SJC-12778

COMMONWEALTH vs. DAGOBERTO SANCHEZ.

Suffolk. December 5, 2019. - August 25, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Jury and Jurors. Practice, Criminal, Jury and jurors, Challenge to jurors, New trial, Verdict, Sentence, Collateral estoppel, Double jeopardy. Estoppel. Collateral Estoppel. Constitutional Law, Double jeopardy.

Indictments found and returned in the Superior Court Department on August 5 and 16, 2005.

Following review by the Appeals Court, 79 Mass. App. Ct. 189 (2011), a motion for a new trial, filed on January 10, 2018, was heard by Douglas H. Wilkins, J.

The Supreme Judicial Court granted an application for direct appellate review.

Cailin M. Campbell, Assistant District Attorney (Mark T. Lee, Assistant District Attorney, also present) for the Commonwealth.

Ruth Greenberg for the defendant.

GAZIANO, J. Throughout the thirteen years of his incarceration, the defendant pressed the same claim at every

stage of appeal or motion for postconviction relief -- that the trial judge did not properly inquire as to whether the prosecutor unconstitutionally struck young African-American men from the jury. The Appeals Court affirmed the trial judge's decision not to probe deeper into the prosecutor's reasons, while the United States Court of Appeals for the First Circuit, on review of the defendant's petition for a writ of habeas corpus, concluded that the trial judge unreasonably applied Federal law.

In this appeal, we must determine what effects these divergent holdings have for a judge considering a subsequent motion for postconviction relief. We also must decide whether the motion judge[1] erred in reducing the verdict under Mass. R. Crim. P. 25 (b) (2), as amended, 420 Mass. 1502 (1995), and whether principles of double jeopardy bar a new trial.

Lastly, we recognize and address apparent differences between Massachusetts and Federal procedures and remedies for impermissible peremptory challenges. In so doing, we adopt the language of the Federal standard for the first step of a challenge pursuant to Batson v. Kentucky, 476 U.S. 79, 95 (1986). We retire the language of "pattern" and "likelihood," which has long governed the first-step inquiry under

[1] The motion judge was not the trial judge, who had retired.

Commonwealth v. Soares, 377 Mass. 461, 486, 489-490, cert. denied, 444 U.S. 881 (1979), because we conclude that this language has resulted in persistent confusion for judges and litigants alike.

For the reasons that follow, we determine that the judge's decision to reduce the verdict in this case under rule 25 (b) (2) was improper, and that principles of double jeopardy do not preclude resentencing or retrying the defendant. Accordingly, we affirm the judge's alternative disposition, and remand the matter to the Superior Court for retrial.

Background. 1. Batson and Soares challenges. "The Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights prohibit a party from exercising a peremptory challenge on the basis of race" or other protected classes. Commonwealth v. Jones, 477 Mass. 307, 319 (2017), citing Batson, 476 U.S. at 95, and Soares, 377 Mass. at 486. Under the Federal Constitution, a racially motivated peremptory challenge violates both the rights of the defendant, Batson, supra at 85, citing Strauder v. West Virginia, 100 U.S. 303 (1880), and the rights of the impermissibly struck juror, Batson, supra at 87. While the inquiry under the Massachusetts Declaration of Rights focuses on a "defendant's right to be tried by a fairly drawn jury of his or her peers," we have long concluded that "[r]egardless of the

perspective from which the problem is viewed, the result appears to be the same." Jones, supra, quoting Commonwealth v. Benoit, 452 Mass. 212, 218 n.6 (2008). Both constitutions "forbid[] striking even a single prospective juror for a discriminatory purpose." Flowers v. Mississippi, 139 S. Ct. 2228, 2244 (2019). See Commonwealth v. Robertson, 480 Mass. 383, 393 (2018). See also Sanchez v. Roden, 753 F.3d 279, 284-288, 300 (1st Cir. 2014) (Sanchez V) ("Batson's core rationale [is] that [a] person's race simply is unrelated to his [or her] fitness as a juror" [quotations and citation omitted]).

Both Federal and Massachusetts courts employ a three-step burden-shifting analysis to examine whether a peremptory strike is being used impermissibly. See Flowers, 139 S. Ct. at 2244; Robertson, 480 Mass. 393. First, the party challenging the strike must rebut a presumption that the peremptory challenge is proper. In Massachusetts, the presumption of propriety is "rebutted on a showing that (1) there is a pattern of excluding members of a discrete grouping and (2) it is likely that individuals are being excluded solely on the basis of their membership in that group." Commonwealth v. Oberle, 476 Mass. 539, 545 (2017). If a party makes such a showing, "the burden shifts to the party exercising the challenge to provide a 'group-neutral' explanation for it" (citation omitted). Id.

Finally, the "judge must then determine whether the explanation is both 'adequate' and 'genuine'" (citation omitted). Id.

2. Voir dire. In the course of the circuitous appellate odyssey of this case, the underlying facts of the voir dire have been discussed repeatedly and at length. See, e.g., Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 190-191 (2011) (Sanchez I); Sanchez V, 753 F.3d at 284-288. We briefly address only those underlying facts that are relevant to this appeal.

The original dispute centered on the prosecutor's twelfth peremptory challenge, in which he struck a nineteen year old African-American college student from the jury. Sanchez V, 753 F.3d at 286. Because two other young, African-American men also had been struck, defense counsel objected on Batson-Soares grounds. Id. at 286-287. Instead of seeking a reason from the Commonwealth or determining that the prima facie showing had been made, the judge responded, "I think his youth and the fact that he's a full-time college student could be a problem." Id. Upon further argument from defense counsel, the judge sought to "shortcut" the process by asking the prosecutor if he would proffer a race-neutral reason for the strike. Id. at 287. The prosecutor argued that age is not a protected characteristic and insisted that the judge formally find that a threshold showing of impropriety had been made before proceeding to the second step of the inquiry. Id. at 287-288. Noting that five African-

American jurors had been seated, the judge declared that the prima facie showing had not been made, and then allowed the prosecutor to use the peremptory challenge without requiring him to give a race-neutral reason. Id. at 288. Defense counsel renewed her objection, and the case proceeded to trial, where the defendant was convicted of murder in the second degree and possession of a firearm without a license. Id.

3. Appellate history. a. Direct review. On appeal, the defendant argued error in the trial judge's decision not to continue past the first step of the Batson-Soares inquiry. The Appeals Court determined that there was no error in the judge's decision. See Sanchez I, 79 Mass. App. Ct. at 191-193. The court reasoned that "the fact that other members -- here, five -- of an allegedly targeted group were seated is an appropriate factor to consider in determining whether the presumption of propriety had been rebutted." Id. at 192. The Appeals Court also determined that the judge was correct in deciding that neither age nor "persons of color" are protected classes under Batson and Soares. Id. at 193. This court denied further appellate review, and the United States Supreme Court denied the defendant's petition for certiorari. See Sanchez v. Massachusetts, 565 U.S. 948 (2011); Commonwealth v. Sanchez, 460 Mass. 1106 (2011).

b. Federal habeas proceedings. In considering the defendant's Federal petition for a writ of habeas corpus, the United States District Court for the District of Massachusetts noted an apparent conflict between Federal law under Batson and Massachusetts law under Soares with respect to the showing required at the first step of the inquiry. See Sanchez vs. Roden, U.S. Dist. Ct., No. 12-10931-FDS (D. Mass. Feb. 14, 2013) (Sanchez IV), vacated by Sanchez V, 753 F.3d 279. The District Court judge's view that "[t]he Massachusetts 'likely' standard is thus more stringent than the [F]ederal standard" led the court to conduct a de novo review of the defendant's Federal Batson claims, in accordance with Federal habeas jurisprudence.[2] Id.

The District Court judge concluded that, while specific racial or ethnic groups are constitutionally protected, the broader appellation of people "of color" did not represent a "cognizable group" for purposes of Batson. Sanchez IV, supra, citing Gray v. Brady, 592 F.3d 296, 302 (1st Cir. 2010).[3]

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[2] The United States Court of Appeals for the First Circuit noted the appearance of the contradiction and did not reach the question whether Massachusetts law actually requires a higher burden at the first stage of a Batson inquiry. See Sanchez v. Roden, 753 F.3d 279, 300 n.15 (1st Cir. 2014) (Sanchez V).

[3] In reaching this determination, the United States District Court employed a three-part test for defining a cognizable group under Batson, according to which the party challenging the strike must show that "(1) the group is identifiable and limited

Similarly, he noted that age is not a cognizable group under Batson. Sanchez IV, supra. He also decided that intersectionality brought the defendant no further, and explicitly declined to recognize "young African-American men" or "young men 'of color'" as cognizable groups for Batson purposes. Id. Accordingly, the judge denied relief; he reasoned that even if the Appeals Court had applied the proper first-step burden, the defendant's claim would fail because it was not based on a specifically protected cognizable group. Id.

The First Circuit reviewed the defendant's habeas claim de novo. See Sanchez V, 753 F.3d at 293. It concluded that the Appeals Court, and by implication this court (in denying further appellate review), unreasonably applied clearly established Federal law. Id. at 299-300 (defining unreasonable application of Federal law as exceeding even clear error).

Specifically, the First Circuit pointed to Snyder v. Louisiana, 552 U.S. 472 (2008), a case in which the United

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by some clearly identifiable factor, (2) a common thread of attitudes, ideas, or experiences runs through the group, and (3) a community of interests exists among the group's members, such that the group's interest cannot be adequately represented if the group is excluded from the jury." Sanchez vs. Roden, U.S. Dist. Ct., No. 12-10931 (D. Mass. Feb. 14, 2013), vacated, 753 F.3d 279 (1st Cir. 2014), citing Gray v. Brady, 592 F.3d 296, 305-306 (1st Cir. 2010). It concluded that "[a]lthough African-Americans and Hispanics are each a distinct cognizable group, when combined they lack the necessary characteristics, definable qualities, common thread of attitudes, or interests to be considered a cognizable 'group.'" Id.

States Supreme Court "made it clear that in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted." Sanchez V, 753 F.3d at 299, quoting Snyder, supra at 478. Accordingly, the First Circuit determined that the Appeals Court "wholly failed to consider all of the circumstances bearing on potential racial discrimination." Sanchez V, supra. In particular, the First Circuit expressed concern that when the Appeals Court pointed primarily to the number of African-Americans who already had been seated, it "sent the unmistakable message that a prosecutor can get away with discriminating against some African Americans (and by extension, individuals from any other ethnic background) on the venire: so long as a prosecutor does not discriminate against all such individuals, not only will his strikes be permitted, but he will not even be required to explain them." Id. at 299-300.

The First Circuit went on to conduct a thorough first-step inquiry by considering all of the relevant facts and circumstances bearing on potential racial discrimination. Id. at 301-307. The court then concluded that the defendant "satisfied his initial burden under Batson, and the prosecutor should have been required to articulate a race-neutral reason for his peremptory strike." Id. at 307. As a remedy, it

remanded the matter to the District Court for an evidentiary hearing "to allow a factual, on-the-merits determination with respect to the second and third prongs" of the Batson inquiry. Id.

At the evidentiary hearing -- some eight years after the voir dire at the defendant's trial -- the United States District Court judge attempted to ascertain whether the prosecutor in fact had exercised his peremptory challenge on the basis of race. See Sanchez vs. Roden, U.S. Dist. Ct., No. 12-10931-FDS (D. Mass. Feb. 4, 2015), aff'd, 808 F.3d 85 (1st Cir. 2015) (Sanchez VII), cert. denied, 136 S. Ct. 1685 (2016). When asked directly, the prosecutor testified that he struck the juror in question because of the juror's age, not his race. Id. Based on a combination of his testimony and his demeanor, including testimony about why he did not strike a twenty-one year old, white, Russian immigrant who also was a student, the judge found that the prosecutor's "race-neutral explanation, under the circumstances presented here, is reasonable and credible." Id. Therefore, the defendant's challenge failed at the third step of Batson, and habeas relief was denied. Id. Reviewing this determination under the deferential standard of clear error, the First Circuit affirmed the Federal District Court judge's determination. See Sanchez VII, supra at 90, 93.

c. Motion for a new trial. The defendant then filed a motion for a new trial pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), or, in the alternative, for a reduced sentence pursuant to Mass. R. Crim. P. 25 (b) (2). The motion judge looked to the First Circuit's holding in Sanchez V. He then noted that this court has

> "recognized and restated the legal rules applied by the First Circuit in the Sanchez case. These principles had always been the law during the pendency of this case, including the trial in 2006. Thus, under clear, preexisting law, [the defendant] should have prevailed on his initial appeal -- to the Massachusetts Appeals Court."

The motion judge concluded that, although the defendant received a remedy for his Federal rights under Batson, "[n]o court has adjudicated [the defendant's] remedial rights under the [S]tate [C]onstitution." Because this court has determined that the erroneous termination of a Batson-Soares inquiry at the first step is structural error, see Robertson, 480 Mass. at 397, the judge exercised the discretion afforded him under rule 30 (b) to grant a new trial.

In recognition of the prejudice to the Commonwealth inherent in retrying a murder case after so many years, the judge gave the Commonwealth a choice of alternative dispositions: either accept a reduction in the verdict to manslaughter under Mass. R. Crim. P. 25 (b) (2) or proceed with the order for a new trial under Mass. R. Crim. P. 30 (b). By

the terms of the order, should the Commonwealth decline to choose, the sentence automatically would be reduced to one for manslaughter. Rather than making an affirmative choice, the Commonwealth filed a notice of appeal.

At a subsequent hearing, the judge resentenced the defendant on the manslaughter conviction to a term of from fifteen years to fifteen years and one day of incarceration. Taking into account the defendant's good time credits, this essentially amounted to a sentence of time served. The Commonwealth filed a second notice of appeal. The Commonwealth, did not, however, seek to have the defendant's new sentence stayed pending appeal.

Discussion. On a written motion, a judge "may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30 (b). A motion for a new trial is addressed to the sound discretion of the judge. Commonwealth v. DiBenedetto, 458 Mass. 657, 663-664 (2011). "[A]n appellate court will examine the motion judge's conclusion only to determine whether there has been a significant error of law or other abuse of discretion." Id. at 664, quoting Commonwealth v. Wolinski, 431 Mass. 228, 235 (2000).

The Commonwealth argues that the motion judge abused his discretion in granting relief, because his order violates principles of both direct and collateral estoppel.

1. Direct estoppel. A judge's authority to grant a new trial pursuant to Mass. R. Crim. P. 30 (b), while broad, is limited by principles of direct estoppel. See Commonwealth v. Ellis, 475 Mass. 459, 475 (2016). For direct estoppel to bar relief, "the Commonwealth must show that the issues raised in the defendant's rule 30 (b) motion were actually litigated and determined . . . , that such determination was essential to the defendant's conviction, and that the defendant had an opportunity to obtain review of the determination." Commonwealth v. Rodriguez, 443 Mass. 707, 710 (2005). When these three criteria are met, i.e., where the "facts and the law are literally the same [as in the direct appeal]," direct estoppel prevents a judge from granting relief under rule 30 (b) solely "based on [the] assertion that [the] direct appeal was decided wrongly." Id. at 710-711. See Ellis, supra; Commonwealth v. McLaughlin, 364 Mass. 211, 229 (1973), and cases cited ("a motion for a new trial may not be used as a vehicle to compel a trial judge to review and reconsider questions of law which were actually raised at the trial and already reviewed by an appellate court").

In Rodriguez, 443 Mass. at 711, however, we left open the possibility that, where this court, in a separate and later case, has indicated or implied that a specific appellate decision was wrongly decided, there might be grounds for a

motion for a new trial under Mass. R. Crim. P. 30 (b) for the particular individual whose appellate case had been cast into doubt.[4] Here, we have not pointed directly to the defendant's case as decided wrongly, but the First Circuit has stated as much on Federal habeas review.[5] Indeed, that court did not mince words in critiquing the Appeals Court's decision, and, by implication, this court's decision to deny further appellate review. "The [Appeals Court]'s treatment of Sanchez's Batson claim was more than clearly erroneous: it was objectively

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[4] In a motion pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), the defendant in Rodriguez sought a new trial because this court had called into doubt one of the grounds for a critical decision on a motion to suppress in Commonwealth v. Jimenez, 438 Mass. 213, 220 n.5 (2002), a case decided after her trial. See Commonwealth v. Rodriguez, 443 Mass. 707, 707-708 (2005). This court ultimately decided that direct estoppel applied, because the footnote in Jimenez invalidated only one of the two possible grounds for the no-knock warrant, and therefore the motion to suppress was not wrongly decided. See Rodriguez, supra at 711.

[5] The Commonwealth is correct in arguing that the assessment of Sanchez I by the First Circuit is not strictly binding on either this court or the Appeals Court. "[A]lthough we give respectful consideration to such lower Federal court decisions as seem persuasive, we are not bound by decisions of Federal courts except the decisions of the United States Supreme Court on questions of Federal law" (quotations and citations omitted). Commonwealth v. Pon, 469 Mass. 296, 308 (2014). See Commonwealth v. Pearson, 96 Mass. App. Ct. 299, 304 n.9 (2019), ("We are not bound by the analysis of constitutional principles applied by the United States Court of Appeals for the First Circuit"), S.C., 484 Mass. 1104 (2020) (granting further appellate review on another ground). To the extent that the motion judge's order implies that the decision of the First Circuit was binding authority as to the correctness of the Appeals Court's decision, that implication is not correct.

unreasonable in light of clearly established [F]ederal law." Sanchez V, 753 F.3d at 300. The question we must decide is whether the conclusion by the First Circuit that Massachusetts appellate courts unreasonably applied Federal law unsettles the preclusive effect of the direct appellate process. We conclude that it does.

Direct estoppel, a form of issue preclusion, is a judicially created doctrine with roots in the common law. See Commonwealth v. Williams, 431 Mass. 71, 74 (2000). Even where the formal requirements are met, the doctrine is not absolute. See Restatement (Second) of Judgments § 28 (1982) (exception to issue preclusion exists when "a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws"). Cf. United States v. Bell, 988 F.2d 247, 251 (1st Cir. 1993) (detailing exceptions to closely related "law of the case" doctrine, including specific exception "in the interests of justice").

Like other stability-promoting judicial doctrines, direct estoppel serves "stability in the decision[-]making process, predictability of results, proper working relationships between trial and appellate courts, and judicial economy." Bell, 988 F.2d at 250 (referring to law of the case doctrine). See Commonwealth v. Stephens, 451 Mass. 370, 375 (2008) ("collateral

estoppel is designed to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication" [quotation and citation omitted]). These interests, while important, exist in some inherent tension with the underlying purpose of Mass. R. Crim. P. 30, which grants broad authority to judges, in order that they may "ensure that the result in every criminal case is consonant with justice." Commonwealth v. Woodward, 427 Mass. 659, 666 (1998). In determining not to apply direct estoppel here, we conclude that the interests of finality and judicial economy must yield to a direct indication from a higher or coordinate court that a specific appeal was wrongly decided; a judge, exercising his or her discretion, may grant a new trial pursuant to Mass. R. Crim. P. 30 on such grounds.

This conclusion draws further support here given our frequent, extensive, and approving reliance on Sanchez V in explaining the standard for evaluating the first phase of a Batson-Soares inquiry. See, e.g., Jones, 477 Mass. at 321-325 (citing Sanchez V, supra, ten times while explaining proper application of Batson). See also Commonwealth v. Ortega, 480 Mass. 603, 607 (2018); Robertson, 480 Mass. at 393; Commonwealth v. Lopes, 478 Mass. 593, 599 (2018). It would not be unreasonable for a trial judge to conclude from this history, as

the motion judge did here, that we have agreed with and adopted the reasoning of the First Circuit, and that its reading of how Federal law should have been applied, specifically with respect to the defendant's case.

We conclude, therefore, that where a Federal Circuit Court of Appeals on habeas review has determined that a Massachusetts appellate court has unreasonably applied Federal law, regardless of the ultimate disposition of the petition, direct estoppel does not bar a judge, in his or her discretion, from granting a new trial on the ground that justice might not have been done.

2. Collateral estoppel. The Commonwealth argues further that, under the doctrine of collateral estoppel, the ultimate result of the defendant's habeas litigation -- denial because the prosecutor's race-neutral reason for exercising the peremptory challenge was found credible -- should be given preclusive effect against the defendant's rule 30 (b) motion. In other words, because the Federal courts ultimately have determined that there was no Batson violation, the defendant cannot be granted a new trial on the ground of a Batson-Soares violation.

For collateral estoppel to apply, five criteria must be met:

> "(1) the issues in the two proceedings must be identical; (2) the party estopped must have had sufficient incentive to litigate the issue fully and vigorously; (3) the party

> estopped must have been a party to the previous litigation; (4) the applicable law must be identical in both proceedings; and (5) the first proceeding must have resulted in a final judgment on the merits such that the defendant had sufficient incentive and an opportunity to appeal" (footnote omitted).

Commonwealth v. Cabrera, 449 Mass. 825, 829 (2007), citing Commonwealth v. Ringuette, 60 Mass. App. Ct. 351, 357, S.C., 443 Mass. 1003 (2004). We agree with the Commonwealth that all five conditions are satisfied with respect to the defendant's rights under the Federal Constitution and Batson.[6] We also agree with the Commonwealth that the evil meant to be prevented by the whole Batson-Soares schema is the discriminatory use of peremptory challenges.

We agree with the motion judge, however, that collateral estoppel does not bar a remedy under the Massachusetts Declaration of Rights and the holding of Soares, because, in order for collateral estoppel to apply to a specific claim, "the applicable law must be identical in both proceedings." See Cabrera, 449 Mass. at 829. For a first-stage Batson-Soares

[6] Specifically, (1) the Batson issue is identical; (2) the defendant had every incentive to litigate vigorously at his criminal trial on a charge of murder; (3) the defendant was a party to the habeas litigation; (4) to the extent that the defendant was litigating under the Federal Constitution, the law was the same; and (5) the determination by the United States District Court for the District of Massachusetts ultimately was affirmed by the First Circuit. See Sanchez v. Roden, 808 F.3d 85, 90 (1st Cir. 2015).

error, our law differs from Federal law in that it provides for a greater and more certain remedy.

Under Federal law, even one peremptory challenge determined to have been exercised on the basis of race is structural error for which prejudice is conclusively presumed. See Scarpa v. Dubois, 38 F.3d 1, 14 (1st Cir. 1994), cert. denied, 513 U.S. 1129 (1995), citing Batson, 476 U.S. at 100. Error at the first step of a Batson challenge, however, i.e., erroneously failing to require a reason from the party attempting to strike the juror, generally is treated by remand for the belated completion of the burden-shifting analysis. See Sanchez V, 753 F.3d at 307-308, citing Batson, supra, and Johnson v. California, 545 U.S. 162, 173 (2005). See also People v. Johnson, 38 Cal. 4th 1096, 1099 (2006) (addressing question of proper procedure after first-step Batson error is recognized on appeal, and noting that "[t]he [F]ederal courts generally remand"); 6 W.R. LaFave, J.H. Israel, N.J. King, & O.S. Kerr, Criminal Procedure § 22.3(d) (4th ed. 2019 update) ("limited remand for a new Batson hearing is the remedy applied by appellate courts throughout this country when a trial court fails to conduct a proper Batson analysis, unless it is impossible to reconstruct the circumstances surrounding the peremptory challenges, due perhaps to the passage of time or the unavailability of the trial judge" [quotations and citations omitted]).

In Massachusetts, by contrast, we essentially have rejected remand as a remedy when a judge erroneously fails to find a prima facie showing at the first stage of the Batson-Soares inquiry. See Ortega, 480 Mass. at 607–608 ("Because the judge failed to recognize that the defendant had made out a prima facie showing of discrimination . . . , the defendant's convictions must be reversed"); Robertson, 480 Mass. at 397 ("Because such an error [(failing to move past the first step)] is structural, carrying the presumption of prejudice, we vacate the convictions and remand the case for a new trial"); Jones, 477 Mass. at 325-326; Commonwealth v. Issa, 466 Mass. 1, 11 n.14 (2013) ("where a judge abuses his or her discretion by failing to find a prima facie case, the error is unlikely to be harmless"); Commonwealth v. Long, 419 Mass. 798, 807 (1995).

Indeed, since well before Batson was decided, we have expressed skepticism concerning the contention that the real motives of a party seeking to strike a juror can be discerned accurately years later on remand. See Soares, 377 Mass. at 492 n.37 ("we have considered carefully, and rejected, the alternative disposition of remanding the matter solely to determine the basis of the prosecutor's exercise of the peremptory challenges in issue. We do not consider this to be a realistic alternative. . . . [T]he conditions of the empanelment in issue cannot be easily recreated"). As the

motion judge in this case was careful to point out, this concern is warranted even where the striking party's good faith and candor are fully credited.

In response to this apparent conflict between Federal and Massachusetts law, the Commonwealth points to a series of footnotes in which we have left open the possibility that circumstances exist where a remand for an evidentiary hearing would be permissible under the Massachusetts Declaration of Rights. See Ortega, 480 Mass. at 608 n.10, quoting Jones, 477 Mass. at 326 n.31. Despite this possibility, however, neither party has identified a single instance where an appellate court in Massachusetts actually has remanded a case for an evidentiary hearing after a first-stage Batson-Soares error in the more than forty years since Soares was decided.[7] Nor has this court.

If ever there were circumstances in which a remand was appropriate, this case -- where the remand occurred nearly eight years after the original voir dire -- does not present such circumstances. The entirely hypothetical (and now foreclosed)

[7] The possibility of a remand also conflicts with those cases where we have determined that prematurely terminating a Batson-Soares inquiry is structural error, the defining feature of which is a conclusive presumption of prejudice. See Robertson, 480 Mass. at 397 ("Because [the first-step] error is structural, carrying the presumption of prejudice, we vacate the convictions and remand the case for a new trial"). If the error is structural, the only proper remedy, as our long-standing practice indicates, is a new trial.

option of remand does not alter our assessment that Massachusetts and Federal law differ significantly on the question of an appropriate remedy for a first-stage Batson-Soares error. Because the operative law is not identical, collateral estoppel does not apply. As the motion judge determined, the defendant thus is entitled to the presumptive remedy of a new trial. See Soares, 377 Mass. at 486. Because neither direct nor collateral estoppel bar that result, we discern no abuse of discretion in the judge's decision to grant a new trial under Mass. R. Crim. P. 30 (b).

3. Trial judge's authority under rule 25 (b) (2). Rule 25 (b) (2) of the Massachusetts Rules of Criminal Procedure gives trial judges the authority "on motion [to] set aside the verdict and order a new trial, or order the entry of a finding of not guilty, or order the entry of a finding of guilty of any offense included in the offense charged in the indictment or complaint." This authority "overlap[s] in significant respects" with that granted under rule 30 (b) to order "a new trial at any time if it appears that justice may not have been done." See Commonwealth v. Gilbert, 447 Mass. 161, 166 (2006); Mass. R. Crim. P. 30 (b). A trial judge's authority under rule 25 (b) (2) is "comparable to the power vested in this court pursuant to G. L. c. 278, § 33E, and . . . 'should be guided by the same considerations.'" Commonwealth v. Rolon, 438 Mass.

808, 820 (2003), quoting Commonwealth v. Gaulden, 383 Mass. 543, 555 (1981). Both provisions embody a legislative delegation of "judicial responsibility to ensure that the result in every criminal case is consonant with justice." See Woodward, 427 Mass. at 666, citing Gaulden, supra at 553-554 & n.7. We review a sentencing reduction under rule 25 (b) (2) only to determine whether "the judge abused his [or her] discretion or committed an error of law." Rolon, supra at 821, citing Woodward, supra at 668.

It is well established that a trial judge has broad authority to reduce a jury's verdict, "even where the evidence supports the verdict returned by the jury." Gilbert, 447 Mass. at 168 n.9. See Rolon, 438 Mass. at 820, citing Woodward, 427 Mass. at 666-667. This authority is exercised properly "where the weight of the evidence in the case, although technically sufficient to support the jury's verdict, points to a lesser crime." Rolon, supra at 821.

We also have sanctioned reductions in verdicts as remedies for certain trial errors. See, e.g., Woodward, 427 Mass. at 667 (reduction in verdict may be used to "ameliorate injustice caused by the Commonwealth, defense counsel, the jury, the judge's own error, or, as may have occurred in this case, the interaction of several causes"); Commonwealth v. Millyan, 399

Mass. 171, 188–189 (1987). In Gilbert, 447 Mass. at 169, we reasoned:

> "If a trial judge has the discretionary authority to reduce a verdict when there are no errors in the trial proceedings, but nevertheless concludes that a different verdict would rectify a 'disproportionate' verdict, [Gaulden, 383 Mass.] at 556, or would be more 'consonant with justice,' Commonwealth v. Seit, 373 Mass. 83, 94 (1977), we see no reasoned basis under our rules or otherwise to preclude a similar reduction where an error does not affect the lesser included offense that is supported by the evidence" (emphasis added).

This authority to reduce verdicts because of errors, although granted by rule, is consistent with long-standing judicial power under the common law. "Trial judges have long held the authority at common law to modify a judgment where a jury's verdict on a greater offense cannot stand, but their finding on a lesser included offense is 'amply supported by the evidence' and 'unaffected' by the error." Gilbert, supra at 168, citing Commonwealth v. Clifford, 254 Mass. 390, 394 (1926).

As these formulations imply, the power to reduce verdicts is not without constraint. By rule, the reduction must be to a lesser included offense of the offense charged. Mass. R. Crim. P. 25 (b) (2). See Commonwealth v. Walker, 68 Mass. App. Ct. 194, 197 (2007). In addition, the lesser included offense must be unaffected by the error warranting the reduction. Gilbert, 447 Mass. at 176. We consistently have explained that "[a] judge should use this power sparingly, and not sit as a second

jury" (quotations and citations omitted). Commonwealth v. Almeida, 452 Mass. 601, 613 (2008). See Commonwealth v. Chhim, 447 Mass. 370, 381 (2006). A reduction to a lesser verdict is not justified when it "would be inconsistent with the weight of the evidence" or is "based solely on factors irrelevant to the level of offense proved." Rolon, 438 Mass. at 822.

Here, the trial judge reduced the defendant's conviction of murder in the second degree to manslaughter on the basis of a first-step error in the Batson-Soares inquiry. The judge wrote that the error "places the fairness of a criminal proceeding in doubt and effectively deprives [the defendant] of his constitutional right to be tried by an impartial jury, in violation of [art.] 12."

After reaching this conclusion, the judge's decision to reduce the sentence because of the Batson-Soares error was an error of law. If the defendant was deprived of his constitutional right to an impartial jury, such that the jury could not have convicted him of murder in the second degree, that jury likewise could not have convicted him of any crime. Because the error here affects all of the lesser included offenses to the same extent as the greater -- indeed, it goes to the power of the jury to render any verdict at all -- it was "irrelevant to the level of offense proved." Rolon, 438 Mass. at 822. Under these circumstances, the only proper remedy was

to grant a new trial.[8] Contrast Millyan, 399 Mass. at 188-189 (reduction from murder in first degree to murder in second degree was affirmed where error alleged at trial pertained to premeditation).

Accordingly, the order reducing the verdict must be vacated and set aside. Before affirming the judge's alternative disposition of a new trial, however, we consider whether that result is barred by the defendant's double jeopardy claim.

4. Double jeopardy. "At its core, the prohibition against double jeopardy, which flows from the Fifth Amendment to the United States Constitution, as well as the statutory and common law of Massachusetts, provides that 'a person cannot twice be put in jeopardy for the same offence.'" Marshall v. Commonwealth, 463 Mass. 529, 534 (2012), quoting Commonwealth v. Burke, 342 Mass. 144, 145 (1961). This guarantee against double jeopardy consists of three independent protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the

[8] Commonwealth v. Gilbert, 447 Mass. 161 (2006), is not to the contrary. On appeal, both the Commonwealth and the defendant in that case agreed that the judge's instructions on premeditation and malice were erroneous such that they created a substantial risk of a miscarriage of justice. Id. at 169-170. This court upheld a reduction of the verdict from murder in the first degree to murder in the second degree because the malice (required for both degrees of murder) could be "ineluctably inferred" from the evidence, while premeditation could not (citation omitted). Id. at 176.

same offense after conviction. And it protects against multiple punishments for the same offense." Commonwealth v. Selavka, 469 Mass. 502, 509 (2014), quoting Aldoupolis v. Commonwealth, 386 Mass. 260, 271–272 (1982), S.C., 390 Mass. 438 (1983). See North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

These prohibitions "'represent[] a constitutional policy of finality for the defendant's benefit' in criminal proceedings." Commonwealth v. Goodwin, 458 Mass. 11, 19 (2010), quoting Aldoupolis, 386 Mass. at 274. See United States v. Jorn, 400 U.S. 470, 479 (1971). This principle of finality "animates our common-law protections against double jeopardy and prevents the Commonwealth from 'shatter[ing] the defendant's repose and threaten[ing] him with grievous harm.'" Selavka, 469 Mass. at 513, quoting Double Jeopardy, 91 Harv. L. Rev. 101, 102 (1977).

Here, the defendant argues that principles of double jeopardy preclude any further punishment, in the event he were to be retried and convicted again. For after the judge reduced the verdict to manslaughter, he sentenced the defendant on the reduced verdict and that sentence has been fully executed and served. The defendant asserts a constitutionally significant finality interest in this completed sentence, such that any further punishment would amount to being impermissibly punished multiple times for the same crime. Because the reduced verdict

underlying that sentence was timely appealed by the Commonwealth, we conclude that the defendant remained in continuing jeopardy, notwithstanding the completion of this invalid sentence.

When a defendant successfully moves to vacate a conviction on either direct or collateral review, an appellate court's subsequent order for a new trial does not generally offend the protections against double jeopardy.[9] See Hicks v. Commonwealth, 345 Mass. 89, 91 (1962), cert. denied, 374 U.S. 839 (1963), and cases cited. See also United States v. Ball, 163 U.S. 662, 672 (1896), and cases cited. Two traditional justifications are given for this deeply rooted rule. First, the defendant has knowingly unsettled the finality of his or her conviction and sentence by appealing. "[T]he double jeopardy proscription protects the defendant against governmental oppression, it does

[9] There are two exceptions. Retrial is prohibited where the appellate court's reversal is based on the sufficiency of the evidence. See Green v. United States, 355 U.S. 184, 186, 191 (1957); Commonwealth v. Beal, 474 Mass. 341, 354 (2016), quoting Marshall v. Commonwealth, 463 Mass. 529, 538 (2012) ("The State . . . generally cannot retry a defendant when an appellate court overturns a conviction because of insufficient evidence" [quotation omitted]). Second, where conviction of a lesser included offense implies an acquittal of the greater offense, the defendant may not be retried on the greater charge. See Commonwealth v. Acevedo, 446 Mass. 435, 451 n.20 (2006) (verdict of murder in second degree acted as acquittal of charge of murder in first degree, barring retrial on greater offense); Commonwealth v. Berry, 431 Mass. 326, 336 n.13 (2000) (manslaughter verdict acted as acquittal of charge of murder in second degree, barring retrial on murder charge).

not 'relieve a defendant from the consequences of his voluntary choice' to invalidate his original punishment." Commonwealth v. Cumming, 466 Mass. 467, 471 (2013), quoting Commonwealth v. Leggett, 82 Mass. App. Ct. 730, 737 (2012). See United States v. Scott, 437 U.S. 82, 99 (1978). Second, double jeopardy is not offended because the defendant is understood to remain in continuing jeopardy from the first prosecution throughout the appellate process. See Commonwealth v. Resende, 476 Mass. 141, 146 (2017) ("Continuing jeopardy, on the other hand, exists where a verdict is vacated, either through a direct appeal or by the allowance of a motion for a new trial, and the defendant is retried on that charge").

The second of these rationales, continuing jeopardy, also supports our long-standing determination that double jeopardy does not prevent the Commonwealth from appealing from an order or decision granting a defendant postconviction relief. See, e.g., Commonwealth v. Therrien, 383 Mass. 529, 532 (1981) (no problem with double jeopardy where Commonwealth appealed from postconviction order granting required finding of not guilty pursuant to rule 25 [b] [1]); Gaulden, 383 Mass. at 550 (same for order to reduce verdict under rule 25 [b] [2]). See also Smith v. Massachusetts, 543 U.S. 462, 467 (2005), citing United States v. Wilson, 420 U.S. 332, 352 (1975) ("When a jury returns a verdict of guilty and a trial judge [or an appellate court]

sets aside that verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not preclude a prosecution appeal to reinstate the jury verdict of guilty").

Here, the Commonwealth filed a timely notice of appeal from the judge's initial order granting postconviction relief. After the defendant was resentenced on the reduced charge, the Commonwealth filed a second notice of appeal objecting to the reduction in the verdict and the new sentence. The ongoing litigation of these appeals put the defendant on notice that any postconviction relief granted to him was not final. "The defendant, of course, is charged with knowledge of the [relevant law allowing a governmental appeal], and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired." United States v. DiFrancesco, 449 U.S. 117, 136 (1980). This is true even in situations where the relief being appealed has resulted in the defendant's discharge from custody. See Wilson, 420 U.S. at 345 ("it is well settled that an appellate court's order reversing a conviction is subject to further review even when the appellate court has ordered the indictment dismissed and the defendant discharged").

The defendant directs us to Selavka, 469 Mass. at 514, but that decision is not to the contrary. There, we determined that even an illegal sentence cannot be revised after the expiration of a sixty-day deadline within which the Commonwealth can, by

rule, seek to correct sentencing errors. Id. See Mass. R. Crim. P. 29, as appearing in 474 Mass. 1503 (2016). In Selavka, supra at 513, however, it was precisely the lengthy period of inaction by the Commonwealth that meant that the "defendant's expectation of finality in his initial sentence [had] 'crystallized'" such that double jeopardy prevented increased punishment (citation omitted). Here, by contrast, the Commonwealth's actions to contest the judge's order were timely. Thus, the defendant did not have "every reason to believe that his sentence would remain fixed." Id. at 514. Rather, he has known since well before he was resentenced[10] that the order granting a new trial or reducing the verdict was under appeal, and that his first conviction legally could be reinstated. Contrast Commonwealth v. Sallop, 472 Mass. 568, 570-572 (2015); Commonwealth v. Goodwin, 458 Mass. 11, 19-20 (2010), and cases

[10] This timing distinguishes those cases where we have determined that the protections against double jeopardy prevented a defendant from being resentenced on a completed sentence. For example, in Commonwealth v. Pacheco, 477 Mass. 206, 216 (2017), the "defendant had completed both his term of probation and his term of incarceration well before the Commonwealth's . . . motion to 'clarify' the defendant's sentence." We explained that "because all parts of the defendant's sentence had been completed at the time of the [Commonwealth's] motion [to clarify], at that point the sentence could not have been modified in any way." Id. In other words, a defendant's expectation of finality in a sentence is different when it is challenged prior to its imposition, as opposed to sometime after it has been fully served.

cited; Commonwealth v. Rossetti, 95 Mass. App. Ct. 552, 560-561 (2019) (Singh, J., dissenting).

Accordingly, in the unusual procedural posture of this case, we ascertain no violation of the protections against double jeopardy in resentencing the defendant should he be reconvicted at a new trial.[11]

5. Apparent conflict in Batson-Soares standards. As described supra, the United States District Court for the District of Massachusetts noted an apparent conflict between Massachusetts law under Soares and Federal law under Batson. See Sanchez IV, supra. Under the frequently cited language of Soares, 377 Mass. at 489-490, the presumption that a peremptory challenge is properly made is rebutted by a "showing that (1) a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group, and (2) there is a likelihood they are being

[11] Of course, double jeopardy protections require that any time that the defendant has served, including "good time credits," be fully subtracted from any new sentence he might receive. See North Carolina v. Pearce, 395 U.S. 711, 718-719 (1969) ("the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense" [footnote omitted]). Here, this includes ensuring that any new sentence would not extend the amount of committed time served prior to the defendant becoming eligible for parole.

excluded from the jury solely by reason of their group membership."

At the same time, "under Batson, a defendant must merely raise an inference that the prosecutor struck a juror because of race or other protected status." See Sanchez IV, supra, citing Johnson, 545 U.S. at 169 (holding unconstitutional California's first-step requirement that discrimination be "more likely than not"). This is not the first time that Federal courts have indicated that the language in Soares might be more stringent than that standard necessary to establish the first step in Batson, and therefore impermissible. See Aspen v. Bissonnette, 480 F.3d 571, 575-576 (1st Cir.), cert. denied sub nom. Aspen v. Roden, 552 U.S. 934 (2007) (equating "an 'inference' of discrimination with a showing that gender was the 'likely' reason that the prosecutor exercised her peremptory challenges" was contrary to clearly established Federal law).[12] See also Gray v. Brady, 588 F. Supp. 2d 140, 142 (D. Mass. 2008), aff'd, 592 F.3d 296 (1st Cir. 2010).

[12] The First Circuit declined to determine whether Massachusetts case law generally was at odds with Batson; it noted that this court has required a group-neutral explanation in situations where, in its view, racially motivated discrimination was not actually "likely." See Aspen v. Bissonnette, 480 F.3d 571, 575 n.4 (1st Cir.), cert. denied sub nom. Aspen v. Roden, 552 U.S. 934 (2007).

We do not agree that the requirements of Soares, 377 Mass. at 489-490, as we consistently have interpreted them, are at odds with the requirements of Batson. We have emphasized repeatedly that the first-step burden under Soares is minimal. See Robertson, 480 Mass. at 390 n.6 ("Our three-step process mirrors the procedure in Batson . . ."); Jones, 477 Mass. at 321 ("rebutting the presumption of propriety is not an onerous task"); Commonwealth v. Maldonado, 439 Mass. 460, 463 n.4 (2003) ("In order to ensure that the important protections set forth in . . . Soares, supra at 491, are fully adhered to, the burden of making this showing ought not be a terribly weighty one"). Indeed, Soares itself articulated the distinct two-part inquiry of "likelihood" and "pattern" as a framework for determining whether an inference of discrimination reasonably could be drawn. See Soares, supra at 490 ("Presented with evidence as to these two elements, the trial judge must determine whether to draw the reasonable inference that peremptory challenges have been exercised so as to exclude individuals on account of their group affiliation").

Nonetheless, it is easy to see how the language of Soares continues to sow confusion. On its face, a reader readily could conclude that showing a peremptory challenge was "likel[y]" discriminatory requires a higher standard of proof than the "inference" required by Batson. See Aspen, 480 F.3d at 575 n.3

(citing Webster's Third New International Dictionary 1310 [1993] for proposition that "[s]omething is 'likely' to occur 'if it has a better chance of occurring than not,'" and noting similarities between this and standard repudiated by Johnson, 545 U.S. at 164, that "the objector must show that it is more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias").

Similarly, Soares, 377 Mass. at 489-490, asks judges to discern whether there has been a pattern of discrimination. Yet, in certain circumstances, we have determined that a single peremptory challenge may establish such a pattern. See Commonwealth v. Prunty, 462 Mass. 295, 306 n.15 (2012) (collecting cases); Commonwealth v. Harris, 409 Mass. 461, 465 (1991). We also have held that, in some circumstances, a judge has broad discretion to move past the first step of the inquiry "without having to make the determination that a pattern of improper exclusion exists." See Lopes, 478 Mass. at 598, quoting Issa, 466 Mass. at 11 n.14.

Surveying our jurisprudence on the issue, we note that we essentially have made the two-part first-step inquiry of Soares, which predated Batson, conform to Federal usage through interpretations that exist in tension with the plain meaning of the words "likely" and "pattern." Unsurprisingly, this has resulted in continuing confusion amongst judges and litigants.

Indeed, the instant case is yet another example in which we have determined that a new trial is required because a trial judge erred by not moving past the first step of the inquiry. See Ortega, 480 Mass. at 607–608; Robertson, 480 Mass. at 397; Jones, 477 Mass. at 325-326.

For these reasons, we take this opportunity to clarify our common law by retiring the specific language of Soares that requires, at the first step, a "showing that (1) a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group, and (2) there is a likelihood they are being excluded from the jury solely by reason of their group membership." Soares, 377 Mass. at 490. After the release of the rescript in this case, we will adopt the Federal language: the presumption of propriety is rebutted when "the totality of the relevant facts gives rise to an inference of discriminatory purpose." See Johnson, 545 U.S. at 168, quoting Batson, 476 U.S. at 93-94.

In determining whether an inference of discriminatory purpose is properly drawn at the first step, the United States Supreme Court has instructed that "all of the circumstances that bear upon the issue of racial animosity must be consulted." Snyder v. Louisiana, 552 U.S. 472, 478 (2008). See Johnson, 545 U.S. at 169, quoting Batson, 476 U.S. at 94 ("a prima facie case of discrimination can be made out by offering a wide variety of

evidence, so long as the sum of the proffered facts gives 'rise to an inference of discriminatory purpose'" [footnote omitted]). As the Court has emphasized, "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." Flowers, 139 S. Ct. at 2244.

In the course of determining whether an inference of discriminatory purpose is warranted with respect to a challenged juror, judges should consider, among any other relevant factors,

> (1) the number and percentage of group members who have been excluded from jury service due to the exercise of a peremptory challenge;[13]
>
> (2) any evidence of disparate questioning or investigation of prospective jurors;[14]
>
> (3) any similarities and differences between excluded jurors and those, not members of the protected group, who have not been challenged (for example, age, educational level, occupation, or previous interactions with the criminal justice system);[15]

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[13] This ordinarily is the beginning of the inquiry. Commonwealth v. Jones, 477 Mass. 307, 322 (2017). While not required to raise the inference, a distinct pattern of disparate strikes is clearly sufficient to move past the first step of the inquiry. See Batson v. Kentucky, 476 U.S. 79, 97 (1986).

[14] See Flowers v. Mississippi, 139 S. Ct. 2228, 2246-2248 (2019); Batson, 476 U.S. at 97 ("the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose").

[15] See, e.g., Miller-El v. Dretke, 545 U.S. 231, 241 (2005) ("More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve"). Indeed, in this case, the First Circuit relied heavily on the fact that the prosecutor did not challenge a white, twenty-one year old

(4) whether the defendant or the victim are members of the same protected group; and

(5) the composition of the seated jury.[16]

college student, but did strike an African-American, nineteen year old college student. See Sanchez V, 753 F.3d at 304-305 ("The only objective difference between the two young men appearing in this record is their race. . . . Such differential treatment, while by no means dispositive as to the ultimate question of racial discrimination, suffices at Batson's first step to raise an inference of possible racial discrimination").

[16] Caution should be exercised in the use of this factor. The bare fact that some members of a protected group were seated on a jury does not immunize future peremptory challenges from constitutional scrutiny. Otherwise, as the First Circuit warned, the challenging party "can get away with discriminating against some [group members] on the venire: so long as [an attorney] does not discriminate against all such individuals, not only will his strikes be permitted, but he will not even be required to explain them." Sanchez V, 753 F.3d at 299-300.

"This list of factors[17] is neither mandatory[18] nor exhaustive; a trial judge and a reviewing court must consider 'all relevant circumstances' for each challenged strike." Jones, 477 Mass. at 322 n.24, citing Batson, 476 U.S. at 96.

While we do not join those States that have eliminated entirely the first step of Batson, 476 U.S. at 93-94,[19] in

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[17] In discussing this step in Jones, 477 Mass. at 332, we enumerated "the possibility of an objective, group-neutral explanation for the strike" as another factor in the initial stage of the analysis. We recognized, as well, that this factor "overlaps" with the second and third stages. See id. at 332 n.25. Because this factor properly applies only to the later stages, we do not include it here as applicable to the first stage. When considering this factor in later stages, a judge should be careful not to conflate the second and third steps by volunteering a possible group-neutral reason on behalf of the party attempting to exercise the strike (as the judge did here by pointing out the juror's age). If there is a readily apparent, group-neutral reason that already has been raised by the striking party in a for-cause challenge, such as, here, a college student, that might cut against an inference of discriminatory intent.

[18] While a judge must consider all relevant factors, the judge need not consider each of these enumerated factors in every individual case; some enumerated factors might not be relevant in particular circumstances, and other factors, not noted here, also might be applicable.

[19] See, e.g., State v. Morales, 71 Conn. App. 790, 800 n.16 (2002); State v. Johans, 613 So. 2d 1319, 1321 (Fla. 1993); State v. Parker, 836 S.W.2d 930, 938 (Mo.), cert. denied, 506 U.S. 1014 (1992). Contrary to the suggestion in Justice Lowy's concurrence, such a significant departure should be made in a case where the issue is raised directly and fully briefed, and where this court has the opportunity to receive input from the bar.

This aside, we are unconvinced that removing the first step entirely is quite as simple or salutary as the concurrence

accordance with our long-standing jurisprudence and the Federal standard, rebutting the presumption of propriety continues to be "not an onerous task." Jones, 477 Mass. at 321. See Johnson, 545 U.S. at 170 ("We did not intend the first step to be so onerous that a defendant would have to persuade the judge -- on

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suggests. Because every potential juror is a member of some discrete race or gender, every peremptory strike then would be subject to challenge and explanation. This leads to two possibilities.

On the one hand, the court could require or imply (in accordance with the rules of professional conduct) that there is some good faith requirement for the exercise of challenges to peremptory strikes. Such a requirement, however, merely would reinstate the first step of the Batson inquiry in a different guise, for a good faith challenge to a peremptory strike could be predicated only on some reason to believe or to infer that the attempt to strike was exercised for an impermissible purpose -- the very question examined in Batson's first step.

On the other hand, if there were no good faith requirement for challenging a peremptory strike, litigants would have a strong incentive to challenge every peremptory strike. Such a challenge, at best, would prevent the removal of a juror whom opposing counsel did not want on the jury and, at a minimum, could reveal something of the opposing trial strategy. Even if there is a cognizable difference between requiring some explanation for every strike and requiring an explanation that meets the standard of a "for cause" challenge, such a regime would alter the nature of a peremptory challenge so fundamentally that it would raise the question whether peremptory challenges simply should be abolished. There may well be good arguments for doing so, see, e.g., Batson, 476 U.S. at 103 (Marshall, J., concurring) (arguing that only eliminating peremptory challenges will end racial discrimination in jury selection); Commonwealth v. Maldonado, 439 Mass. 460, 468 (2003) (Marshall, C.J., concurring) (calling for abolishment of or substantial restriction on peremptory challenges), but a determination to do so unquestionably is a decision we cannot reach here, without full briefing and input from the bar.

the basis of all the facts, some of which are impossible for the defendant to know with certainty -- that the challenge was more likely than not the product of purposeful discrimination"). And, having determined that erroneously terminating a Batson-Soares inquiry at the first step is structural error, we reiterate our exhortation that judges "think long and hard before they decide to require no explanation from the prosecutor for the challenge and make no findings of fact." Issa, 466 Mass. at 11 n.14.[20] As the United States Supreme Court has explained, "[t]he inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." Johnson, supra at 172.

As is evident in this case, it is essential for trial judges to examine carefully all of the relevant facts and circumstances at the first stage of a Batson-Soares inquiry. See Sanchez V, 753 F.3d at 301-307. We anticipate that adopting the Federal formulation of the test will emphasize the multifaceted nature of the necessary inquiry, so that judges may better ferret out improper peremptory challenges.

[20] This guidance was issued well after the trial in this case, and therefore was unavailable to the trial judge.

Conclusion. The order reducing the verdict under Mass. R. Crim. P. 25 (b) (2) is vacated and set aside. So much of the judge's order as grants a new trial is affirmed.

So ordered.

LOWY, J. (concurring). I agree with the court that the judge's decision to reduce the defendant's verdict under Mass. R. Crim. P. 25 (b) (2), as amended, 420 Mass. 1502 (1995), was improper, and that the judge's order granting a new trial should be affirmed. I write separately because I believe that upon timely objection to a peremptory challenge made on the basis of race or another protected class, we should conclude that that party has met the first prong of the Batson-Soares test (Batson test). See Batson v. Kentucky, 476 U.S. 79, 93-94 (1986); Commonwealth v. Soares, 377 Mass. 461, 489-490, cert. denied, 444 U.S. 881 (1979). See also State v. King, 249 Conn. 645, 658 n.18 (1999), quoting State v. Hodge, 248 Conn. 207, 219 n.18, cert. denied, 528 U.S. 969 (1999) ("the party objecting to the exercise of the peremptory challenge satisfies step one of the tripartite process simply by raising the objection"); Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996) (first prong met upon timely objection, upon showing that struck "venireperson is a member of a distinct" group, and upon request that court ask challenging party for reason for challenge); State v. Meeks, 495 S.W.3d 168, 173 (Mo. 2016) (en banc), quoting State v. Parker, 836 S.W.2d 930, 939 (Mo.) (en banc), cert. denied, 506 U.S. 1014 (1992) (first prong satisfied where defendant raises Batson objection and identifies "the cognizable racial group to which the venireperson or persons belong"); State v. Edwards, 384 S.C.

504, 508 (2009) ("When one party strikes a member of a cognizable racial group or gender, the trial court must hold a Batson hearing if the opposing party requests one"); Provost, Excavating from the Inside: Race, Gender, and Peremptory Challenges, 45 Val. U.L. Rev. 307, 353 (2010) (proposing model State statute moving to second Batson prong upon showing of peremptory challenge based on membership in cognizable group). Doing so, in my view, will result in a fairer process for the parties, attorneys, prospective jurors, and the court, and will result in fewer avoidable reversals of convictions.

We have persistently urged, if not beseeched, judges to reach the second prong and elicit a group-neutral explanation regardless of whether they find that the objecting party has satisfied the first prong. See Commonwealth v. Ortega, 480 Mass. 603, 607 n.9 (2018), quoting Commonwealth v. Issa, 466 Mass. 1, 11 n.14 (2013) ("We therefore again 'urge judges to think long and hard before they decide to require no explanation from the prosecutor for [a Batson] challenge and make no findings of fact' . . ."); Commonwealth v. Robertson, 480 Mass. 383, 396 n.10 (2018), quoting Commonwealth v. Lopes, 478 Mass. 593, 598 (2018) (judges have broad discretion to move to second prong without having to decide that defendant met first prong); Commonwealth v. Jones, 477 Mass. 307, 325-326 (2017) ("Had the judge allowed the inquiry to go forward, the prosecutor might

well have proffered an adequate and genuine race-neutral reason for her strike . . ."); Issa, supra ("the judge created a significant and needless risk of reversal by failing to require the prosecutor to explain her reasons for challenging [the] juror"). See also Commonwealth v. Fritz, 472 Mass. 341, 348 (2015), quoting Commonwealth v. Smith, 450 Mass. 395, 406, cert. denied, 555 U.S. 893 (2008) ("[a] judge may, of course, raise the issue of a Soares violation sua sponte"); Commonwealth v. Benoit, 452 Mass. 212, 220-221 (2008) (concluding that judge's request for prosecutor explanation constitutes implicit finding that first prong was satisfied). This is especially so given the considerable deference we give to a judge's determination as to the second and third prongs of the Batson inquiry, see Commonwealth v. Prunty, 462 Mass. 295, 304 (2012), and the judge's obligation to determine that the objected-to peremptory challenge is both adequate and genuine, see id. at 309, quoting Commonwealth v. Maldonado, 439 Mass. 460, 464 (2003) ("The determination whether an explanation is 'bona fide' entails a critical evaluation of both the soundness of the proffered explanation and whether the explanation [no matter how 'sound' it might appear] is the actual motivating force behind the challenging party's decision").

And while the court here "reiterate[s]" that same "exhortation" to judges here, ante at , it still opts to

align the first prong's standard with that articulated under Federal law. I agree that the Federal standard is more straightforward than the Soares standard utilized by our courts for the last forty years, but my suggestion will avoid confusion about the first prong and impose a process that recognizes not just the perniciousness of racial discrimination, but implicit bias as well.[1] Compare Johnson v. California, 545 U.S. 162, 168 (2005), quoting Batson, 476 U.S. at 93-94 (under Federal law, first prong met where "the totality of the relevant facts gives rise to an inference of discriminatory purpose"), with Soares, 377 Mass. at 489-490 (first prong met where challenging party demonstrates both "a pattern of conduct" that peremptorily struck jurors "are members of a discrete group" and "a likelihood" of exclusion based solely on their "group membership").

I agree with the court that meeting the first prong is "not an onerous task," Jones, 477 Mass. at 321; indeed, that reality undergirds my suggestion that the first prong is satisfied when counsel objects to a peremptory challenge on the basis of race or another protected class. However, I fear that the court's

[1] "Multiple studies confirm the existence of implicit bias, and that implicit bias predicts real-world behavior. . . . That is, even people who do not believe themselves to harbor implicit bias may in fact act in ways that disfavor people of color." Commonwealth v. Buckley, 478 Mass. 861, 878 n.4 (2018).

new, nonexhaustive multifactorial test merely replaces one complicated, uncertain, and possibly inconsistent standard with another. See State v. Whitby, 975 So. 2d 1124, 1127 (Fla. 2008) (Pariente, J., concurring) (describing "the confusion that Florida law avoids by requiring race-neutral explanations more often than federal law").

"The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." Johnson, 545 U.S. at 172. Our case law demonstrates that the first prong is unnecessary and inefficient. Indeed, we have reversed at least three cases of murder in the first degree since 2017 because judges have declined to request a group-neutral reason when faced with a Batson challenge. See Ortega, 480 Mass. at 607-608; Robertson, 480 Mass. at 397 (erroneous termination of Batson inquiry at first prong constitutes structural error); Jones, 477 Mass. at 325-326; Commonwealth v. Long, 419 Mass. 798, 807 (1995). Thus, while the first prong is unnecessary, it is not harmless.

Further, I see no reason to retain a presumption of peremptory propriety in this context. As the presumption inherently suggests, attorneys are officers of the court, and thus, there is every good reason to believe that most challenges are -- or at the very least, are intended to be -- appropriate.

As such, a judge's finding that the objecting party satisfied the first prong, and thus demonstrated "an inference of discriminatory purpose," is, by its nature, a finding that the challenging attorney may have engaged in discriminatory conduct. Johnson, 545 U.S. at 168, quoting Batson, 476 U.S. at 93-94. This often requires the judge to make a finding of discriminatory intent concerning an attorney whose ability and integrity the judge respects based on years of the judge's experience. One can understand a judge's reticence to do so, and perhaps even a fellow attorney's as well, in the face of what appears to be minimal evidence of discriminatory purpose.

Perhaps our focus is in the wrong place. Considering the reality of implicit bias, it seems best course for all trial participants, including prospective jurors who have a constitutional right to serve, to require a group-neutral explanation upon a proper Batson objection. See Batson, 476 U.S. at 87 ("by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror"). Such a procedure avoids automatically impugning counsel and helps thwart not only the insidious danger of discriminatory animus, but also the arguably more prevalent peril of implicit bias.

So long as a challenging party can provide the court with a group-neutral reason, the Batson inquiry will continue. See

Jones, 477 Mass. at 319. And if the challenging party cannot, then the second prong will have accomplished exactly what the courts intended the Batson inquiry to accomplish -- discovering and eradicating discriminatory use of peremptory challenges, whether implicit or purposeful. See id., citing Batson, 476 U.S. at 95, and Soares, 377 Mass. at 486.

GANTS, C.J. (concurring). I agree with Justice Lowy that there are sound reasons to consider abandoning the first prong of the Batson-Soares test, which, under the court's decision, now provides that "the presumption of propriety is rebutted when the totality of the relevant facts gives rise to an inference of discriminatory purpose" (quotation and citation omitted). Ante at . See Batson v. Kentucky, 476 U.S. 79, 95 (1986); Commonwealth v. Soares, 377 Mass. 461, 489-490, cert. denied, 444 U.S. 881 (1979). I defer from joining his concurrence only because I agree with the court that if we were to announce such a departure from our current jurisprudence, we should do so in a case where the question is squarely presented and where we have the benefit of briefing by the parties and amici.

The court's opinion and Justice Lowy's concurrence describe three alternatives: (1) keeping the first prong, and applying the standard that the court articulates in its opinion; (2) eliminating the first prong entirely; or (3) keeping the first prong, but modifying it by adopting a good faith standard. A good faith standard would not require a judge to make a finding of an inference of discriminatory purpose but would avoid the risk that some attorneys might challenge every exercise of a peremptory strike by a prosecutor or defense counsel. With the benefit of such briefing, we will be able to carefully consider

which of these three alternatives, or a variation thereof, to adopt.