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BEFORE THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

No. 33199

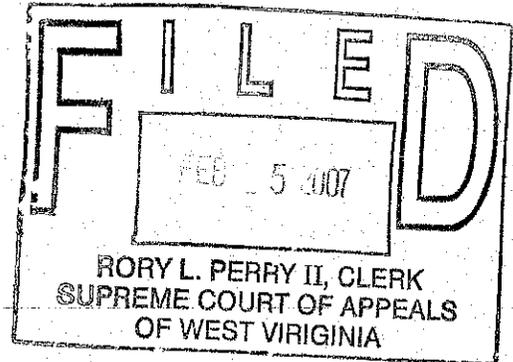
CHRISTOPHER LEE DAVIS,

Appellant,

v.

THOMAS McBRIDE, Warden,
Mount Olive Correctional Complex,

Appellee.



APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

APPELLANT'S APPEAL BRIEF

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APPELLANT'S APPEAL BRIEF

What does it mean to strike a juror because of race?...Somewhere down the road our legal system must rid itself of the unspoken lie that African-Americans want to be victims of crime and therefore will not convict criminals.—Justice Franklin D. Cleckley, concurring opinion in *State v. Rahman*, 199 W.Va. 144,160, 483 S.E.2d 273, 289 (1996).

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.—Justice Thurgood Marshall, concurring opinion in *Batson v. Kentucky*, 476 U.S. 79, 103,106 S.Ct. 1712, 1726, 90 L.Ed.2d 69, ____ (1986)

I.

Kind of proceeding and nature of ruling below

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

In *Rahman*, Justice Cleckley expressed the desire to eliminate race as a factor in jury selection. In *Batson*, Justice Marshall, after being involved in several decisions by the United States

Supreme Court attempting to obtain this worthwhile objective, finally concluded that only the complete elimination of peremptory strikes would accomplish this goal.

The goal of eliminating racial considerations in jury selection not only would protect the equal protection and due process rights of the person on trial, but also has been demonstrated to positively impact the jury's decision making process. In a 2006 study conducted at Tufts University by Samuel R. Summers entitled "On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations," www.apa.org/releases/0406_JPSP_Sommer.pdf, the data revealed:

First, diverse groups spent more time deliberating than did all-White groups. Of course, longer decision-making processes are not necessarily better processes, but diverse groups used their extra time productively, discussing a wider range of case facts and personal perspectives. Arguably, the accuracy of the information discussed by a group is even more important than the sheer number of facts, and on this count as well, heterogeneous groups proved superior. Even though they deliberated longer and discussed more information, diverse groups made fewer factual errors than all White groups. Moreover, inaccuracies were more likely to be corrected in diverse groups. These findings dispel any notion that the longer duration of heterogeneous deliberations was attributable to decreases in efficiency. Rather, racially heterogeneous groups had discussions that were more comprehensive and remained truer to the facts of the case. As detailed above, diverse groups were also more open-minded in that they were less resistant to discussions of controversial race-related topics. (*Id.* at 37-38).

This appeal presents this Court with an opportunity to address this critical equal protection question. Once again, this Court is being asked to do the impossible—determine, after the fact, whether or not the State based its decision to use a peremptory strike to eliminate 100% of the black potential jurors, there being only one black potential juror available, based upon the potential

juror's race. These unspoken racial issues are even more problematic when the defendant is black and the victim is white.

In the present case, Appellant Christopher Lee Davis, who is black, was accused of killing Kraig E. Davis, who was white, and shooting Kraig's brother, Kenneth Michael Davis, II. During the selection of the jury, the State used one of its peremptory strikes to eliminate the only black potential juror from the group of jurors selected at trial. Thus, once again, this Court is faced with a criminal conviction where the State's use of its peremptory strikes has resulted in an all white jury deciding the fate of a black criminal defendant.

On September 8, 2000, a jury in the Circuit Court of Kanawha County convicted Appellant of first degree murder and malicious wounding.¹ On January 11, 2001, Appellant was sentenced to serve life with mercy for first degree murder and not less than 2 nor more than 10 years on the malicious wounding with a firearm, to run consecutively.² This Court denied Appellant's appeal on September 20, 2001, on a 3 to 2 vote, with Justices Starcher and Albright voting to grant the appeal.

The present habeas corpus action initially was filed by Appellant *pro se* and the Honorable Judge Louis H. Bloom appointed present counsel to represent him. In an order entered January 17, 2006, the trial court denied all habeas corpus relief. Appellant respectfully appeals from

¹The case was tried before the Honorable A. Andrew MacQueen. By the time Appellant was sentenced, Judge Bloom presided over this case.

²At trial, Appellant's appointed counsel were James B. McIntyre, who was a great champion of civil rights and is sorely missed by anyone who had the pleasure of knowing him, and Gary A. Collias. The State was represented by Don Morris and Reagan E. Whitmyer.

this final order.³ In this brief, counsel for Appellant will present the Court with the traditional legal arguments, based upon decisions from the United States Supreme Court and this Court. In addition to these legal arguments, counsel for Appellant has added a real world discussion of this issue, inviting the Court to consider Justice Marshall's conclusion, which recently was accepted by Justice Stephen Breyer, that the only way to eliminate race as a factor in jury selection is the elimination of peremptory strikes.⁴

II.

Statement of facts

A.

*The tragic death of Kraig E. Davis
and wounding of Kenneth Davis*

It would be very easy to write this petition and leave out the tragic facts that lead to the senseless death of a young unarmed Marine and the wounding of his brother. However, it would not be fair to this Court for to gloss over the facts, particularly since Appellant has accepted responsibility for his actions, is extremely remorseful, apologized to the victim's family at trial, and must live with the consequences of his actions the rest of his life. The issue at trial was not

³Appellant's petition for appeal also raised an issue seeking a reversal of *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981). However, the order granting this appeal limited the issue to the question of striking the only black potential juror from the jury panel. While counsel for Appellant strongly believes that this Court's case law requires at least a modification of *Losh*, due to the inherent violation of the attorney client and work product privileges required by the "*Losh* checklist," that issue has been omitted from this brief based upon the Court's order.

⁴Counsel for Appellant recognizes that such a radical departure would generate a lot of controversy and most likely will not be achieved in this case. Nevertheless, since two United States Supreme Court Justices have accepted this solution and there are courts anticipating the possibility that peremptories will be eliminated eventually, the issue at least is worthy of this Court's attention.

Appellant's guilt or innocence. The issue was whether Appellant was guilty of second degree or first degree murder. Although the trial court did not make any findings of fact regarding the underlying crime, Appellant believes these facts place the legal issues raised in context.

On September 8, 1999, Kraig E. Davis, who was stationed at Camp LeJeune and preparing to be stationed in Iwo Jima, Japan, the following Sunday, met with his brother Kenneth and friends in RBG's, a bar and pool hall in Kanawha City. (Tr. 386-88). On this same date, Appellant, who was living with his parents at the time of this incident, also was 22 years old, and had completed enough credits for the 11th grade. (Tr. 548). Appellant was employed as a broiler cook at Chi-Chi's and a maintenance man at McDonald's. (Tr. 549). He got off work at about 11:00 and went to his home in Kanawha City. (Tr. 551). Soon thereafter, he went to RBG's with his friends, including a friend named Grant Lewis. (Tr. 552).

On that night, Appellant was carrying a loaded .45 caliber semi-automatic hand gun. (Tr. 558). Appellant had owned this gun for about a month prior to this night and had only fired it once. (Tr. 571).

Kraig and Kenneth Davis were playing pool in RBG's when the incident occurred. Kenneth Davis testified that at some point, Mr. Lewis came into the pool area, picked up a pool stick, stood about five feet away from the pool table, twirled the pool stick, and tossed it on the table and the stick hit Chad Walborn. (Tr. 393). Mr. Lewis turned and went back to the bar. (Tr. 394).

There was a commotion and Kenneth saw Kraig standing closer to the dance floor with his arms by his side and palms facing forward. (Tr. 398-99). Kenneth was telling Kraig it was their turn to shoot pool when two shots rang out and a third shot went by Kenneth's ear. (Tr. 399). Kenneth saw his brother fall down and then noticed that the gun was pointed toward him, so Kenneth

tried to hit the shooter with the pool stick. (Tr. 400). As he was hitting the shooter, the shooter kept firing at Kenneth until the gun fell out of his hands. (Tr. 401). The only thing he remembers the shooter saying is, "What do you think you're doing?" (Tr. 401). Kenneth had been shot twice all the way through and one grazing shot. (Tr. 403). A few minutes passed between the incident with Mr. Wallborn and the shooting. (Tr. 406).

Appellant's version of these events was that his friend Grant Lewis came to him from the area of the pool tables upset and claimed that someone over there had assaulted him. Appellant went over to pool tables, where Kraig Davis, his brother, and some other people were playing. (Tr. 559). After some words were exchanged with Mr. Wallborn, Appellant testified that he was hit in the head with what he thought was a bar stool. (Tr. 561). After being hit, Appellant staggered around and began to shoot. (Tr. 562). The end result was that Kraig Davis was killed by the shots and Kenneth Davis suffered gun wounds. Appellant left and went to Morgantown without knowing that he had killed Kraig Davis. (Tr. 566-68). Appellant returned to Charleston the next day and turned himself into the police. (Tr. 568).

B.

State's use of a peremptory strike to remove juror Patterson from the panel

When the jury panel was selected, the only black potential juror was Juror Patterson. During *voir dire*, Juror Patterson initially noted that she needed to take her son to college in Miami the following Monday. (Finding of fact No. 11).⁵ Juror Patterson also noted that she knew two of the possible defense witnesses, one of whom was a good friend of her husband. (Finding of fact No.

⁵The findings of fact noted are from the trial court's January 17, 2006 order.

12). However, Juror Patterson denied that knowing these witnesses would have any impact on her evaluation of their testimony. (Finding of fact No. 13). At this point, the State acknowledged it did not have a basis for striking Juror Patterson for cause. (Finding of fact No. 14).

“Juror Patterson later raised her hand and stated the following: ‘Judge, the longer I sit here, I don’t think I can be impartial’ due to the ‘closeness of the relationship I have with [the two defense witnesses].’” (Finding of fact No. 15). During individual *voir dire*, Juror Patterson was informed that Appellant’s counsel had decided not to call the two witnesses she knew. **Juror Patterson testified that “her judgment would not be affected if the two witnesses she knew were not called.”** (Emphasis added). (Finding of fact No. 17). However, Juror Patterson did note that these two witnesses, that Appellant’s counsel had decided not to call, were “men of God, so I would really have to take what they say and believe it.”⁶ (Finding of fact No. 18).

The State gave the following explanation for using one of its peremptory strikes to remove Juror Patterson:

- (1) Juror Patterson is acquainted with the two witnesses and has already made a determination as to those witnesses’ credibility;
- (2) Juror Patterson expressed concerns and exhibited facial expressions and body language that indicate that she does not wish to serve as a juror;
- (3) Juror Patterson indicated that she would be unavailable for the entire week, beginning the week after trial began; and
- (4) Juror Patterson approached and patted one of the defendant’s family members on the back. (Finding of fact No. 19).

⁶These two defenses witnesses were ministers, as was Juror Patterson’s husband.

III.

Issue presented

Whether the trial court erred in rejecting 's Batson challenge where the State's main reason for striking the only black potential juror was that this juror knew two possible defense witnesses, who were not going to be called to testify at trial?

IV.

Argument

A. THE LEGAL ARGUMENT:

The trial court erred in rejecting 's Batson challenge because the State's main reason for striking the only black potential juror was that this juror knew two possible defense witnesses, who were not going to be called to testify at trial

Appellant's main argument is that his constitutional rights to equal protection, due process, and to a jury of his peers were violated when the State used a peremptory strike to remove the only black potential juror from the panel. The trial court rejected this argument for several reasons. First, this issue was raised in Appellant's appeal of the underlying convictions, which appeal was refused by this Court. This idea that a previously raised issue in an appeal that was refused somehow waives that issue in a subsequent habeas corpus action is a frequent misconception in habeas corpus practice.

This Court made it clear in the Syllabus of *Smith v. Hedrick*, 181 W.Va. 394, 382 S.E.2d 588 (1989), that the denial of an appeal does not bar an inmate from raising the same issue in a subsequent habeas corpus petition:

This Court's rejection of a petition for appeal is not a decision on the merits precluding all future consideration of the issues raised therein, unless, as stated in Rule 7 of the West Virginia Rules of Appellate

Procedure, such petition is rejected because the lower court's judgment or order is plainly right, in which case no other petition for appeal shall be permitted.

Thus, there is no waiver or prohibition against an inmate raising an issue in a habeas corpus petition that had been included in the appeal of his underlying conviction where the appeal was refused by this Court.

Second, to the extent the initial appeal did not waive this issue, the trial court concluded "the prosecution provided a neutral, non-pretextual, non-discriminatory challenge where their challenge was based on juror Patterson's initial hesitancy to serve on the jury and her subsequent statements that she would have to believe the two defense witnesses because they were 'men of God' and that she was questioning her impartiality." (Conclusion of law No. 3). The fact that these two defense witnesses were not called to testify did not make a difference because somehow "this may have caused her to believe any and all witnesses the defendant called in his defense." (Conclusion of law No. 4).⁷

As noted by the trial court, the seminal case establishing the procedure to be followed where there is an allegation that a potential juror was stricken from the jury panel for discriminatory reasons is *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). This Court has followed and applied *Batson* in a number of cases. *State ex rel. Ballard v. Painter*, 213 W.Va. 290, 582 S.E.2d 737 (2003); *State ex rel. Rahman v. Canady*, 205 W.Va. 84, 516 S.E.2d 488 (1999); *State ex rel. Azeez v. Mangum*, 195 W.Va. 163, 465 S.E.2d 163 (1995); *State v. Kirkland*, 191 W.Va. 586,

⁷Appellant assumes from the January 17, 2006 order that the trial court's failure to cite the three other reasons asserted by the State for striking Juror Patterson—her alleged body language, her possible unavailability the following week, and the alleged patting one of Appellant's family members on the back—means that these additional reasons were not particularly persuasive. Therefore, Appellant will not address these issues alleged justifications for striking Juror Patterson.

447 S.E.2d 278 (1994); *State v. Bass*, 189 W.Va. 416, 432 S.E.2d 86 (1993); *State v. Rahman*, 199 W.Va. 144, 483 S.E.2d 273, 82 A.L.R.5th 733 (1996); *State v. Harris*, 189 W.Va. 423, 432 S.E.2d 93 (1993); *State v. Marrs*, 180 W.Va. 693, 379 S.E.2d 497 (1989). In two of these cases--*Ballard* and *Marrs*--this Court was persuaded that the State's reasons for using one of its peremptory strikes against the only black potential juror was pretextual and required reversal of the convictions.

Batson first was adopted and applied in *Marrs*, where this Court held in Syllabus Points 1, 2, and 3:

1. It is a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution for a member of a cognizable racial group to be tried on criminal charges by a jury from which members of his race have been purposely excluded.

2. To establish a prima facie case for a violation of equal protection due to racial discrimination in the use of peremptory jury challenges by the State, "the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." (Citations omitted). *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

3. The State may defeat a defendant's prima facie case of a violation of equal protection due to racial discrimination in selection of a jury by providing nonracial, credible reasons for using its peremptory challenges to strike members of the defendant's race from the jury.

This procedure was modified slightly in Syllabus Point 4 of *Azeez*, where this Court followed *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), and held that a

Batson challenge can be raised, even where the defendant is of a different race than the prospective juror. This modification is of no great moment in the present case because Appellant is black and all of the venire, except for juror Patterson, were white.

The most recent *Batson* opinion decided by the United States Supreme Court is *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). In *Miller-El*, the United States Supreme Court examined the development of the law surrounding the peremptory striking of potential jurors of a cognizable racial group. This right to have a jury free of purposeful discrimination based upon the race of the potential jurors first was recognized in *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880).

In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the United States Supreme Court held that a defendant would have to demonstrate that there was a “continuity of discrimination over time” before such a constitutional challenge to the striking of a potential juror would arise to a constitutional violation. Eventually, the United States Supreme Court decided that this approach “turned out to be difficult to the point of unworkable, and in *Batson v. Kentucky*, we recognized that this requirement to show an extended pattern imposed a ‘crippling burden of proof’ that left prosecutors’ use of peremptories ‘largely immune from constitutional scrutiny.’” *Miller-El*, 545 U.S. at ___, 125 S.Ct. at 2324, 162 L.Ed.2d at ___.

In *Batson*, as noted above and adopted in the quoted syllabus points from *Marrs*, the United States Supreme Court sought to establish a more individualized analysis, rather than requiring a showing that a particular office has a demonstrated history of discriminating against minorities. However, in *Miller-El*, 545 U.S. at ___, 125 S.Ct. at 2325, 162 L.Ed.2d at ___, the United States Supreme Court noted the inherent problems with this approach:

Although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain*'s wide net, the net was not entirely consigned to history, for *Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give. If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson*'s explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination.

The point emphasized in *Miller-El* is that a prosecutor simply stating a neutral reason for striking a particular juror is not the end of the inquiry. The reasons given must be examined in light of the totality of relevant circumstances. In examining the totality of the circumstances in the present case, one of the most critical circumstances for the Court to consider is the fact that Juror Patterson was the only black potential juror in the panel selected for Appellant's trial. Where the State's use of a peremptory strike results in an all white jury, Appellant respectfully submits that the reasons offered by the State for striking the lone black potential juror requires additional scrutiny. Another relevant circumstance examined at length in *Miller-El* that is applicable in the present case is a comparison of the black potential juror who was stricken with any similarly situated white potential juror. *See also Burnett v. State*, 71 Ark.App. 142, 27 S.W.3d 454 (2000)(Lists a number of federal and state court decisions applying this juror comparison analysis).

In Syllabus Points 12 and 13 of *Rahman*, the West Virginia Supreme Court agreed that this type of comparison is relevant in evaluating a *Batson* challenge:

12. Striking even a single black juror for racial reasons violates equal protection, even though other black jurors remain on the panel. The focus of the trial court's analysis should be on whether the State's reason for a challenged strike is pretextual, and not on the overall composition of the jury.

13. In assessing a *Batson* challenge, the trial court must consider a party's assertion that a similarly situated prospective juror was not challenged, both in determining whether the defendant has stated a prima facie case of discrimination, and in deciding whether the explanation given by the prosecution was a pretext for racial discrimination. In order for the trial court to make the latter determination, the State must articulate a credible reason for the different treatment of similarly situated black and white jurors.

While it is the better practice for these comparisons to be made at the time the *Batson* challenge is made at trial, as suggested by Syllabus Points 12 and 13 of *Rahman*, there is nothing to prevent a trial court in a habeas corpus action from making this comparison. For example, in footnote 2 of *Miller-El*, the majority, in challenging the dissenting view that the "comparisons of black and nonblack venire panelists...are not properly before this Court, not having been put before the Texas courts," explained, "But the dissent conflates the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence." Thus, the point made by the majority in *Miller-El* is that as long as the evidence from which this juror comparison can be made is in the record, the trial court in a habeas corpus proceeding can perform this analysis, even if it was not first raised during the underlying trial.

During the *voir dire*, three potential jurors acknowledged knowing at least one or more of the possible witnesses identified. Juror Patterson knew Mr. Bullett and Mr. Byers, who did not testify; juror Hayes knew Dr. Kessell, **who did testify**; and juror Akers knew Arlo Cook as being someone who lived in her neighborhood, who did not testify. (Tr. 41, 43). Of the three potential jurors who admitted having some knowledge of a possible witness, only juror Patterson was stricken by the State. Juror Hayes and juror Akers, both of whom were white, remained on the jury.

The trial court rejected this argument by focusing solely on comparing Juror Hayes and Juror Patterson, omitting any reference to Juror Akers. With respect to Juror Hayes, who worked

at a hospital as a nurse, knew Dr. Kessell, but had not worked with him, the trial court concluded, "The Court finds that this is quite different from juror Patterson's situation where she referred to the witnesses she knew as men of God, her husband's friends, and where she questioned her impartiality." (Finding of fact No. 23).

Appellant agrees there are always going to be factual distinctions that can be made when potential jurors are compared. Juror Hayes and Juror Akers did not state that they could not be impartial regarding Dr. Kessel and Mr. Cook respectively, whereas Juror Patterson clearly expressed some ambivalence with respect to her ability to be impartial, if the two suggested defense witnesses had been called. However, Juror Patterson expressed no ambivalence once she was informed that these two witnesses were not going to be called. Thus, the pretext of the State striking the only black potential juror based upon that juror's alleged impartiality regarding two witnesses **who were never called to testify at trial** is evident on its face. The State knew during the pretrial that these two possible defense witnesses **were not going to be called as witnesses**, yet, the State based its peremptory strike of Juror Patterson, in part, on her comments regarding these two possible defense witnesses.

Appellant respectfully submits that under the foregoing case law, the reasons given by the State for striking Juror Patterson are pretextual, resulting in a violation of Appellant's constitutional rights to equal protection, due process, and to a jury of his peers. Making a strong statement condemning the striking of the only black potential juror because she may have questioned her partiality with respect to two witnesses, who were never going to be called to testify at trial, would send another signal to prosecutors and defense lawyers that race should never be a factor in making peremptory strikes.

B. THE ARGUMENT BASED UPON REALITY:

Should this Court follow the opinions of Justice Thurgood Marshall and Justice Stephen Breyer and eliminate all peremptory challenges?

The foregoing case law demonstrates the sheer frustration the United States Supreme Court has experienced in its attempt to eliminate any consideration of race from the jury selection process. The standard of review has changed with each pivotal decision. *Batson* has spawned challenges to peremptory strikes based upon other protected classifications, such as religion and sex. *See generally* Annot., "Use of peremptory challenges to exclude persons from criminal jury based on religious affiliation—post-*Batson* state cases," 63 A.L.R.5th 375 (1998); Annot., "Voir dire exclusions of men from state trial jury or jury panel—post-*J.E.B. v. Alabama ex rel.T.B.*, 511 U.S. 127, cases," 88 A.L.R.5th 67 (2001); Annot., "Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury—post-*Batson* state cases," 47 A.L.R.5th 259 (1997). Courts also are struggling with how to handle a *Batson* challenge where the prosecutor provides both neutral and racial reasons for the peremptory strike. Annot., "Adoption and application of 'tainted' approach or 'dual motivation' analysis in determining whether existence of single discriminatory reason for peremptory strike results in automatic *Batson* violation when neutral reasons also have been articulated," 15 A.L.R.6th 319 (2006). It is conceivable the day will come where all peremptory strikes will have to be explained on the record to ensure that such strikes were based upon constitutionally valid reasons.

What the United States Supreme Court has failed to acknowledge is the simple truth that **regardless of what any lawyer represents to a trial court, race absolutely is a factor in jury**

selection. In researching the case law in this area, counsel for Appellant has been unable to find a court having a discussion of this issue that is based in reality.

At the beginning of a trial, lawyers only have the most basic demographic information on the potential jurors. Before a trial, the clerk's office makes available to all counsel sheets containing the potential juror's age, sex, occupation, marital status, address, and race.⁸ Jury consultants, who are being used more frequently, absolutely consider the race of the potential juror in their analysis. If race indeed is not supposed to be a factor or consideration at all, why do clerk's offices include this fact in the juror information provided? While some additional information regarding a potential juror may be gleaned through the voir dire process, more often than not, lawyers only have this general information.

In light of this fact, it is patently ridiculous for any court to state, with a straight face, that race is not a factor in jury selection. Jury selection necessarily is based upon a lawyer's perceived generalizations regarding the life experiences of the potential jurors. Thus, prosecutors, rightly or wrongly, believe a black potential juror may be more skeptical of the State's evidence while defense lawyers, rightly or wrongly, believe a black potential juror will be more sympathetic to the defendant's case. Regardless of the validity or invalidity of these generalizations, lawyers do not have anything else to rely upon in making peremptory strikes, other than sheer intuition or instinct.

⁸The "Summoned Juror Profile" used in Kanawha County includes fields for Age, Sex, Race, Marital Status, Occupation, Employer, Education, Pay Property Tax, Spouse, Spouse Occupation, Employer, Number of Children, and Ages.

In his concurring opinion in *Miller-El*, Justice Breyer accepted Justice Marshall's conclusion that the *Batson* rule would not achieve its goal of eliminating the unconstitutional use of race in the jury selection process and that only the elimination of peremptory challenges would accomplish this result. *Miller-El*, 545 U.S. at ___, 125 S.Ct. at 2340, 162 L.Ed.2d at ___. In *Murphy v. Dretke*, 416 F.3d 427, 439 (5th Cir. 2005), the Fifth Circuit recognized there may be some momentum supporting this view and acknowledged that *Miller-El* "may be the first ring of the death knell for peremptory challenges ...and that the Supreme Court may well grant *certiorari* in this case to finally bury the concept of peremptory challenges."⁹ While barring all peremptory strikes is a radical concept that at least two United States Supreme Court Justices advocate, it certainly would eliminate this convoluted after-the-fact attempt by trial and appellate courts to parse through the reasons given by the State for striking a black potential juror searching to determine whether the reasons are pretextual or not.

In West Virginia, which is not as racially diverse as most other parts of the country, the impact of a peremptory strike against a black potential juror is even greater because often, as in the present case, there may only be one black potential juror. At a minimum, whether or not peremptory strikes should be eliminated is worthy of serious consideration and study by this Court and the Bar.

⁹This prediction turned out to be false as the United States Supreme Court denied *certiorari* in this case. *Murphy v. Dretke*, ___ U.S. ___, 126 S.Ct. 1028, 163 L.Ed.2d 868 (2006).

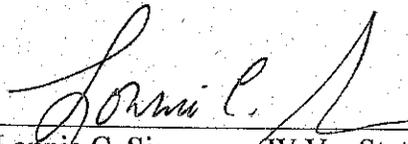
V.

Conclusion

For the foregoing reasons, Appellant Christopher Lee Davis respectfully moves this Court to grant this **APPEAL**, to schedule this case on the argument docket, to reverse the final order of the Circuit Court of Kanawha County, to set aside Appellant's convictions, and to remand this for a new trial on the underlying criminal charges.

CHRISTOPHER LEE DAVIS, Appellant,

--By Counsel--

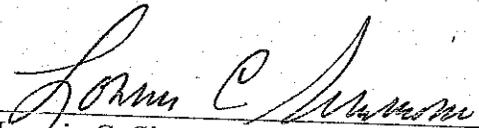


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CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **APPELLANT'S APPEAL BRIEF** was served on counsel of record on the 5th day of February, 2007, through the United States Postal Service, to the following:

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