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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2010-2011

CR-05-2371

Jason Michael Sharp

v.

State of Alabama

Appeal from Madison Circuit Court
(CC-99-2473)

On Return to Second Remand

KELLUM, Judge.

Jason Michael Sharp was convicted of murder made capital because it was committed during the course of a rape or attempted rape in the first or second degree. See § 13A-5-

40(a)(3), Ala. Code 1975. By a vote of 11-1, the jury recommended that Sharp be sentenced to death for his capital-murder conviction. The trial court accepted the jury's recommendation and sentenced Sharp to death.

This Court initially remanded the case for the trial court to amend its sentencing order. Sharp v. State, [Ms. CR-05-2371, August 29, 2008] ___ So. 3d ___ (Ala. Crim. App. 2008). On return to remand, this Court affirmed Sharp's conviction and sentence. Sharp v. State, [Ms. CR-05-2371, December 19, 2008] ___ So. 3d ___ , ___(Ala. Crim. App. 2008)(opinion on return to remand). The Alabama Supreme Court granted certiorari review and reversed this Court's judgment, holding that, under the plain-error standard of review, see Rule 45A, Ala. R. App. P., the record raised an inference that the State had used its peremptory strikes in a racially discriminatory manner and remanded the case for this Court to remand to the trial court to conduct a hearing pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), at which the State would be required to articulate the reasons for its strikes against African-American veniremembers. See Ex parte Sharp, [Ms. 1080959, December 4, 2009] ___ So. 3d ___ (Ala. 2009).

In accordance with the Supreme Court's instructions, we remanded this case for the trial court to conduct a Batson hearing and to determine whether the State had used its strikes in a racially discriminatory manner. See Sharp v. State, [Ms. CR-05-2371, March 5, 2010] ___ So. 3d ___ (Ala. Crim. App. 2010) (opinion after remand from the Alabama Supreme Court).

The trial court complied with our instructions and conducted a Batson hearing on April 27, 2010. At that hearing, the State articulated its reasons for striking African-American veniremembers. The trial court permitted Sharp to file a written response to the State's asserted reasons, in which Sharp made an extensive argument that all the State's reasons for striking African-American veniremembers were pretextual. After that, the State filed a written reply to Sharp's response. The trial court issued an order on July 16, 2010, finding that the State's reasons for its peremptory strikes against African-American veniremembers were race-neutral and were not pretextual and, thus, that the State had not violated Batson in using its peremptory strikes. We reverse and remand.

The record indicates that the venire consisted of 80 potential jurors. Nine of those jurors were removed for cause. Of the remaining 71, from which the jury was struck, 14 were African-American and 57 were Caucasian. The State was afforded 30 peremptory strikes and the defense 29 peremptory strikes, with each party's last strike serving as an alternate juror. The State used 11 of its 30 strikes against African-Americans, removing all but 3 African-Americans from the venire. The defense struck two African-Americans. One African-American sat on Sharp's jury.

At the hearing on remand, the State provided the following reasons for striking the 11 African-Americans, which we address in the order in which the State addressed them. As to Juror 55, the State provided the following reasons:

> "[T]he State would then start with Juror Number 55. And the State would put forth as the reasons that juror Number 55 was struck by the State, first and foremost, that the juror was opposed to the death penalty. And that was evidenced in the juror's questionnaire, specifically Question Number 53, and then in that the juror had responded that they would automatically vote against the death penalty. Also in 53 the juror wrote opposed with respect to the death penalty.
>
> "And then in the general voir dire of the panel, the juror expressed opposition to the death penalty.

> And in individual voir dire, the juror said that she could only impose the death penalty if she had to.
>
> "Further, the prosecution noted that in the juror's work that she dealt extensively with victims of abuse in her work and that she was a witness in many cases. She was in, specifically --
>
> "Do you have her questionnaire?
>
> "She was a social service case worker, Judge. And that was of some concern to the State in that case, as I have noted. She had been a witness in many cases because of her work.
>
> "Juror further acknowledged that she knew trial counsel, Barry Abston.
>
> "And then later of lesser importance to the State was the fact that she knew Your Honor in the case.
>
> "We also noted in her questionnaire that her son had been a victim of an attempted murder case and that there had never been any conviction or prosecution in that attempted murder case.
>
> "And, Judge, those are basically the reasons that the State struck Juror Number 55."

(Record on Return to Remand ("RTR"), R. 5-6.)

The State gave the following reasons for striking Juror 37:

> "Judge, our next one would be Juror Number 37. And the reasons that we struck Juror Number 37, generally speaking, is he was opposed to the death penalty. On his questionnaire, on Question Number 53 that asked about personal, ethical, or moral beliefs against the death penalty that you'd

automatically vote against it. He left it blank. He did not answer that. And then it was his feelings on the death penalty were uncovered during the voir dire portion of the trial in that he said he had a religious or moral objection to the death penalty.

"And then also in individual voir dire he said that the Bible teaches that vengeance is the Lord's.

"Additionally in individual voir dire he said he would not be able to live with himself if he had anything to do with the defendant receiving the death penalty. That was the main reason that he was struck.

"And further there was his questionnaire there was just -- there were so many questions that were left blank by this particular prospective juror, and included in those, I've already mentioned Question Number 53, as well as 54. He left blank Question 55. He left blank Question 56 having to do with should a defendant have effective assistance of counsel. Question 60 about whether the death penalty was used too often or not.

"We additionally noted his occupation, Judge, as being a custodian, and that was of some importance to us, besides the death penalty issues, in that as the Court is well aware that this was a circumstantial case that really the thrust of the State's evidence was DNA evidence, as the Court knows is somewhat sophisticated and technical evidence. So his sophistication socially or professionally was noted by the State.

"And those are the reasons that the State struck Juror Number 37."

(RTR, R. 8-10.)

As to Juror 65, the State gave the following reasons:

"Next would be Juror Number 65.

"Juror Number 65, Question 53 in his questionnaire, again having to do with the death penalty, he answered in the affirmative that he would automatically vote against the death penalty. Additionally in Question 54 when the question asked if you have some feelings against the death penalty which fall short of the previous question, this prospective juror wrote, 'Vengeance is mine saith the Lord, no man.' It says, 'believe life in prison instead.' That was Question 54.

"And then also in Question 62 he also answered in the affirmative that you would automatically vote for its imposition. And then in voir dire of the entire group, the general voir dire, he raised his hand as having a religious or moral objection to the death penalty.

"In individual voir dire he said I am not in favor of the death penalty. He additionally said there might be some instances where maybe a juror could impose the death penalty. When asked in individual voir dire, could you impose the death penalty, he said, 'I don't think so.'

"He also noted in voir dire that he had some family obligations that might prevent him from jury service.

"And those were the main factors of why Juror Number 65 was struck."

(RTR, R. 10-11.)

Regarding Juror 39, the State explained:

"The next would be Juror Number 39. The first thing of note to the prosecution in this case was the fact that this juror was Seventh Day Adventist, his religion, that the Court had engaged the entire

panel in general voir dire about possible service on Saturday and that this would conflict with his religious beliefs. That was our primary reason for striking him, that was he noted he was Seventh Day Adventist in his questionnaire in Question Number 8 and then also acknowledged that in voir dire.

"We also noticed from his questionnaire that he was unemployed and there was scant information from him about his employment. That was another factor in that.

"And then in Question Number 44, it says something about him or family in the ministry, and he indicated in there -- it was not completely clear, I believe, judge. It says do you or any relative or close personal friend belong to any group or organization which ministers to prisoners or inmates, B. Provides legal, social, or other assistance to prisoners, inmates, or ex-cons? He answered yes. And it says please explain. He said prison ministries. That, too, was a factor in our eliminating him from the jury.

"We also note in Question 26 that a friend of his was a pastor.

"Then in Question Number 79 at the end of the questionnaire, having to do with media and whether a particular juror could be fair, this juror answered, Juror Number 39 answered that he could not, not be fair.

"Also there was some -- on Question Number 24, he didn't fully answer, have you, family, friend been accused of a crime. But there was no more information on that other than yes.

"And those are the reasons that the State struck Juror Number 39."

(RTR, R. 11-12.)

The State gave the following reasons for striking Juror 52:

> "Next would be Juror Number 52. The first thing we noted in reviewing the questionnaires was that this juror's religious denomination was that of a Sabbath Keeper, which is nearly identical to Seventh Day Adventist, which brought up the possibility of a conflict as further discussed about the earlier juror and the possibility of the Court having to work through Saturday on this case.
>
> "We also noticed in Question Number 26 that this juror had studied or was studying to become a minister. And it was determined that that was not the kind of juror we were looking for. We additionally noted that this juror's work history and present employment was that of somewhat manual labor, forklift operator. And again, with the realities of the case we had before us, Judge, with technical, sophisticated DNA evidence, that was not the kind of juror we were looking for.
>
> "We also noted in Questions 22 and 23 that this juror was actually a witness to a murder and that her brother was, in fact, murdered and he had been convicted several times of varying offenses before he was murdered.
>
> "It was just our feeling this juror was a little too connected to the process, in the role of a witness or in the role of a family member having to do with a murder.
>
> "And those were the -- those were the reasons that we struck Juror Number 52."

(RTR, R. 12-13.)

As to Juror 27, the State provided the following reasons:

> "Next, Judge, would be Juror Number 27. And first and foremost that occurred to us was her employment, that being a packer on an assembly line at Target Distribution Center. Her previous employment was at Burger King [fast-food restaurant]. And that was something obviously that the State in its quest for jurors that possessed a little more sophistication either in a professional or a social sophistication, that was of some concern to us, as the kind of employment she had.
>
> "I also noticed, Judge, in Question Number 79 at the very end of the questionnaire, when the question asks, 'If you've heard anything in the media regarding this case, do you feel you could still be fair and impartial?' And she circled no. That caused us concern.
>
> "And of equal concern was the fact that according to our records she had been charged with what appears to be six counts of possession of marijuana in the second degree. It appeared that she had been convicted on at least one of these counts. These cases arose back in 1990. Of some interest to me was the fact I was exclusively a drug prosecutor from '88 until '94, so I would have been in the office. She appeared to have lived here in Madison County, these charges came out of Madison County.
>
> "And all of those were of concern to the State and that's the reasons we struck Juror Number 27."

(RTR, R. 14-15.)

Regarding Juror 11, the State explained:

> "Judge, the next one would be prospective Juror Number 11. And the reasons that the State struck

her, first, we noted she too was Seventh Day Adventist. For the reasons earlier stated, she was not desirable to us.

"We also noticed in her employment questions, specifically Number 6, that she had been -- she was unemployed. And when asked previous work experience for the last 10 years, she had none. It asked what her husband's work was. Apparently she had an ex-husband. And when asked what work he did she said unknown.

"And again, in the employment area, in light of the evidence we were presenting that was not a desirable juror to us.

"In Question Number 79, she didn't give an answer in Question Number 79 about media and whether she could be fair and impartial.

"We had noted that she did have a conviction for issuing a worthless check through our records.

"....

"Well, she didn't fully answer Number 74. And, Judge, those were the reasons that the State struck Juror Number 11."

(RTR, R. 15-16.)

The State explained that it struck Juror 64 for the following reasons:

"The next, Judge, would be Juror Number 64. The first thing we noted was that this juror had served on three juries in the previous six years before the trial in the incident case. One of those cases had resulted in a not guilty verdict. We noted when this juror filled out her questionnaire, when some of the principals of the criminal law was discussed

that she had circled reasonable doubt in Question 50. And on Question 55 also asked if there was any other information. And she said I'm a great person. And in general, Judge, our feeling was -- our feeling was that she was, for lack of a better term, a little bit too much of a somewhat arrogant, professional juror. Because in general voir dire she was fairly verbal in that process asking about whether the death penalty has appeals. She was just she was pretty vocal. And the fact that she had had prior service seemed to be, again, for the lack of a better word, seemed to be somewhat of a professional juror. One of those prior juries she had returned a not guilty.

"We also noted that this juror was a nurse. As the Court well remembers, the victim in this case was a nurse, as was one of our key witnesses. And we were of the opinion that to risk a juror second guessing what a key witness in our case, Nurse Kim Hellums had done in the hospital, was something to be avoided.

"And Juror Number 64 was struck for those reasons."

(RTR, R. 16-17.)

As to Juror 38, the State explained:

"The next one, Judge, would be Juror Number 38. One of the first things we noticed on this was this particular juror's checkered employment history, that she was presently working as a car rental agent and had only been on the job for two weeks. And from her employment history section, Question 17, she had never been at any employer for more than three months. So it appeared to total roughly seven months of work in the last 10 years. She did not appear to be sophisticated to us in filling out her questionnaire, in that she misspelled Wal-Mart as one of her previous employers as Wal-Marts.

"There was some questions she did not answer such as Question Number 50. She said she knew some attorney in Michigan, but not much -- in Question Number 26, but not much more information than that. And what was noted from my seating chart, Judge, is that this particular juror appeared to me to be somewhat inattentive and disinterested during the voir dire process.

"And for those reasons we struck Juror Number 38."

(RTR, R. 17-18.)

With regard to Juror 47, the State explained:

"Judge, our next one would be Juror Number 47. And the first thing we noted was again in the area professional or social sophistication, that this lady was a cafeteria manager, that her husband was a security guard, that she had answered some questions, and I'm not trying to lead the Court to believe she's the only one who messed up these answers, because there were a number of people on the panel, and some that remained on the jury that, too, had trouble with some questions such as Question Number 50, if the burden should be beyond all doubt for the State and she said yes. That the defendant -- in Question 58, that the defendant should be required to testify.

"And then we got to the area of media exposure and she was -- she was in -- we noted in her questionnaire that she said she never watched TV. And then in the general voir dire she had said that she had seen some media exposure of this case. And then we further voir dired her in individual voir dire, and I made a note on my seating chart that as a result of that she said she could be fair, but as a result of that questioning, I don't know if it was specifically that question, but I detected a

hostility on her part just in general. Didn't know if she wanted to be here.

"But between that, that I noted about her, the fact that her sophistication level was somewhat suspect in our opinion and we had uncovered she had also had an issuing a worthless check, it was for those reasons, Judge, that we struck Juror Number 47."

(RTR, R. 19-20.)

Finally, the State explained why it struck Juror 74:

"Judge, the next one would be Juror 74. In reviewing her questionnaire we noted at Question 20 that she had had previous jury service, one involving a capital murder charge where the defendant received a sentence of life without parole. That was of some interest to us and we were not -- obviously we were seeking the death penalty in this case, we were not looking for any expert jurors or seasoned jurors in this case.

"In fact, when you look at the twelve that remained on the jury only one juror had ever served on a jury and it was 45 [sic] years before this case, roughly, back in the '70s according to him.

"We also noticed here on Juror Number 74 that her occupation was a secretary. That in the questionnaire on Question Number 67 it says, 'Do you agree that the indictment charging capital murder is only a formal charge and has nothing to do with guilt or innocence?' She says, 'No.'

"Question 74 we noted that she didn't -- she didn't explain her answer. We also noted that her son in Question 23 was the victim of two robberies, both being obviously a violent crime, and that no arrest or convictions were had in that case.

> "And, Judge, it's for those reasons that we struck Juror Number 74."

(RTR, R. 21-22.)

We note that during the hearing, the trial court inquired about the State's strike of Juror 38 based on her employment history, specifically asking if the prosecutor knew that Juror 38 was retired -- the prosecutor indicated that he did not know that Juror 38 was retired. In addition, during the hearing, the prosecutor explained the "lack of sophistication" reason that he had given for striking several African-Americans as follows:

> "[W]ith respect to professional or social sophistication, Judge, I will note for the Court that when you do look at the jurors who remained on this case, the Court will find that they were all professionals or of management level, with the exception of one lady who was a housewife but married to a guy who worked at Dunlop Tire who had appeared in court as an expert witness. And this lady also had two children who were both educated.
>
> "And it was the State's intent, as I said earlier, that with the level of technical jury that this -- or technical evidence that this jury was going to have to confront that that was one of the main concerns of the State in this case, to, in fact, get a jury that could comprehend DNA evidence. As the Court remembers the defense put up a DNA expert in this case. And the defense had actually sent the DNA evidence to two other independent labs, so we were not sure exactly what may be confronting

> us. Obviously we had DNA testimony from Rodger Morrison at [the Department of Forensic Sciences]."

(RTR, R. 20-21.)

In evaluating a Batson claim, a three-step process must be followed. As explained by the United States Supreme Court in Miller-El v. Cockrell, 537 U.S. 322, 328-29 (2003):

> "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. [Batson,] 476 U.S., at 96-97. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Id., at 97-98. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. Id., at 98."

In this case, the first step of the process -- establishing a prima facie case of discrimination -- has been established. In its opinion, the Supreme Court held that the record raised an inference of discrimination. ___ So. 3d at ___. Thus, it is the second and third steps of the process with which we are here concerned.

In the second step of the process, the State is required to provide race-neutral reasons for its strikes. "After a prima face case is established, there is a presumption that the peremptory challenges were used to discriminate against black jurors" Ex parte Branch, 526 So. 2d 609, 623 (Ala.

1987), and "the burden shifts to the State to provide a race-neutral reason for each strike." Cooper v. State, 611 So. 2d 460, 463 (Ala. Crim. App. 1992). The State "has the burden of articulating a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory." Ex parte Branch, 526 So. 2d at 623.

> "Within the context of Batson, a 'race-neutral' explanation 'means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' Hernandez v. New York, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991). 'In evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law.' Id."

Allen v. State, 659 So. 2d 135, 147 (Ala. Crim. App. 1994) (emphasis added).

In this case, the State provided facially race-neutral reasons for striking African-American jurors. All the reasons given by the State for its strikes of African-American jurors were based on something other than the jurors' race. Indeed, both this Court and the Alabama Supreme Court have

specifically recognized as race-neutral the reasons asserted by the State here, such as prior convictions, failure to answer questions on a juror questionnaire, lack of mental acuity, religion, a relative who has been the victim of a crime, opposition to the death penalty, demeanor, bias resulting from media exposure, and unemployment. See, e.g., Ex parte Brown, 686 So. 2d 409 (Ala. 1996) (the fact that a prospective juror has a criminal history or has a relative who has a criminal history is a race-neutral reason for a peremptory strike); Martin v. State, [Ms. CR-07-0276, March 5, 2010] ___ So. 3d ___, ___ (Ala. Crim. App. 2010) ("Failure to answer questions on a juror questionnaire is a race-neutral reason for a peremptory strike."); Johnson v. State, 43 So. 3d 7, 12 (Ala. Crim. App. 2009) (the fact that a prospective juror "lacked mental acuity" is a race-neutral reason for a peremptory strike); Smith v. State, 838 So. 2d 413 (Ala. Crim. App. 2002) (religious-based reasons are race-neutral reasons for peremptory strikes); Rogers v. State, 819 So. 2d 643 (Ala. Crim. App. 2001) (the fact that a prospective juror has a relative who has been the victim of a crime is a race-neutral reason for a peremptory strike); Acklin v. State, 790 So. 2d

975, 988 (Ala. Crim. App. 2000) ("Mixed feelings or reservations regarding imposition of the death penalty are valid race-neutral reasons for peremptory strikes."); Sockwell v. State, 675 So. 2d 4, 20 (Ala. Crim. App. 1993) (the fact that a prospective juror "may have gained information from pretrial publicity related to the facts of the case to be tried is a race-neutral reason for a strike."), aff'd, 675 So. 2d 38 (Ala. 1995); Hart v. State, 612 So. 2d 520 (Ala. Crim. App. 1992) (a prospective juror's demeanor is a race-neutral reason for a peremptory strike, as is a prospective juror's unemployment), aff'd, 612 So. 2d 536 (Ala. 1992); and Demunn v. State, 627 So. 2d 1005, 1006 (Ala. Crim. App. 1991) ("The striking of venirepersons on the basis of bias is race-neutral."), aff'd, 627 So. 2d 1010 (Ala. 1992). Therefore, the State satisfied its hurdle under step two of the Batson process.

In the third step of the process, the burden is on the defendant to establish that the State's asserted reasons for its strikes were pretextual and, thus, discriminatory.

> "Once the prosecutor has articulated a nondiscriminatory reason for challenging the black jurors, the other side can offer evidence showing that the reasons or explanations are merely a sham

or pretext. [People v.] Wheeler, 22 Cal. 3d [258] at 282, 583 P.2d [748] at 763-64, 148 Cal. Rptr. [890] at 906 [(1978)]. Other than reasons that are obviously contrived, the following are illustrative of the types of evidence that can be used to show sham or pretext:

> "1. The reasons given are not related to the facts of the case.
>
> "2. There was a lack of questioning to the challenged juror, or a lack of meaningful questions.
>
> "3. Disparate treatment -- persons with the same or similar characteristics as the challenged juror were not struck. ...
>
> "4. Disparate examination of members of the venire; e.g., a question designed to provoke a certain response that is likely to disqualify the juror was asked to black jurors, but not to white jurors. ...
>
> "5. The prosecutor, having 6 peremptory challenges, used 2 to remove the only 2 blacks remaining on the venire. ...
>
> "6. 'An explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically.' Slappy [v. State], 503 So. 2d [350] at 355 [(Fla.Dist.Ct.App. 1987)]. For instance, an assumption that teachers as a class are too liberal, without any specific questions having been directed to the panel or the individual juror showing the potentially liberal nature of the challenged juror."

Ex parte Branch, 526 So. 2d at 624.

In addition, "'[t]he explanation offered for striking each black juror must be evaluated in light of the explanations offered for the prosecutor's other peremptory strikes, and as well, in light of the strength of the prima facie case.'" Ex parte Bird, 594 So. 2d 676, 683 (Ala. 1991) (quoting Gamble v. State, 257 Ga. 325, 327, 357 S.E.2d 792, 795 (1987)). In other words, all relevant circumstances must be considered in determining whether purposeful discrimination has been shown. See, e.g., Snyder v. Louisiana, 552 U.S. 472, 478 (2008) ("[I]n reviewing a ruling claimed to be a Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted.").

> "Under Alabama law, the trial judge must 'evaluat[e] the evidence and explanations presented' and 'determine whether the explanations are sufficient to overcome the presumption of bias.' Branch, 526 So. 2d at 624. 'The trial judge cannot merely accept the specific reasons given ... at face value; the judge must consider whether the facially neutral explanations are contrived to avoid admitting the acts of group discrimination.' Id."

Smith v. Jackson, 770 So. 2d 1068, 1072-73 (Ala. 2000). "[T]he proponent's explanations -- even if facially neutral -- are not viewed by the judiciary with credulous naivete." Ex parte Bruner, 681 So. 2d 173, 179 (Ala. 1996) (Cook, J.,

concurring specially). "[T]he critical question in determining whether a [defendant] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. At this stage, 'implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.'" Miller-El, 537 U.S. at 339 (quoting Purkett v. Elem, 514 U.S. 765, 768 (1995)).

"'The trial court is in a better position than the appellate court to distinguish bona fide reasons from sham excuses.'" Harris v. State, 2 So. 3d 880, 899 (Ala. Crim. App. 2007) (quoting Heard v. State, 584 So. 2d 556, 561 (Ala. Crim. App. 1991)). Thus, we must give deference to a trial court's findings and "'[w]e will reverse the circuit court's ruling on the Batson motion only if it is "clearly erroneous."'" Johnson, 43 So. 3d at 12 (quoting Cooper, 611 So. 2d at 463 (quoting in turn Jackson v. State, 549 So. 2d 616, 619 (Ala. Crim. App. 1989))). However, "[d]eference does not by definition preclude relief." Miller-El, 537 U.S. at 340. "'"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire

evidence is left with the definite and firm conviction that a mistake has been committed."'" Fletcher v. State, 703 So. 2d 432, 436 (Ala. Crim. App. 1997) (quoting Davis v. State, 555 So. 2d 309, 312 (Ala. Crim. App. 1989) (quoting in turn Powell v. State, 548 So. 2d 590, 594 (Ala. Crim. App. 1988), aff'd, 548 So. 2d 605 (Ala. 1989))).

We have thoroughly reviewed the transcript of voir dire, the juror questionnaires, and the proceedings on remand, and considering all relevant circumstances, we have no choice but to conclude that the State engaged in purposeful discrimination in violation of Batson. The record discloses a strong prima facie case of discrimination, disparate treatment, and a lack of questioning regarding alleged areas of concern. The State struck a high percentage of African-American jurors and failed to question the potential jurors it struck about many of the reasons it later proffered for its strikes. In addition, many of the State's proffered reasons for its strikes of African-American jurors were either unsupported by the record, suspect, or not applied equally to African-American and Caucasian jurors. While most of these reasons were accompanied by other reasons that were valid --

i.e., that were not suspect, that were supported by the record, and that were applied equally to African-American and Caucasian jurors -- we find that the reasons for the State's strikes of Jurors 27 and 11 were all pretextual and improper under Batson. As explained below, the strength of the prima facie case of discrimination, the evidence of disparate treatment, the lack of questioning, and the State's reasons for its other strikes all leave this Court with no option but to conclude that the State struck Jurors 27 and 11 in violation of Batson.

As noted above, after challenges for cause, there were 71 jurors on the venire, of which 14, or approximately 20 percent, were African-American. The prosecutor struck 11, or approximately 79 percent, of those eligible African-American jurors. The defense struck two African-American jurors, and only one African-American juror sat on Sharp's jury. As noted by the Alabama Supreme Court in its opinion, the record indicates that some African-American jurors who were struck provided responses to questions similar to the responses of Caucasian jurors who were not struck. In addition, the record indicates that the African-American jurors who were struck

shared the characteristic of race but were otherwise heterogenous. Under these circumstances, we find the prima facie case of discrimination to be strong, and we consider the reasons for striking Jurors 27 and 11 with that in mind.

On remand, the State proffered three reasons for striking Juror 27: (1) her employment as a packer on an assembly line at a Target Distribution Center and her previous employment at a Burger King fast-food restaurant indicated that she lacked "sophistication"; (2) on question 79 on the juror questionnaire, asking, "If you've heard anything in the media regarding this case, do you feel you could still be fair and impartial?" she circled "no"; and (3) she had been charged in Madison County with six counts of possession of marijuana in the second degree and convicted of one of those counts in 1990, a time when the prosecutor was exclusively a drug prosecutor for the district attorney's office. The State proffered the following reasons for striking Juror 11: (1) she was a Seventh Day Adventist; (2) she was unemployed, had no employment history over the last 10 years, and indicated on the juror questionnaire that she did not know her ex-husband's place of employment; (3) she did not answer question 79 on the

juror questionnaire and did not "fully" answer question 74; and (4) she had a prior conviction for issuing a worthless check.

The State proffered as a reason for striking Juror 27 that she lacked "sophistication" because she worked as a packer and proffered as a reason for striking Juror 11 that she was unemployed and lacked knowledge of her ex-husband's employment. The State first used "lack of sophistication" as a reason for its strike against Juror 37, the second African-American it struck, who was a custodian. In doing so, the State explained: "[T]he Court is well aware that this was a circumstantial case that really the thrust of the State's evidence was DNA evidence, as the Court knows is somewhat sophisticated and technical evidence. So his sophistication socially or professionally was noted by the State." The State noted later that "with respect to professional or social sophistication ... one of the main concerns of the State in this case [was], to, in fact, get a jury that could comprehend DNA evidence." Thus, it appears that the State was using the term "sophistication" as a synonym for "intelligence," and that it believed that Juror 27 was not sufficiently

intelligent to understand DNA evidence. In addition, although the State did not specifically assert that Juror 11 lacked "sophistication" as it did with Juror 27, it is clear that the State's reasoning was the same for both jurors. The State referred to Juror 11's unemployment and her lack of knowledge of her ex-husband's employment "in light of the evidence we were presenting," thus showing that it also believed Juror 11 was not sufficiently intelligent to understand DNA evidence.

Although, as noted above, low intelligence is a facially race-neutral reason for a peremptory strike, it is nonetheless a suspect reason because of its inherent susceptibility to abuse. See McGahee v. Alabama Dep't of Corr., 560 F.3d 1252, 1265 (11th Cir. 2009) ("[T]he State's claim that several African-Americans were of 'low intelligence' is a particularly suspicious explanation given the role that the claim of 'low intelligence' has played in the history of racial discrimination from juries."). In this case, the reason is even more suspect because it is unsupported by the record and based solely on a group bias. The State's sole basis for coming to the conclusion that Jurors 27 and 11 would not be able to understand DNA evidence was those jurors' employment

-- Juror 27 was a packer and Juror 11 was unemployed and had no knowledge of her ex-husband's employment. However, the nature of a person's employment or the lack of employment, by itself, is not sufficient to establish a lack of intelligence. Nor is there any logical connection between a person's lack of knowledge of an ex-spouse's employment and that person's ability to understand DNA evidence. Yet the prosecutor made no attempt in this case to question these jurors (or any of the jurors on the venire, for that matter) regarding their intelligence level or their ability to understand DNA evidence. "[T]he failure of the State to engage in any meaningful voir dire on a subject of alleged concern is evidence that the explanation is a sham and a pretext for discrimination." Ex parte Bird, 594 So. 2d at 683. Rather, the prosecutor merely assumed that Jurors 27 and 11 would not be able to understand DNA because Juror 27 was employed in a manual-labor or blue-collar job and Juror 11 was unemployed and had no knowledge of her ex-husband's employment. Therefore, this reason for striking Jurors 27 and 11 was clearly based on a group bias against blue-collar workers and the unemployed where the trait of concern -- intelligence --

was not shown to apply to these two particular jurors. Group bias is evidence that the reason for a strike is a sham or pretext for discrimination.

We note that the State used this lack-of-sophistication reason not merely for Jurors 27 and 11, but for a total of 7 of its 11 strikes of African-American jurors -- specifically, Jurors 37, 52, 27, 11, 38, 47, and 74. In other words, 63 percent of the State's strikes against African-American jurors were based, at least in part, on those jurors' supposed lack of intelligence. This is a troubling statistic in light of the historically suspect nature of this reason. Equally troubling is the fact that the record does not support any of the State's strikes for this reason. The State's strikes of Jurors 37, 39, 52, 47, and 74 were also based solely on those jurors' employment -- Juror 37 was a custodian, Juror 39 was unemployed, Juror 52 drove a forklift, Juror 47 was a cafeteria manager, and Juror 74 was a secretary. With respect to these five jurors, the State made the same unsupported group-based assumption it made with Jurors 27 and 11 -- that those jurors who were unemployed or who worked manual-labor or blue-collar jobs were not sufficiently intelligent to

understand DNA evidence -- without questioning any of them regarding their intelligence level or their ability to understand DNA evidence.

With respect to Juror 38, the State relied not only on employment but also on a misspelled word in the juror questionnaire. However, the fact that a juror misspelled a single word on a juror questionnaire fails to establish lack of intelligence, especially in light of the fact that Juror 38 stated on her juror questionnaire that she had attended college and had received a bachelor's degree. In addition, our review of the juror questionnaires reveals that Caucasian jurors who were not struck by the State also misspelled one or more words on their juror questionnaires -- specifically, Juror 5, who misspelled "police," Juror 24, who misspelled "channel," and Juror 33, who misspelled "chamber" and "robbery," all sat on Sharp's jury.[1]

[1]We also note the State's assertion that Juror 38 had a "checkered" employment history and had worked for only seven months in the last 10 years is belied by the record. On her juror questionnaire, Juror 38 stated, on the first page of the questionnaire, that she had retired from the Department of Defense as a program analyst in 2003, approximately three years before Sharp's trial. At the hearing on remand, the trial court inquired whether the State was aware that Juror 38 was a retiree, and the State indicated that it was not.

Further, the record discloses disparate treatment by the State with regard to its lack-of-sophistication reason for striking jurors. Although the State struck seven African-Americans based on lack of "sophistication," either because they were unemployed or were employed in manual-labor or blue-collar jobs, the State did not strike Juror 43, a Caucasian who indicated on her juror questionnaire that she was a housewife and had been unemployed for the last 10 years. See, e.g., Carter v. State, 603 So. 2d 1137 (Ala. Crim. App. 1992). The State attempted to justify this disparate treatment at the hearing on remand, explaining that it did not strike Juror 43 because her husband had once testified as an expert witness and her two adult children were "educated," a conclusion apparently based on Juror 43's answer in the juror questionnaire that her son was an engineer and her daughter was a teacher. However, the fact that Juror 43 was married to someone who had once been an expert witness and had two adult children who were "educated" in no way shows the intellectual level of Juror 43 or the ability of Juror 43 to understand DNA evidence.

We recognize that disparate treatment evident in the record may, in some circumstances, be overcome by a sufficient explanation by the State. For example, as the Alabama Supreme Court explained in Ex parte Brown, 686 So. 2d 409 (Ala. 1996):

> "A prosecutor can strike based on a mistaken belief, see Taylor v. State, 666 So. 2d 36, 42 (Ala. Cr. App. 1994); therefore, it is logical that a prosecutor may also decide, based on a mistaken belief, not to strike a veniremember. Because the discrepancy in the way these two jurors were treated was adequately explained, we conclude that the strike of Juror 19 was race-neutral."

686 So. 2d at 420. In this case, however, the State's explanation for not striking Juror 43 was insufficient to dispel the disparate treatment here. Indeed, the State's proffered explanation of the disparate treatment is, itself, support for the conclusion that there was disparate treatment. Despite its reliance on the education level of Juror 43's adult children to conclude that she was sufficiently "sophisticated" to understand DNA evidence, the State struck Jurors 47 and 74, both African-Americans, in part, because they were not sufficiently "sophisticated" even though both had at least one adult child who was "educated" -- Juror 47 had a daughter who was a nurse and Juror 74 had a son employed in information technology.

Finally, although at the hearing on remand the State asserted that it was concerned with seating jurors who were sufficiently "sophisticated" to understand the complex and technical DNA evidence that was to be presented at Sharp's trial, the record of voir dire belies this assertion. During voir dire, the State questioned the venire about DNA evidence as follows:

> "Now what we have here is forensic science, real life forensic science that you'll be confronted with, and specifically it is DNA evidence. You'll hear some cutting edge technology on DNA evidence that was recovered at the scene. And you are not expected to be a scientist or to become a scientist if you're chosen on this jury. And I'm not saying DNA is impossible to understand, because obviously if I understand it and [the other prosecutor] can understand it and these gentlemen [defense attorneys] can understand it, then, you know, you don't have to be super smart to understand it. But what I want to ask you is, is there anybody here who thinks the nature of that testimony, and by the nature I mean it's scientific, do you think that it would be difficult for you to be a juror in that, not because you're not smart enough, I'm not asking you that, but because it's just something that would bore you to tears and you don't think -- you don't think you could pay attention to it, to that kind of testimony?"

(R. 243; emphasis added.) Contrary to the State's contention at the hearing on remand, the State was not concerned, at the time it questioned and struck the jury, with the ability of

the potential jurors to understand the DNA evidence to be presented because "you don't have to be super smart to understand it."

For these reasons, we conclude that the State's proffered reason -- that Jurors 27 and 11 were not sufficiently "sophisticated" to understand DNA evidence -- is pretextual. Having determined that this reason for striking Jurors 27 and 11 was pretextual, the remaining reasons for striking these jurors must be closely scrutinized. Once one of the State's reasons for striking a potential juror is found to be invalid, the remaining reasons for striking that juror and the reasons for the striking of other jurors become suspect and are subject to greater scrutiny. See, e.g., Ex parte Bird, 594 So. 2d 676 (Ala. 1991), and Maddox v. State, 708 So. 2d 220 (Ala. Crim. App. 1997). As the Alabama Supreme Court explained in Ex parte Bird:

> "Although one unconstitutional peremptory strike requires reversal and a new trial, we take this opportunity to accentuate the specific weaknesses of the State's explanations regarding a number of its challenges. In doing so, we point out that the State's failure to articulate a legitimate reason for its challenge of veniremember number 26 exposes its rationale for subsequent strikes to greater scrutiny. See State v. Antwine, 743 S.W.2d 51, 64 (Mo. 1987). Thus, even explanations that would

> ordinarily pass muster become suspect where one or more of the explanations are particularly fanciful or whimsical."

594 So. 2d at 683 (emphasis added).

The State also proffered as a reason for striking both Juror 27 and Juror 11 that each had a prior conviction, specifically that Juror 27 had a prior conviction for possession of marijuana at a time when the prosecutor was working exclusively on drug-related cases and that Juror 11 had a prior conviction for issuing a worthless check. However, nothing in the record supports these assertions. On the juror questionnaires, potential jurors were asked whether they, or any relative or close friend, had ever been accused of a crime and what the outcome, if any, of that accusation was. Juror 27 stated "no" in answer to the question, and Juror 11 indicated that her brother had previously been accused and convicted of a crime, but she did not list herself as having ever been accused of a crime. The State had the opportunity to question these jurors about their prior criminal history and to specifically question them regarding the discrepancy between their answers on the questionnaire and the State's records (to which the State referred at the

hearing on remand) but did not do so. As noted above, "[T]he failure of the State to engage in any meaningful voir dire on a subject of alleged concern is evidence that the explanation is a sham and a pretext for discrimination." Hemphill v. State, 610 So. 2d 413, 416 (Ala. Crim. App. 1992).

In addition, when Sharp pointed out in his written response the lack of support in the record for the assertion that these jurors had prior convictions, the State proffered no evidence of these jurors' prior convictions, nor did it even mention Sharp's argument in this regard in its reply.[2]

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[2]Indeed, the State did not address in its written reply any of Sharp's specific arguments. Rather, the State made only a general denial of any discriminatory intent, and claimed that Sharp's numerous arguments regarding disparate treatment were based on a flawed analysis. Specifically, the State argued that its strikes were based on the aggregate characteristics of a particular juror and that none of the Caucasian jurors in this case who were not struck by the State shared all the same aggregate characteristics as the African-American jurors who were struck and, thus, that there could be no disparate treatment. However, the likelihood of two potential jurors sharing all the same characteristics is remote, at best, which is why such a view has been expressly rejected by the United States Supreme Court. As explained in Miller-El:

> "None of our cases announces a rule that no comparison of [potential jurors] is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. ... A per se rule that a defendant

We recognize that "[t]he fact that a prosecutor's stated reason for striking a juror is not reflected in the record does not necessarily make that reason pretextual." Martin v. State, [Ms. CR-07-0276, March 5, 2010] ___ So. 3d ___, ___ (Ala. Crim. App. 2010). This Court has held that "[t]here is no requirement that a prosecutor establish evidentiary support for every strike in every case, especially where the defendant has not specifically questioned the validity of the prosecutor's explanations or demanded further proof." Hall v. State, 816 So. 2d 80, 85 (Ala. Crim. App. 1999) (emphasis added). However, in this case, because Sharp questioned the validity of this reason for striking Jurors 27 and 11 in his written response, it was incumbent on the State to at least reply to Sharp's argument.

Moreover, the record discloses disparate treatment in this regard. The State struck Jurors 27 and 11, as well as Juror 47, all African-Americans, in part, because they had at

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> cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters."

545 U.S. at 247 n.6.

least one prior conviction. Yet the State did not strike Juror 24, a Caucasian, who stated on his questionnaire that he had previously been convicted of assault, and this juror sat on Sharp's jury. As this Court explained in Yancey v. State, 813 So. 2d 1 (Ala. Crim. App. 2001):

> "Though we have held that striking a prospective juror because of a prior criminal history is a race-neutral reason, we have also held that the failure to strike both whites and blacks because of prior criminal records is evidence of disparate treatment, in violation of Batson. See Powell v. State, 548 So. 2d 590 (Ala. Crim. App. 1988), aff'd, 548 So. 2d 605 (Ala. 1989). 'Such disparate treatment of otherwise similarly situated persons who happen to be of different racial backgrounds, would evidence discriminatory intent in the State's use of its strikes.' Bishop v. State, 690 So. 2d 498, 500 (Ala. Crim. App. 1995), on remand, 690 So. 2d 502 (Ala. Crim. App. 1996)."

813 So. 2d at 7. See also Rice v. State, [Ms. CR-09-1013, November 5, 2010] ___ So. 3d ___, ___ (Ala. Crim. App. 2010), and Preachers v. State, 963 So. 2d 161, 167-69 (Ala. Crim. App. 2006).

The State's lack of questioning of jurors regarding their prior convictions, the lack of support in the record for the State's proffer that Jurors 27 and 11 had prior convictions, and the disparate treatment of African-American and Caucasian

jurors who had prior convictions leads us to conclude that this reason for striking Jurors 27 and 11 was also pretextual.

The State proffered as a reason for striking Juror 27 that she had answered "no" on question 79 on the juror questionnaire and proffered as a reason for striking Juror 11 that she had not answered question 79 on the questionnaire and had not "fully" answered question 74 on the questionnaire. With respect to Juror 27, although she did, in fact, answer "no" to question 79, indicating that she could not be fair <u>if</u> she had heard anything in the media regarding this case, Juror 27 indicated that she had not, in fact, heard anything in the media regarding the case. During group voir dire, Juror 27 did not respond when asked if anyone had read or heard about the case through the media. On the juror questionnaire, the following six questions -- questions 68, 69, 70, 71, 78, and 79 -- asked about knowledge of the case:

> "68. Do you know anything about the facts of this case other than what you have heard in Court today? Yes _____ No _____ If yes, please explain.
>
> "69. From what source have you heard about this case?
>
> "70. Have you discussed this case with someone who claimed to know something about the facts of

> this case? Yes _____ No _____ If yes, please explain.
>
> "71. Have you heard of this defendant or anything about him apart from anything stated here in open court today? Yes _____ No ____ If yes, what is the source of this information, and please explain how you obtained this information.
>
> "....
>
> "78. What, if anything, have you heard in the media regarding this case?
>
> "79. If you have heard anything in the media regarding this case, do you feel you can still be fair and impartial to both sides. Yes _____ No _____ If no, please explain."

Juror 27 answered "no" to question 68, "none" to question 69, "no" to questions 70 and 71, and "nothing" to question 78. As applied to Juror 27 then, question 79 was nothing more than a hypothetical question and, in context, when Juror 27 answered "no" to question 79, she was not indicating that she could not be fair and impartial in the case, but was indicating that if the circumstances were different, i.e., if she had actually heard about the case through the media, she would not be able to be fair and impartial. Thus, this answer by Juror 27 was no basis for the State's proffered "concern." Indeed, a simple question during voir dire could have cleared up any "concern" by the State regarding this juror's impartiality.

However, the State did not question Juror 27 about her answer to question 79. Indeed, Juror 27 was not questioned individually at all.

With respect to Juror 11, she, too, did not respond during group voir dire when asked if anyone had read or heard about the case through the media. In addition, she, too, indicated on the questionnaire that she had not heard anything about the case, answering "no" to questions 68, 70, and 71, not answering question 69, and answering "nothing" to question 78. Because Juror 11 had heard nothing about the case, there was no reason for her to answer question 79 which, as with Juror 27, was purely hypothetical as applied to her. Moreover, as with Juror 27, the State did not question this juror about her failure to answer question 79. Finally, the record reflects that many potential jurors did not answer question 79 on the questionnaire. Of particular importance here is the fact that Jurors 24, 29, 33, 66, 68, and 79 -- all Caucasians -- also did not answer question 79 on the questionnaire, but none of these jurors was struck by the

State, and all were chosen to sit on Sharp's jury.[3] Although the lone African-American juror who sat on Sharp's jury also did not answer question 79 on the questionnaire, this does not diminish the evident disparate treatment in the record.

In addition, question 74 on the questionnaire asked:

> "Do you feel the accused is guilty just because he/she is in the courtroom today? Yes _____ No _____ If no, please explain."

Juror 11 answered "no" to this question, but did not explain as requested. However, of the 14 jurors selected for service, only one provided an explanation to this question or, as phrased by the prosecutor, "fully" answered this question. Although all 14 jurors selected to serve answered "no" to this question -- as did Juror 11 -- 12 of those jurors provided no explanation at all for their answer, just like Juror 11, and one indicated "N/A." Thus, it would not appear that the State was overly concerned about the failure of jurors to "fully" answer question 74, despite its claim to the contrary at the hearing on remand. "This court has condemned the failure to strike white venirepersons who share the same characteristics

[3]Juror 79, although initially sitting on Sharp's jury, was replaced by an alternate during trial. This fact, however, does not alter our Batson analysis.

as black venirepersons who were struck." Bishop v. State, 690 So. 2d 498, 500 (Ala. Crim. App. 1995). Moreover, the State did not question Juror 11, or any of the potential jurors, with respect to question 74. Accordingly, based on the disparate treatment and lack of questioning, we must conclude that these reasons for striking Jurors 27 and 11 were also pretextual.

Finally, the State proffered as a reason for striking Juror 11 that she was a Seventh Day Adventist and, thus, that she could not work on Saturdays because of her religious beliefs. The record reflects that during group voir dire, the trial court informed the venire that the trial might last through Saturday of that week and asked if anyone had a problem with working Saturday and, if so, to write that on the questionnaires they were going to complete that afternoon. Juror 11 did not state on her questionnaire that she a problem with working on Saturday, although she did indicate on the questionnaire that she was a Seventh Day Adventist. The State also did not question Juror 11 about her ability to work on Saturday. Rather, the State merely assumed, based solely on her religious affiliation, that she could not work on

Saturday. The fact, however, that a person holds a certain religious affiliation does not establish that he or she subscribes to all of the beliefs of that religion. As noted previously, a group bias where the trait of concern -- in this case, the inability to work on Saturday -- was not shown to apply to this particular juror is evidence that the proffered reason for striking Juror 11 is a sham or pretext for discrimination. In addition, the State's lack of questioning of this juror, which could have easily cleared up any concern as to whether this juror could work on Saturday, is also evidence of discrimination. Therefore, we must conclude that this reason for striking Juror 11 was also pretextual.

Our conclusion that all the State's reasons for striking Juror 27 and Juror 11 were pretextual is buttressed by the questionable reasons the State proffered for its strikes of other African-American jurors. For example, one of the reasons the State proffered for striking Juror 39 was that he had a friend who was a pastor and either was himself or knew someone involved in prison ministries and one of the reasons the State proffered for striking Juror 52 was that she was studying to be a minister and "that was not the kind of juror

[the State was] looking for." (RTR, R. 13.) However, the State did not strike Juror 79, a Caucasian, who was a minister and who indicated on his questionnaire that he had previously volunteered visiting inmates in prison.

In addition, one of the reasons the State proffered for striking Juror 47, an African-American, was that she had answered on the juror questionnaire that she believed the State should have to prove its case beyond all doubt and that a criminal defendant should have to testify on his or her own behalf. However, when proffering this reason at the hearing on remand, the State admitted that many other jurors, some of whom sat on Sharp's jury, had provided similar answers. Indeed, the record reflects that half of the petit jurors had answered similarly to Juror 47. Specifically, Jurors 5, 29, 44, 46, 59, and 70 -- all Caucasians who sat on Sharp's jury -- answered on their questionnaires that they believed the State should have to prove its case beyond all doubt. Additionally, Juror 59 answered on the questionnaire -- exactly like struck African-American Juror 47 -- that he believed a criminal defendant should have to testify on his or her own behalf.

Finally, one of the reasons proffered for striking Juror 74 was that she had a son who had been the victim of two robberies and that no arrest or conviction was made regarding those crimes. Similarly, one of the reasons proffered for striking Juror 55 was that she had a son who had been the victim of attempted murder and no arrest or conviction was made regarding that crime. However, the State did not strike Juror 66 -- a Caucasian who sat on Sharp's jury -- who indicated that he had been the victim of assault and, although an arrest was made, no conviction resulted. Likewise, the State did not strike Juror 68 -- a Caucasian who also sat on Sharp's jury -- and who had been the victim of date rape and no arrest or conviction was made in connection with that crime. Additionally, several other Caucasian jurors who sat on Sharp's jury had, themselves, been victims of violent crimes similar to that endured by Juror 74's son, although all of those crimes resulted in arrests and convictions.

We recognize the inherent difficulty facing prosecutors who have to provide reasons for peremptory strikes years, and hundreds of trials, after those strikes were made. We also recognize that the disparate treatment of jurors may have a

legitimate explanation. Peremptory strikes are, after all, often based on instinct. However, as the United States Supreme Court explained in Miller-El:

> "[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."

545 U.S. at 252.

Under the circumstances in this case, after thoroughly reviewing the record and examining the reasons proffered by the State for its strikes, we have no choice but to conclude that the State exercised its peremptory strikes in a discriminatory manner against African-Americans, in violation of Batson. Therefore, Sharp is entitled to a new trial.

Based on the foregoing, the judgment of the trial court is reversed and this cause is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Welch, P.J., and Windom, J., concur.