1850, Spooner published a pamphlet denouncing a Massachusetts capital trial in which three jurors had been struck for voicing opposition to capital punishment. As a result of these jurors' exclusion, Spooner argued, the defendant had not been "tried by a legal jury; but by a jury *packed*, by the court." Lysander Spooner, *Illegality of the Trial of John W. Webster* 3 (1850) (emphasis in original). In Spooner's analysis, excluding venirepersons who objected to the death penalty destroyed a jury trial's legitimacy. It replaced the democratic guarantee of trial by a representative sample of "the country" with trial by "the government"—that is, "by persons selected by the government for no other reason than that they lack that degree of sensibility, touching the matter in issue, which a greater or less portion of 'the country' possess." *Id.* at 8. By thus severing the link between the people and the sentence imposed, Spooner argued, death qualification had deprived the Massachusetts defendant of his fundamental right to a jury trial. *Id.* at 16. And the three excluded jurors had been "disenfranchised of their constitutional right to be heard, both on the question of the guilt, and the question of the punishment, of one of their fellow men." *Id.*

Spooner's argument remained a dissenting viewpoint during his lifetime. However, even his contemporaries who supported death qualification did so on grounds that have little relevance outside the capital trial procedures of their time. They presumed a trial in which the defendant's guilt or innocence was the only question, and, in the event of

conviction, death was the only available sentence. This common-law rationale for death qualification—the need to ensure that a defendant's guilt would be fairly adjudicated—provides no justification for death qualification in modern capital trials. As practiced today, death qualification has no connection to assuring that jurors can reach accurate verdicts of guilt or innocence, but instead simply allows exclusion for opposing the death penalty.

B. The Pre-1859 Common Law Provides No Justification for Death-Qualifying Jurors in Modern, Bifurcated Capital Trials in which Sentencing Determinations Are Individualized.

The form of capital trial in place since Kansas's reauthorization of the death penalty in 1994 differs significantly from the capital trials of the 19th century. As administered today, death qualification is an unjustifiable infringement on Section 5's fundamental rights that would be unrecognizable to the Kansas Constitution's framers and ratifiers.

Kansas capital trials are now bifurcated into an initial phase to determine innocence or guilt and "a separate sentencing proceeding to determine whether the defendant shall be sentenced to death." Kan. Stat. Ann. § 21-6617(b). A sentence of death thus does not follow automatically from conviction for a capital crime. *Id.* If imposed at all, a death sentence must be predicated on an individualized assessment of the defendant's circumstances, including a weighing of aggravating and mitigating circumstances. *Id.* § 21-6617(c).

Before a defendant may be sentenced to death, a unanimous jury must find, beyond a reasonable doubt, that the existence of one or more enumerated aggravating circumstances "is not outweighed by any mitigating circumstances which are found to exist . . . ." *Id.* § 21-667(e). Kansas juries are free to consider *any* mitigating circumstance that bears on the question of whether death is warranted, including their own assessment of

"[t]he appropriateness of the exercise of mercy." *State v. Kleypas*, 272 Kan. 894, 1034, 40 P.3d 139, 243 (2001), *overruled on other grounds by Kansas v. Marsh*, 548 U.S. 163, 176 (2006) (approving a Kansas jury instruction on mercy as a mitigating factor as "[c]onsonant with the individualized sentencing requirement" in modern death-penalty cases).

Indeed, whether mitigation exists, and the weight jurors should give it, is essentially a "value call." *Kansas v. Carr*, 577 U.S. 108, 119 (2016) (holding that "[w]hether mitigation exists . . . is largely a judgment call (or perhaps a value call)"). There is no statute that dictates which mitigating factors jurors may consider or how they should value them. And, though jurors may differ in what they consider mitigation and the weight it should be given, that does not signal an unwillingness to follow the law or an abdication of their oath. Crucially, as Kansas has recognized and the United States Supreme Court has confirmed, sentencing in death penalty cases implicates mercy. Jurors are free to "accord mercy if they deem it appropriate, and withhold mercy if they do not . . . ." *See id.* That is precisely what the modern capital trial's structure "is designed to achieve." *Id.*

Under this dramatically different form of capital trial, there is no longer any basis for death qualification in the historical common-law principles known to the Kansas framers and ratifiers. The continued use of death qualification thus represents an unjustified infringement on Section 5's fundamental right to a jury trial.

Yet the use of death qualification continues in Kansas capital trials—including the Defendant-Appellant's trial below. *See* Reply Br. of Defendant-Appellant at 11 (describing "a pool of death-qualified jurors" at trial). Eligible Kansas jurors are excluded for reasons that have nothing to do with their willingness to follow the law in reaching a verdict. *See,*

e.g., *State v. Carr*, 300 Kan. 1, 104–06 , 331 P.3d 544, 622 (2014), *rev'd and remanded*, *Kansas v. Carr*, 577 U.S. 108 (2016) (discussing exclusion of juror who expressed religious objection to the taking of human life but also testified he could "impose the death penalty if forced to do so by law" and confirmed his "moral, philosophical, or religious beliefs" would not prevent him "from following the law"); *State v. Robinson,* 303 Kan. 11, 189, 363 P.3d 875, 1001 (2015) *disapproved of by State v. Cheever*, 306 Kan. 760, 402 P.3d 1126 (2017) (affirming the exclusion of a juror who was equivocal about ability to impose death sentence in the punishment phase).

To the extent that the present death-qualification regime in Kansas is predicated on the federal constitutional standards set forth in *Witherspoon v. Illinois*, 391 US. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985), these federal standards provide a floor for constitutional jury rights under the Kansas Constitution, not a ceiling—and have no bearing on this Court's analysis of the distinct, independent, and broader rights protected by Section 5. *See State v. Gleason*, 305 Kan. 794, 805, 388 P.3d 101, 110 (2017) ("Neither our legislature nor this court are subordinate to a federal test that merely denotes the federal constitutional floor when state law requires more.").

As applied to Kansas capital trials today, death qualification is wholly divorced from the common-law rationale of assuring that juries can reach accurate verdicts on the question of guilt or innocence. Instead, jurors are now excluded because they believe too strongly in the right to life—another fundamental right protected by the Kansas Constitution. In a bifurcated capital trial, death qualification does not advance any interest related to the determination of guilt or innocence, the only rationale for the death qualification practice

that was recognized by the common law as of 1859. Under the fundamental-rights analysis called for by this Court in *Hilburn* and *Hodes*—indeed, under any form of scrutiny—today's death qualification cannot be reconciled with Section 5's fundamental rights.

IV. Death Qualification also Infringes on Section 5 Because it Skews Jury Pools and Disproportionately Excludes Black Jurors.

In addition, the use of "death-qualified" juries further infringes on the Section 5 right because it distorts jury pools and leads to, among other defects, the disproportionate exclusion and underrepresentation of Black venirepersons. These effects of death qualification have long been known within the legal community, confirmed by multiple studies, and even highlighted by Justice Marshall in his dissent in *Lockhart v. McCree*, 476 U.S. 162, 187–88 (1986) (Marshall, J., dissenting) (citing evidence that death qualification excludes a "disproportionate number of blacks and women").

Recent work shows that these disturbing trends persist. For example, a study of venire questioning in seven capital trials in Louisiana revealed that "[B]lack jurors were 1.8 times more likely to be struck under *Witherspoon* than white jurors." Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 Ind. L. J. 113, 136–37 (2016). Another empirical study conducted on eligible jurors across six death-penalty states found that women and people of color disproportionately expressed views that would subject them to exclusion under death-qualification rules, "indicat[ing] that death qualification leads to more male and White juries." Justin D. Levinson et. al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 558

(2014).[1] Further, eligible jurors whose responses suggested they would likely be death-qualified displayed higher levels of both implicit and explicit racial bias. *Id.* at 559–60.

Death qualification demonstrably produces discrimination through the exclusion of Black jurors, to the detriment both of criminal defendants denied a representative jury pool and of eligible jurors disenfranchised from their civic duty to decide whether another Kansan should be executed. Such "whitewashing"[2] of the jury pool abrogates the fundamental right of defendants, preserved as inviolate under Section 5, to be tried by "an impartial jury of the county or district." *See* Kan. Const. B. of Rts. § 10. Racially discriminatory results in jury exclusion also violate the constitutional rights of venirepersons "to participate in the judicial process without facial racial or other invidious discrimination" and may undermine "the integrity of the judicial system in the eyes of the litigants, other participants, and the community as a whole." *Peterson*, 427 P.3d at 1015.

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[1] *See also* Ann Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 Ne. L. Rev. 299, 342 (2017) (32% of Black venirepersons excluded for opposition to death penalty, but only 8% of white venirepersons); Alicia Summers et al., *Death Qualification as Systematic Exclusion of Jurors with Certain Religious and Other Characteristics*, 40 J. App. Soc. Psych. 3218, 3224-25, 3228 (2010) (in study of mock jurors, "racial minority members were more than twice as likely . . . to be excluded by the death-qualification item"); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 L. & Hum. Behav. 31, 46 (1984) ("Blacks are more likely than other racial groups to be excluded under *Witherspoon* (25.5% vs. 16.5%)"); Joseph E. Jacoby & Raymond Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. Crim. L. & Criminology 379, 386 (1982) (55% of Black respondents "*Witherspoon*-excludable" versus 21% of white respondents).

[2] *See* Mona Lynch & Craig Haney, *Death Qualification in Black and White, Racialized Decision Making and Death-Qualified* Juries, 40 L. & Pol'y 148, 157 (2018) ("Death qualification is yet another part of the jury selection process that contributes to the whitewashing of juries.").

Death qualification skews the jury pool in other ways as well. The findings of the Capital Jury Project, based on qualitative interviews with 1,201 former capital jurors, suggest that the application of death-qualification procedures also yields juries that are "disproportionately guilt-prone and death-prone" as compared to the population at large. William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. L. Bull. 51, 60–61 (2003).

Given the jury's central role in a democratic criminal justice system, the exclusion of Black venirepersons from jury service "inhibits the functioning of the jury as an institution to a significant degree." *See Ballew v. Georgia*, 435 U.S. 223, 231 (1978); *cf. State v. Sanders*, 225 Kan. 147, 148–49, 587 P.2d 893, 896 (1978) (recognizing a defendant's "right to require that the state not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice") (quoting *Alexander v. Louisiana*, 405 U.S. 625, 628–29 (1972)); *Lockhart*, 476 U.S. at 175 (noting that removal on "the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an 'appearance of unfairness.'"). This unjustified distortion of the capital jury pool infringes on fundamental rights and cannot be reconciled with the Kansas constitutional guarantee that jury rights "shall be inviolate."

CONCLUSION

For the foregoing reasons, and those set forth in the Supplemental Brief of the Defendant-Appellant, this Court should rule that the death penalty violates Sections 1 and 5 of the Bill of Rights to the Kansas Constitution.

Dated: April 23, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing will be served on counsel for each party through the Court's electronic filing system, which will send a "Notice of Electronic Filing" to each party's registered attorney. The undersigned also certifies that the foregoing will be served on counsel for all *amici curiae*, including the NAACP Legal Defense and Educational Fund, Inc.

/s/ Rebecca E. Woodman
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427 P.3d 1015 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Christian PETERSON, Appellant.

No. 116,931
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Opinion filed October 5, 2018.
|
Review Denied June 24, 2019

Appeal from Wyandotte District Court; MICHAEL GROSKO, judge.

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Before Atcheson, P.J., Hill, J., and Stutzman, S.J.

MEMORANDUM OPINION

Per Curiam:

***1** A jury sitting in Wyandotte County District Court convicted Christian Peterson of aggravated indecent liberties with a child and found him not guilty of lewd and lascivious conduct. Because the district court failed to adequately examine Peterson's contention that the jurors may not have been selected in a race-neutral way, we remand for further proceedings on that point and hold in abeyance his other challenges to the conviction and the resulting sentence.

Given the narrow issue we address, we dispense with any outline of the conflicting factual accounts of the events underlying the charges. We focus on jury selection and Peterson's claim the prosecutor may have used peremptory strikes to remove potential jurors based on their race—commonly known as a *Batson* challenge.

Batson *Principles Outlined*

We necessarily begin with *Batson v. Kentucky*, 476 U.S. 79, 88-89, 106 S. Ct. 1712, 90 L.Ed. 2d 69 (1986), and the United State Supreme Court's holding that in criminal cases, prosecutors may not rely on race as a criterion to excuse African-Americans called as potential jurors. We also draw heavily, often verbatim and without further attribution, from *State v. Jenkins*, No. 117,026, 2018 WL 2375788 (Kan. App.) (unpublished opinion), *petition for rev. filed* June 22, 2018, this court's most recent discussion of *Batson* and its allied principles.

In *Batson*, the Court recognized twin equal protection considerations supporting a prohibition on the State's use of racially based peremptory challenges or juror strikes. First, defendants are denied the right to equal protection if the State seeks to try them before juries "from which members of [their] race have been purposefully excluded." 476 U.S. at 85. Just as important, however, citizens called for jury duty have a constitutional right to serve if they are otherwise qualified. The State violates that right when a prosecutor eliminates them during the jury selection process because of their race. 476 U.S. at 87. Exclusion of citizens from jury service based on race reflects "a primary example of the evil the Fourteenth Amendment was designed to cure." 476 U.S. at 85; see *Miller-El v. Dretke*, 545 U.S. 231, 237-38, 125 S. Ct. 2317, 162 L.Ed. 2d 196 (2005) (noting the dual equal protection violations attendant to the State's race-based removal of potential jurors during the selection process).

The Court has extended the rule of *Batson* to permutations of the essential fact pattern present there—the State's systematic use of peremptory strikes to remove African-Americans from the jury pool in the trial of an African-American defendant on criminal charges. For example, a Caucasian defendant may assert a *Batson* challenge to the prosecutor's apparently deliberate removal of African-Americans called as jurors in a

criminal case. *Powers v. Ohio*, 499 U.S. 400, 415-16, 111 S. Ct. 1364, 113 L.Ed. 2d 411 (1991). The State may challenge a defendant's use of peremptory challenges in what appears to be a racially motivated fashion. *Georgia v. McCollum*, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L.Ed. 2d 33 (1992). [1]

***2** [1] The Court has recognized that Hispanics reflect a sufficiently identifiable racial or ethnic group to be protected by the *Batson* rule. *Hernandez v. New York*, 500 U.S. 352, 355, 111 S. Ct. 1859, 114 L.Ed. 2d 395 (1991) (prosecutor's deliberate exclusion of Hispanics from jury would violate Equal Protection Clause). The Court has also extended the principle underlying *Batson* to the State's systematic exclusion of women from juries based on gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129, 114 S. Ct. 1419, 128 L.Ed. 2d 89 (1994). Some courts have recognized *Batson* challenges to the removal of potential jurors because of their religious beliefs. See *United States v. Brown*, 352 F.3d 654, 668-69 (2d Cir. 2003); but cf. *United States v. Girouard*, 521 F.3d 110, 113 (1st Cir. 2008) (regarding the question as an open one and declining to decide it). Likewise, neither plaintiffs nor defendants in civil cases may purposefully strike potential jurors because of their race. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616, 111 S. Ct. 2077, 114 L.Ed. 2d 660 (1991).

All of those decisions reflect the independent significance of the equal protection rights of citizens called to jury service to participate in the judicial process without facing racial or other invidious discrimination. See *Powers*, 499 U.S. at 402, 409. A defendant's *Batson* challenge serves to protect the rights of those citizens, since they are not in a position to efficiently or effectively assert their own rights. 499 U.S. at 413-15. Moreover, the eradication of purposeful racial discrimination in juror selection promotes the integrity of the judicial system in the eyes of the litigants, other participants, and the community as a whole. *McCollum*, 505 U.S. at 48-49; *Powers*, 499 U.S. at 412-13.

The ultimate question in a *Batson* challenge asks whether the prosecutor has purposefully and deliberately sought to exclude potential jurors because of their race or another protected class characteristic. The analytical framework for answering that question draws on the model developed in employment discrimination cases to probe an employer's intent in hiring, firing, promoting, or otherwise making workplace decisions. *Johnson v. California*, 545 U.S. 162, 170-71 & n.7, 125 S. Ct. 2410, 162 L.Ed. 2d 129 (2005). Peterson based his challenge on race, so we focus our discussion accordingly. Because purposeful racial discrimination typically is difficult to prove—seldom will the discriminatory actor admit the illicit purpose—the approach imposes shifting burdens of production of circumstantial evidence. The inquiry advances in three stages. *Foster v. Chatman*, 578 U.S. ---------, 136 S. Ct. 1737, 1747, 195 L.Ed. 2d 1 (2016); *State v. Kettler*, 299 Kan. 448, 461-62, 325 P.3d 1075 (2014).

The party challenging the peremptory strikes—here, the criminal defendant alleging racial discrimination in the State's selection of jurors—has to make a prima facie showing of impermissible intent on the part of the prosecutor. *Miller-El*, 545 U.S. at 239; *Johnson*, 545 U.S. at 168; *State v. McCullough*, 293 Kan. 970, 992, 270 P.3d 1142 (2012). The burden at the first stage is not intended to be onerous. *Johnson*, 545 U.S. at 170 (initial burden satisfied if the proffered evidence is "sufficient to permit the trial judge to draw an inference that discrimination has occurred"). The systematic use of peremptory challenges to remove members of a protected racial class from the pool of potential jurors typically would suffice. *Miller-El*, 545 U.S. at 240-41. The

exercise of a few peremptory strikes (among many) to remove all members of an identifiable ethnic group from the jury pool provides a prima facie indicator of impermissible animus. See *Johnson*, 545 U.S. at 173. The prosecutor's disparate questioning of African-American and Caucasian jurors in an apparent effort to generate grounds to disqualify the African-Americans for cause likely would establish a prima facie case for the later use of peremptory strikes to keep those persons from serving on the jury. See *Miller-El*, 545 U.S. at 255-60.

***3** If the defendant presents such evidence, the prosecutor is then obligated to state a racially neutral reason for the exercise of the disputed peremptory challenges. *Miller-El*, 545 U.S. at 239; *Johnson*, 545 U.S. at 168; *McCullough*, 293 Kan. at 992. Again, the burden at that second stage is slight. *Purkett v. Elem*, 514 U.S. 765, 767-68, 115 S. Ct. 1769, 131 L.Ed. 2d 834 (1995) ("The second step of this process does not demand an explanation that is persuasive, or even plausible."). The prosecutor's ability to voice a nondiscriminatory rationale for his or her approach to juror selection does not in and of itself defeat the *Batson* challenge. *Miller-El*, 545 U.S. at 240. That simply advances the district court's inquiry to the third step and the ultimate question of whether purposeful discrimination has been shown based on all of the available evidence. 545 U.S. at 251-52; *Purkett*, 514 U.S. at 768; *McCullough*, 293 Kan. at 993-94. The district court must determine if the prosecutor's stated reasons for excluding the potential jurors are the true reasons or merely a pretext—a cover-up—for impermissible racial discrimination. As the *Purkett* Court explained: "At that [third] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." 514 U.S. at 768. In making that call, the district court may look at various forms of circumstantial evidence. See *Miller-El*, 545 U.S. at 253. The party asserting the *Batson* challenge bears the ultimate burden of proving by a preponderance of the evidence that racial discrimination or intent substantially motivated the peremptory strikes. *Crittenden v. Ayers*, 624 F.3d 943, 958 (9th Cir. 2010); *United States v. Martinez*, 621 F.3d 101, 109 (2d Cir. 2010); see also *Snyder v. Louisiana*, 552 U.S. 472, 485, 128 S. Ct. 1203, 170 L.Ed. 2d 175 (2008) (suggesting but not deciding prosecutor might prevail if racial discrimination were one of several factors in striking potential juror as long as it "was not determinative").

Batson *Principles Applied*

Here, the district court cut off the *Batson* inquiry at the first stage, finding that Peterson failed to make a prima facie showing of possible racial discrimination on the part of the prosecutor in selecting jurors. The record of the *Batson* challenge and the district court's ruling is, in a word, terse; it barely fills a page of the trial transcript. We have gleaned from the record that Peterson is African-American. Although a defendant need not belong to an ethnic minority to assert a *Batson* challenge, his or her ethnicity could be relevant in assessing whether racial animus is afoot in jury selection, especially when potential jurors sharing the defendant's ethnic background have been struck from the panel. *Powers*, 499 U.S. at 416.

The prosecutor and Peterson's lawyer elected to pass for cause enough potential jurors so they would have a jury of 12 with one alternate to hear the evidence after they used all of their peremptory strikes. See K.S.A. 22-3411a (at request of either party, district court must pass for cause panel of potential jurors equal to 12 plus the number of peremptory strikes allotted to both parties). Because aggravated indecent liberties with a child is an off-grid felony, the State and Peterson each had 12 peremptory strikes. See K.S.A. 2017 Supp. 22-3412(a)(2)(A). We, thus, infer there were 39 potential jurors after the district court disposed of any challenges for cause. See K.S.A. 2017 Supp. 22-3412(c) (if district court empanels alternate juror, each party entitled to additional peremptory strike).

Each side then struck or removed one potential juror at a time in alternating fashion, beginning with the prosecutor, until all but 13 persons had been eliminated. The parties made their strikes outside the presence of the potential jurors, but nothing in the appellate record describes the process they used. So we don't know exactly what the lawyers did. [2]

[2] In one common method, the lawyers literally strike through a potential juror's name on a seating

> chart with a pen and indicate whether the strike is by the State or the defendant and the number of the strike, e.g., State # 1 or Δ # 7. The chart containing the strikes is then commonly made part of the district court record. No such chart or any other written memorialization of the strikes appears in the record on appeal. The district court judge was talking to the potential jurors as the lawyers were making their strikes, so he wasn't actively involved in or supervising the process. We don't mean to suggest some sort of direct judicial supervision would be necessary if, for example, the lawyers were passing a seating chart back and forth to record their strikes.

***4** After the process had been completed, the district court announced the names of the jurors and the alternate who had been selected to hear the evidence. Peterson's lawyer then immediately asked for a conference outside the jurors' presence. At the start of the bench conference, the lawyer stated he was making a *Batson* challenge. He said based on the "jury questionnaires," seven of the prospective jurors passed for cause identified themselves as African-American and the prosecutor had peremptorily struck five of them. Of the two remaining African-Americans, the lawyer pointed out that one would be among the 12 jurors and the second would be the alternate juror. Neither the prosecutor nor the district court took issue with the lawyer's racial identification of the potential jurors. See *Jenkins*, 2018 WL 2375788, at *8 (lawyers disagreed over whether prospective juror was Hispanic; district court tacitly concluded she was not, while offering defendant's lawyer opportunity to inquire further of her).

The district court interjected that "saying numbers" likely didn't amount to a "prima facie showing" when "[w]e have ... two blacks [ ] on the jury." The district court then asked, "Your response?" The prosecutor began to explain why she peremptorily struck one of the jurors. The district court cut her off and repeated that Peterson's lawyer failed to satisfy the initial showing required under *Batson's* shifting burdens of production. The district court then denied Peterson's challenge. So the prosecutor never explained why she removed the five African-Americans as prospective jurors. And Peterson, of course, never had the chance to dispute those explanations as pretext for impermissible racial discrimination.

In context, we wonder whether the district court's request for a response was actually directed to Peterson's lawyer to find out if he had additional support for his *Batson* challenge. The prosecutor, however, immediately jumped in to address the second step of the *Batson* process rather than endorsing the district court's conclusion that Peterson's lawyer failed to satisfy the first step. Peterson's lawyer wasn't really given another opportunity to expand upon the circumstances suggestive of possible racial animus or to otherwise speak to the issue.

On appeal, Peterson has raised the district court's denial of his *Batson* challenge, among other points. From our perspective, the *Batson* issue entails no disputed facts and, thus, presents related questions of law we decide without deference to the district court. See *State v. Arnett*, 290 Kan. 41, 47, 223 P.3d 780 (2010) (appellate court exercises unlimited review over question of law); *State v. Bennett*, 51 Kan. App. 2d 356, 361, 347 P.3d 229 (when material facts undisputed, issue presents question of law), *rev. denied* 303 Kan. 1079 (2015); *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 258-59, 261 P.3d 943 (2011) (legal effect of undisputed facts question of law).

The questions, however, are narrow ones: Did the district court impermissibly terminate the *Batson* inquiry at the first step of the process? And, if so, what is the proper remedy?

Two considerations bear repeating as we answer those questions. First is the slight burden of production upon a defendant at the initial stage of the *Batson* inquiry. The circumstances merely must be suggestive of possible racial discrimination in jury selection to warrant further examination. As we have outlined, the next step requires the prosecutor to voice explanations for the strikes that presumably will be race neutral. And the defendant then gets to identify information casting substantial doubt on those reasons as the true reasons. *Johnson*, 545 U.S. at 172 ("The

Batson framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.").

Second, the *Batson* rule vindicates the equal protection rights of those persons called for jury duty to serve without being excluded because of their race or some other protected class characteristic. That purpose cannot be underestimated or shortchanged. A core value of the Fourteenth Amendment guarantees that both the rights and obligations of citizenship should be shared equally without regard to race. If race becomes the deciding factor in excluding even a single potential juror, then the selection process violates the Fourteenth Amendment. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 n.13, 114 S. Ct. 1419, 128 L.Ed. 2d 89 (1994) ("The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system."); *United States v. Cruse*, 805 F.3d 795, 809 (7th Cir. 2015) ("The Equal Protection Clause is violated if even a single juror is excluded because of invidious racial discrimination.").

***5** Statistics do not prove a *Batson* violation if a prosecutor presents valid nondiscriminatory reasons for striking African-Americans or other minorities from a jury panel. In other words, numbers alone fail to establish the requisite illicit intent to discriminate because of race. But an obviously skewed use of peremptory strikes to remove members of an identifiable ethnic group would call for some explanation, given the constitutional rights at stake. The validity of that race-neutral explanation can then be assessed based on all of the evidence, including numerical disparities.

Here, the threshold requiring a prosecutor to explain a pattern of strikes has been crossed. The prosecutor peremptorily removed five of seven prospective African-American jurors —about 71 percent of those on the panel. And that's more than chance or sheer randomness would at least superficially suggest. Overall, the prosecutor presumably peremptorily excused 13 of 39 potential jurors or about 33 percent of the group. Thirty-three percent of the seven African-Americans on the panel would have been two. We recognize those are crude measures based on small populations, and the exercise of each set of peremptory challenges altered the composition of the remaining pool of potential jurors.

But we are not tackling a statistics final examination—an undertaking we recognize we almost surely would fail. Rather, we are assessing whether on outward appearances, one might fairly ask if race could have played a part in the prosecutor's decisions on who to remove from the jury panel. Under the circumstances, we find it to be both a reasonable question and one for which there may be a perfectly reasonable answer having nothing to do with race. Those circumstances, however, tilt in favor of requiring an explanation. The weight of authority governing *Batson* challenges supports further inquiry. [3]

[3] See *Batson*, 476 U.S. at 97 ("[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination."); *Miller-El*, 537 U.S. at 331 (relying, in part, on statistical evidence that prosecution struck 91% (10 out of 11) of the eligible African-American jurors and 13% (4 out of 31) of the eligible Caucasian jurors to find that the defendant established a prima facie case of racial discrimination); *Turner v. Marshall*, 63 F.3d 807, 813 (9th Cir. 1995) ("[T]he prosecutor's exclusion of five out of nine available African-American venirepersons removed a sufficient percentage of African-Americans to establish a pattern of discrimination," even when four African-American women remained on the jury), *overruled on other grounds by* *Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999); *United States v. Alvarado*, 923 F.2d 253, 255-56 (2d Cir. 1991) (prima facie showing where prosecutor used four of seven peremptory challenges to remove minorities, reflecting rate much higher than would be expected by chance); *Fleming v. Kemp*, 794 F.2d 1478, 1484 (11th Cir. 1986) (removal of 8 of 10 African-Americans from venire panel consisting of 10 African-Americans and 45 Caucasians constituted prima facie showing of discriminatory intent); but see *Ex parte Walker*, 972 So. 2d 737, 741 (Ala. 2007) ("An objection based on numbers alone, however, does not support the finding of a prima facie case of discrimination and is not sufficient to shift the burden to the other party to explain its peremptory strikes.").

In finding Peterson satisfied the first step in the Batson inquiry, we have treated the African-American seated on the

jury and the African-American alternate juror equivalently. But the way the alternate was chosen could bolster the numerical prima facie case and could provide independent circumstantial evidence of intent. The record is silent on the method. The lawyers clearly knew the identity of the alternate juror at the time of the *Batson* challenge. At oral argument, the State's lawyer, who did not try this case, explained that potential jurors are assigned numbers and, by common practice in Wyandotte County, the remaining juror with the highest number serves as the alternate. If that were done here, the prosecutor could have channeled the African-American juror into the alternate spot by striking white jurors with higher numbers. Everyone expected the trial to be short—it lasted two days—so the likelihood of the alternate juror participating in deliberations was slim. That sort of manipulation could be evidence of racial animus, even though the prosecutor would not have used a peremptory strike to eliminate an African-American from the jury panel. Cf. *United States v. Esparza-Gonzalez*, 422 F.3d 897, 904-06 (9th Cir. 2005) (prosecutor's waiver of peremptory challenge that, given selection method, affected racial composition of jury may be weighed in *Batson* challenge).

***6** In sum, the district court erred in ruling Peterson had failed to satisfy the minimal requirements of the first step in the *Batson* inquiry. We, therefore, remand to the district court with directions to complete a full hearing at which the prosecutor will be expected to offer reasons for the State's peremptory challenges and Peterson will then be allowed to offer additional evidence disputing the legitimacy of those reasons. To be perfectly clear, we hold no opinion about the legitimacy of Peterson's *Batson* challenge. We have decided only that the inquiry should go forward in the district court.

Because Peterson must receive a new trial if he prevails on his *Batson* challenge, we defer ruling on his other appellate issues that would require the same relief: court error in admitting cumulative evidence; prosecutorial error in closing argument; constitutionally ineffective assistance of his trial lawyer; and cumulative trial error. Peterson has also appealed the district court's imposition of lifetime postrelease supervision as part of an off-grid life sentence. Ruling on those issues now would be premature. So we retain jurisdiction over the case except for the *Batson* challenge.

Considerations on Remand

On remand, the district court should appoint a conflict-free lawyer to serve as Peterson's lead counsel on the *Batson* issue. Because of the unresolved ineffective assistance claim, Fredrick Zimmerman, who represented Peterson during the trial, cannot serve in that capacity. He also could be a witness in the *Batson* hearing. See Kansas Rule of Professional Conduct 3.7(a)Rule of Professional Conduct 3.7(a) (2018 Kan. S. Ct. R. 351) (lawyer should not act as advocate if he or she is likely to be witness in proceeding). As the trial lawyer for Peterson, Zimmerman almost certainly has specific (and perhaps unique) information bearing on jury selection in this case and likely would be a significant resource for Peterson's new lawyer leading up to and during the hearing.

The district court also ought to encourage and assist the lawyers in reconstructing the jury selection process as best they can. For example, clear findings or stipulations describing the process for striking potential jurors, the method of designating the alternate juror, and the racial composition of the jury panel passed for cause and the final jury would greatly enhance our ability to review the issue, should we be required to do so.

Assuming the prosecutor provides race-neutral reasons for the State's peremptory challenges, the district court may then explore a wide array of circumstances indicative of pretextual justifications for race based decisions. As we have mentioned, the markedly disproportionate use of peremptory strikes to remove African-Americans or other minorities from a jury pool will buttress other circumstantial evidence of racial animus, especially when the ostensible explanations for the disparity are highly subjective ("negative" body language), strangely idiosyncratic (nightshift workers are nonconformists), or otherwise improbable. See *Purkett*, 514 U.S. at 768.

Shifting reasons for removing a potential juror may indicate pretext. *Foster*, 136 S. Ct. at 1750-51. That is, should an initial reason look unpersuasive under closer scrutiny, the prosecutor's sudden recollection of another reason suggests neither may be the real reason. See *Miller-El*, 545 U.S. at 245-46. Disparate questioning of African-American and Caucasian members of the jury panel could be considered suspicious. If the stated reason for striking a potential juror

pertains to a particular experience or characteristic disclosed during voir dire, the prosecutor's failure to ask further about that circumstance may indicate the information really wasn't significant and has been offered to paper over an impermissible reason. See *Snyder*, 552 U.S. at 482-83; *Miller-El*, 545 U.S. at 244-46. If the prosecutor removes an ethnically identifiable juror ostensibly because of certain experiences or characteristics yet retains as jurors Caucasians with the same or similar experiences or characteristics, pretext looms over those decisions. *Foster*, 136 S. Ct. at 1750-51; *Snyder*, 552 U.S. at 483-84; *Miller-El*, 545 U.S. at 241, 244-48; *McCullough*, 293 Kan. at 995.

***7** In *Foster*, the Court found the prosecution trial team's notations about potential jurors unmistakably showed race to be a consideration that corresponded to the use of peremptory strikes to excuse African-Americans. 136 S. Ct. at 1755. A court may also consider historical data or information on the State's practices in excluding African-Americans or other minorities from jurors in other cases in the relevant district. *Miller-El*, 545 U.S. at 253; see *Batson*, 476 U.S. at 95 (defendant may present evidence of purposeful exclusion of African-Americans across multiple cases but need not do so). [4]

[4] The *Foster* Court recognized that the prosecutors' trial notes related to jury selection were appropriately considered in examining " 'all of the circumstances' " bearing on whether invidious discrimination infected the selection process. 136 S. Ct. at 1748. Uncertainty about who authored the notes went to their weight rather than admissibility. 136 S. Ct. at 1748. The notes commonly would be shielded by work-product privilege, since they reflect the lawyer's mental impressions and strategic considerations in choosing among potential jurors. See *Wichita Eagle & Beacon Publishing Co. v. Simmons*, 274 Kan. 194, 218-19, 50 P.3d 66 (2002) (policy behind privilege insulates lawyer's legal theories and strategies in case, fostering independence and objectives of adversarial process). The privilege, however, is not absolute and may be overridden for compelling reasons or waived. K.S.A. 2017 Supp. 60-426a(a) (waiver); 274 Kan. at 218.

In the second stage of the *Batson* inquiry, the prosecutor states specific reasons for challenged strikes of potential jurors, thereby disclosing ostensible mental impressions and strategies behind those decisions. That disclosure during the hearing entails a waiver of work-product privilege for notes related to jury selection for purposes of the *Batson* challenge, permitting their timely production. K.S.A. 2017 Supp. 60-426a(a); see *Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989) (work-product privilege waived when lawyer voluntarily discloses information to court); *Stern v. O'Quinn*, 253 F.R.D. 663, 676-77 (S.D. Fla. 2008) (party waives work-product privilege by making protected information relevant to dispute and assertion of privilege would deprive opposing party of access to that highly probative information). Here, the notes would tend to confirm or refute the prosecutor's stated reasons. If they are consistent with the prosecutor's representations, no additional strategy has been disclosed. If they are inconsistent, they stand as circumstantial evidence of pretext. Given the fundamental equal protection rights at issue, work-product protection should yield to a full airing of evidence bearing on racial animus in jury selection. Apart from notes related to jury selection, however, work product privilege would continue to protect the rest of the prosecutor's trial preparation materials such as outlines for witness examination or closing argument.

Although Peterson continues to bear the burden of proof on the *Batson* challenge, his inability to fill evidentiary gaps material to the second and third steps in the process because of the passage of time should not be weighed against him. Those blind spots derive from the district court's decision to cut off the *Batson* inquiry before reaching those steps rather than from any omission or misstep on Peterson's part. If the delay precludes assembling an adequate record from which to fairly decide the *Batson* challenge, the consequences of that inadequacy fall on the State and, in turn, may require relief for Peterson. Cf. *Snyder*, 552 U.S. at 485-86 (given passage of time, no "realistic possibility" consideration of prosecutor's explanation for strike based on potential juror's demeanor "could be profitably explored further on remand" in absence of contemporaneous findings by trial court).

***8** If Peterson demonstrates the prosecutor exercised any of the peremptory strikes based on impermissible racial animus, he must receive a new trial. A successful *Batson*

challenge establishes that at least one prospective juror has been the victim of impermissible invidious discrimination violating the Equal Protection Clause. And the injection of racial animus in the selection of jurors undermines both the appearance and reality of fundamental fairness in the judicial process. The resulting impact on a criminal prosecution effectively amounts to a structural error, requiring the reversal of any conviction without regard to the strength of the evidence supporting the guilty verdict. *Weaver v. Massachusetts*, 582 U.S. ——, 137 S. Ct. 1899, 1911-12, 198 L.Ed. 2d 420 (2017) (like errors "deemed structural," *Batson* violation requires "automatic reversal"); *Crittenden v. Chappell*, 804 F.3d 998, 1003 (9th Cir. 2015) (describing *Batson* violation as structural error); *United States v. McAllister*, 693 F.3d 572, 582 n.5 (6th Cir. 2012) (recognizing *Batson* violation not subject to harmless error review and characterizing harm as structural error); cf. *Vasquez v. Hillery*, 474 U.S. 254, 263-64, 106 S. Ct. 617, 88 L.Ed. 2d 598 (1986) (government's deliberate exclusion of African-Americans from grand jury indicting defendant undermines "structural integrity" of criminal justice process, cannot be excused as harmless error, and requires reversal of guilty verdict at trial). The Kansas Supreme Court has similarly recognized that a prosecutor's purposeful exclusion of potential jurors based on race requires a defendant be granted a new trial. See *Kettler*, 299 Kan. at 461-62.

We sum up our decision this way:

- We reverse and remand to the district court to conduct a complete hearing on Peterson's *Batson* challenge. Peterson needs to be appointed a lawyer for the hearing and should be present personally.

- If Peterson prevails on the *Batson* issue, he should be granted a new trial. If he loses on the *Batson* issue, we will take up the remaining issues he has raised. Either party may file a supplemental notice of appeal from the district court's ruling on the *Batson* challenge on remand if such an appeal would have been permitted following a final judgment or as otherwise provided in the Kansas Code of Criminal Procedure. The time for requesting an appeal shall run from the district court's filing of findings and conclusions or a journal entry. The party taking any appeal should ensure the appellate record is adequately supplemented to permit us to review the district court's disposition of the *Batson* challenge.

- We retain jurisdiction over the remaining issues Peterson has raised on appeal.

- The parties shall file joint or separate reports with the Clerk of the Appellate Courts on the status of the case on remand at 90-day intervals triggered by filing of this opinion.

Remanded in part with directions for further proceedings.

All Citations

427 P.3d 1015 (Table), 2018 WL 4840468

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