STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED January 20, 2009
v	No. 275327 Wayne Circuit Court
JAMES DRAIN, Defendant-Appellee.	LC No. 02-004012-01

Before: Gleicher, P.J., and O'Connell and Kelly, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, the trial court did not abuse its discretion when it granted defendant's motion for relief from judgment. Therefore, I would affirm.

I. Prior Proceedings

Defendant's first-degree murder trial commenced on June 11, 2002 with jury selection. The 14 prospective jurors in the first venire included four African-Americans (Loretta James, Carolyn Jeffers, Shawn Williams and Buford Jackson), and one Hispanic (Leah Gutierriez). After an initial round of voir dire, the trial court excused two Caucasian venirepersons for cause (Chris Koka and Robert Stewart). Mary Dewberry, an African-American, took the seat vacated by Koka, and a Caucasian juror assumed Stewart's seat. When afforded the first opportunity to exercise peremptory challenges, the prosecutor struck James and Jeffers, two of the four African-Americans in the panel. Two Caucasians took the places of the peremptorily removed African-Americans.

After voir dire examination of the two new Caucasians, defense counsel peremptorily challenged four venirepersons, and Johnie Trotter, an African-American, joined the venire. The trial court excused venireperson Bonnie Sherlock for cause. George Scurry, an African-American, took Sherlock's place. The venire then included six minority jurors: Dewberry, Scurry, Trotter, Williams, Jackson and Gutierriez. The prosecutor used her third peremptory challenge to strike Dewberry, and a Caucasian juror assumed Dewberry's seat. The defense exercised a peremptory challenge, and prospective juror Richard Morris took the vacated seat. Immediately after identifying himself as "a mechanic currently unemployed," Morris announced "I really don't think I will be acceptable as a juror." He proceeded to explain that he "spent about 15 years of my life as a drug user" and knew that "when drugs are involved," all witnesses, "includ[ing] the police" lacked credibility. The prosecutor attempted to challenge Morris for

cause, but the trial court disallowed a for-cause challenge. The prosecutor used her fourth peremptory challenge to strike Morris, and her fifth to strike Gutierriez. At that point the prosecutor had struck four minority jurors and Morris. Four African-Americans remained on the jury: Scurry, Trotter, Williams and Jackson.

Caucasian jurors assumed the seats vacated by Morris and Gutierriez. The prosecutor used her sixth peremptory challenge to excuse Scurry, whose seat was taken by a Caucasian. At that point, the prosecutor had peremptorily challenged five minorities and Morris. Three African-Americans remained on the panel.

Defense counsel exercised a peremptory challenge, and when the prosecutor's next challenge opportunity arrived, she asserted, "Your Honor, People are satisfied." At that point, the prosecutor had six remaining peremptory challenges.[1] Defense counsel utilized her eighth peremptory challenge, and after another round of voir dire the prosecutor challenged Elizabeth Malave, a Caucasian juror who had been among the original 14 jurors comprising the venire. Defense counsel peremptorily challenged the venireperson who took Malave's seat, and Maleea Standfield, an African-American, filled it.

The prosecutor peremptorily struck Standfield. At that point, three African-Americans remained on the jury: Trotter, Williams and Jackson. During the next rounds of the voir dire defense counsel exercised her three remaining peremptory challenges, and two African-Americans (Lakira Wilbourn and Shirley Blasingame) took two of the vacated seats. The prosecutor then peremptorily struck Trotter, one of the five African-Americans on the venire. Arthur Ball, an African-American, took Trotter's seat. The trial court interrupted Ball's voir dire for a lunch break. When the voir dire recommenced, the trial court observed, "I note for the record that [the prosecutor] has excused nine jurors, seven of whom are black women, I'm sorry, six black women and one black male. And I'm challenging your for-cause on that and you will have to give me a reason for excusing any other black jurors in this case."[2] The prosecutor advised the trial court that she "probably" would request that the court excuse juror Ball for cause. The trial court replied, "Well if you have—if you want to excuse a black juror, you are going to have to ask to approach the bench and give me the reasons before you can excuse another black juror."

The prosecutor then volunteered the following reasons for her peremptory strikes of six of the seven challenged minority jurors:

> *Jeffers*: Ms. Jeffers was asleep, judge . . . . I suspected that she had been sleeping.

[1] Pursuant to MCR 6.412(E)(1), both defendant and the prosecution possessed 12 peremptory challenges in this case.

[2] The transcript later revealed that the trial court included Gutierriez, the Hispanic juror, as an African-American.

James: There was something that she said early on in the voir dire that made me question whether she was gonna listen to the testimony of a person that's a drug user and second police officers, and that is my case, as objectively as she might a plummer [sic] or carpenter or whatever. So I had some misgivings about that.

Dewberry: Miss Dewberry in response to [defense counsel's] statements indicated that she could not and she believed that a person who is a drug user always has their senses and their judgment affected, that she did not believe such a person would be credible.

Again, that's my case. That's a key witness in my case.

Gutierriez: Frankly it was just the fact that Ms. Gutierriez was very, very I think, much younger than any of the other persons. And in my experience, younger jurors don't always bring as much life experience to a case as they would like.

Trotter: Mrs. Trotter, frankly, in hindsight, I wish I hadn't. My misgiving about her was, and that's the one in seat 12, but the misgiving about her was during the initial questioning when you asked her about complying with the burden of proof and applying the appropriate standard, what slipped out of her lips was something about, oh, yes, I'd weigh for a shadow of—I mean a reasonable doubt.

And I believe that someone who starts with a perception that the case has to be proven beyond a shadow of a doubt is gonna hold me to a higher standard. We have had a very abbreviated, you know, kind of opportunity so I couldn't really explore that.

Standfield: Oh, that was the young girl—I believe the one that sat on the end. That was the young girl who indicated she had friends or relatives who had some narcotics use. That again it's the youth factor primarily with her. That she didn't believe or wouldn't believe anything that a person that was a drug user would have to say. She didn't believe they could accurately relate things that they had seen and again that's my case.

Defense counsel remained completely silent throughout the exchange between the prosecutor and the trial court, and never objected to the prosecutor's use of nine peremptory challenges to strike seven minority venirepersons.

During an extended colloquy with the prosecutor regarding the stated reasons for the challenges, the trial court acknowledged that the prosecutor had peremptorily excused two Caucasians, and that defense counsel peremptorily challenged five African-Americans and seven

Caucasians.[3] Additionally, the trial court identified the five African-Americans remaining (Blasingame, Jackson, Williams, Wilbourn, and Ball).[4] Voir dire resumed, and the trial court upheld the prosecutor's for-cause challenge of Ball. The trial court then announced that the 13 remaining venirepersons "will be the jury in this case." The jury that convicted defendant thus included four African-Americans.

In defendant's appeal as of right to this Court challenging his convictions, his appellate counsel argued that the prosecutor had used peremptory challenges "in a discriminatory manner to excuse African-American jurors." *People v Drain*, unpublished opinion per curiam of the Court of Appeals, June 29, 2004 (Docket No. 246014), slip op at 1. This Court observed that defendant "did not raise the *Batson*[5] issue at trial," and "remained silent as the prosecutor offered reasons for excusing past prospective African-African [sic] jurors." *Id*. at 2. The Court further noted that "the trial court did not properly implement the *Batson* procedure when sua sponte finding that the prosecutor had excused African-American jurors based on their race," but nonetheless concluded that "defendant waived the error, thereby extinguishing this issue." *Id*. at 3. The Michigan Supreme Court denied defendant's application for leave to appeal. 472 Mich 867 (2005).

In 2006, defendant filed a motion for relief from judgment pursuant to MCR 6.500 *et seq*. Defendant argued that both his trial and appellate attorneys provided ineffective assistance of counsel by failing to properly raise and seek redress for the events that transpired during the jury selection in his case. The trial court agreed, finding that defendant's "trial attorney was not functioning at a reasonable standard of professional conduct when she stood silently by as the court and the prosecutor wrestled with the *Batson* issue. The defense counsel made no attempt to assert, preserve or protect the constitutional rights of her client during this proceeding." The trial court also opined, "The defendant's appellate attorney failed to present the obvious and substantial claim that the trial attorney's failure to participate in the *Batson* proceeding was ineffective assistance of counsel that affected the defendant's substantial rights and resulted in prejudice."

In its lengthy written opinion granting defendant's motion for relief from judgment, the trial court additionally examined whether defendant had suffered prejudice caused by his attorneys' failures to preserve his right to challenge the jury selection process. The trial court noted that during voir dire, it had "found that the prosecutor's peremptory challenges were based on race in violation of *Batson*," and reiterated this finding when granting the motion for relief. The trial court further explained as follows:

> The trial court's remedy to the *Batson* violation was to require the prosecutor to get approval from the court before she could remove anyone else

[3] At that point, the defense had no remaining peremptory challenges.

[4] The prosecutor "guess[ed]" that another seated juror could be Hispanic, but the trial court rejected that speculation.

[5] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), mod in *Powers v Ohio*, 499 US 400, 415-416; 111 S Ct 1364; 113 L Ed 2d 411 (1991).

> with a peremptory challenge. The court allowed the prosecutor to dismiss one more juror for cause then a side bar was held with the attorneys and the bench. The trial court announced to the jury that the trial would proceed with thirteen jurors instead of fourteen and the trial began. This was an error. The trial court's decision to proceed with the jury tainted by the discriminatory use of peremptory challenges was not adequate to cure the violation of the challenged jurors [sic] constitutional right to serve on a jury as guaranteed under the Fourteenth Amendment. The court's remedy for *Batson* violation was not adequate and the defendant was denied his right to a jury free from the taint of discriminatory use of peremptory challenges.

The trial court relied on *People v Bell*, 473 Mich 275, 293; 702 NW2d 128, mod 474 Mich 1201 (2005), in concluding that the *Batson* error committed during defendant's trial was "subject to automatic reversal."

II. Analysis: *Batson* Issues

The majority framed the dispositive issue in this case as "whether defendant's claim of ineffective assistance of counsel established good cause and actual prejudice to preclude the application of MCR 6.508(D)(3) to bar his claims." *Ante* at 2. However, the majority declined to consider this issue because it instead determined "that there was no *Batson* violation." *Ante* at 3. I respectfully disagree with that conclusion.

Batson forbids the use of peremptory challenges to strike jurors on the basis of race. *Batson*, *supra* at 89, 96-98. "It set forth a three-step process for determining an improper exercise of peremptory challenges." *Bell*, *supra* at 282 (opinion by Corrigan, J.). In *Bell*, our Supreme Court summarized the three steps as follows:

> First, there must be a prima facie showing of discrimination based on race. Once the opponent of the challenge makes a prima facie showing, the burden shifts to the challenging party to come forward with a neutral explanation for the challenge. … Finally, the trial court must decide whether the nonchallenging party has carried the burden of establishing purposeful discrimination. Since *Batson*, the Supreme Court has commented that the establishment of purposeful discrimination comes down to whether the trial court finds the race-neutral explanations to be credible. [*Id*. at 283 (opinion by Corrigan, J.) (internal quotation omitted).]

According to the majority, the trial court failed to follow any of *Batson*'s three steps. Regarding the first step, the majority implies that the presence of minorities on the jury eliminated a prima facie showing of discrimination. *Ante* at 4, 7. The majority opines that "even assuming a prima facie showing," the trial court improperly "combin[ed] the second and third steps of the Batson inquiry into one" by requiring the prosecutor "to offer both race-neutral and persuasive reasons in support of her peremptory challenges of black jurors." *Ante* at 4-5. The majority further suggests that the third-step process employed by the trial court impermissibly "shifted the burden of proof," and that "the trial court's evaluation of the prosecutor's race-neutral explanations during the *Batson* arguments was unsupported by the record." *Ante* at 5.

I respectfully disagree that the trial court improperly conducted steps one and two of its *Batson* inquiry. In my view, the trial court did not err when it sua sponte raised *Batson* concerns, determined the existence of a prima facie case of discrimination, and considered the prosecutor's race-neutral reasons for striking minority jurors. Regarding step three, I believe that the majority has improperly substituted its evaluation of the record for that of the trial court, and that the deferential review required by our Supreme Court and the United States Supreme Court compels us to uphold the trial court's finding of purposeful discrimination. Nevertheless, I believe that the trial court erred when it constructed a remedy lacking any cognizable legal basis.

A. Standards of Review

In *People v Knight*, 473 Mich 324; 701 NW2d 715 (2005), our Supreme Court described in detail the standards of review that govern *Batson* claims of unconstitutional juror exclusion. The applicable standard of review varies according to the *Batson* step at issue. *Id*. at 338. During the first step of a *Batson* analysis, appellate courts review questions of law de novo and factual findings for clear error. *Id*. at 343. De novo consideration "governs appellate review of *Batson*'s second step." *Id*. at 344. We apply the clear error standard to "a trial court's resolution of *Batson*'s third step." *Id*. at 345.[6]

B. Step One: Prima Facie Case of Discrimination

The first *Batson* step requires the establishment of a prima facie case of purposeful racial discrimination "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, *supra* at 93-94. To satisfy the initial showing, a defendant must establish membership in "a cognizable racial group," and "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."[7] *Id*. at 96. During this step, "the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." *Id*. (internal quotation omitted). The defendant must then demonstrate that "these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id*. In *Batson*, the Supreme Court observed that a "pattern" of strikes against African-American jurors may give rise to an inference of discrimination, as may "the prosecutor's questions and statements during *voir dire*." *Id*. at 97.

[6] Our Supreme Court also applied these standards of review in *Bell*, *supra*, which it decided the same day as *Knight*. Notably, in *Bell* the trial court sua sponte raised a *Batson* objection to the defendant's exercise of two peremptory challenges, and ultimately disallowed them; but unlike this case, the opposing party joined in the trial court's *Batson* objection. *Id*. at 284-285 (opinion by Corrigan, J.). The Supreme Court in *Bell* also applied the clear error standard of review to "a trial court's decision on the ultimate question of discriminatory intent under *Batson*." *Id*. at 282.

[7] The United States Supreme Court later clarified that the party challenging allegedly unconstitutional peremptory juror strikes need not share the ethnicity of the challenged jurors. *Powers*, *supra* at 415-416.

Citing *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004), the majority asserts that "[b]ased on our review of the record … a prima facie showing of purposeful discrimination was dubious at best." *Ante* at 4. According to the majority, the prosecutor's decisions to peremptorily excuse two Caucasians and to refrain from challenging four African-Americans strongly mitigated against the establishment of a prima facie case of discrimination. The majority supports this conclusion by invoking this Court's previous observation "[t]hat the prosecutor did not try to remove all blacks from the jury is strong evidence against a showing of discrimination." *Ante* at 4, quoting *Eccles*, *supra* at 388, quoting *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989).

The majority's analysis of *Batson*'s first step qualifies as erroneous for three reasons. First, "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue whether the defendant had made a prima facie showing becomes moot." *Hernandez v New York*, 500 US 352, 359; 111 S Ct 1859; 114 L Ed 2d 395 (1991); see also *Bell*, *supra* at 296. Consequently, whether or not a prima facie case of discrimination existed here has become irrelevant.

Second, I believe that the dicta cited by the majority from *Eccles* and *Williams* is plainly incorrect. *Batson* contemplates that "a single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." *Batson*, *supra* at 95-96 (internal quotation omitted). In *Lancaster v Adams*, 324 F3d 423, 434 (CA 6, 2003), the Sixth Circuit further clarified this principle as follows:

> Where purposeful discrimination has occurred, to conclude that the subsequent selection of an African-American juror can somehow purge the taint of a prosecutor's impermissible use of a peremptory strike to exclude a venire member on the basis of race confounds the central teachings of *Batson*. Recently, this Court reached precisely this conclusion when we rejected the proposition that the failure to exclude one member of a protected class is sufficient to insulate the unlawful exclusion of others. [*Id*., quoting *United States v Harris*, 192 F3d 580, 587 (CA 6, 1999).]

See also *United States v Battle*, 836 F2d 1084, 1086 (CA 8, 1987) ("In remanding this case, we emphasize that under *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors."), and *United States v Alvarado*, 923 F2d 253 (CA 2, 1991) ("The discrimination condemned by *Batson* need not be as extensive as numerically possible. A prosecutor may not avoid the *Batson* obligation to provide race-neutral explanations of what appears to be a statistically significant pattern of racial peremptory challenges simply by forgoing the opportunity to use all of his challenges against minorities."). In my view, the cited language from *Eccles* and *Williams* incorrectly states the law, and this Court should cease repeating it.

Third, I believe that the instant record demonstrates that the prosecutor employed an obvious pattern of strikes against African-American vernirepersons to disproportionately remove African-Americans from the venire. In *Johnson v California*, 545 US 162, 169; 125 S Ct 2410; 162 L Ed 2d 129 (2005), the United States Supreme Court offered further guidance regarding the

establishment of a prima facie *Batson* violation. The prosecutor in *Johnson* used three peremptory challenges to remove all African-Americans in the venire. *Id*. at 164-165. After the prosecutor struck the second African-American juror, the defendant's counsel raised a *Batson* objection. *Id*. at 165. The trial court found that the defendant had not established a prima facie case of discrimination, but warned the prosecutor that "we are very close." *Id*. The defendant's counsel renewed his *Batson* objection after the prosecutor struck the third prospective African-American juror. *Id*. The trial court did not require the prosecutor to give race-neutral reasons for the strikes, but instead "opined that the black venire members had offered equivocal or confused answers in their written questionnaires," and "determined that [the defendant] had failed to establish a prima facie case." *Id*. at 165-166.

The California Court of Appeals set aside the defendant's conviction, ruling that the trial court erred by requiring the defendant "to establish a 'strong likelihood'" of discriminatory purpose, rather than "enough evidence to support an 'inference' of discrimination." *Johnson*, *supra* at 166. The California Supreme Court reinstated the defendant's conviction, although the majority acknowledged that "it certainly looks suspicious that all three African-American prospective jurors were removed from the jury." *Id*. at 166-167 (internal quotation omitted). The United States Supreme Court reversed the California Supreme Court, observing that "[t]he *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Id.* at 172. The Supreme Court reasoned that the concerns voiced by the California judges "that 'we are very close,'" and that "it certainly looks suspicious that all three African-American prospective jurors were removed from the jury," sufficed to establish a prima facie case of discrimination. *Id*. at 173. "[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." *Id.* at 169 (internal quotation omitted). The Supreme Court explained that it did not intend the establishment of a prima facie case

> to be so onerous that a defendant would have to persuade the judge—on 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. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. [*Id.* at 170.]

Here, the prosecutor peremptorily struck three minority jurors in a row before striking Morris. The prosecutor then struck four more minority venirepersons, and one Caucasian. Statistically, the prosecutor exercised 78 percent of her peremptory challenges to exclude minorities, despite the fact that minorities composed only 28 percent of the venire at its inception, and 31 percent at its conclusion. Consistent with *Johnson*'s teaching that a mere inference of discriminatory purpose suffices to establish a prima facie showing of discrimination, I agree with the trial court that the prosecutor's repetitive strikes of minority jurors gave rise to such an inference.

C. Steps Two and Three of *Batson* Analysis

In *Batson*, the Supreme Court introduced the procedure that trial courts must follow when a defendant establishes a prima facie case of purposeful discrimination during jury selection.

"The prosecutor … must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id*. at 98. Step two requires the prosecutor to "give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges." *Id*. at 98 n 20. Here, the prosecutor unquestionably provided race-neutral and specific explanations for all of the challenged minority jurors except Scurry. Because the prosecutor's explanations qualify as race-neutral, "we pass to the third step of *Batson* analysis to determine whether the race-neutral and facially valid reason was, as a matter of fact, a mere pretext for actual discriminatory intent." *Knight*, *supra* at 344, quoting *United States v Uwaezhoke*, 995 F2d 388, 392 (CA 3, 1993).

Step three concerns whether the defendant "carried his burden of proving purposeful discrimination." *Hernandez*, *supra* at 359. The majority opines regarding step three as follows:

> Here, the court required the prosecutor to offer both race-neutral and persuasive reasons in support of her peremptory challenges of black jurors. When the prosecutor offered explanations that were race-neutral on their face, the court found these explanations unpersuasive because white jurors remaining on the panel were similarly situated to the challenged black jurors. However, "[i]t is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Purkett*, *supra* at 768 (Emphasis in original).[8] In essence, by requiring the prosecutor to offer persuasive reasons for her peremptory challenges, the trial court shifted the burden of proof. [*Ante* at 4-5.]

This analysis inaccurately characterizes the actual jury selection events and the governing law.

The trial court announced the existence of a prima facie case of jury selection discrimination, "I note for the record that [the prosecutor] has excused nine jurors, seven of whom are black women, I'm sorry, six black women and one black male," and continued, "I'm challenging your [sic] for-cause on that and you will have to give me a reason for excusing any other black jurors in this case. . . . [I]f you want to excuse a black juror, you are going to have to ask to approach the bench and give me the reasons before you can excuse another black juror." The prosecutor then *volunteered* to provide the trial court with the race-neutral explanations for her exercise of the previous challenges of African-American jurors, and the trial court replied, "Good. Go ahead." The prosecutor's reasons for striking the minority jurors undisputedly qualified as race-neutral.

Contrary to the majority opinion, the trial court did not did not "require[] the prosecutor to offer both race-neutral and persuasive reasons in support of her peremptory challenges of black jurors." *Ante* at 4-5. The trial court plainly required only that the prosecutor give explanations for any *future* peremptory challenges, which in my view constituted a separate error, discussed *infra*. The prosecutor elected to offer race-neutral reasons for the challenges,

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[8] *Purkett v Elem*, 514 US 765; 115 S Ct 1769; 131 L Ed 2d 834 (1995).

and did so with minimal interruption by the court. At the conclusion of the prosecutor's recitation, the trial court rejected the proffered explanations. The trial court never "shifted the burden of proof" because at no time did it require the prosecutor to "prove" anything at all. The trial court merely listened to the prosecutor's race-neutral reasons for the strikes and then ruled on whether the prosecutor had engaged in purposeful discrimination.

> *The Court*: It's clear to me that you have consistently excluded black jurors based on their race.
>
> *The Prosecutor*: Judge, I have not excluded black jurors based on their race.
>
> *The Court*: That is my finding.
>
> *The Prosecutor*: I understand that that's your finding. You didn't even let me go through the rest of the jurors, though, before you made the finding.
>
> *The Court*: I did let you go through the rest of the black jurors except for Mr. Scurry. And I know you already objected to the fact that I didn't excuse him for cause.
>
> You went through all the black jurors that you excused.
>
> *The Prosecutor*: . . . I have excused nine jurors and you have only raised with me questions about a few of them—
>
> *The Court*: No, Jeffers, James, Dewberry, Gutierriez, Standfield and Trotter.
>
> You explained—you gave me your explanation of those. Those are the—
>
> *The Prosecutor*: But those [are] not all the jurors I excused.
>
> *The Court*: Those are the black jurors that you excused.
>
> *The Prosecutor*: But you didn't ask me about the white jurors that I excused. And I think under—
>
> *The Court*: I am not interested in that.
>
> *The Prosecutor*: But under *Batson* there has to be, as I understand the case, there has to be a systematic exclusion.
>
> *The Court*: It is a systematic exclusion.
>
> *The Prosecutor*: Not if I have not excused only—
>
> *The Court*: Excuse me. I have already ruled on this. Thank you.

Ordinarily, after hearing the prosecutor's race-neutral explanations, the trial court would have sought argument from defense counsel concerning whether the grounds articulated by the prosecutor amounted to persuasive evidence of nondiscriminatory purpose. As the majority correctly notes, the burden of persuasion regarding purposeful discrimination falls on and never leaves the opponent of a strike. *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). However, here the trial court constituted the sole opponent of the strikes because defense counsel elected not to join the court's *Batson* objection. The trial court approached step three after listening to the prosecutor's race-neutral explanations, considered the prosecutor's reasoning, and rejected it as to several of the challenged jurors. When a trial court supplies the sole opposition to a party's peremptory strikes, the court's objection must serve as the method for implementing *Batson*'s third step. See *Knight*, *supra* at 339 ("In the event a trial court fails to clearly state its findings and conclusion on the record, an appellate court must determine on the basis of a fair reading of the record what the trial court has found and ruled.").

Furthermore, the trial court's pathway to *Batson*'s third step comports with the procedure approved by our Supreme Court in *Bell*, another case in which the trial court sua sponte objected to a party's use of peremptory challenges. In *Bell*, the Supreme Court acknowledged the trial court's failure to adhere strictly to *Batson*'s procedures, but excused the "imperfect compliance" because the trial court ultimately remained faithful to the principle "that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from the opponent of the strike." *Bell*, *supra* at 297 (opinion by Corrigan, J.), quoting *Purkett*, *supra* at 768. Here, as in *Bell*, after the prosecutor provided race-neutral explanations for the strikes, the trial court determined that the explanations qualified as pretexts for purposeful discrimination. According to my review of the record, the instant trial court's *Batson* methodology mirrored that of the trial court in *Bell*, although one of the parties in *Bell* joined the trial court's objection. *Bell*, *supra* at 284-285 (opinion by Corrigan, J.). I cannot imagine what else the trial court could have done or said in this case that would have more completely complied with *Batson*'s mandates.

In addition to discrediting the trial court's methodology, the majority rejects the trial court's determination of discriminatory intent, characterizing it as "unsupported by the record." *Ante* at 5. The majority further faults the trial court for "assess[ing] discriminatory intent as it related to the challenged black jurors collectively." *Ante* at 7. The majority deems that the trial court should have "assessed such intent on a case-by-case basis" because "it may have found the prosecutor's reasons for exercising her peremptory challenges credible." *Ante* at 7. I believe that the majority's analysis again misstates the facts and misapplies the law.

The record reveals that the trial court did not engage in a "collective" analysis of the prosecutor's reasons for striking the African-American venirepersons, but considered each challenged venireperson separately. The trial court specifically mentioned each potential juror by name, and in the order of the strikes. After entertaining the prosecutor's explanations for each challenge, the trial court explained the reasons underlying its ruling. Again, I cannot envision how the trial court should have conducted itself differently to better achieve compliance with *Batson*. Furthermore, the standard of review for *Batson*'s third step requires us to defer to the trial court's finding regarding discriminatory intent unless it qualifies as clearly erroneous. *Knight*, *supra* at 344-345.

In *Miller-El v Cockrell*, 537 US 322, 338-339; 123 S Ct 1029; 154 L Ed 2d 931 (2003), the United States Supreme Court observed that "the critical question in determining whether a

prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." "[T]he issue comes down to whether *the trial court* finds the prosecutor's race-neutral explanations to be credible." *Id*. at 339 (emphasis supplied). It cannot be overemphasized that *Batson*'s step three focuses on the *trial court's* ascertainment of discriminatory intent. In *Snyder v Louisiana*, __ US __; 128 S Ct 1203, 1207-1208; 170 L Ed 2d 175 (2008), the United States Supreme Court expounded on the trial court's central role in discerning a *Batson* violation:

> On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous. The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge. In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province, and we have stated that in the absence of exceptional circumstances, we would defer to the trial court.

The Michigan Supreme Court has also emphasized that reviewing courts should defer to a trial court's ultimate resolution of a *Batson* challenge. In *Knight*, *supra* at 344, our Supreme Court explained that appellate courts review for clear error a trial court's finding that the opponent of the peremptory challenge has proved purposeful discrimination. "[T]he trial court's ultimate factual finding is accorded great deference." *Id*. In my view, the deference afforded the trial court should eliminate the need for any lengthy discussion of *Batson*'s third step because the trial court here carefully considered and rejected the prosecutor's race-neutral reasons for the challenges. However, I engage in a more extensive discussion of the trial court's analysis to clarify the errors permeating the majority's opinion.

D. Comparative Juror Analysis

The prosecutor excused two minority jurors because of their youth (Gutierriez and Standfield), and two others (James and Dewberry) because the prosecutor feared they would discredit the testimony of Collandria Baker, the prosecution's central witness. The majority concedes that the record does not support the prosecutor's stated reason for challenging Johnie Trotter, a fifth minority juror. The prosecutor attempted to challenge for cause a sixth minority venireperson (Scurry), but because the trial court disallowed the challenge it did not include Scurry in its computation of improperly challenged venire members. In my view, the record supports the trial court's finding that the prosecutor employed pretexts to explain her challenges of Gutierriez, James and Dewberry.

1. Gutierriez

The prosecutor justified her strike of Gutierriez by proffering, "Frankly it was just the fact that Ms. Gutierriez was very, very I think, much younger than any of the other persons. And in my experience, younger jurors don't always bring as much life experience to a case as they

would like." The majority observes that the trial court "pointed out that the prosecutor failed to excuse Paul Reger, a white juror, who was 'obviously the youngest juror on here . . . .'" *Ante* at 5-6. But the majority apparently affords little weight to the trial court's finding on the basis that Reger's "age is not revealed" in the record.[9] *Ante* at 6. Even accepting the trial court's finding of Reger's youth, the majority holds that "'*Batson* is not violated whenever two veniremen of different races provide the same responses and one is excused and the other is not. This is so because counsel must be entitled to make credibility determinations in exercising peremptory challenges.'" *Ante* at 6, quoting *Matthews v Evatt*, 105 F3d 907, 918 (CA 4, 1997).

The continuing validity of the quoted language from *Matthews* is questionable, however, in light of the United States Supreme Court's decision in *Miller-El v Dretke*, 545 US 231; 125 S Ct 2317; 162 L Ed 2d 196 (2005).[10] In *Dretke*, the Supreme Court not only utilized "side-by-side comparisons" of black and white venirepersons, it termed this method of analysis "[m]ore powerful" than statistics. *Id*. at 241. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id*. The Supreme Court in *Dretke* examined the voir dire answers of the peremptorily challenged venirepersons, and compared them to the answers given by whites remaining on the jury. Regarding one challenged venireperson (Fields), the Supreme Court observed that the prosecutor "simply mischaracterized Fields's testimony," while "accept[ing] with no evident reservations" the testimony of white panel members who had expressed the same thoughts as Fields:

> In sum, nonblack jurors whose remarks on rehabilitation could well have signaled a limit on their willingness to impose a death sentence were not questioned further and drew no objection, but the prosecution expressed apprehension about a black juror's belief in the possibility of reformation even though he repeatedly stated his approval of the death penalty and testified that he could impose it according to state legal standards even when the alternative sentence of life imprisonment would give a defendant (like everyone else in the world) the opportunity to reform. [*Id*. at 245.]

The Supreme Court also noted in *Dretke* that after comparing Fields with nonblack jurors "similarly situated to Fields," the differences detected were "far from significant." *Id*. at 247. Citing *Miller-El, supra* at 339, the Supreme Court in *Dretke*, *id*., explained that the credibility of a prosecutor's reasons for exercising a challenge "can be measured by how reasonable, or how

[9] The question of Reger's age is unquestionably one of fact, which we may not set aside "unless clearly erroneous." MCR 2.613(C), MCR 6.001(D). Because the record does not supply Reger's age, in my view this Court must accept the trial court's characterization that he was "obviously the youngest juror" in the venire.

[10] In my view, the quoted language also qualifies as illogical. If counsel exercising a peremptory challenge may avoid the consequences of a discriminatory choice merely by employing a "credibility" argument, *Batson*'s third step has no meaning at all.

improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'"[11]

Comparison of the voir dire testimonies of Gutierriez and Reger readily confirms the purely pretextual nature of the prosecutor's strike. Although Gutierriez did not reveal her age, she testified that she worked for the City of Detroit as a "principle [sic] accountant," and had previously served on a criminal jury "[a] long time ago."[12] Paul Reger testified that he was a full-time student at Central Michigan University entering his junior year, and worked part-time at a golf course. The trial court clearly rejected the prosecutor's explanation that she struck Gutierriez because she was "very, very … much younger than any of the other persons." On the basis of my review, the record amply supports the trial court's finding that Gutierriez's "youth," the only reason given for her strike, qualified as pretextual.

2. James and Dewberry

The prosecutor's race-neutral explanations for striking James and Dewberry centered on these jurors' answers to questions regarding the credibility of a drug user.[13] With respect to James, the prosecutor explained the basis for the challenge as, "There was something that she said early on in the voir dire that made me question whether she was gonna listen to the testimony of a person that's a drug user and second police officers, and that is my case, as objectively as she might a plummer [sic] or carpenter or whatever. So I had some misgivings about that." James testified that she worked for the National Automotive Service Company and had seven children ranging between 12 and 29 years of age. James added, "I have seven grand kids from ages five months old to nine years old and I'm a nine time grandmother." The prosecutor's relevant questioning of James and another venireperson, Lulu Richards, involved the following colloquy:

[11] According to the majority, "because the trial court did not permit the prosecutor to explain the basis for her peremptory challenges of white jurors, it was impossible for the court to have adequately evaluated the prosecutor's proffered race-neutral explanations because the prosecutor may have excused both white and black jurors for the same reasons." *Ante* at 6. In my view, this statement reflects a misunderstanding of the law. A *Batson* challenge requires the proponent of the strike to articulate a race-neutral basis for the challenge. The trial court then evaluates that basis by, in part, comparing the challenged juror's answers to those given by nonchallenged jurors. No authority supports the majority's suggestion that the trial court also should have permitted the prosecutor to explain her reasons for challenging Caucasian jurors. I am unable to locate any published opinion discussing a prosecutor's reasons for striking nonminority jurors, and I thus conclude that these reasons are simply irrelevant to a *Batson* inquiry.

[12] Neither the prosecutor nor defense counsel asked any questions of Gutierriez during the voir dire, which strengthens my conclusion that her alleged youth served as a pretext.

[13] Collandria Baker served as the prosecution's key witness, and testified that she saw defendant shoot the victim. Baker admitted to being a heroin user but denied that she had used heroin or any other controlled substance on the day of the crime. She initially told the police that she saw the shooting as she approached a "weed" house, but later admitted that she had been on her way to buy heroin.

The Prosecutor: Okay. Let me ask other members of the jury if it turns out in the course of this trial, like Mr. Stewart has pointed out he had a previous experience and his was one involving narcotics, if you heard testimony in this case that related to narcotics, narcotic trafficking, would that so inflame you that you wouldn't be able to focus on the testimony and the evidence?

James: No.

* * *

The Prosecutor: …What if it turned out that one of the witnesses in the case was a drug user?

Would you, Miss Richards, automatically reject what this person has to say simply because she is a drug user?

Richards: Not automatically, no.

The Prosecutor: You would be a little suspicious?

Richards: I might be.

The Prosecutor: And you want to understand well what did you see and what condition were you in when you saw it?

Richards: Yes.

The Prosecutor: Would you question, Miss James, what her ability to perceive might have been at the time?

James: Yes, I would.

The Prosecutor: Okay. Do you think that it's possible for someone to be a drug user and see something and relate it?

James: Well it depend [sic] on what kind of condition, like you said, they are in. Cause they can be spaced out at the time.

The Prosecutor: Could be. You recognize, though, that drug users aren't necessarily spaced out 24-7, right?

James: Right.

The trial court interrupted James's questioning for a recess. When voir dire resumed, the prosecutor summarized the topic as follows:

The question I was asking about was whether any of you would feel that automatically because a witness tells you that that person was a drug user or even was a drug user at the time, not necessarily using at that second but was in the act

or habit, I suppose, of using, would any of you feel well automatically you are gonna disregard anything and everything that person says because of that person's condition as a narcotics user?

If there is, please raise your hand. We just want to know. Everybody has opinions. We need to know what yours are, okay.

Okay. I think as Miss James indicated you would want to know something about whether they were high at that time so that you can assess whether their perceptions might be affected by the drug use.

Does that seem reasonable?

Prospective Jurors: Yes.

James's testimony simply did not give rise to any reasonable inference of a reluctance to "listen to the testimony of a person that's a drug user and . . . police officers," as claimed by the prosecutor. The answers James provided regarding a witness's drug use instead substantially matched those given by the other jurors.

Prospective juror Dewberry described herself as a part-time student at "U of D Mercy" and a retired "supervisor with Smart, the transportation people." Dewberry indicated that she had three adult children, ages 34, 35, and 38. The prosecutor's questioning of Dewberry and Ernestine Mobley, another venireperson, included this exchange:

The Prosecutor: I asked some questions about hearing testimony from someone who admits that they have been a narcotics user.

Is there anything, Ms. Mobley or Miss Dewberry, anything about that that you want to bring to my attention? In particular, did either of you feel if a person gets on that witness stand and says I use drugs or I used to use drugs or was using drugs around this time, would you automatically reject everything they say?

Dewberry: If they use drugs, I would assume that their memory is kind of cloudy a lot of times, especially if they use a lot instead of just you don't use the judgments during that time and you don't always perceive things as they are.

The Prosecutor: Okay. If there is other evidence that would indicate that what they're saying may be true or may be at least consistent with other evidence, would that have any sway with you? Would you still say well so what you're still a junky?

Dewberry: The evidence would have to be very strong in alignment with theirs.

The Prosecutor: Okay. Ms. Mobley, how do you feel about it?

Mobley: Well people can change, like he say before. And I do believe all things are possible but, you know, you would have to show me that at that

particular time that they was using or they was high. But if you can't prove that then, you know, I would have to tend to believe that person.

The Prosecutor: Okay. All right. I am not sure that I made it clear, Miss Mobley.

What I'm saying is if a witness comes in and says I saw A, B, C, and the witness also says at the time I was a drug user, I happened to see this because I was doing whatever in a position to go buy or obtain or whatever, okay.

What I'm trying to find out is would that mean to you necessarily that person's perceptions were so distorted they could not be accurately telling you what they saw?

Mobley: They may not have been high.

The Prosecutor: That's my point. You would want to know not just what the person's status is, that is, drug user but what was their condition at the time, were they high then?

Mobley: Right.

The Prosecutor: Would you agree with that, Miss Dewberry, or do you think that just the fact that a person uses means that their perceptions are always clouded and distorted?

Dewberry: If they are not high at that particular time, they should be able to make a rational judgment of what they saw.

Defense counsel then questioned Mobley and Dewberry on the narcotic-user credibility issue as follows:

Defense Counsel: Say a person, a known person admit to using heroin or cocaine, crack cocaine and it's at 2:30 in the morning and they are going to purchase. Would you assume just based on that's [sic] fact that that person was high?

Mobley: No.

Defense Counsel: You wouldn't. How about you? Would you make that assumption?

Dewberry: 2:00 in the morning?

Defense Counsel: 02:30 in the morning.

Dewberry: 2:30 in the morning there is a possibility that he may not be because he could have just gotten it [sic] from a nap, you know. There are a whole lot of little things you can stick in there that would indicate he may not be.

The prosecutor explained her challenge of Dewberry, "Miss Dewberry in response to [defense counsel's] statements indicated that she could not and she believed that a person who is a drug user always has their senses and their judgment affected, that she did not believe such a person would be credible. Again, that's my case. That's a key witness in my case." The actual testimony does not support the prosecutor's characterization. Dewberry simply did not assert that a drug user "always has their senses and judgment affected."

Furthermore, a comparable juror analysis reveals that the prosecutor's reasons for striking both Dewberry and James qualified as pretextual. Caucasian juror Donna Wright was similarly situated in many respects to Dewberry and James. Wright worked as "a housekeeper for a senior citizen," and her husband had retired from National Steel. She had three adult children and two grandchildren. The prosecutor did not question Wright in the same manner as she had James and Dewberry:

> *The Prosecutor*: Okay. Do you think that some people perceive, some people, I'm not saying you or the law, do you think that some people perceive marijuana to be a different kind of drug, for example, than heroin or cocaine?
>
> *Wright*: I have never dealt with any drugs before, so I really can't tell you if other—I mean I would any kind of a drug would be a problem.
>
> *The Prosecutor*: Agree. Do you think that some people, however, somehow view marijuana as, I'm not saying it's right I'm just saying what do you think, less serious than other drugs?
>
> *Wright*: Oh, yes.
>
> *The Prosecutor*: I'm not saying that it is less serious but I am saying some people think it's less serious.
>
> *Wright*: Yes.
>
> *The Prosecutor*: All right. Thank you.

Defense counsel subsequently questioned Wright as follows:

> *Defense Counsel*: Do you think that drugs affect a person's ability to perceive?
>
> *Wright*: Yes, I do.
>
> *Defense Counsel*: Would you question the testimony?
>
> *Wright*: I don't know about drugs, but I would think they would have an affect [sic] on them.
>
> *Defense Counsel*: Would you question the testimony or the credibility of someone who was under the influence of drugs?

Wright: Sure.

To the extent that defense counsel questioned Wright about the credibility of a drug user, Wright's response revealed more potential for disbelief than had the more extensive and nuanced answers given by James and Dewberry. The prosecutor's contrasting questioning of James and Dewberry also reflects an intent to manufacture an excuse to challenge the two African-American women. I find the prosecutor's stated reasons for striking James and Dewberry simply implausible in light of her acceptance of Wright.

E. Remedy for Discriminatory Challenges

In my view, the trial court's resolution of the third *Batson* step does not constitute clear error. The record supports the trial court's conclusion that the prosecutor improperly challenged James, Dewberry and Gutierriez. However, I believe that the trial court erred by selecting an improper remedy for the discrimination.

In *Batson*, the United States Supreme Court recognized two options for curing discriminatory peremptory challenges. "We express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire." *Batson*, *supra* at 99 n 24. In *Knight*, the Michigan Supreme Court noted, "[I]f stricken veniremembers are dismissed and later found to be part of a pattern of discriminatory strikes, the only remaining remedy for the *Batson* violation would be to discharge the entire venire and start the process anew. A court may not ignore or fail to remedy the prior improper strikes simply because the court already dismissed the veniremembers." *Knight*, *supra* at 348. Here, it appears that the trial court had dismissed Gutierriez, James, Dewberry and Trotter before making its *Batson* ruling. Under those circumstances, the "only remedial option would have been to dismiss the entire venire and select the jury from a new panel . . . ." *Id*.

I cannot locate any authority for the trial court's chosen remedies: limiting the venire to 13, and requiring explanations for future challenges. In my view, neither of those remedies suffices to cure the effects of the prosecutor's discrimination. I conclude that the trial court erred by failing to discharge the venire and recommence jury selection with an entirely new group of prospective jurors.

III. Analysis of Motion for Relief from Judgment

Defendant's motion for relief from judgment asserted that his trial attorney's failure to preserve a *Batson* claim amounted to ineffective assistance of counsel. Defendant additionally alleged that his appellate counsel provided ineffective assistance by failing to properly frame the *Batson* issue as one of constitutionally ineffective counsel. The trial court granted defendant's motion on the basis that his trial and appellate counsel both qualified as ineffective.

The motion for relief from judgment is governed by MCR 6.508(D)(3), which requires that a defendant demonstrate

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that . . .

* * *

(iii) . . . [T]he irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case.

We review for an abuse of discretion a trial court's ultimate decision to grant relief from judgment. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001). An abuse of discretion arises only if "an unprejudiced person, considering the facts on which the trial court (relied), would find no justification or excuse for the ruling made." *People v McSwain*, 259 Mich App 654, 685; 676 NW2d 236 (2003) (internal quotation omitted). In my view, the trial court did not abuse its discretion when it concluded that defendant established both good cause and actual prejudice.

A. Good Cause: Ineffective Assistance of Counsel

"'Cause' for excusing procedural default is established by proving ineffective assistance of appellate counsel, pursuant to the standard set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)." *People v Reed*, 449 Mich 375, 378 (opinion by Boyle, J.); 535 NW2d 496 (1995). In *Reed*, the defendant claimed "that his appellate counsel was ineffective for not arguing that his trial counsel was ineffective . . . ." *Id*. at 390. A plurality of the Supreme Court agreed that

> [t]o excuse this double procedural default defendant must show that (trial) counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. Defendant must also show that appellate counsel's performance fell below an objective standard of reasonableness and was constitutionally deficient. [*Id*. (internal quotation omitted).]

The showing of ineffective assistance by an appellate counsel discussed in *Reed* echoes the two-part test described by the United States Supreme Court in *Strickland*, *supra*. The first part of that test mandates a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. The effective assistance of counsel is presumed, and the defendant must overcome a heavy burden to demonstrate otherwise. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The second part of the *Strickland* test requires a showing that counsel's deficient performance prejudiced the defense. "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, *supra* at 600. Or as the Michigan Supreme Court observed in *Reed*, "To establish prejudice, a criminal defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 401,

quoting *Strickland*, *supra* at 687. This standard resembles that in MCR 6.508(D)(3)(b)(iii), further discussed *infra*, because both focus on the inherent fairness of a defendant's trial.

We review for clear error a trial court's determination of the relevant facts, but we consider de novo the trial court's determination "whether those facts constitute a violation of the constitutional right to the effective assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). My review of the record and the trial court's factual findings demonstrates no clear error in the court's findings of fact. I remain unable to discern a strategic explanation for defense counsel's failure to join in the trial court's sua sponte *Batson* objection, thereby at least preserving the issue for appellate review. Similarly, I cannot characterize trial counsel's silence as a reasonable exercise of professional judgment because no possible harm would have resulted to defendant's case had his counsel simply voiced agreement with the trial court's *Batson* concerns.

Although defendant's initial appellate counsel raised the *Batson* issue on appeal, he failed to recognize that trial counsel had waived this issue by remaining silent during the entire *Batson* colloquy. In deciding that trial counsel had waived the *Batson* issue, this Court invoked the following quotation: "*It seems to be pretty well settled* that, after one has knowledge of an irregularity, he cannot remain silent, and take his chances of a favorable verdict, and afterwards, if the verdict goes against him, base error upon it." *Drain*, *supra*, slip op at 3 (emphasis supplied, internal quotation omitted). Given the "well settled" nature of the waiver rule, defendant's appellate counsel overlooked an obvious appellate argument: ineffectiveness by defendant's trial counsel. Because appellate counsel raised the *merits* of the *Batson* issue, I cannot conceive that he failed to include an ineffectiveness argument premised on any considered judgment or appellate strategy. Furthermore, appellate counsel certainly knew that a successful *Batson* argument would yield reversal of defendant's conviction, and that trial counsel's silence during the *Batson* colloquy lacked any reasonable explanation. Appellate counsel's failure to include an ineffectiveness argument, which would have consumed no more than a page or two of his brief, clearly qualifies as constitutionally deficient representation.

In my view, an uncured *Batson* error deprives a defendant of a fair trial. "A *Batson* error occurs when a juror is actually dismissed on the basis of race or gender. It is undisputed that this type of error is of constitutional dimension and is subject to automatic reversal." *Bell*, *supra* at 293 (opinion by Corrigan, J.). This conclusion is consistent with the United States Supreme Court's explanation for its requirement of automatic reversal when discrimination permeates the selection of grand jurors:

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired. Similarly, when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained. Like these fundamental flaws, which never have been thought harmless, discrimination in the grand jury undermines the structural integrity of

> the criminal tribunal itself, and is not amenable to harmless-error review. [*Vasquez v Hillery*, 474 US 254, 263; 106 S Ct 617; 88 L Ed 2d 598 (1986).]

The most recent *Batson* case decided by the United States Supreme Court, *Snyder*, *supra*, is also instructive. A jury convicted the defendant in *Snyder* of first-degree murder and sentenced him to death. *Id*. at 1206. The Supreme Court determined that the prosecution had exercised some of its peremptory challenges in a manner violating *Batson*. *Id*. at 1208-1212. Rather than engaging in a harmless error analysis, the Supreme Court reversed the defendant's conviction. *Id*. at 1206-1207. The Supreme Court did not weigh the evidence of the defendant's guilt in arriving at that remedy; indeed, the Supreme Court's discussion of the facts of the case clearly indicates that the defendant murdered his wife's boyfriend in a premeditated fashion. *Id*. at 1206.

In *Arizona v Fulminante*, 499 US 279, 307-310; 111 S Ct 1246; 113 L Ed 2d 302 (1991), the United States Supreme Court pointed out that errors occurring during the presentation of a case to a jury may be quantitatively assessed in the context of other evidence, but certain constitutional deprivations "affect[] the framework within which the trial proceeds." In the absence of the "basic protections" afforded by constitutional provisions, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id*. at 310 (internal quotation omitted). Furthermore, as the United States Supreme Court has recognized in other cases, *Batson* errors violate the equal protection rights of the excluded jurors as well as the involved litigants. See *Georgia v McCollum*, 505 US 42, 48-50; 112 S Ct 2348; 120 L Ed 2d 33 (1992) (emphasizing that *Batson* was intended to protect the "dignity of persons" as well as "the integrity of the courts"). In my view, a *Batson* violation automatically satisfies *Strickland*'s prejudice component because it constitutes a structural error that fundamentally impairs the fairness of a defendant's trial.

B. Prejudice

Neither this Court nor the Michigan Supreme Court has definitively construed the definition of prejudice contained in MCR 6.508(D)(3)(b)(iii). However, our Supreme Court used language in *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999), which adopted the plain error rule for unpreserved claims of constitutional error. The plain error doctrine prohibits reversal of a defendant's conviction on the basis of unpreserved constitutional error unless a defendant demonstrates either his actual innocence or that the plain error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 765-766, 774.[14]

For the same reasons that the *Batson* violations satisfied the prejudice prong of defendant's ineffective assistance of counsel claim, I believe that they tainted the integrity of

[14] In *Carines*, the Supreme Court adopted the plain error rule described by the United States Supreme Court in *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Several federal circuit courts of appeal have held that "where a fault in the trial proceedings constitutes a structural error, the third prong of the *Olano* test is satisfied, and a specific showing of prejudice is not necessary." See *United States v Recio*, 371 F3d 1093, 1101 (CA 9, 2004).

defendant's trial. In *Bell*, our Supreme Court recognized the "constitutional dimension" of a *Batson* error, and declared that a case harboring such error "is subject to automatic reversal." *Bell*, *supra* at 293 (opinion by Corrigan, J.). The Supreme Court supported that conclusion with a citation to *JEB v Alabama ex rel TB*, 511 US 127, 142 n 13; 114 S Ct 1419; 128 L Ed 2d 89 (1994), which footnote includes the following statement: "The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." Similarly, in *Powers v Ohio*, 499 US 400, 411; 111 S Ct 1364; 113 L Ed 2d 411 (1991), the United States Supreme Court emphasized that racial discrimination in jury selection "casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt."

Ultimately, the basis for proper resolution of the prejudice issue appears in *Batson* itself. "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Batson*, *supra* at 86. Trial by a fairly selected jury serves as a cornerstone of the integrity of a criminal trial. A deliberate erosion of this cornerstone, accomplished through purposeful discrimination, deprives a defendant of the foundation essential for a fair trial.

Because defendant demonstrated both good cause and actual prejudice under MCR 6.508(D)(3), I would affirm the trial court's grant of defendant's motion for relief from judgment.

/s/ Elizabeth L. Gleicher