PEREMPTORY CHALLENGES IN KANSAS

AMENDED REPORT OF ELISABETH SEMEL

I. Qualifications and Referral Questions

I have been a member of the U.C. Berkeley School of Law faculty since 2001, when I became the founding director of the Berkeley Law Death Penalty Clinic, which I currently co-direct.

A copy of my curriculum vitae is on file with the Court. Here, I discuss my qualifications and experience in so far as they are relevant to the purpose of my report in this matter. I have represented men and women facing capital punishment for more than three decades. In practice and as a research topic, I have also concentrated on the impact of race discrimination in the selection of petit juries in capital and non-capital cases.

Between 2003 and 2018, I published summaries of cases addressing the application of *Batson v. Kentucky*, 476 U.S. 79 (1986), on an annual or biannual basis. The summaries included opinions issued by the United States Supreme Court, federal courts of appeal, the California Supreme Court, and other selected state courts. The summaries are available to criminal defense counsel throughout the country.

Between 2011 and 2018, Tom Meyer and I co-authored a chapter on peremptory challenges, Batson *and the Discriminatory Use of Peremptory Challenges in the 21st Century* in *Jurywork: Systematic Techniques* (Thomson Reuters), which we updated periodically. Beginning with the 2018-19 edition, I have been the sole author of the chapter, which I revise annually or biennially. The chapter is a comprehensive discussion of *Batson* case law for trial practitioners.

Under the auspices of the Berkeley Law Death Penalty Clinic, I co-authored amicus curiae briefs in support of the appellant or petitioner in cases such as *Williams v. California*, 571 U.S. 1197 (2014); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231 (2005); *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322 (2003); and *People v. Lenix*, 187 P.3d 946 (Cal. 2008).

I am a co-author of the 2020 report *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* ("*Whitewashing the Jury Box*").[1] The report "investigates the history, legacy, and continuing practice of excluding people of color, especially African Americans, from California juries through the exercise of peremptory challenges."[2] We recommended far-reaching reform of the *Batson* framework, which we modeled on Washington Supreme Court General Rule 37, adopted in 2018.[3]

I participated in drafting California Assembly Bill 3070 (A.B. 3070),[4] which works a wholesale revision of the *Batson* inquiry. I was involved in the legislative process that culminated in the bill's passage.[5]

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[1] Elisabeth Semel, Dagen Downard, Emma Tolman, Anne Weis, Danielle Craig & Chelsea Hanlock, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, Berkeley L. Death Penalty Clinic (2020).

[2] *Id*. at iv.

[3] Wash. Ct. R. General Applicability, Gen. R. 37. In 1978, the California Supreme Court decided *People v. Wheeler*, 583 P.2d 748 (Cal. 1978). The court crafted a three-step inquiry similar to the framework the United States Supreme Court later adopted in *Batson v. Kentucky*, 476 U.S. 79 (1986). *Id*. at 764-65.

[4] A.B. 3070, also known as the "Ending Discrimination in Jury Selection Act," was authored by Dr. Shirley K. Weber, then a member of the California Assembly and currently California's Secretary of State.

[5] A.B. 3070, 2019-2020 Leg., Reg. Sess. (approved by Governor, Sept. 30, 2020, ch. 318) (codified at Cal. Civ. Proc. Code § 231.7).

In 2021, I provided comments to the California Supreme Court's Jury Selection Work Group on the implementation of A.B. 3070.[6]

In 2021, I also provided comments to the New Jersey Judicial Conference on Jury Selection.[7]

Between 2014 and 2019, I litigated or assisted in the litigation of challenges to death qualification in four California counties: Solano, Fresno, Los Angeles, and Santa Clara. In each case, the motions, which I drafted with students in the Death Penalty Clinic, included an analysis of data collected from a contemporaneous survey of jury-eligible respondents in the relevant judicial district.[8]

As my C.V. enumerates, I have been a frequent lecturer on *Batson* and death qualification at national and state criminal defense training programs.

I was asked by counsel for Cornell McNeal to provide my opinions about the following issues:[9]

1. From a national perspective, the effectiveness of the three-step procedure approved by the United States Supreme Court in *Batson*, 476 U.S. at 96-98, as a mechanism for identifying and eliminating racially discriminatory peremptory challenges;

2. The effectiveness of the *Batson* framework as a remedy for the exercise of racially discriminatory peremptory challenges in Kansas; and

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[6] Letter from Elisabeth Semel to Justice Kathleen O'Leary, Cal. Sup. Ct., and Cal. Sup. Ct. Jury Selection Members (June 3, 2021).
[7] Letter from Elisabeth Semel to the Hon. Glenn A. Grant (Oct. 28, 2021).
[8] The pleadings in each case are public record documents, which I can furnish upon request.
[9] Death Penalty Clinic students Max Endicott and Maddison Pilgrim provided invaluable research assistance with indispensable support from Death Penalty Clinic students Aysha Spencer, Devin Oliver, and Alexis Hoffman. For that reason, when discussing the research, I use "we," rather than "I." The opinions are my own.

3. The relationship between the process of death qualifying jurors in capital cases and the operation of *Batson* in those cases.

In order to address these questions, I first consider the historical exclusion of Black Americans from juries and the development of the *Batson* framework. I analyze the shortcomings of *Batson* nationally, including its failure to account for implicit bias, prosecutors' continued usage of explanations based in stereotypes, and the failure of the courts to meaningfully or effectively enforce *Batson*. The bulk of my report is devoted to my analysis of Kansas *Batson* opinions (both published and unpublished). I find that Kansas prosecutors have disproportionately exercised peremptory strikes against Black jurors, and despite the intent of *Batson*, relied upon racial stereotypes to justify their strikes. I found that in more than half of the cases, the prosecutor struck at least half of the jurors of a cognizable minority race or ethnicity from the panel, and, in at least one third of the cases, the prosecutor struck every member of a cognizable minority racial or ethnic group from the panel. I further conclude that Kansas prosecutors frequently rely upon explanations that correlate with racial stereotypes, which have been explicitly deemed impermissible under the California and Washington state reforms. Despite this, there is only one published *Batson* decision in Kansas reversing for the wrongful exclusion of a juror of color.

As part of my analysis, I also conducted a qualitative review of the appellate decisions by the Kansas Court of Appeals and Kansas Supreme Court. Here I find that the appellate courts have contributed in several significant ways to *Batson*'s failure as it is applied in Kansas. The courts place undue emphasis on the number of seated jurors of color while undervaluing the rate at which the State has excluded jurors of color, thus elevating the burden of proof required at step three of the *Batson* analysis, undermining comparative juror analysis by erecting procedural

bars, and disregarding evidence of pretext. I conclude my report by examining Kansas opinions that illustrate how death qualification amplifies the State's ability to disproportionately remove jurors of color through the exercise of peremptory challenges.

II. The Historical Exclusion of Black Americans from Juries: More Than 200 Years to *Batson*

> Whitewashing the Jury Box *offers a very brief overview of the historical exclusion of Black citizens from juries in the United States and California.*[10] *The national history has been documented elsewhere, including the sources on which we relied for our synopsis. The synopsis below, which is foundational to a discussion of peremptory challenges, is excerpted in significant part from pages 2-8 of the report, but omits the California references.*

Black Americans have historically been, and continue to be, disproportionately excluded from juries in criminal trials across the country. The mechanisms of this exclusion, which affect both who is summoned for jury duty and who serves on the trial jury, have evolved over time, responding primarily to changes in the law that prohibit intentional racial discrimination in jury selection processes.

After the nation abolished slavery, the federal government attempted to "guarantee the meaningful inclusion of African-Americans in the social, political and legal fabric of the United States" through the passage of the Civil Rights Act of 1866 and the Fourteenth Amendment.[11] During Reconstruction, legislatures in many Southern states repealed formal race-based jury requirements.[12] The Civil Rights Act of 1875 included a provision outlawing race-based discrimination in jury service.[13] However, the provision was never effectively enforced.[14]

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[10] Semel et al., *supra* note 1, at 2-3.
[11] Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying That Race Still Matters*, 1994 Wis. L. Rev. 511, 532-34 (1994).
[12] Michael J. Klarman, *From Jim Crow to Civil Rights* 10, 39 (2004).
[13] Civil Rights Act of 1875, Ch. 114, § 4, 18 Stat. 335, 336-37 (an act to protect all citizens in their civil and legal rights).
[14] *See* Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 9-10 (2010) (citing Randall Kennedy, *Race, Crime and the Law* 172 (1997)).

In 1879, in *Strauder v. West Virginia*, the United States Supreme Court held unconstitutional state statutes that, on their face, restricted jury service to white (male) citizens.[15] It was, however, becoming apparent that institutional opposition to Black enfranchisement and political participation had taken hold in the South, ushering in "the Jim Crow era of white supremacy, state terrorism, and apartheid . . . ."[16] Although laws no longer explicitly barred African Americans from jury service, in many states, "local officials achieved the same result by . . . implementing ruses to exclude black citizens."[17] For example, some jurisdictions employed jury lists in which the names of white and Black potential jurors were "printed on different color paper" or instituted "vague requirements" for jury service—"such as intelligence, experience, or good moral character"—to conceal, albeit thinly, their intention of keeping Black Americans off the rolls.[18] "In essence, the right not to be excluded from jury service because of one's race promised only the *possibility* of having members of one's racial group sitting on a particular jury, nothing more."[19]

In opinion after opinion following *Strauder*, the Supreme Court placed procedural barriers between local- and state-sanctioned discrimination and federal judicial review.[20] The Court concluded either that the defendant's case was insufficient to merit federal review, or that "racist state practices were inevitably protected by a futile search for discriminatory purpose on the part of state officials."[21]

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[15] *Strauder v. West Virginia,* 100 U.S. 303, 310 (1879).
[16] *See* EJI, *Illegal Racial Discrimination*, *supra* note 14, at 9.
[17] *Id*. at 10.
[18] *Id.*; *see also* Klarman, *supra* note 12, at 42.
[19] Brand, *supra* note 11, at 542 (emphasis in original).
[20] *Id*. at 539-49; *see* EJI*, Illegal Racial Discrimination*, *supra* note 14, at 9-10.
[21] Brand*, supra* note 11, at 539-49; *see* EJI, *Illegal Racial Discrimination*, *supra* note 14, at 9-10.

In 1935, in *Norris v. Alabama*, the Supreme Court finally addressed the total and systematic exclusion of African Americans from jury pools in the second trial of one of the "Scottsboro Boys."[22] Clarence Norris, one of nine Black teenagers falsely accused of raping two white women, was twice tried, convicted, and sentenced to death by an all-white jury.[23] The Court agreed that the "long-continued, unvarying, and wholesale exclusion" of Blacks from the grand and petit jury venires denied him equal protection under the Fourteenth Amendment.[24] The opinion "signaled a major shift: the Court would no longer tolerate the *total exclusion*, by law or by practice, of black citizens from jury rolls."[25]

Following *Norris*, "state officials became more imaginative in their efforts to limit minority participation on juries," allowing token Black Americans to serve on juries to avoid total exclusion.[26] In addition, the limited gains of African-American inclusion on the jury were "immediately counteracted" by the discriminatory use of peremptory challenges.[27]

"The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[28] The peremptory challenge has its roots in English common law.[29] As early as the 14th century, however, Parliament began to restrict the right of the King's counsel to exercise peremptory challenges.[30] In American courts, the right of the defendant to exercise peremptory challenges

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[22] *Norris v. Alabama*, 294 U.S. 587, 588 (1935).
[23] *See generally* Dan T. Carter, *Scottsboro: A Tragedy of the American South* (rev. ed. 1979).
[24] *Norris*, 294 U.S. at 597.
[25] EJI, *Illegal Racial Discrimination*, *supra* note 14, at 11 (emphasis in original).
[26] Brand, *supra* note 11, at 556; *see also Kennedy, supra* note 14, at 178-79.
[27] EJI, *Illegal Racial Discrimination*, *supra* note 14, at 12; *see also* Brand, *supra* note 10, at 564.
[28] *Swain v. Alabama,* 380 U.S. 202, 220 (1965).
[29] *Id.* at 217-18.
[30] Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715, 1719 n.21 (1977) (citing Jon Van Dyke, *Jury Selection Procedures* 147-48 (1977)).

"was accepted as part of the common law."[31] However, the prosecution was not universally entitled to exercise peremptory challenges in the United States until the late 19th century.[32] Unlike challenges for cause, peremptory challenges are not constitutionally guaranteed.[33]

The United States Supreme Court has readily acknowledged that the peremptory challenge is "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty."[34] For almost two centuries, state and federal courts in this country nonetheless accepted these strikes as "a necessary part of trial by jury."[35]

In 1965, in *Swain v. Alabama*, the Court ruled for the first time that the prosecution's exercise of peremptory challenges against Black prospective jurors *might*, in very specific circumstances, violate the Equal Protection Clause.[36] In *Swain*, an Alabama case in which a Black man was sentenced to death by an all-white jury for the rape of a white woman,[37] the prosecutor struck all six of the prospective Black jurors.[38] The Court found that the utility of peremptory challenges in "the institution of the jury trial" precluded it from examining the prosecution's strikes in the specific case, much less finding that those challenges violated the Equal Protection Clause.[39] The Court expressed a willingness to entertain a constitutional

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[31] *Id*.
[32] *Id*. (citing *Hayes v. Missouri*, 120 U.S. 68 (1887); *Swain*, 380 U.S. at 220).
[33] *Rivera v. Illinois* 556 U.S. 148, 152 (2009) ("The right to exercise peremptory challenges in state court is determined by state law."); *see also Swain*, 380 U.S. at 219.
[34] *Swain*, 380 U.S at 220.
[35] *Id*. at 219.
[36] *Id.* at 223-24.
[37] *Id.* at 231 (Goldberg, J., dissenting).
[38] *Id.* at 205 (majority opinion).
[39] *Id*. at 222.

argument, but only upon a showing that the prosecution exercised strikes systematically, in trial after trial, so as not "to leave a single Negro on any jury in a criminal case."[40]

In 1986, the Supreme Court decided *Batson v. Kentucky*, announcing that *Swain*'s evidentiary burden was "crippling," and that "a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury based solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."[41] The Court held that discriminatory jury selection practices "harm" the defendant, the excluded juror, and "the entire community" because they "undermine public confidence in the fairness of our system of justice."[42]

The decision in *Batson* was grounded in the Fourteenth Amendment's Equal Protection Clause.[43] The Court adopted a three-step procedure for determining whether the prosecution purposefully discriminated against a Black prospective juror in the exercise of a peremptory challenge.[44] At step one, the defendant must establish a "prima facie case" of purposeful discrimination.[45] To do so, the defendant need only raise an "inference" of discrimination based upon "all relevant circumstances."[46] If the trial court agrees that the defendant has made a prima facie showing, the inquiry moves to the second step. At step two, the prosecution must "come forward with a neutral explanation for challenging black jurors," which must be "related to the

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[40] *Id.* at 224.
[41] *Batson*, 476 U.S. at 92, 96.
[42] *Id*. at 87.
[43] *Id*. at 84 (asserting that the Court has "'consistently and repeatedly'" reaffirmed the amendment's prohibition against a "State's purposeful or deliberate denial" of Black people's participation in juries (quoting *Swain*, 380 U.S. at 203-04)); *id*. at 89 ("[T]he State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause.").
[44] *Id*. at 93-98.
[45] *Id*. at 93-94.
[46] *Id*. at 93-94, 96; *Johnson v. California*, 545 U.S. 162, 168 (2005).

particular case to be tried."[47] The majority in *Batson* stated that a prosecutor may not rebut the prima facie showing by simply "denying" that he had "a discriminatory motive" or insisting that he acted in "good faith."[48] At the third step, the trial court decides whether the defendant has established purposeful discrimination.[49] The Court left no doubt that, consistent with all other equal protection challenges, the defendant must establish a "'racially discriminatory purpose'" to prevail on a *Batson* motion.[50]

Justice Thurgood Marshall concurred in *Batson* to acknowledge that the Court had taken a "historic step," but also to caution that the eradication of racial discrimination in jury selection "can be accomplished only by eliminating peremptory challenges entirely."[51] He offered several reasons for his view. First, while a three-step procedure similar to the one adopted in *Batson* was already the law in states such as California and Massachusetts, the small number of African Americans in the venire made it exceedingly difficult for the defendant to establish a prima facie showing.[52] Second, he described the ease with which prosecutors could "assert facially [race] neutral reasons," especially when they rely on a prospective juror's demeanor, thus creating a "difficult burden" for judges who must assess the credibility of those reasons.[53] Last, Justice Marshall addressed the issue of "conscious or unconscious racism," which leads prosecutors to

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[47] *Batson*, 476 U.S. at 97-98.
[48] *Batson,* 476 U.S. at 98.
[49] *Id.* In later opinions, the Court reaffirmed the trial court's duty to decide the ultimate question based upon "'all of the circumstances that bear upon the issue of racial animosity.'" *Foster v. Chatman*, 578 U.S. 488, 501 (2016) (quoting *Snyder*, 552 U.S. at 478); *see also Miller-El II*, 545 U.S. at 252 (directing that the step-three ruling must be made "in light of all evidence with a bearing on it").
[50] *Batson*, 476 U.S. at 98 (quoting *Washington v. Davis*, 46 U.S. 229, 240 (1976)) (citing other equal protection cases).
[51] *Id*. at 102-03 (Marshall, J., concurring).
[52] *Id*. at 105.
[53] *Id*. at 105-06.

characterize Black jurors in negative terms—especially with regard to demeanor—and judges to credit those reasons.[54] As I discuss below, and as judicial opinions and significant scholarship have repeatedly acknowledged, Justice Marshall's skepticism has been borne out in jury selection across the country. Based on my analysis, Kansas appears to be no exception.

By its terms, *Batson* only prohibited prosecutors from striking Black jurors in trials involving Black defendants.[55] In later decisions, the Supreme Court extended *Batson* to apply to civil and criminal trials, to all trials irrespective of the race of the parties, to defense attorneys as well as prosecutors, and to strikes based on ethnicity or gender.[56] Some federal and state courts have expressly extended *Batson* to other groups, such as those who have in common national origin, sexual orientation, or religious affiliation.[57] Some states prohibit discrimination in jury selection under their state constitutions, by statute, or both.[58]

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[54] *Id.* at 106.
[55] *Id.* at 92, 96-98.
[56] *J.E.B v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (extending *Batson* to gender-based strikes); *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that *Batson* applies to peremptory challenges by defense counsel in criminal trials); *Hernandez v. New York*, 500 U.S. 352 (1991) (extending *Batson* to Latinx prospective jurors); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (holding that *Batson* applies to civil trials); *Powers v. Ohio*, 499 U.S. 400 (1991) (applying *Batson* to any litigant regardless of race).
[57] *See, e.g.*, *United States v. Brown*, 352 F.3d 654, 669-70 (2d Cir. 2003) (holding that a peremptory strike based on religious affiliation violates *Batson*); *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 486 (9th Cir. 2014) (recognizing "sexual origination" as a cognizable group for *Batson* purposes); *People v. Douglas*, 232 Cal. Rptr. 3d 305, 312-313 (Cal. Ct. App. 2016) (holding that a peremptory challenge based on sexual orientation violates California's representative cross-section guarantee and the Fourteenth Amendment); *State v. Fuller*, 862 A.2d 1130, 1132-33 (N.J. 2004) (holding that a peremptory challenge based on religious affiliation violates *Batson*).
[58] Some state constitutional guarantees encompass religious groups. *See State v. Levinson*, 795 P.2d 845, 849 (Haw. 1990) (relying on the Hawaii Constitution); *Thorson v. State*, 721 So. 2d 590, 594 (Miss. 1998) (en banc) (relying on the Mississippi Constitution); *State v. Gilmore*, 511 A.2d 1150, 1159 n.3 (N.J. 1986) (decided shortly after *Batson* but grounded solely in the state constitution's representative cross-section rule prohibiting discrimination based on "religious principles, race, color ancestry, national origin, and sex"); *People v. Langston*, 163 Misc. 2d 400 (N.Y. Sup. Ct. 1996) (prohibiting a strike against a Muslim juror based upon the Equal Protection

In *Hernandez v. New York*, decided five years after *Batson*, the Supreme Court held that the "disproportionate removal" of members of a cognizable group is not a "per se violation of the Equal Protection Clause."[59] Dissenting, Justice Stevens, joined by Justice Marshall, wrote that the majority: (1) had sanctioned any "nonpretextual justification that is not facially discriminatory"; (2) "[b]y requiring that the prosecutor's explanation itself provide additional, direct evidence of discriminatory motive, the Court ha[d] imposed on the defendant the added requirement that he generate evidence of the prosecutor's actual subjective intent to discriminate"; and (3) had signaled that it would tolerate "any explanation, no matter how insubstantial and no matter how great its disparate impact."[60] Four years later, in *Purkett v. Elem*, the Court made express Justice Stevens's assessment. The Court announced that, at step two, even "silly or superstitious" or implausible or illegitimate reasons would suffice.[61] In this instance, the Court concluded that the prosecutor's assertion that a Black juror looked "suspicious" because of his long hair, mustache, and beard was "race-neutral" because "it is not a characteristic that is peculiar to any race."[62] Again, Justice Stevens dissented, writing, "Today the Court holds that it did not mean what it said in *Batson*."[63] In his view, the prosecutor's explanation was indistinguishable from the type of "intuitive judgment" held insufficient at step

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Clause of the New York Constitution); *State v. Eason*, 445 S.E.2d 917, 921-23 (N.C. 1994) (holding that article I, section 26 of the North Carolina Constitution prohibits exclusion "from jury service on account of sex, race, color, religion, or national origin").

[59] *Hernandez v. New York*, 500 U.S. 352, 361 (1991).

[60] *Id*. at 376 (Stevens, J., with Marshall, J., dissenting). *See State v. Aziakanou*, 498 P.3d 391, 407 (Utah 2021) (stating that "disproportionate removal of racial minorities—whether it is due to peremptory strike criterion that disparately impact persons of color, implicit bias, or some other factor—erodes confidence in the justice system and weakens the very notion of a fair trial by an impartial jury") (citation omitted).

[61] *Purkett v. Elem*, 514 U.S. 765, 767-69 (1995). *See also Rice v. Collins*, 546 U.S. 333, 338 (2006) (per curiam)).

[62] *Id*. at 767, 769 (internal quotation marks and citation omitted).

[63] *Id*. at 771 (Stevens, J., dissenting).

two in *Batso*n because of the likelihood that the assumption was race-based.[64] As I discuss below, *Hernandez* and *Elem* opened the judicial floodgates to whitewashing dozens of justifications that "devalue[] the real-life experiences of our Black citizens"[65] and/or reflect implicit racial or ethnic bias and thus ratified the disproportionate removal of those jurors.

Today there is widespread acknowledgement that *Batson* has failed its central aim of prohibiting unconstitutional jury selection. Prosecutors continue to prevent Black Americans from serving on juries through the exercise of racially discriminatory peremptory challenges.[66]

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[64] *Id*. at 775.

[65] *See People v. Triplett*, 48 Cal. App. 5th 655, 267 Cal. Rptr. 675, 692-93 (Cal. Ct. App. 2020) (Liu, J., dissenting from the denial of review).

[66] *See generally id*.; Semel et al., *supra* note 1, at 2 & nn.1-2, 36-37, 44-52 (collecting and discussing judicial opinions and legal and empirical scholarship, as of June 2020); *id.* at 13-23 (reporting empirical findings of California prosecutors' use of peremptory strikes); *see also State v. Veal*, 930 N.W.2d 319, 340 (Iowa 2019) (Wiggins, J., concurring in part and dissenting in part) ("In the majority of cases, the reasons given by prosecutors in response to a *Batson* challenge appear to be pretextual."); *Commw. v. Carter*, 172 N.E.3d 367, 388-90 (Mass. 2021) (Lowy, J., concurring) (proposing the elimination of *Batson*'s first step and citing Washington Supreme Court General Rule 37); *State v. Andujar*, 254 A.3d 606, 611-12, 622-23, 627 (N.J. 2021) (relying on state constitutional grounds to modify *Batson*'s third step to preclude a peremptory challenge based on "implicit or unconscious racial bias" and calling for a Judicial Conference on Jury Selection); *Aziakanou*, 498 P.3d at 406-07 & 407 n.12 (acknowledging that *Batson* does not preclude strikes based on implicit bias, directing the "advisory committee on the rules of criminal procedure" to consider and provide guidance on that concern as well as the "disproportionate removal of racial minorities," and citing reforms and reports in other states); *Report of the Connecticut Supreme Court's Jury Selection Task Force to Chief Justice Richard A. Robinson* ("*Connecticut Task Force Report*") 28-30, 28 n.21 (2020) (collecting and discussing studies); Aliza Plener Cover, *Hybrid Jury Strikes*, 52 Harv. Civ. Rts.-Civ. Liberties L. Rev. 356, 365-70 (2017) (analyzing the ways in which "the *Batson* reality has failed to live up to its ideals"); Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection* (2021) (updating its 2010 report and recommending reforms); Shaun L. Gabbidon, Leslie K. Kowal, Kareem L. Jordan, Jennifer L. Roberts & Nancy Vincenzi, *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002-2006*, 33 Am. J. Crim. Just. 59, 62-64 (2008) (analyzing 184 federal criminal trials and finding that prosecutors exercised peremptory challenges against Black prospective jurors in close to 90% of the cases, and that reviewing courts found *Batson* violations in only 12.3% of cases); Brian Gallini, Samantha, Klausen, & Eden Vasquez, *Remedying* Batson*'s Failure to Address Unconscious Juror Bias in Oregon*, 57 Willamette L. Rev. 85, 117-22 (2021) (analyzing peremptory challenges in Oregon through a historical, rather than empirical lens, and recommending the elimination of peremptory challenges or a rule modeled on Washington

III. Contextualizing *Batson*'s Failure

A. *Implicit Bias as Context*

In *Whitewashing the Jury Box,* we described a half-century of social science research on implicit bias to introduce our investigation into prosecutorial and judicial resistance to *Batson*.[67] Several of the key observations relevant to peremptory challenges follow:

- Unconscious processing is pervasive. Stereotypes can manifest in social judgments and behaviors that are uncontrolled and different from a person's reported attitudes.[68]

- A growing body of social science research on implicit bias focuses on the pervasiveness of implicit biases in the criminal legal system.[69] Much of the research has shown that implicit bias is widespread in all aspects of the criminal legal system, resulting in discrimination against both Black defendants and Black jurors by various actors, including police officers, attorneys, judges, and jurors.[70] The research shows that implicit bias establishes a general pattern of attributing positive attributes to white individuals and negative attributes to Black individuals, regardless of the race of the respondent.[71]

- Individuals generally associate people of color—particularly African Americans—with criminality more often than they do whites.[72] This association has accounted and continues to account for "a disproportionate amount of crime arrests" of Black Americans,[73] a higher likelihood of conviction when charged with a crime jurors associate with Black people,[74] and lengthier sentences for Black defendants than those imposed on comparable white defendants.[75] Most of the social science research has focused on the Black-white dichotomy. However, studies examining the effects of implicit bias on other people of color have produced similar results.[76]

Supreme Court's General Rule 37 and California's A.B. 3070); Anna Offit, *Race-Conscious Jury Selection,* 82 Ohio St. L.J. 201, 238 (2021) ("Judges and prosecutors disproportionately excuse Black jurors, while defense attorneys disproportionately excuse White jurors."); *id*. at 239-42 (collecting and discussing studies); *id*. at 223-37 (presenting the results of a qualitative field study based on interviews with Assistant United States Attorneys).

[67] Semel et al., *supra* note 1, at 31-32.
[68] Semel et al., *supra* note 1, at 31 & n.315.
[69] *Id*. at 33 & n.334.
[70] *Id*. at 33 & n.336.
[71] *Id*. at 32 & n.326.
[72] *Id*. at 33.
[73] *Id*. at 33 & n.337.
[74] *Id*. at 33 & n.338.
[75] *Id*. at 33 & n.339.
[76] *Id*. at 33 & n.340.

- Implicit racial biases affect decision-making in jury deliberations, and studies have shown that racially diverse juries reduce deliberation inaccuracies and racially discriminatory decision-making.[77]

- Through social science experiments, researchers have demonstrated that implicit bias against African Americans affects jury selection, specifically influencing the exercise of peremptory challenges.[78]

Among jurists and scholars, there is a consensus—and likely unanimity—that requiring proof of "purposeful discrimination" is one of *Batson*'s most significant shortcomings.[79] Justice Marshall eloquently presaged this deficiency when he warned, "Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet."[80] He added that prosecutors "seat-of-the-pants instincts" about a juror, on which they often rely in exercising peremptory strikes, may "be just another term for racial prejudice."[81]

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[77] *Id*. at 33 & nn.344-46.
[78] *Id*. at 34 & nn.347-56.
[79] *See, e.g. Miller-El II,* 545 U.S. at 267-68 (Breyer, J., concurring) ("[A]t step three, *Batson* asks judges to engage in the awkward, sometimes hopeless, task of second-guessing a prosecutor's instinctive judgment—the underlying basis for which may be invisible even to the prosecutor exercising the challenge.") (citing *Batson*, 476 U.S. at 106) (Marshall, J., concurring); *Andujar,* 254 A.3d 606, at 623 (relying on state constitutional grounds to modify *Batson*'s third step to preclude a peremptory challenge based on "implicit or unconscious racial bias"); A.B. 3070, *supra* note 5, at § 1(b) ("[T]he [California] Legislature finds that requiring proof of intentional bias renders the [*Batson*] procedure ineffective); *Connecticut Task Force Report*, *supra* note 66, at 16 (proposing a New General Jury Selection Rule that would eliminating the intentionality requirement); *id*. at 19 (acknowledging that "the strict purposeful discrimination requirement has thwarted *Batson*'s effective and ignores unconscious racism"); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 150 (2010); (stating that "[j]udge-dominated voir dire and the *Batson* challenge process are well-intentioned methods of attempting to eradicate bias from the judicial process, but they actually perpetuate legal fictions that allow implicit bias to flourish"); Semel et al., *supra* note 1, at 147 n.871 (describing the process that led to the adoption of Washington General Rule 37, which, among other reforms, eliminated *Batson*'s intentionality requirement).
[80] *Batson*, 476 U.S. at 106. (Marshall, J., concurring).
[81] *Id*.

B. *The Racist History of the Criminal Legal System as Context*

Decades of social science research confirm that Black and white Americans differ in their views of the criminal legal system. The reasons for the divide in perception are embedded in the historical and present-day differences in how Black and white Americans experience the administration of the criminal law—from policing to incarceration to execution—and are summarized in *Whitewashing the Jury Box*.[82] Black prospective jurors are far more likely to have been stopped, searched and arrested because of the disparities in the criminal justice system.[83] As a result, "African Americans and whites do not conceptualize 'American justice' in the same terms. Where white citizens tend to see the scales of justice as reasonably balanced, their African American counterparts believe that unfairness, based on race, is integral to the operation of the criminal justice system."[84]

Black and white Americans' differing views of the criminal legal system cover a range of issues—issues that are frequently the basis for prosecutors' peremptory strikes. Among them are the following:

- "Almost 80% of African Americans—as compared with 30% of Whites—consider the treatment of people of color by the criminal justice system to be a significant problem."[85]

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[82] Semel et al., *supra* note 1, at 36-43 & nn.387-492.
[83] *Id.* at 39-40; *see also*, Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson,* Yale L. & Pol'y Rev. 387, 389 (2016).
[84] James D. Unnever & Francis Cullen, *Reassessing the Racial Divide in Support for Capital Punishment: The Continuing Significance of Race*, 44 J. Rsch. Crime & Delinq. 124, 14 (2007); *see also* Semel et al., *supra* note 1, at 37, 41 & nn.389, 441-61. California Supreme Court Justice Goodwin Liu has several times observed, "[I]t is a troubling reality, rooted in history and social context, that our black citizens are generally more skeptical about the fairness of our criminal justice system than other citizens." *People v. Johnson*, 453 P.3d 38, 81 (2019) (Liu, J., dissenting) (quoting *People v. Harris*, 306 P.3d 1195, 1242 (2013) (Liu, J., concurring)).
[85] John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, Pew Rsch. Ctr. (May 21, 2019); *see also*, *People v. Triplett*, 267 Cal. Rptr. 3d 675, 683-93 (Cal. Ct. App. 2020) (Liu, J., dissenting from the denial of review) (discussing studies reaching the same conclusions); Semel et al., *supra* note 1, at 41-43 & nn.449-91.

- African Americans' marked skepticism about fair and equal treatment of African Americans extends to the courts.[86]

- Black people historically support the death penalty at lower rates that white people.[87]

- Almost every public opinion poll and social scientific survey conducted in the United States in the last thirty years found a substantial difference between Black Americans' and white Americans' support for the death penalty.[88] The "long-standing, durable racial divide" in death penalty support should not be treated as the product of chance, but instead understood within a legacy of state- supported racial subordination.[89]

Writing about the California Supreme Court's *Batson* jurisprudence, California Supreme Court Justice Goodwin Liu remarked, "As it stands, our case law rewards parties who excuse minority jurors based on ostensibly race-neutral justifications that mirror the racial fault lines in society."[90] One commentator observed, "[T]he very inequalities in the criminal justice system that make jury diversity so important also, perversely, create formally race-neutral justifications for the exclusion of minorities under *Batson* . . . The very inequality of the criminal justice system provides cover for prosecutors to strike minorities on ostensibly race-neutral reasons."[91] They are among the reasons we identified in *Whitewashing the Jury Box* as those prosecutors are trained to put forward and do put forward most frequently.[92] This is true as a general matter across the country, and it is true in Kansas. *See* Sections IV and VI below. And while these reasons are "formally race neutral" because courts have consistently sanctioned their use, there is

[86] *See* Semel et al., *supra* note 1, at 41 & nn.449-455 (discussing and citing research).
[87] Semel et al., *supra* note 1, at 40 & nn.438-45.
[88] *See Death Qualification in Segwick County Kansas: Report of Mona P. Lynch,* on file herein, at 3-4.
[89] James Unnever et al., *Race, Racism, and Support for Capital Punishment*, 37 Crime & Just. 45, 81 (2008).
[90] *Triplett*, 267 Cal. Rptr. 3d at 692 (Liu, J., dissenting from the denial of review).
[91] Cover, *supra* note 66, at 368-69.
[92] Semel et al., *supra* note 1, at 13-23 (presenting findings on California prosecutors' strikes); *id*. at 44-52 (presenting findings on district attorney training materials).

nothing truly race neutral about them.[93] As the Washington Supreme Court found, they are "historically associated with improper discrimination in jury selection."[94] Likewise, they are among reasons the California Legislature labeled "presumptively invalid" in A.B. 3070.[95]

IV. Prosecutors Continued Resistance to *Batson* and Reliance on Explanations that Bespeak of Racial Stereotypes

Since *Batson*, prosecutors across the country have continued to use peremptory strikes to disproportionately exclude Black prospective jurors.[96]

A. *National Overview*

Prosecutors' opposition to prohibiting discriminatory jury selection practices is long-standing.[97] When the United States Supreme Court was considering *Batson*, the National District Attorneys Association ("NDAA") filed a brief in support of the state of Kentucky.[98] The NDAA argued, "Prosecutorial peremptory juror challenges to remove . . . all members of a defendant's race is not violative of a defendant's right to be tried by an impartial jury . . . under the sixth amendment of the United States Constitution."[99] In Justice Marshall's concurring

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[93] *See, e.g., Triplett*, 267 Cal. Rptr. 3d at 691-92 (Liu, J., dissenting from the denial of review) (providing examples of California Supreme Court opinions upholding "peremptory strikes of jurors based on their experiences with law enforcement or perceptions of the courts, even though this disproportionately burdens Black jurors"); *supra* notes 66 and 79 (citing judicial opinions and studies); Cover, *supra* note 66, at 368-69 nn.66-68 (citing cases); Semel et al. *supra* note 1, at 13-23 (based upon a study of California appellate opinions, reporting findings in cases that upheld prosecution strikes of Black and Latinx jurors, a significant percentage of which involved peremptory challenges based on experiences with law enforcement or perceptions of the criminal legal system).

[94] Wash. Gen. R. 37(h), *supra* note 5.

[95] Cal. Civ. Proc. Code § 271.7(e)(1)-(3).

[96] Semel et al., *supra* note 1, at 82-84 nn.1-2 (collecting judicial opinions and legal and empirical scholarship as of June 2020); *id*. at 13-23 (reporting empirical findings); *supra* notes 66 and 79, (adding opinions, reports, and scholarship).

[97] This paragraph and the next are excerpted from Semel et al., *supra* note 1, at 36.

[98] Brief for the Nat'l Dist. Att'ys Ass'n as Amicus Curiae Supporting Resp't, *Batson v. Kentucky*, 476 U.S. 79 (1976) (No. 84-6263), 1985 WL 669927, at *4.

[99] *Id*.

opinion in *Batson*, he wrote that the "misuse of the peremptory challenge to exclude black jurors has become both common and flagrant."[100] Justice Marshall referenced an instruction book used by the Dallas County, Texas District Attorney's Office, which "explicitly advised prosecutors that they conduct jury selection so as to eliminate 'any member of a minority group.'"[101] Until 2010, the NDAA refused to adopt *Batson* as a standard. Instead, the organization recommended that prosecutors "be familiar with the decisions . . . [and] closely follow other cases that develop . . . *Batson* . . . issues."[102]

Prosecutors across the country are trained in how to exercise peremptory strikes against African Americans and other jurors of color without violating *Batson.* For example, a year after *Batson* was decided, then-Philadelphia Assistant District Attorney Jack McMahon gave a videotaped training session to prosecutors in his office. He instructed them to circumvent *Batson* by thoroughly questioning Black jurors so that "you [have] more ammunition to make an articulable reason as to why you are striking them, not for race."[103] At a 1995 North Carolina

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[100] *Batson*, 476 U.S. at 103 (Marshall, J., concurring).

[101] *Id*. The defendant in *Miller-El II* was tried before *Batson*. 545 U.S. at 236. He presented evidence that the district attorney's office "'had adopted a formal policy to exclude minorities from jury service,'" including a training manual containing an article "'outlining the reasoning'" for the policy. *Id*. at 264 (quoting *Miller-El I*, 537 U.S. at 334). The manual "instructed its prosecutors to exercise peremptory strikes against minorities: 'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" *Miller-El I*, 537 U.S. at 334-35. The Court noted that the manual "remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial." *Id*. at 335.

[102] NDAA, *Jury Selection Standards*, cmt., in *National Prosecution Standards* 206 (2d ed. 1991). The NDAA's current policy is found in NDAA, *National Prosecution Standards* 74 (3d ed. 2010). Standard 6-2.3 provides: "A prosecutor should not exercise a peremptory challenge in an unconstitutional manner based on group membership or in a manner that is otherwise prohibited by law." The commentary to this standard reminds prosecutors that they represent "all of the people in [their] jurisdiction[s]" and states that "it is important that none of those people be obstructed from serving on a jury because of their status as a member of a particular group." *Id*.

[103] Nancy S. Marder, *The Jurisprudence of Justice Stevens: Justice Stevens, the Peremptory Challenge, and the Jury*, 74 Fordham L. Rev. 1683, 1726 (2006). McMahon offered

Conference of District Attorneys training program, attendees received a one-page handout titled "*Batson* Justifications: Articulating Juror Negatives."[104] It provided 10 vague reasons such as inappropriate dress, physical appearance, poor attitude, or body language.[105] In 2004, a list of purportedly race-neutral justifications was distributed to Texas prosecutors that included suggestions such as "Watched gospel TV programs" and "Agreed with O.J. Simpson verdict."[106] A 2005 edition of a national trial manual for prosecutors did not once refer to *Batson.*[107]

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other advice such as the following: "'My experience, young black women are very bad. There's an antagonism. I guess maybe they're downtrodden in two respects. They are women and they're black . . . so they somehow want to take it out on somebody, and you don't want it to be you.'" Barry Siegel, *Storm Still Lingers over Defense Attorney's Training Video*, L.A. Times (Apr. 29, 1997), https://www.latimes.com/archives/la-xpm-1997-04-29-mn-53632-story.html (last visited Feb. 15, 2022). The title refers to the fact that, after he left the District Attorney's Office, McMahon became a defense lawyer. *Id*.

[104] The handout is available online through the American Civil Liberties Union. Batson *Justifications: Articulating Juror Negatives* [hereinafter Batson *Justifications*], https://www.aclu.org/legal-document/north-carolina-v-tilmon-golphin-christina-walters-and-quintel-augustine-batson (last visited Feb. 15, 2022); *see also* Jacob Biba, *Did Prosecutors Use a "Cheat Sheet" to Strike Black Jurors in North Carolina Death Penalty Case?*, The Appeal (Sept. 4, 2018), https://theappeal.org/did-prosecutors-use-a-cheat-sheet-to-strike-black-jurors-in-north-carolina-death-penalty-case/ (last visited Feb. 15, 2022); Ian A. Mance, *Cheat Sheets and Capital Juries: In* State v. Tucker, *North Carolina's Attorney General and Supreme Court Contend with Evidence of Prosecutors' Efforts to Circumvent* Batson v. Kentucky, 44 Campbell L. Rev. 3, 5-6 (2022), (discussing the litigation in *Tucker*, including the discovery of the "cheat sheet" in the prosecutors' case file, the similarity between the list of ostensibly race-neutral reasons and those offered by the prosecution to support their peremptory challenges of Black jurors, and "factual similarities to other capital cases on appeal").

[105] Batson *Justifications*, *supra* note 104.

[106] Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, New Yorker (June 5, 2015), https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors (last visited Jan. 26, 2022).

[107] *See generally* Prosecutors Rsch. Inst., *Basic Trial Techniques for Prosecutors* (2005). The manual's discussion of peremptory challenges informs prosecutors that they may strike whomever they wish provided the strikes are not made "in a discriminatory manner," and that when challenging "a member of a suspect or protected class, they should be prepared to provide the court with a logical reason." *Id*. at 9.

B. *California Prosecutors'* Batson *Training*

In *Whitewashing the Jury Box*, my co-authors and I examined dozens of training documents distributed by California district attorneys' offices between 1990 and 2019.[108] While this study was specific to California prosecutorial training, my experience and research from multiple jurisdictions around the country confirm that these practices are not unique to California, and that the same patterns play out in jurisdictions all across the country.

We found that the training in California encourages discriminatory strikes in at least four respects:[109]

First, prosecutors are trained to identify the "ideal juror," which is a person who most resembles them. These are individuals who are "attached to the community, educated, stable, [and] professional[]," have "traditional lifestyles," and are "middle class, middle aged homeowners." Prosecutors are likewise advised to avoid individuals who are members of groups in which people of color are overrepresented, that is, "less educated people and blue collar workers," and those who are "unemployed or underemployed" or who have family members experiencing economic hardship. The message is that if a prosecutor relies on characteristics that are facially neutral but in fact apply disproportionately to members of a protected group, they will survive a *Batson* objection.

Second, prosecutors are instructed to strike jurors based on their "gut reactions" to jurors' facial expressions, body language, clothing, and hairstyle, and to rely on lengthy stock lists of

[108] Semel et al., *supra* note 1, at 44 & n.493 (explaining the method of collection and public access to the documents, which are now available on the Berkeley Law Death Penalty Clinic's website).
[109] The following four paragraphs are excerpted from *Whitewashing the Jury Box*. *See id*. at 44-51 for the complete findings and citations to source materials.

court-approved "race-neutral" reasons to explain their challenges. Social science has repeatedly shown that "gut reactions" are often the product of implicit biases that correlate with racial and ethnic stereotypes. This approach feeds directly into the preference for demeanor-based reasons. One training document states, "Race, religion, gender, socioeconomic status and culture all have their own nonverbal markers." The California District Attorney Association suggests, for example, making "notes of demeanor attributes, looking for differences between those of potential challenges and potential keepers"' and giving "a detailed verbal expression to such subjective instincts," which can be accomplished by using the 18 "acceptable attributes for demeanor challenges."

Third, prosecutors are trained to rely on "encyclopedias of stock, court approved 'race neutral' reasons," which include many explanations based on the fact that the prospective juror had a negative experience with law enforcement or is distrustful of the criminal legal system or is close to someone who has been arrested, charged, or convicted of a crime. They are, in other words, instructed to exploit the historic and present-day differential treatment of whites and people of color, especially Black and Latinx people, by the police, prosecutors, and the courts.

Fourth, prosecutors are taught that courts will approve peremptory challenges based on "extremes." For example, prosecutors use the fact that a prospective juror had "too much" or "too little" education as a race-neutral reason. Prosecutors may strike a juror for lack of community or family ties or too many of those relationships. They may excuse a prospective juror for having previously served on a hung jury or on a jury that acquitted, or because he or she never served on a jury.

V. The Judiciary's Role in *Batson*'s Failure

Judicial norming of racial proxies and stereotypes as "race-neutral" is among the most insidious and effective ways in which the central goal of *Batson*—to identify and ferret out race discrimination in jury selection—has been crippled; this is particularly so when implicit bias is at work.[110] In the *Batson* context (though not only there), tolerance of racial bias is something of a feedback loop: prosecutors' explanations for peremptory challenges of Black jurors that are racial proxies, judicial approval of those explanations, and the training of prosecutors to employ these judicially-sanctioned "race-neutral" reasons, with the result that the list of acceptable reasons appears almost infinite.[111] The track records of the Kansas Supreme Court and Court of Appeals, discussed below, are strikingly similar to those of other state courts and federal courts for which data is available. Courts in other jurisdictions rarely grant *Batson* relief, and some have yet to do so. For example, in 2013, the Washington Supreme Court declared, "In over 40 cases since *Batso*n, Washington appellate courts have never reversed a conviction based on a trial court's erroneous denial of a *Batson* challenge."[112] A 2016 study of North Carolina's

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[110] This paragraph is excerpted from my comments to the New Jersey Courts Conference on Jury Selection, *supra* note 7. *See, e.g.*, Bennett, *supra* note 79, at 156-58 (discussing studies on implicit bias and judicial decision-making); EJI, *Illegal Racial Discrimination*, *supra* note 14, at 16-18 (discussing prosecutors' reliance on and courts' tolerance of reasons that "do[] not explicitly mention race" but are "stereotype-based" reasons); Semel et al., *supra* note 1, at 52-65 (describing five ways in which the California Supreme Court's *Batson* decisions over the past three decades have turned a blind eye to discrimination against Black prospective jurors).

[111] Semel et al., *supra* note 1, at 49-51 (examining California prosecutors' jury selection training materials, which include dozens of judicially approved race-neutral justifications. *E.g.*, *id*. at 50 ("*The Inquisitive Prosecutor's Guide* lists 77 race-neutral reasons for striking a juror."). The district attorney training materials referenced in *Whitewashing the Jury Box* are available on the Berkeley Law Death Penalty Clinic's website.

[112] *State v. Saintcalle*, 309 P.3d 326, 334 (Wash. 2013), *abrogated on other grounds by City of Seattle v. Erickson*, 398 P.3d 1124 (Wash. 2017). As noted elsewhere in this report, the Washington Supreme Court's comments in *Saintcalle* and *Erickson* were, in significant part, the impetus for further inquiry into the exercise of peremptory challenges in the state and the court's

published *Batson* opinions reported that it had been 30 years since the North Carolina Supreme Court found a *Batson* violation, but noted that, during this period, the state's appellate court had remedied two instances of "'reverse *Batson*' claims where the court found purposeful discrimination against white jurors challenged by black defendants."[113] An analysis of 184 federal criminal trials between 2002 and 2006 found that prosecutors exercised peremptory challenges against Black prospective jurors in close to 90% of the cases, and that reviewing courts found *Batson* violations in only 12.3% of cases.[114] A more recent study of 269 federal civil and criminal *Batson* decisions over a nine-year period revealed that relief in the form of a new trial was granted in fewer than seven percent of the cases, and that in "85.1% [of the] cases, the court rejected the *Batson* claim altogether."[115] In *Whitewashing the Jury Box*, we reported that "[o]ver a 30-year period (1989-2019), the California Supreme Court reviewed 142 *Batson* cases and found error only three times."[116] That figure has not changed.[117] Our report examined 683 California Court of Appeal *Batson* opinions issued from 2006 through 2018, and determined

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adoption of General Rule 37 in 2018. *See supra* note 3; *Proposed New GR 37—Jury Selection Workgroup FINAL REPORT* 2 (Feb. 2018).

[113] Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C.L. Rev. 1957, 1959, 1962-63 (2016) (citing *State v. Hurd*, 246 N.C. App. 281(2016); *State v. Cofield*, 498 S.E. 2d 823 (1998)). On February 11, 2022, the North Carolina Supreme Court reversed for *Batson* error in *State v. Clegg,* Case No. 101PA15-3 (Feb. 11, 2022).

[114] Shaun L. Gabbidon, Leslie K. Kowal, Kareem L. Jordan, Jennifer L. Roberts & Nancy Vincenzi, *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002-2006*, 33 Am. J. Crim. Just. 59, 62-64 (2008).

[115] Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1092 (2011).

[116] Semel et al., *supra* note 1, at 23 & n.234.

[117] *People v. Battle*, 280 Cal. Rptr. 3d 337, 489 P.3d 329, 370 (Cal. 2021) (Liu J., dissenting) (observing that the court's record of failing to "find any type of *Batson* error involving the removal of a Black juror" is unchanged).

that "[t]he six appellate districts found *Batson* error in only 18 cases (2.6%) and remanded three cases (0.4%) for the trial court to rehear the *Batson* motion."[118]

Even in the absence of a quantitative analysis of case outcomes, a growing number of state courts and individual state and federal jurists and scholars have criticized the *Batson* inquiry.[119] It bears mention that *Batson* has failed not simply because it does not capture strikes based on unconscious racism. To be clear, trial judges been reluctant to call out purposeful discrimination, and appellate courts have found innumerable ways to insulate intentional discrimination.[120]

VI. *Batson* in Kansas

A. *Introduction*

In a recently published report, the Kansas Bar Association Diversity Committee acknowledged that *Batson* "has failed to protect a significant number of Black Americans from being struck from criminal jury trials," proposed that the Kansas Bar Association Board of Governors "consider and encourage the passage of a *Batson*-strengthening bill," and identified California's new statute as one such example.[121] In reaching its conclusions and recommendations, the Kansas Bar Association Diversity Committee relied on a 2010 study by

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[118] Semel et al. *supra* note 1*,* at 24 & n.237.
[119] *See supra* notes 66 and 79.
[120] *See, e.g., Coombs v. Digugliemo,* 616 F.3d 255, 264 (3d Cir. 2010) ("No judge wants to be in the position of suggesting that a fellow professional—whom the judge may have known for years—is exercising peremptory challenges based on forbidden racial discrimination"); *Connecticut Task Force Report*, *supra* note 66, at 4 of PDF ("When it comes to *Batson* challenges, most judges are loathe [sic] to make a finding of purposeful discrimination in concluding that the attorney in question has acted unethically and has willfully violated a potential juror's constitutional rights.")
[121] Merideth J. Horgan & Diana Stanley, *Response to Racial Injustice*, 90-Dec. J. Kan. B.A. 42, 46-47 (Nov./Dec. 2021) (citing EJI, *Illegal Racial Discrimination*, *supra* note 14; citing A.B. 3070).

the Equal Justice Initiative and a 2020 report by the Connecticut Task Force.[122] Similarly, the Equal Justice Task Force of the Wichita Bar Association recommended that the Kansas Legislature "enact a statute to address the *Batson* protections more specifically."[123] The Wichita Task Force report cited the California statute, California AB 3070, as an example of legislation that addresses some of *Batson*'s shortcomings.[124] As discussed above, numerous studies—including more recent research by scholars and state-based committees—as well as judicial opinions, validate the committee's recommendation.[125]

Representatives of the state's legal community have also remarked that prosecutors "routinely target minorities for exclusion from juries in Kansas."[126] Wyandotte County District Attorney Mark Dupree—Kansas's only Black district attorney—agrees that studies show the connection between Black Americans' district of law enforcement and the nation's history of racism.[127] He acknowledged that prosecutors and defense attorneys "'know these studies,'" and that prosecutors' "'strategy'"[128] disproportionately removes people of color by leveraging what *Batson* allows, and that this approach "has kept Black, brown, and broke folks off of juries for decades, and until we deal with it, it will continue to do so."[129]

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[122] *Id*. at 46.
[123] *Equal Justice Under Law*: *Report of the Racial Justice Task Force to the Board of Governors of the Wichita Bar Association*, at 6 (June 4, 2021).
[124] *Id*. at 13.
[125] *See supra* notes 66 and 79.
[126] *Jury Pool*, ACLU Kansas (May 10, 2021), https://www.aclukansas.org/en/publications/jury-pool (last visited Feb. 15, 2022).
[127] *Id*.
[128] *Id*. (quoting Mr. Dupree).
[129] *Id*.

B. *2003 Review of* Batson *Opinions*

Evidence specific to Kansas demonstrates that the courts here have had no more success than courts in other state and federal jurisdictions in reducing discriminatory peremptory challenges through the *Batson* framework. A 2003 article by Jeb C. Griebat surveyed 35 appellate opinions involving *Batson* issues decided by the Kansas Supreme Court or Court of Appeals between 1987 and 2001.[130] He found that there had been only four "successful" *Batson* challenges in during that period.[131] Griebat's definition of "successful" was generous; he included cases in which a court had remanded the matter for a *Batson* hearing.[132] In fact, there was only one reversal for a *Batson* violation during the entire 14-year review period: *State v. Belnavis*, 246 Kan. 309, 787 P.2d 1172 (1990), *disapproved by State v. Walston*, 256 Kan. 372, 886 P.2d 349 (1994).

Griebat identified two "weaknesses" in the Kansas courts' application of *Batson* that made the three-step inquiry "quite easy to circumvent."[133] The first involved the use of demeanor-based reasons, which are "easy to assert [and] hard to disprove."[134] Griebat noted that in his concurring opinion in *Batson*, Justice Marshall raised this, among other concerns, as an indicator that *Batson* was unlikely to reduce discriminatory strikes.[135] Second, Griebat pointed to the ease with which prosecutors could "strategically mak[e] the prima facie case harder to

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[130] Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge*, 12 Kan. J.L. & Pub. Pol'y 323, 332 & nn.73-74 (2003).
[131] *Id*. at 332 & n.74.
[132] *Id*. at 332.
[133] *Id*.
[134] *Id*.
[135] *Id*.

establish" because of the small number of prospective jurors of color in the pool.[136] He gave several examples of cases in which prosecutors had successfully used their peremptory challenges to remove all but one juror of color.[137] Although Griebat did not make this connection, Justice Marshall also warned of the likelihood that the requirement of a prima facie showing would defeat *Batson*'s efficacy, particularly where there are relatively few Black jurors in the venire.[138]

C. *Review of* Batson *Opinions: Initial Findings*

We conducted a review of 208 opinions involving *Batson* challenges decided by the Kansas Supreme Court or Court of Appeals between 1987 and 2021.[139] Our investigation confirmed Griebat's findings and offered additional insights into patterns of prosecutorial conduct and judicial decision-making in the application of *Batson* in Kansas, which further explain the procedure's ineffectiveness as a protection against the discriminatory removal of Black and Latinx[140] jurors.

First, we found that prosecutors across Kansas use peremptory strikes to disproportionately remove African American and Latinx citizens. Second, we found that that the Kansas courts have reversed only once for *Batson* error in a published opinion—and that was more than 30 years ago.[141] Our findings suggest that *Batson* fails to protect defendants or

[136] *Id*.
[137] *Id*. at 333.
[138] *Batson*, 476 U.S. at 105 (Marshall, J., concurring) ("Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an 'acceptable' level.").
[139] *See infra* subsection D for a discussion of our searches and calculations.
[140] I use the term "Latinx" throughout this report, although most Kansas opinions use the term "Hispanic."
[141] *Belnavis*, 246 Kan. at 314.

prospective jurors of color at the trial level, and that Kansas lacks an effective judicial mechanism (or the judicial will) to correct such failures at the appellate level.

Subsection D presents our findings about how prosecutors in Kansas use peremptory strikes to discriminate against Black and Latinx jurors, highlighting some of the most commonly used and problematic categories of race-neutral explanations and offering case-specific examples to show how easily prosecutors can circumvent the constitutional protections *Batson* was intended to provide.

Subsection E catalogues several of the ways in which the Kansas courts have interpreted *Batson* that explain the abysmally low rate at which Kansas reviewing courts find *Batson* error despite the clear racial disparities in prosecutorial peremptory strikes.

D. *Prosecutors Disproportionately Exercise Peremptory Challenges Against Black Jurors and Do So by Relying on Racial Stereotypes*

We reviewed 208 opinions of the Kansas Supreme Court and Court of Appeals citing *Batson,* identified through Westlaw searches.[142] Of the 208 appellate opinions we examined, 77 cases either did not involve a merits determination of a race-based *Batson* claim, involved civil rather than criminal cases, involved co-defendants who raised the same *Batson* claim but in separate opinions, or were earlier appeals of the same *Batson* challenges in the same case, and we removed them from our analysis. That left a total of 131 cases in which the defendant made a *Batson* claim regarding the State's use of peremptory challenges, amounting to at least 305 strikes.[143] Of the disputed strikes, 234 (77%) involved defense objections to the State's strikes of

[142] We conducted a Westlaw search for all Kansas cases listed in the citing references to *Batson v. Kentucky*, 476 U.S. 79 (1986), through February 15, 2022.

[143] This total does not include reverse-*Batson* objections, i.e., objections by the State to defendants' peremptory challenges. Because appellate opinions often concerned only a subset of the *Batson* objections defendants made at trial, we could not always confirm the total number of objections. We included only those objections that were clearly identified in the opinion (whether raised on

Black jurors and 47 (15%) involved defense objections to prosecutors' strikes of Latinx jurors. Only 24 (8%), involved defense objections to the State's removal of jurors of other or unspecified races or ethnicities.[144] In at least 70 cases (53%), the prosecutor struck at least half of the jurors of a cognizable minority race or ethnicity from the panel, and in at least 43 cases (33%), the prosecutor struck every member of a cognizable minority racial or ethnic group from the panel.[145]

After an initial review of the opinions to obtain a preliminary assessment of the frequency with which the State gave specific explanations for its peremptory challenges, and based on previous studies, we coded for four categories:[146]

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appeal or not), which makes it likely that we undercounted the total number of defense *Batson* objections.

[144] Appellate courts did not always make a specific determination of a struck juror's race or ethnicity, referring to a juror or juror solely as a "minority." *See, e.g.*, *State v. Williams*, 277 Kan. 338, 354, 85 P.3d 697 (Kan. 2004) (noting that three "minority veniremen" were struck).

[145] This figure includes all of the State's peremptory strikes, whether or not the defense objected to each one. Not every opinion included a complete breakdown of the composition of the jury panels or even a complete breakdown of the composition of the seated jury. For purposes of these two calculations, we only counted cases in which the reviewing court noted that the State struck the majority or all of a cognizable group and/or that the final jury was white.

[146] In most instances, prosecutors gave more than one explanation for a peremptory challenge, and it was common for prosecutors to rely on more one than of the four reasons we coded. *See, e.g.*, *State v. Drennan*, 278 Kan. 704, 725, 101 P.3 1218 (Kan. 2004), *overruled on other grounds by State v. Neighbors*, 299 Kan. 234, 328 P.3d 1081 (Kan. 2014) (striking a Black juror who "frowned," a "minority" juror for having a highly skilled job whom the prosecutor believed would require more than reasonable doubt to convict, and another minority juror whose "body language and her response . . . indicated . . that she might be somewhat protective of an individual who was a drinker or an enabler"); *State v. Fleming*, 195 P.3d 291, 2008 WL 4849086, at *5 (Kan. Ct. App., Nov. 7, 2008) (per curiam) (unpublished) (striking a Black juror because she lacked work experience, "knew several law enforcement officers and connected more with defense counsel than with the State"); *State v. Jarman*, 268 P.3d 506, 2012 WL 401603, at *5 (Kan. Ct. App., Feb. 3, 2012) (per curiam) (unpublished) (striking a Black juror for giving short answers on voir dire and failing to adequately "engage with the attorneys," "ha[ving] no experiences with guns," having friends and family who had been convicted of crimes, and agreeing that police officers were "human and make mistakes"); *State v. Kettler*, 299 Kan. 448, 463, 325 P.3d 1075 (Kan. 2014) (striking a Black juror for lack of formal education and "'life experience'" and presumed "adverse

- Demeanor and/or Appearance
- Bias Against Law Enforcement
- Unemployed or Underemployed
- Neighborhood/Location

As I discussed in Section IV, above, research shows that prosecutors across the country routinely rely on similar reasons to explain their peremptory strikes against jurors of color. While courts have almost universally held that these explanations are "race-neutral," they correlate strongly with racial stereotypes.[147] These four reasons are among those identified by Washington Supreme Court General Rule 37 and the new California statute as "historically associated with improper discrimination in jury selection" and/or "presumptively invalid."[148]

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contact with law enforcement" based on the juror's unpaid traffic tickets); *State v. Gonzalez*, 311 Kan. 281, 301, 460 P.2d 348 (Kan. 2020) (striking a Latinx juror because she was young, a student, unemployed, and had a prior arrest); *State v. Brown*, 461 P.3d 87, 2020 WL 1897361, at *2-3 (Kan. Ct. App., Apr. 17, 2020) (per curiam) (unpublished) (striking a multi-racial juror because she "had smiled" when defense counsel spoke, was interested in legal drama television shows, failed to "fully disclose her employment status on her juror card," and her concerns about convicting innocent people of color suggested "biases" towards African Americans).

[147] *See supra* Section IV.

[148] *See supra* note 3 (discussing Wash. Gen. R. 37(h)(i)-(v) ("having prior contact with law enforcement officers"; "expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling"; "having a close relationship with people who have been stopped, arrested, or convicted of a crime"; or "living in a high-crime neighborhood"); *id*. subdiv. (i) ("allegations that the prospective juror was sleeping, inattentive, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers"); *supra* note 5 (discussing A.B. 3070 *codified at* Cal. Code Civ. Proc. § 231.7); Cal. Code Civ. Proc. § 231.7(e)(1)-(3) (listing a juror's stated "distrust of or having a negative experience with law enforcement or the criminal legal system"; stated "belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner"; and "[h]aving a close relationship with people who have been stopped, arrested, or convicted of a crime"), *id*. subdiv. (e)(4) the juror's "neighborhood"; *id*. subdiv. (e)(9) "[d]ress, attire, or personal appearance"; (11) "[l]lack of employment or underemployment of the prospective juror or prospective juror's family member"; *id.* subdiv. (g)(1)(A-C) the prospective juror "was inattentive, or staring or failing to make eye contact"; "exhibited either a lack of rapport or problematic attitude, body language, or demeanor"; or "provided unintelligent or confused

Our analysis identified the frequency with which prosecutors gave these four explanations. Prosecutors relied on demeanor and/or appearance as a reason for their peremptory challenges in over 38% of cases.[149] The State offered these explanations to exclude jurors who, for example, exhibited "hostile" body language, seemed inattentive or disinterested, appeared "confused," or made eye contact with defense counsel or the defendant, but failed to make eye contact with the prosecutor. In 34% of cases, prosecutors cited what they characterized as a bias against the criminal legal system or negative experience with law enforcement, either because of the juror's own experience or the juror's relationship with someone who had been stopped, arrested, or convicted of a crime. In 12% of cases, prosecutors struck jurors because they lived in what prosecutors described as a high-crime neighborhood or frequented an area that was associated with the case on trial. In 15% of cases, prosecutors struck jurors because they were unemployed or underemployed.

1. Peremptory challenges based on demeanor and/or appearance

Of the four categories, prosecutors relied most frequently on demeanor and/or appearance as a reason for their peremptory challenges of Black or Latinx prospective jurors (over 38% of cases). As discussed in Section III, these reasons correlate with racial stereotypes because we unconsciously and reflexively categorize people of a different race or ethnicity based on demeanor. The following cases are illustrative of the demeanor-and/or appearance-based explanations that prosecutors cited and courts found "race-neutral":

answers"); *see also* Semel et al., *supra* note 1, at 14-15 and Appendix A (explaining the coding selection).

[149] Because appellate opinions often did not discuss the State's proffered explanations for each of the challenged strikes in a given case, there is likely a significant undercount of the total number of cases in which prosecutors relied on the four categories of "race-neutral" reasons.

- Striking a Black juror with whom the prosecutor claimed the defendant had made eye contact, stating that the defendant and juror might have shared a connection.[150]

- Striking a Black juror who the prosecutor claimed "was nodding and smiling broadly" when defense counsel asked the jury panel whether the juror believed that officers could lie, even though neither the trial judge nor defense counsel observed her smiling and other seated white jurors also answered affirmatively.[151]

- Striking a Black juror because her "body language and tone of voice were 'closed off' and 'not receptive'" towards the prosecutor as compared to the defense attorney, and she "appeared sleepy."[152]

- Striking a Black juror because the juror appeared to be "nodding off," and the State was "unclear about [the juror's] gender."[153]

- Striking two Black jurors for exhibiting body language that suggested sympathy for the defense, explaining that they "'seemed to pay careful attention to what defense counsel was saying.'"[154]

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[150] *State v. Dean*, 273 Kan. 929, 931-33, 46 P.3d 1130 (Kan. 2002). The Kansas Supreme Court affirmed the denial of the *Batson* objection based on "counsel's intuition" and the fact that one Black person was on the seated jury, i.e., the prosecutor "chose" not to strike him. *Batson*, of course, disapproved the notion that "intuition" is a race-neutral reason. *See* 476 U.S. at 97. I note here that the Kansas Supreme Court used the word "intuition" to describe the State's reliance on the struck juror's demeanor. *Id*. at 933. In subsection E, below, I discuss the problem with Kansas's courts overreliance on the number of seated jurors of color to conclude that the trial court did not abuse its discretion in denying the *Batson* objection.

[151] *State v. Pink*, 270 Kan. 728, 732, 20 P.3d 31 (Kan. 2001), *abrogated on other grounds by State v. Gleason*, 277 Kan. 624, 88 P.3d (Kan. 2004).

[152] *State v. Thomas*, 342 P.3d 678, 2015 WL 569371, at *18-19 (Kan. Ct. App., Jan. 30, 2015) (per curiam) (unpublished).

[153] *State v. Williams*, 308 Kan. 1320, 1327, 429 P.3d 201 (Kan. 2018). The prosecutor also stated that he "'was not a fan'" of the fact that the juror was a para-educator. *Id*.

[154] *State v. Walston*, 256 Kan. 372, 375, 888 P.2d 349 (Kan. 1994). *Id.* at 388 (concluding, in the court's words, that one of the struck juror's "exhibited hostile body language toward the prosecutor"). The State Supreme Court acknowledged that "body-language justifications . . . are not capable of being reviewed . . . .unless counsel expressly makes note of them. *Id*. at 375. The court directed trial judges to "'be particularly sensitive when body language alone is advanced as a reason for striking a juror.'" *Id*. at 376 (quoting *State v. Hood*, 245 Kan. 367, 374, 780 P.2d 160 (Kan. 1989)). Based on our review, it appears that Kansas courts often recite the holding in *Hood*, but because the admonition is limited to the rare case in which the State's only reason was demeanor-based, it does no meaningful work to advance *Batson*'s objectives.

- Striking one Black juror because he was "youthful in appearance and maturity," and another because she was "very pregnant and dressed inappropriately."[155]

- Striking a Black juror because she was silent during most of voir dire and did not respond as promptly as other jurors when asked if she had relatives in law enforcement, although the prosecutor observed that the "panel as a whole was fairly quiet," and the Court of Appeals noted that "other quiet jurors ultimately served . . . due to the panel's general reticence."[156]

- Striking a Black juror because, as the prosecutor described, "'he had a very unfavorable disposition through his body language and facial expressions, frowning when [the prosecutor] was mentioning certain aspects of the case, even though he did not comment.'"[157]

- Striking a Black juror who did not respond to the prosecutor's questions on voir dire and failed to make eye contact.[158]

Even when a prosecutor acknowledges reliance on a "stereotype," trial and appellate courts often allow the strikes. For example, in *State v. Bolton*, the prosecutor admitted that he was relying on "stereotypes"—the defendant wore braids at the time of the crime and the prospective juror, a "'fairly young Black male,'" was also wearing braids—to justify his assertion that the juror "would bond with the defendant" or otherwise be "affected" by that evidence at trial.[159] Bolton was remanded for a *Batson* hearing because the trial court erred in ruling that the defendant had not made a prima facie showing.[160] At the hearing, the district court found the reason to be "'borderline' . . . because the vast majority of those with that

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[155] *State v. Betts*, 272 Kan. 369, 395, 31 P.2d 575 (Kan. 2001), *overruled on other grounds by State v. Davis*, 283 Kan. 569, 158 P.3d 317 (Kan. 2006).
[156] *State v. Howard*, 345 P.3d 295, 2015 WL 1402825, at *6 (Kan. Ct. App., Mar. 20, 2015) (unpublished).
[157] *State v. Angelo*, 287 Kan. 262, 273, 197 P.3d 337 (Kan. 2008).
[158] *State v. Villa-Vasquez*, 49 Kan. App. 2d 421, 434, 310 P.3d 426 (Kan. Ct. App. 2013).
[159] *State v. Bolton*, 274 Kan. 1, 14, (Kan. 2002). For a different outcome see *Clayton v. State*, 797 S.E.2d 639, 643-44 (2017) (holding that the prosecution's reliance on the fact that a Black prospective juror "had gold teeth in his 'entire mouth'" was "not racially neutral" because it "is a cultural proxy stereotypically associated with African-Americans").
[160] *Bolton*, 274 Kan. at 10.

particular hairstyle are African American."[161] Denying the *Batson* motion, the judge relied on other reasons given for *other* jurors, "the credibility of the prosecutor," and the number of Black jurors who were seated.[162] The Kansas Supreme Court did not specifically address the "borderline" objection and deferred to the trial court's "judgment of credibility" and the number of Black seated jurors.[163]

Kansas reviewing courts do not require that the trial judge observed the demeanor cited by the prosecution to credit the reason.[164] However, it is precisely because cross-racial observations of demeanor are so susceptible to implicit bias and have been used historically as a basis for improper discrimination that (1) Washington and California reformed their peremptory challenge inquiry to require that either the trial judge or opposing counsel observed the demeanor, and (2) other jurisdictions are considering similar reforms.[165]

The fact that prosecutors in Kansas (and elsewhere) often cite demeanor-based reasons is not a product of happenstance. Demeanor and appearance are as varied as the jurors in the venire, offering endless opportunities for prosecutors to find something discomfiting about

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[161] *Id*. at 15.
[162] *Id*. at 15-16.
[163] *Id*. at 19.
[164] *See e.g., Williams*, 308 Kan. at 1330-31 (relying on *Thaler v. Haynes*, 559 U.S. 43, 47-48 (2010)). *Thaler*, however, was decided under the doubly deferential standard of federal habeas review. 559 U.S. at 47, 49. The Supreme Court considered its opinion in *Snyder v. Louisiana*, 552 U.S. 472 (2008), and concluded that clearly established Supreme Court precedent at the time of Thaler's trial did not preclude a trial court from crediting a demeanor-based reason even though the trial judge had not observed the demeanor. *Thaler* did not disapprove *Snyder*'s holding that a reviewing court should not defer to a demeanor-based reason when it is not clear from the record that the trial judge credited the explanation. *See Snyder*, 552 U.S. at 477.
[165] *See supra* notes 3 and 5 (citing Wash. G. Rule 37 and AB 3070); *supra* note 66 (discussing proposed reforms in other jurisdictions); *supra* Section III (discussing implicit bias); *Batson* 476 U.S. at 106 (Marshall, J., concurring).

almost any juror of color.[166] Notwithstanding their propensity to reflect racial stereotypes, in Kansas, these explanations appear to be all but reversal-proof explanations, and in no small part because of the degree of deference afforded by reviewing courts.[167]

2. Peremptory challenges based on potential bias against law enforcement or the criminal legal system

Prosecutors pointed to the possibility of bias against law enforcement or the criminal legal system as a reason for the strike in 34% of the cases we reviewed based on jurors' expressions of concern about the fairness of the criminal legal system, their personal experience, or their relationship with someone who had negative contact with law enforcement—that is, a person who has been stopped, arrested, or convicted of a crime. As we described in *Whitewashing the Jury Box*, African Americans are more likely to be stopped, arrested, and convicted of a crime than any other racial or ethnic group, making these justifications opportunities for the expression of explicit or implicit bias.[168] Prosecutors in Kansas successfully used these justifications irrespective of the remoteness in time of the juror's experience or remoteness of the juror's relationship with someone who had a negative experience, and notwithstanding jurors' explicit affirmations that the experience would not affect their ability to be impartial. Below are some examples of prosecutors' successful reliance on these explanations:

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[166] *See* Elisabeth Semel, Batson *and the Discriminatory Use of Peremptory Challenges in the Twenty-First Century in Jurywork*: *Systematic Techniques* 245, 342-46 (Thomson-Reuters, 2020-21 ed.) (discussing judicial opinions and studies considering the use of demeanor-based reasons).
[167] *See State v. Thomas*, 342 P.3d 678, 2015 WL 569371 at *19, (Kan. Ct. App., Jan. 30, 2015) (per curiam) (unpublished) (stating that juror demeanor can form the basis of a peremptory challenge and that evaluations of credibility and demeanor lie "'peculiarly within a trial judge's province'") (quoting *Snyder,* 552 U.S. at 477); *see also* Semel, *supra* note 166, at 343 (commenting that "*Batson* jurisprudence is littered with federal and state court decisions upholding demeanor-based strikes").
[168] *See* Semel et al. *supra* note 1, at 39.

- Striking a Black juror because his uncle had been prosecuted by the district attorney's office 10 years earlier "for a domestic violence situation," even though the juror affirmed that it "would in no way affect his ability to be a fair and impartial juror."[169]

- Striking four Black jurors in whole or in part based on their negative experiences with law enforcement, including one young woman because of "her attitude toward a traffic ticket and the officer who issued the ticket"; a second woman because "police officers pulled their guns on her when she bailed from a car"; and a third woman because she had been stopped multiple times by law enforcement and felt those stops were baseless.[170]

- Striking a Black juror who had "a number of friends, family with crimes of convictions" and wrote on his questionnaire that "officers are human and make mistakes."[171]

- Striking a Black juror who stated that she was aware of racial issues involved in dealing with crime—including a statistic that more Black men are arrested than white men—and that she would feel "some affiliation" with the defendant because they were both Black, although she stated that she could be fair and that her awareness of the arrest statistic "would not affect her ability to hear the case and she would look at the facts presented."[172]

- Striking a Black juror who had unpaid parking tickets, which the prosecutor argued represented "some adverse contact with law enforcement."[173]

- Striking a mixed-race juror who, in response to the prosecutor's question about the possibility that innocent people might be found guilty, indicated a concern about wrongful convictions—especially of people of color—and stated that it was important to "get everything right," "do everything by the book," and make sure "there is nothing else involved but the evidence."[174]

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[169] *State v. Johnson*, 309 P.3d 9, 2013 WL 5303512, at *4 (Kan. Ct. App., Sept. 20, 2013) (per curiam) (unpublished).
[170] *State v. Hobby*, 124 P.3d 1083, 2005 WL 3527000, at *2 (Kan. Ct. App., Dec. 23, 2005) (per curiam) (unpublished).
[171] *Jarman*, 2012 WL 401603, at *5. According to defense counsel, the juror was the "[o]nly black juror" he had "ever seen on a Cherokee County jury." *Id*.
[172] *State v. Marbley*, 20 Kan. App. 2d 34, 35-36, 882 P.2d 1004 (Kan. Ct. App. 1994).
[173] *Kettler*, 299 Kan. at 463.
[174] *State v. Brown*, 461 P.3d 87, 2020 WL 1897361 at *2-3 (Kan. Ct. App., Apr. 17, 2020) (per curiam) (unpublished), *aff'd on other grounds,* 498 P.3d 167 (Kan. 2021). Although the Court of Appeals acknowledged that "the State may have misinterpreted [her] heartfelt statement about wrong incarceration of African-Americans," it upheld the trial court's ruling. *Id*. at *3.

In *Whitewashing the Jury Box*, we showed that the seemingly limitless number of court-approved race-neutral reasons facilitates training prosecutors to "use both the fact that a prospective juror had too much or too little education as a race-neutral reason to strike a juror"; "to strike a juror for lack of community or family ties or too many of those relationships"; or to "excuse a prospective juror for having previously served on a hung jury or on a jury that acquitted, or because they never served on a jury."[175] Consistent with that finding, Kansas prosecutors were also successful in striking Black jurors based on the assumption that those who had been crime victims or knew victims of crime—a characteristic typically viewed as favorable to prosecutors—would be biased against the State. For example:

- Striking a Black juror who stated that the police had not followed up after he reported an apartment break-in and car theft (though he denied this would have any effect on his ability to be a fair and impartial juror) and that he was a "little nervous" to be a juror in a case involving a Black defendant since he was "'from the South" and had "'seen a lot.'"[176]

- Striking a Latinx juror in a rape case because a friend of her cousin had been sexually assaulted, notwithstanding her own assurance that she could still be impartial.[177]

- Striking the only Black male juror on the panel in part because one of his family members had been the victim of a gang-related homicide.[178]

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[175] Semel, et al., *supra* note 1, at 50.

[176] *State v. McCoy*, 350 P.3d 1137, 2015 WL 3632037 at *8-9 (Kan. Ct. App., Jun. 5, 2015) (per curiam) (unpublished).

[177] *State v. Munoz*, 401 P.3d 684, 2017 WL 4081374, at *8, 10 (Kan. Ct. App., Sept. 15, 2017) (per curiam) (unpublished). The prosecutor used eight of his twelve peremptory challenges to remove Latinx jurors, citing multiple demeanor-based reasons and the fact that one juror "had a past history of some criminal activity." *Id.* at *6. Before denying all the *Batson* objections, the trial court conceded that it was "nervous" about the State's use of its peremptory challenges. *Id*. at *9-10.

[178] *State v. McCullough*, 293 Kan. 970, 993-94 (2012). In 2020, "Black or African American" people "alone or in combination" were 7.6% of the Kansas population but comprised 23% of the victims of violent crime. For homicides, the disparity is even greater. In 2015, the homicide rate for all Kansans was 4.6%. U.S. Census, *Kansas: 2020 Census*, https://www.census.gov/library/stories/state-by-state/kansas-population-change-between-census-

3. Peremptory challenges based on a juror's neighborhood or location

The State also frequently stuck Black jurors because they resided in or had been to neighborhoods associated with high crime rates or the case on trial.[179] Prosecutors offered this justification in 12% of cases. These cases include:

- Striking one Black juror who had been to the store where the crime happened, another Black juror who had "been inside" a different store where the defendant was arrested, and yet another Black juror who had "been to the intersection" where the defendant was arrested.[180]

- Striking a Black juror who "lived in the area where the crime occurred."[181]

- Striking a Black juror who resided in "'the projects' where the prosecution said that there were many homicides."[182]

- Striking a Black juror who lived "in the neighborhood of where the incident took place" and "within a matter of blocks" of the defendant's last known address, although the record reflected that the juror actually lived 1.3 miles from the crime scene and 2 miles from the defendant's address.[183]

- Striking a Black juror who stated that, at "about the time of the homicide," she lived in an apartment complex where the defendant had spent fifteen to twenty minutes outside drinking with friends before going to the crime scene, though she had never seen the defendant at the complex.[184] The prosecutor did not exercise a peremptory

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decade.html (last visited Feb. 14, 2022); F.B.I., *Crime Data Explorer*, https://crime-data-explorer.fr.cloud.gov/pages/explorer/crime/crime-trend (last visited Feb. 9, 2022); F.B.I., Crime Data Explorer, https://crime-data-explorer.fr.cloud.gov/pages/explorer/crime/crime-trend (last visited Feb. 14, 2022).

[179] *See* Semel et al., *supra* note 1, at 45-46 (describing how prosecutors are trained to identify the "ideal" juror, which results in the disproportionate removal of jurors of color based on residence); *see also* Semel, *supra* note 166 (discussing cases holding that a juror's neighborhood may be a proxy for race); Cover, *supra* note 66, at 367 (discussing "residence in a high crime neighborhood" as grounds for a peremptory challenge).

[180] *State v. Buie*, 388 P.3d 631, 2017 WL 466108, at *2-3 (Kan. Ct. App., Feb. 3, 2017) (per curiam) (unpublished).

[181] *State v. Alexander*, 268 Kan. 610, 621, 1 P.3d 875 (Kan. 2000), *disapproved on other grounds by State v. Andrew*, 301 Kan. 36, 340 P.3d 476 (Kan. 2014).

[182] *State v. Washington*, 275 Kan. 644, 655, 68 P.3d 134 (Kan. 2003).

[183] *State v. Ellis*, 205 P.3d 791, 2009 WL 1036110 at *5 (Kan. Ct. App., Apr. 17, 2009) (unpublished).

[184] *State v. Poole*, 252 Kan. 108, 111-12, 843 P.2d 689 (Kan. 1992).

challenge against a non-Black juror who had been to the same apartment complex, nor against another non-Black juror who lived "'nearby the actual scene of the murder.'"[185]

4. Peremptory challenges based on unemployment or underemployment

Prosecutors frequently struck Black people because they did not consider the prospective jurors' employment to be stable, e.g., they were unemployed, had not been employed for long in their current job, worked multiple jobs, or worked at a low-paying job, using this explanation in 15% of cases. The correlation between race and unemployment is historically entrenched and well documented.[186] In 2019, the national unemployment rate for Black people was 6.1% as compared to 3.3% for white people.[187] The disparity in employment rates is more pronounced in Kansas. Figures for 2016 show that the unemployment rate for Latinx people was more than one and a half times the rate for white people, and the unemployment rate for Black people was more than double the rate for whites.[188] Prosecutors repeatedly struck Black jurors on this basis, including:

- Striking a nineteen-year-old Black juror who quit his job at the Kansas City International airport after only a short period of employment and was attending a high school that the prosecutor considered "'a high school for people who have had trouble in regular high schools.'"[189]

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[185] *Id.* at 112 (quoting defense counsel).

[186] *See* Semel et al., *supra* note 1, at 45-46 (discussing how prosecutors are trained to identify the "ideal" juror, which results in the disproportionate removal of jurors of color based on their employment status); Cover *supra* note 66, at 367 (discussing employment as a "race-neutral" explanation)

[187] U.S. Bureau of Labor Statistics, *BLS Reports* (Dec. 2020) at 2, https://www.bls.gov/opub/reports/race-and-ethnicity/2019/home.htm.

[188] Kansas Dep't of Labor, *Kansas Population & Labor Force Demographics 2016*, at 2, https://klic.dol.ks.gov/admin/gsipub/htmlarea/uploads/2016%20Population%20%26%20Labor%20Force%20Demographics.pdf (reporting a 4.7% unemployment rate for "White" people, a 7.5% unemployment rate for "Hispanic or Latino people (of any race)", and a 10.9% unemployment rate for "Black or African American people").

[189] *State v. Green*, 100 P.3d 105, 2004 WL 2578672, at *3 (Kan. Ct. App., Nov. 12, 2004) (per curiam) (unpublished).

- Striking a Black woman whose husband had a job but who described herself as "'currently unemployed,'" which the prosecutor argued might make her sympathetic to the defendant who was also unemployed.[190]

- Striking a middle-aged, married Black man with three children who the prosecutor "did not feel was a stable person" because he had only been working his current job as a school district janitor for one year.[191]

- Striking a Black woman who was unemployed because she was currently a full-time nursing student, which made the prosecutor question "the source of the juror's livelihood," although she said that she rented her residence.[192]

- Striking a Black juror because he was unemployed and had a disabled wife, which the prosecutor believed "might affect his concentration," despite the fact that she asked no follow-up questions about the juror's financial situation or his need to care for his wife.[193]

Despite prosecutors' apparent concerns about Black jurors who are unemployed, they also strike Black jurors who are at the opposite end of the spectrum, i.e., they have multiple or highly skilled jobs. For instance, over objection, the prosecutor struck a young Black woman who had two degrees, explaining that he "had some concern about her education level, even though she has degrees," and that he found it "odd that someone who has two degrees has to work two jobs," and had "concerns that when somebody has to work two part-time two jobs to save money."[194]

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[190] *State v. Campbell*, 268 Kan. 529, 536, 997 P.2d 726 (Kan. 2000).
[191] *Betts*, 272 Kan. at 395.
[192] *State v. Lewis*, 38 Kan. App. 2d 91, 99, 161 P.3d 807 (Kan. Ct. App. 2007). The prosecutor also argued that the juror regularly visited the crime scene, but when defense counsel pointed out that a white juror who "frequently drove by the crime scene" was seated and attacked the legitimacy of the prosecutor's proffered race-neutral reasons, the prosecutor came up with two additional reasons: "the juror's young age and lack of life experience." *Id*. *See Miller-El II*, 545 U.S. at 244 (observing that when the defense refuted the prosecutor's "misdescription," the prosecutor offered an altogether different explanation, which "reeks of afterthought").
[193] *State v. Garland*, 90 P.3d 378, 2004 WL 1176615, at *4 (Kan. Ct. App., May 21, 2004) (per curiam) (unpublished).
[194] *State v. Bates*, 437 P.3d 107, 2019 WL 1412600, at *6-8 (Kan. Ct. App., Mar. 29, 2019) (per curiam) (unpublished). The juror had graduated from college with a double major in business and theater and was saving money to move to New York. *Id*. at *6.

5. An observation about gender-based reasons

While there are few Kansas *Batson* cases that raise claims of gender discrimination, gender issues seem to occur primarily in cases in which the State struck jurors of color (most often Black women) in part because they were unmarried mothers or did not have children. In responding to *Batson* objections based on race discrimination, prosecutors asserted that these women lacked investment in the community or could not relate to the facts of the case. For example:

- Striking a Black female juror because she was unmarried, and the State was "'interested in having someone who has at least been in a . . . long-term relationship.'"[195]

- Striking a mixed-race woman because she was "young, did not have children or a spouse, and had her job for less than a year," and thus the State described her as not that "'invested in the community,'" despite having lived her entire life there and currently working as a bank teller.[196]

More often, however, prosecutors target the "Black single mother," whose status ostensibly shows a lack of stability. For example:

- Striking the only Black woman in the venire because she was a "'youthful,' divorced single parent, and lived with her sister."[197]

- Striking the only Black female juror because she was a young, single, working mother of a five-year-old and thus might have scheduling conflicts, although the juror never indicated that she might have difficulty serving and no inquiry was made into who watched the child when the juror was at work.[198]

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[195] *State v. Smith*, 278 Kan. 45, 47, 92 P.3d 1096 (Kan. 2004).
[196] *Gonzalez*, 311 Kan. at 301-02.
[197] *State v. Walker*, 252 Kan. 117, 122-23, 843 P.2d 203 (Kan. 1992). On appeal, defense counsel argued that the juror had been employed for seven years at Wichita State University and managed an office, but while the Kansas Supreme Court noted the "stability in [juror's] employment," it concluded that the relevant factor was her unstable marital history. *Id.* at 124.
[198] *State v. Parker*, 376 P.3d 95, 2016 WL 3570512, at *6-7 (Kan. Ct. App., Jul. 1, 2016) (per curiam) (unpublished), *aff'd on other grounds,* 309 Kan. 1 (Kan. 2018). The Court of Appeals remanded for a *Batson* hearing because the trial court erred in ruling that Parker had not made out

In *State v. Gann*, the prosecutor assumed that a Black mother was both unmarried and had her "child out of wedlock."[199] There, the prosecutor struck a Black woman because "she '*appeared to be*' the only 'unmarried' potential juror with children" and lived in a rural area.[200] In response,

> Gann's lawyer pointed out that at least one other juror was a single parent with children and identified him by name. The prosecutor responded that male juror was older, a homeowner, and had been divorced. He then described M.S. as "apparently" having her "child out of wedlock," a circumstance he suggested made her less "regimented [with] expectations of society" than the male juror.[201]

More importantly, defense counsel "pointed out that M.S. had not stated whether she had been married."[202] The prosecutor never asked the juror about her marital status, and the Court of Appeals noted that "the prosecutor never explained if M.S. said something during voir dire that caused him to believe she had been an unwed mother or he simply assumed that to be so."[203] On appeal, the defense presented statistics from the Center for Disease Control showing that, in 2011, almost 74% of Black women were unwed when they gave birth.[204] The court concluded that because the CDC statistics establish a "high probability any given African-American woman with a young child was not married when she gave birth," the prosecutor need not have asked "any questions to verify his statistically warranted (though possibly incorrect) assumption."[205] Remarkably, the defendant "conceded" that the State's belief—"unwed mothers flout

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a prima facie showing. *Id.* at *10. However, because the State had given its reasons and Parker agreed that the reasons were race-neutral, the court limited the remand to argument by the parties as to the step-three determination. *Id*. at *11.

[199] 308 P.3d 31, 2013 WL 4778151, at *6 (Kan. Ct. App., Sept. 6, 2013) (per curiam) (unpublished).

[200] *Id.* (emphasis added).

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] Id. at *7.

[205] *Id.* at *7-8.

convention"—was "race-neutral," and the appeals court held that the juror was struck "for legitimate reasons rather than because of her race."[206] The contrary is true. Here, the State made a judgment about the juror based solely on her race. Precisely because the explanation is "associated with improper discrimination in jury selection," it is now a "presumptively invalid" reason under Washington Supreme Court General Rule 37(h)(v).[207]

A review of these cases strongly suggests that prosecutors' exercise of race-based peremptory challenges has very much continued to the present day. Consistent with the findings of every other study, my analysis leads me to conclude that prosecutors in Kansas continue to disproportionately use peremptory challenges to exclude jurors of color, especially Black citizens. Moreover, Kansas courts have been either unable or unwilling to rigorously enforce *Batson* and its objectives.

E. *Kansas Courts Almost Never Find* Batson *Error*

1. Introduction

We reviewed 208 Kansas Supreme Court and Court of Appeals cases in which *Batson* was mentioned decided in our search.[208] Over this 33-year period, the Kansas Supreme Court issued 50 opinions on the merits and found reversible error in only one case, *State v. Belnavis*, decided more than two decades ago.[209] During the same period, the state supreme court

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[206] *Id.* at *8.
[207] *See supra* note 3.
[208] See subsection D for a discussion of our searches and calculations.
[209] 246 Kan. 309, 314, 787 P.2d 1172 (Kan. 1990), *disapproved by State v. Walston*, 256 Kan. 372, 886 P.2d 349 (Kan. 1994). In the WestLaw search, the Kansas Supreme Court mentioned *Batson* in 71 cases. For example, we included the most recent *Carr* opinions in the total because *Batson* was mentioned in the concurring opinions, although there was no merits decision. *State v. Carr*, 2022 WL 187436, at *28-29 (Kan., Jan. 21, 2022) (Luckert, C.J., concurring in part) (opinion not yet published); *State v. Carr*, 2022 WL 187437, at *78-79 (Kan., Jan. 21, 2022) (Luckert, C.J., concurring in part) (opinion not yet published). This was a broader tally in which we counted all

remanded two cases.[210] Both cases ultimately resulted in the denial of *Batson* relief.[211] The Kansas Court of Appeals has never reversed for *Batson* error. Between 1990 and 2021, the court issued 96 merits opinions.[212] The court remanded nine cases for hearings but found no error on return from remand for those cases as to which we could determine the outcome.[213] Justice

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merits decisions in criminal cases involving a defendant's race-based *Batson* claims, including multiple appeals by the same defendant and co-defendant cases. The Kansas Supreme Court reviewed defense race-based *Batson* claims on their merits in 50 cases. In 21 cases, the Kansas Supreme Court cited to *Batson*, but either the Kansas Supreme Court did not make a merits determination, the *Batson* claim was not based on prosecutorial race discrimination, or the case was a civil case.

[210] *State v. Hood*, 242 Kan. 115, 123, 744 P.2d 816 (Kan. 1987); *State v. Bolton*, 271 Kan. 538, 544, 23 P.3d 824 (Kan. 2001).

[211] *State v. Hood*, 245 Kan. 367, 374–76, 780 P.2d 160 (Kan. 1989); *State v. Bolton*, 274 Kan. 1, 19, 49 P.3d 468 (Kan. 2002).

[212] In the Westlaw search, the Kansas Court of Appeals mentioned *Batson* in 137 cases. Of those, the Court of Appeals considered the merits of 96 defense race-based *Batson* claims in criminal cases. *See supra* note 209 for an explanation of which types of cases were included in the count.

[213] The Kansas Court of Appeals remanded *State v. Webb*, 1995 WL 18252706, at *3 (Kan. Ct. App., Feb. 10,1995) (unpublished), and the court affirmed the denial of *Batson* error in *State v. Webb*, 1997 WL 35435468, at *4 (Kan. Ct. App., May 2, 1997) (per curiam) (unpublished). The Kansas Court of Appeals remanded *State v. Acosta*, 1999 WL 35814281, at *2 (Kan. Ct. App., Oct. 8, 1999) (per curiam) (unpublished), and the search revealed no subsequent history. The Kansas Court of Appeals remanded *State v. Garland*, 2002 WL 35657365, at *2 (Kan. Ct. App., May 31, 2002) (per curiam) (unpublished), and the court affirmed the denial of *Batson* error in *State v. Garland*, 90 P.3d 378, 2004 WL 1176615, at *2-5 (Kan. Ct. App., May 21, 2004) (per curiam) (unpublished). The Kansas Court of Appeals remanded *State v. Williams*, 2003 WL 27393683, at *2 (Kan. Ct. App., July 25, 2003), and the court affirmed the denial of *Batson* error in *State v. Williams*, 121 P.3d 1003, 2005 WL 2840261, at *2 (Kan. Ct. App., Oct. 28, 2005) (per curiam) (unpublished). The Kansas Court of Appeals remanded *State v. Davis*, 37 Kan. App. 2d 650, 666, 155 P.3d 1207 (Kan. Ct. App. 2007), and the search revealed no subsequent history. The Kansas Court of Appeals remanded *State v. Buie*, 294 P.3d 1211, 2013 WL 678219, at *9 (Kan. Ct. App., Feb. 22, 2013) (per curiam) (unpublished), and the court affirmed the denial of *Batson* error in *State v. Buie*, 388 P.3d 631, 2017 WL 466108, at *2-3 (Kan. Ct. App., Feb. 3, 2017) (per curiam) (unpublished). The Kansas Court of Appeals remanded *State v. Knighten*, 51 Kan. App. 2d 417, 426-27, 347 P.3d 1200 (Kan. Ct. App. 2015), and the search revealed no subsequent history. The Kansas Court of Appeals remanded *State v. Parker*, 376 P.3d 95, 2016 WL 3570512, at *10-11 (Kan. Ct. App., July 1, 2016) (per curiam) (unpublished), solely for the purpose of argument on steps two and three of the *Batson* inquiry. The *Batson* issue was not raised in the appeal to the Kansas Supreme Court in *State v. Parker*, 309 Kan. 1, 3-4, 430 P.3d 975 (Kan. 2018), and the search revealed no subsequent history. The Kansas Court of Appeals remanded *State v. Peterson*, 427 P.3d 1015, 2018 WL 4840468, at *6 (Kan. Ct. App., Oct. 5, 2018) (per curiam)

Goodwin Liu's comment about the California Supreme Court's poor reversal record also applies to Kansas: "Racial discrimination against black jurors has not disappeared here or elsewhere during that time."[214] These numbers may speak to the Kansas courts' reluctance to apply *Batson* vigorously. Certainly, they tell story of *Batson*'s failure to achieve its objective.

In *People v. Belnavis*, a non-capital case, the Kansas Supreme Court reversed a conviction for *Batson* error for the first and last time.[215] Belnavis was a 22-year-old man of Jamaican descent.[216] The State struck two Black women from the panel.[217] The first juror "did detail work on photography."[218] Because the account of one of the State's witnesses contained "great discrepancies," the prosecution did not want a juror who "might pay an inordinate amount of attention to details."[219] The second Black woman was "a young, single mother, with a 7-month baby" who the prosecutor thought "might be easily distracted."[220] The Kansas Supreme Court conducted a comparative juror analysis and pointed to several seated white jurors who either had jobs that involved attention to detail or had young children.[221] The court held that the prosecution failed to present race-neutral reasons, reversing and remanding the case for a new trial.[222]

(unpublished), and the defense did not prevail in *State v. Peterson*, 493 P.3d 311, 2021 WL 3823405, at *6 (Kan. Ct. App., Aug. 27, 2021) (unpublished). The court also remanded a civil case and subsequently affirmed the denial of the *Batson* claim. *See Robinson v. McBride Bldg. Co*., *Inc.*, 16 Kan. App. 2d 120, 818 P.2d 1184 (Kan. Ct. App. 1991).

[214] *People v. Johnson*, 255 Cal. Rptr. 3d 393, 453 P.3d 38, 76-77 (Cal. 2019) (Liu, J., dissenting) (internal quotation marks and citation omitted).

[215] *Belnavis*, 246 Kan. at 310, 314.

[216] *Id*. at 311.

[217] *Id*.

[218] *Id*. at 312.

[219] *Id*.

[220] *Id.* at 313.

[221] *Id*. at 313-14.

[222] *Id*. at 314.

The reversal in *Belnavis* cannot be attributed to the State's patently race-based explanations for its peremptory challenges; they were remarkably similar to those the prosecution offered in cases before *Belnavis* and thereafter in which reviewing courts found no error.[223] Just four years later, in *State v. Walston*, the Kansas Supreme Court disavowed much of its opinion in *Belnavis*.[224] In the interim between *Belnavis* and the *Walston*, the United States Supreme Court issued *Hernandez v. New York*, significantly undermining *Batson*.[225] In the wake of *Hernandez*, the Kansas Supreme Court held, first, that the court in *Belnavis* had failed to reach the third step of *Batson*, thus improperly relieving the defendant of the burden of proving purposeful discrimination and not affording the trial judge's ruling the "great deference on appeal" to which it is entitled.[226] Second, on appeal, a defendant may not rely on a comparative analysis—comparing a struck Black juror to a similarly-situated seated white juror—at step three unless he or she made that comparison at trial.[227]

As I outline below, in the nearly two decades that followed, Kansas reviewing courts turned to *Walston*—and *Hernandez v. New York*—to place *Batson* relief out of reach in at least four ways.[228] First, the courts view any reason the prosecution offers as race-neutral, avoiding the reality that some reasons given are so associated with racial or ethnic stereotypes they do not, as a matter of law, satisfy the prosecution's burden to provide a race neutral explanation at step

[223] *See supra* Section VI.D (discussing explanations the State offered most often for striking jurors of color and including citations to opinions affirming the trial court's denial of the *Batson* objection(s)).
[224] 256 Kan. 372, 377, 380, 886 P.2d 349 (Kan. 1994).
[225] 500 U.S. 352 (1991).
[226] 256 Kan. at 379-80 (internal quotation marks omitted).
[227] *Id*. at 380.
[228] *Id*. at 377-380 (citing *Hernandez v. New York*, 500 U.S. 352 (1991)).

two.[229] Second, *Walston*'s treatment of comparative juror analysis disincentives trial judges from engaging in it. Third, the courts view comparative analysis as forfeited on appeal unless trial counsel presents at trial the precise comparison counsel seeks to raise on appeal, imposing an unreasonable burden on trial counsel and conflicting with the Supreme Court's decision in *Miller-El II.* Fourth, deference in Kansas is all but absolute.

In my opinion, the combined effect of *Walston* and other Kansas opinions heightens the defendant's burden of persuasion at step three beyond the showing required by the Supreme Court.

[229] The step-two ruling is a law-based inquiry in which the court assesses the facial validity of the prosecution's explanation. *Hernandez*, 500 U.S. at 359-60; *see Johnson v. Love*, 40 F.3d 658, 668 (3d Cir. 1994) (holding that the *Batson* inquiry ends at step two if the prosecutor's explanation would be inadequate as a matter of law to support the strike). As a result of the Supreme Court's unwillingness to acknowledge the historical and present-day reality of structural racism in *Hernandez* and *Elem* (*see supra* Section II), lower courts can easily, indeed lawfully, turn a blind eye to racial proxies. *See* Semel *supra* note 166, at 316-28 (discussing explanations that may be inadequate as a matter of law); *id*. at 322 (acknowledging the infrequency with which federal and state courts conclude that a prosecutor's reasons were insufficient at step 2); *id.* at 322 n.5 (collecting some of the few favorable state court opinions). *See also* Mance, *supra* note 104, at 8 ("On its face *Batson Justifications* is not a document that is intended to help prosecutors pick a jury in a race-neutral way . . . .[T]he document is a list of reasons to be used once an inference of discrimination has been raised to prevent the judge from making a finding of purposeful discrimination. [I]f, rather than give her true reasons for striking the juror, . . . a prosecutor chooses instead to give reasons suggested by the handout, this is the very definition of pretext and strong evidence that her unspoken, subjective reasons were impermissibly race conscious.") (quoting the Affidavit of Equal Justice Initiative Executive Bryan Stevenson in *State v. Tucker*, currently pending before the North Carolina Supreme Court, filed in earlier pleadings); *id*. at 8-9 (explaining that "phrases like those in the North Carolina handout are rooted in historically derogatory labels applied to African Americans who did not show adequate deference to the prevailing racial order . . .").

2. Tolerance of the State's Persistent Removal of a Significant Percentage of Jurors of Color, Especially Black Jurors

Our examination of Kansas appellate decisions found that courts routinely affirm the State's removal of at least half, and often, a majority of jurors of color—primarily Black jurors—through the exercise of its peremptory challenges.

From my initial review, it appears that, in the overwhelming majority of Kansas appellate opinions, there were only a handful of jurors of color in the jury pool. As Justice Marshall cautioned, this disparity may make it almost impossible for the defendant to establish a prima facie showing.[230] In 2016, in *State v. Parker*, the Kansas Court of Appeals declined to adopt "a bright-line rule that striking all of the members of a race, including the sole member of that race, establishes a prima facie case under *Batson*."[231] As *Parker* acknowledged, other courts have embraced this rule, including the Washington Supreme Court in 2017.[232]

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[230] *Batson*, 476 U.S. at 105 (Marshall, J., concurring). *See, e.g.*, *State v. Sledd*, 250 Kan. 15, 22, 825 P.2d 114 (Kan. 1992) (holding that the trial court did not abuse its discretion in finding no prima facie showing where the prosecution struck two of four Black prospective jurors on the panel because "[t]here was "no claim that the State had any pattern to exclude blacks"); *State v. Humphrey*, 30 Kan. App. 2d 16, 18-20, 36 P.3d 844 (Kan. Ct. App. 2001) (affirming the trial court's ruling of no inference at step one where the State struck one of two Black jurors, the other Black juror was seated, and an Asian juror was also seated, and stating that it was "impossible for the defendant to make a prima facie case of racial discrimination"); *State v, Fischer*, 93 P.3d 745, 2004 WL 1609116, at *1-2 (Kan. Ct. App., Jul. 16, 2004) (per curiam) (unpublished) (affirming the trial court's ruling of no inference at step one where the prosecution ~~r~~emoved one of three Latinx jurors and one of two Black jurors, and the remaining Black juror was seated because "Fischer did not demonstrate a pattern of exclusion"); *State v. Jackson*, 382 P.3d 484, 2016 WL 6140969, at*6 (Kan. Ct. App., Oct. 21, 2016) (per curiam) (unpublished) (where, of its total of eight strikes, the State used four to remove three Black jurors and one to remove a juror who identified as Black and white, affirming no prima facie showing "because the State used its peremptory challenges equally between minority and nonminority potential jurors").

[231] *Parker*, 2016 WL 3570512, at *9-10 (remanding for a *Batson* hearing in a "unique case" where the defendant was Black and the State struck the only Black venireperson but characterizing the step one determination as "a close question").

[232] *Id.*; *see City of Seattle v. Erickson*, 398 P.3d 1124, 1126 (Wash. 2017) (en banc). In 1989, the Connecticut Supreme Court modified *Batson*'s test, eliminating the first step so that once the

The impact of *Parker* is mitigated somewhat by the fact that the Kansas Supreme Court expressed its preference in *State v. Sledd* for district courts to require the prosecution to proffer its reasons and "determine whether they are racially neutral" regardless of whether a prima facie case has been established.[233] Appellate opinions suggest that trial judges took the advice seriously, more often than not reaching step three, and thus mooting out the step-one determination.[234] Nonetheless, the practice does not appear to have increased Black or Latinx representation on criminal juries in Kansas.[235]

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defendant makes a *Batson* objection, the prosecution must provide its reasons for the peremptory challenge. *State v. Holloway*, 553 A.2d 166, 171-72 (Conn. 1989). Washington and California have now eliminated the first step. *See supra* notes 3 and 5.

[233] *Sledd*, 250 Kan. at 2.

[234] *See, e.g*., *Bolton*, 271 Kan. at 540–41 (opinion prior to remand) (citing *Hernandez v. New York*, 500 U.S. 352, 359 (1991)).

[235] *See, e.g., State v. Vargas*, 260 Kan. 791, 793, 796, 926 P.2d 223 (Kan. 1996) (finding no abuse of discretion where the State struck two Latinx jurors and two Black jurors, and pointing to the number of seated jurors and the fact that the defendant struck a Latinx juror); *State v. Sanders*, 263 Kan. 317, 326–27, 949 P.2d 1084 (Kan. 1997) (finding no abuse of discretion where the State struck the only two Black jurors who were in the panel from which the seated jury was selected, pointing to the one Black juror who served as an alternate); *State v. Adams*, 269 Kan. 681, 684, 687–88, 8 P.3d 724 (Kan. 2000) (finding no abuse of discretion where the State used six of 12 available peremptories—all six to exclude Black jurors—and pointing to the two Black jurors who served and one Black alternate juror, and emphasizing that the prosecutor could have struck all of the Black jurors); *State v. Campbell*, 268 Kan. 529, 534, 537, 997 P.2d 726 (Kan. 2000) (where the State struck three Black prospective jurors and the defendant raised the name of fourth juror whose race or ethnicity is not identified in the opinion, finding no abuse of discretion at step three); *State v. Conley*, 270 Kan. 18, 25-27, 11 P.3d 1147 (Kan. 2000) (where the State struck three of four Black prospective jurors, finding no error at step three), *implied overruling on other grounds recognized in State v. Astorga*, 299 Kan. 395, 324 P.3d 1046 (Kan. 2014); *State v. Betts*, 272 Kan. 369, 394-97, 33 P.3d 575 (Kan. 2001) (where the State struck seven of the 11 African Americans on the panel and the only Latinx member, finding no abuse of discretion at step three), *overruled on other grounds by State v. Davis*, 283 Kan. 569, 158 P.3d 317 (Kan. 2006); *State v. Dean*, 273 Kan. 929, 931, 933, 46 P.3d 1130 (Kan. 2002) (where the State struck one of two Black jurors and one Black juror was seated, finding no abuse of discretion because the State "chose" not to completely strip the jury of Black members); *State v. Washington*, 275 Kan. 644, 654, 659, 68 P.3d 134 (Kan. 2003) (finding no abuse of discretion where the State used 10 of its 12 peremptory challenges to remove Black prospective jurors, but two Black jurors were seated); *State v. Trotter*, 280 Kan. 800, 811, 813, 816-18, 127 P.3d 972 (Kan. 2006) (upholding the State's removal of nine out of 10 Black jurors in a death penalty case where the remaining Black juror served as an

In the Supreme Court's most recent *Batson* opinion, *Flowers v. Mississippi*, the majority reaffirmed that "statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors" is one of the factors the judge considers in deciding the ultimate question.[236] In Kansas, however, the State's exclusion rate[237]—a percentage based on the number of members of the cognizable group in the venire at the time peremptory challenges commenced and how many of those individuals the State struck—loses its import by virtue of the outsized weight courts give to two other factors, neither of which was on the Supreme Court's list.[238] If at least one juror of color was seated, no matter how many Black or Latinx jurors the State struck, reviewing courts find that the trial court did not "abuse its discretion."[239] The Kansas Supreme Court and Court of Appeals also point to the

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alternate, and stating "[l]ooking at the numbers alone suggests discrimination existed in this case"); *State v. Williams*, 299 Kan. 509, 535, 539-40, 324 P.3d 1078 (Kan. 2014) *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (Kan. 2016) (characterizing the State's "elimination of all African-Americans from the jury [as] very troubling," but declining to find a pattern of discrimination because the defendant exercised peremptory challenges against the two remaining "minority" jurors, and "we simply do not know whether the State would have exercised peremptory challenges to remove the two minority prospective jurors who were removed by the defense"); *State v. Johnson*, 309 P.3d 9, 2013 WL 5303512, at *3-4 (Kan. Ct. App., Sept. 20, 2013) (per curiam) (unpublished) (relying on *State v. Angelo*, 287 Kan. 262, 197 P.3d 337 (2008), and finding no error where the State used seven of its 12 strikes against the nine Black venirepersons remaining when peremptory challenges commenced, thus removing six Black members from the seated jury and one Black potential alternate, leaving one Black seated juror); *State v. Munoz*, 401 P.3d 684, 2017 WL 4081374, at *6-7, *10 (Kan. Ct. App., Sept. 15, 2017) (per curiam) (unpublished) (where the prosecutor used eight of his 12 peremptory challenges to remove Latinx jurors, relying *Campbell*'s limited application of comparative juror analysis on appeal and finding no error at step three) (citing *Campbell*, 268 Kan. at 535).

[236] *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019); *see Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 240-41 (2005); *Batson*, 476 U.S. at 97.

[237] *See Jones v. West*, 555 F.3d 90, 98-100 (2d Cir. 2009) (explaining the difference between the strike rate and the exclusion rate).

[238] *See Flowers*, 139 S. Ct. at 2243.

[239] *See supra* note 235. Kansas reviewing courts routinely look to whether the district court's *Batson* ruling was an "abuse of discretion." *E.g.*, *State v. Bates,* 437 P.3d 107, 2019 WL 1412600, at *8 (Kan. Ct. App., Mar. 29, 2019) (per curiam) (unpublished) ("The State's reasons for striking R.T. and G.C. were clearly race-neutral, so they are deemed as such unless a discriminatory intent

defendant's strikes of any jurors of color as evidence that undermines the defendant's showing of purposeful discrimination.[240] As a result, the State was able to strip juries of at least half of the jurors of a cognizable minority race or ethnicity from the panel in over half the cases we reviewed. *See* subsection D, above.

The Kansas Supreme Court's recent opinion in *State v. Williams* illustrates how prosecutors' discriminatory peremptory challenges are not subject to appropriate judicial scrutiny.[241] The State struck two Black women.[242] As to Juror 12, the prosecutor argued that the juror appeared to be "nodding off"; he was "unclear about [the juror's] gender; and he "was not a fan" of the fact that the juror was a para-educator.[243] The defendant responded to each of the State's reasons, including pointing out that the juror's questionnaires made it clear that "she was a female."[244] The district judge did not find the State's "confusion" about the juror's gender to

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is inherent in the explanation. The opponent of the strike continues to bear the burden of persuasion. We find no such discriminatory intent to be present here. Under these circumstances, the district court did not abuse its discretion by concluding that the prosecutor had valid, race-neutral reasons to strike R.T. and G.C. As a result, the court did not err in overruling Bates's *Batson* challenge."). The state supreme court's adoption of the abuse-of-discretion standard appears at least as early as *State v. Hood*, 254 Kan. at 375-76; *see also Walston*, 256 Kan. at 372; *State v. McCullough*, 293 Kan. 970, 992, 279 P.3d 1142 (Kan. 2012). The United States Supreme Court, however, asks whether the trial court's ruling was "clearly erroneous." *See, e.g., Snyder*, 552 U.S. at 447 (holding that the appropriate question is whether the trial judge has committed "clear error"). Kansas courts take the view that the "abuse-of-discretion" and "clear error" standards are synonymous. *See State v. Gann*, 308 P.3d 31, 2013 WL 4778151, at *4 (Kan. Ct. App., Sept. 6, 2013) (per curiam) (unpublished). I question whether this test, particularly as applied in the context of Kansas courts' highly deferential standard on appeal, may be too demanding. *See Johnson v. California*, 545 U.S. 162, 168 (2005) (rejecting the California Supreme Court's position that its "more-likely-than-not" standard at step one is synonymous with the Supreme Court's standard requiring that the defendant raise an "inference" of discrimination and holding that the former is too onerous).

[240] *See supra* note 235.

[241] 308 Kan. 1320, 429 P.3d 201 (Kan. 2018).

[242] *Id*. at 1327.

[243] *Id*.

[244] *Id*. at 1327.

be "particularly compelling one way or the other," did not see the juror "sleeping," and stated that he would "leave [the para-educator reason] to [counsel's] own decision to ponder."[245] The sum total of the trial court's ruling denying the *Batson* objection was its statement that the prosecutor's explanations "are all race-neutral."[246] The Kansas Supreme Court had no difficulty deciding that the judge "did not abuse his discretion."[247] Here, however, the district judge never made a credibility finding as to any of the State's reasons; he was dubious of the first one, did not observe the juror's ostensibly problematic demeanor, and did not address the third explanation.[248] The State's dislike of the juror's profession is highly suggestive of implicit bias, given the frequency with prosecutors strike jurors who have occupations that disproportionately serve people of color.[249] Ultimately, the removal of Juror 12 came down to the state supreme court's reliance on the fact that the prosecutor did not excuse "all African-Americans from the jury panel, although he could have done so."[250] Upholding a "troubling" jury strike because every juror of color was not struck is reminiscent of *Swain*'s "crippling" burden of proof, explicitly denounced by *Batson*.[251]

Kansas courts appear to have a selective view of one of *Batson*'s step-three requirements, though it has been repeated time and again by the Supreme Court: "[a] defendant may rely on

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[245] *Id*. at 1330.
[246] *Id*.
[247] *Id*. at 1332.
[248] *Id*. The opinion conflicts with *Snyder*, 552 U.S. at 479 (declining to defer to the prosecutor's demeanor-based explanation because "the record does not show that the trial judge actually made a determination concerning [the juror's] demeanor").
[249] *See, e.g*., Semel et al., *supra* note 1, at 121 n.503 (citing to several California district attorney training materials that encourage striking "Juror (or Spouse of Juror) [who] is Employed In a Job or Engages in Activities That Reflect an Orientation Towards Rehabilitation and Sympathy for the Defendants").
[250] *Williams,* 308 Kan. at 1331 (internal quotation marks and citation omitted).
[251] *Batson*, 476 U.S. at 92, 96.

'all relevant circumstances.'"[252] These circumstances include the prosecution's number and pattern of striking jurors in a cognizable group.[253] Put differently, the defendant may rely on numbers and patterns to raise an inference of discrimination,[254] but the evidence does lose its relevance at step three. Kansas has turned *Batson*'s command to consider all relevant circumstances on its head. Instead, what matters to courts is how many jurors the State chose not to strike.[255]

Kansas is not the only state that considers the number of seated jurors of color and/or the defendant's strikes of jurors of color as part of its step-three determination.[256] I, however, share the view of courts and individual jurists who believe that that this approach conflicts with *Batson*'s objectives and masks purposeful discrimination by removing the focus from the party whose peremptory challenges are at issue.[257] The Third Circuit has held that "a prosecutor who

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[252] *Flowers*, 139 S. Ct. at 2245 (quoting *Batson*, 476 U.S. at 96-97); *Foster,* 578 U.S. at 501 ("[A]ll of the circumstances that bear upon the issue of racial animosity must be consulted.'") (quoting *Snyder*, 552 U.S. at 478).

[253] *Flowers*, 139 U.S. at 2248 (pointing to the "State's striking of five of six black prospective jurors at the sixth trial"); *Miller-El II*, 545 U.S. at 240 ("The numbers describing the prosecution's use of peremptories are remarkable.").

[254] *Batson*, 476 U.S. at 97.

[255] This further suggests that Kansas courts have lost sight of another cardinal principle of *Batson* jurisprudence: The impermissible strike of a single juror violates the Equal Protection Clause. *See, e.g., J.E.B. v. Alabama ex rel. T.B*., 511 U.S. 127, 142 n.13 (1994) ("The exclusion of even one juror for impermissible reasons harms that juror and undermines confidence in the fairness of the system").

[256] *See, e.g., Allen v. Lee*, 366 F.3d 319, 329 (4th Cir. 2004) (finding no "pattern" of race-based strikes by the prosecution where the jury "had more African-Americans on it than if it had exercised no challenges at all"); *United States v. Harding*, 864 F.3d 961, 963–64 (8th Cir. 2017) (where the defendant objected to the government's peremptory challenges of Native American jurors, finding no error in the district court's consideration of the fact that the defendant struck a Native American juror); *People v. Lomax*, 112 Cal. Rptr. 3d 96, 234 P.3d 377, 414 (Cal. 2010) ("Acceptance of a panel containing African-American jurors 'strongly suggests that race was not a motive' for the challenges of an African-American panelist.") (internal citation omitted).

[257] *See, e.g*., *Allen*, 366 F.3d at 358 (Gregory, J., dissenting) (asserting that "[a]lthough it was appropriate to take into consideration evidence of who was seated, the court should have focused

intentionally discriminates against a prospective juror on the basis of race can find no refuge in having accepted others [sic] venirepersons of that race for the jury."[258] California Court of Appeal Justice Jon Streeter recently remarked that courts have placed "too much significance" on the "prosecutor's willingness to pass the panel with one or two" jurors of the same race as the defendant.[259] He concluded that this undue emphasis "provide[s] an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion."[260] The frequency with which Kansas prosecutors engage in this conduct bears out Justice Streeter's admonition.[261]

At minimum, the Supreme Court precedent shows that the timing of the State's decision to refrain from striking a juror may undermine its credibility at step three. In *Miller-El II*, the prosecution used 91 percent of its strikes to remove Black prospective jurors, but decided, toward the end of jury selection, when it had few strikes remaining, to allow one Black man to be seated.[262] Rejecting the prosecutor's explanation for retaining the juror, the Supreme Court observed that "if the prosecutors were going to accept any black juror to obscure the otherwise consistent pattern of opposition to seating one, the time to do so was getting late."[263]

The Court's skepticism about the prosecution's retention of one Black juror was well-founded. For example, in our investigation into California district attorney training manuals, we discovered a commonplace instruction: leave at least one member of "each cognizable group

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on those members of the venire who were excluded from the jury for allegedly unconstitutional reasons as Batson requires").

[258] *Holloway v. Horn*, 355 F.3d 707, 729 (3d Cir. 2004).

[259] *People v. Smith*, 244 Cal. Rptr. 3d 289, 308, 32 Cal. App. 5th 860 (2019), *as modified on denial of reh'g* (Mar. 1, 2019) (Streeter, J., concurring).

[260] *Id*. (internal citation and quotation marks omitted).

[261] *See supra* note 235 (citing, *e.g*., *Sanders, Adams, Dean, Washington,* and *Trotter*).

[262] *Miller-El II*, 45 U.S. at 241.

[263] *Id.* at 250.

from which you are challenging persons to 'create a record that will justify any challenges you make.'"[264] Courts should not reflexively attribute the State's decision to refrain from stripping the seated jury of all jurors of color to an absence of purposeful discrimination when it may well have been the product of a discriminatory strategy.

With respect to Kansas courts' reliance on the number of defense strikes against the same cognizable group, as the Third Circuit Court of Appeals stated, this "fails the test for relevancy. Instead, the focus properly falls on the prosecutor's actions."[265]

3. Elevating the Burden of Proof at Step Three to Deny Meaningful Review of the State's Reasons for its Peremptory Challenges.

In my opinion, Kansas reviewing courts have elevated the defendant's burden of persuasion at step three in two respects that have no basis in United States Supreme Court precedent. First, the courts mandate that the defendant affirmatively ask the trial judge to make a step-three ruling or object when it is unclear that the trial judge has done so at the peril of failing to "preserve the issue for appeal."[266] Second, they require the defendant to present a comparative juror analysis to the trial court or forfeit any such analysis on appeal.[267] Both requirements create unacceptable barriers to review. As a related matter, the Kansas Supreme Court and Court of Appeals defer to district court decisions where, at best, it is unclear that the

[264] Semel, et al., *supra* note 1, at 50 and n.599 (quoting a 2006 California District Attorney Association training materials).
[265] *Holloway*, 355 F.3d at 729.
[266] *See e.g.*, *McCullough*, 293 Kan. at 994 (where the defendant did not object to the district court's "failure to complete the third step," holding that the defendant "failed to preserve the issue for appeal," and further holding that "even if the issue is preserved, McCullough's claim fails because the district court's analysis of the third step can be implied").
[267] *Walston*, 256 Kan. at 380.

trial judge made a step-three ruling.[268] Rather, courts blame defense counsel for failing to insist that the district court issue a reasoned step-three rulings and, even when they have done so, inevitably endorse implicit *Batson* rulings.[269] Finally, Kansas court facilitate deference by speculation that solely advantages the State.[270]

In 2007, in *State v. Angelo*, the Kansas Supreme announced that the trial court may satisfy step three by an implicit ruling.[271] Specifically, the court held that the district judge may rule on the credibility of the State's reasons by simply signaling a clear acceptance or rejection of the *Baston* objection.[272] The court further announced that the party who advances the *Baston*

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[268] *State v. Jarman*, 268 P.3d 506, 2012 WL 401603, at *5, *7 (Kan. Ct. App., Feb. 3, 2012) (per curiam) (unpublished) (where the defendant did not attempt to rebut the State's reasons, deferring to the district court's implicit step-three ruling rejecting the *Batson* challenge, thus affirming the State's removal of the only Black veniremember); *State v. Johnson*, 309 P.3d 9, 2013 WL 5303512, at *3-4 (Kan. Ct. App., Sept. 20, 2013) (per curiam) (unpublished) (where the district court allowed the defendant to respond after the State offered its reasons, holding that the court "adequately" ruled at step three although it did not explicitly determine that the defendant failed to carry his burden); *State v. Villa-Vasquez*, 49 Kan. App. 2d 421, 433, 310 P.3d 426 (Kan. Ct. App. 2013) (upholding the trial court's implicit step-three ruling where the defendant offered rebuttal to the State's explanations, but did not object to "the district court's analysis of the issue," thus affirming the State's removal of the two Latinx prospective jurors); *State v. Williams*, 240 P.3d 626, 2010 WL 4156759, at *8 (Kan. Ct. App., Oct. 8, 2010) (per curiam) (unpublished) (relying on *Angelo*, holding that where the defendant "failed to object at the time to the trial court's apparent incomplete *Batson* analysis," he "failed to proceed with the third *Batson* step).

[269] *Id*.

[270] *See People v. Mai*, 161 Cal. Rptr. 3d 1, 305 P.3d 1175, 1238-39 (Cal. 2013), *as modified on denial of reh'g* (Oct. 2, 2013) (Liu, J., concurring) ("In light of what decades of research have revealed about the stubborn role of race in jury selection, it seems empirically suspect—if not downright unfair—to apply a rule of deference whose practical effect [of deferring to a trial court's unexplained ruling] is to hold that what a trial court leaves unsaid in denying a *Batson* claim will be construed on appeal in favor of the prosecution.") (internal citation omitted).

[271] *State v. Angelo*, 287 Kan. 262, 263, 274–75, 197 P.3d 337 (Kan. 2008). Just the year before, in *State v. Davis*, the Kansas Court of Appeals held that the trial court did not conduct a complete analysis at step three of *Batson*, and "thus never reached the ultimate determination of whether the defendant carried his burden of purposeful discrimination. 37 Kan. App. 2d 650, 651, 155 P.3d 1207 (Kan. Ct. App. 2007). The court remanded for a proper *Batson* hearing. *Id.* at 661–62.

[272] *Angelo,* 287 Kan. at 263, 275.

objection bears the burden of ensuring that the trial court make the credibility determination.[273] *Angelo* acknowledged that "the better practice is for the trial court to identify and follow each of the *Batson* steps in its analysis and, in the third step, to clearly articulate something like 'the defendant has not carried his burden of proving purposeful discrimination.'"[274] Where the defense does not expressly request that trial court make a step three ruling, "[t]hat failure is fatal to his claim."[275] Creating such a harsh default rule whole cloth disincentivizes district courts from making a third step ruling by guaranteeing that cases without such an explicit ruling are insulated from appellate review. This rule protects neither the defendant whose jury was selected in a discriminatory manner nor the citizens who were impermissibly excluded from jury service.

Supreme Court precedent does not support this punitive approach. The Court has never retreated from its holding in *Batson* that the inquiry consists of three distinct steps, which are triggered by the defendant's objection: (1) the defendant's prima facie showing; (2) the prosecution's burden of coming forward "with a neutral explanation"; and (3) "the trial court['s] duty to determine whether the defendant has established purposeful discrimination."[276] The trial judge must make a determination at each step: The prima facie showing is a burden of production, which requires only that the defendant raise "an inference of discriminatory purpose.'"[277] Step two is a law-based inquiry into the prosecution's explanations.[278] Step three

[273] *Id*. at 273-74.
[274] *Id*. at 278.
[275] *Id*. at 277.
[276] *Batson*, 476 U.S. at 97-98.
[277] *Johnson v. California*, 545 U.S. 162, 168 (2005) (quoting *Batson*, 476 U.S. at 93-94).
[278] *Hernandez*, 500 U.S. at 359-60.

is principally a fact-based assessment of the credibility of the prosecution's reasons.[279] A trial court may find that the defendant did not carry his or her burden of persuasion by failing to offer a rebuttal, just as the defendant may not prevail even when he or she forcefully responds to the State's proffered reasons. But the Court has not relieved trial judges of their "duty" to reach step three after steps one and two are completed, much less sanctioned an inadequate step-three ruling because the defendant did not insist on an explicit determination of the ultimate question."[280]

There is a split of authority among the federal circuits and state courts as to whether a reviewing court may defer to the trial court's denial of a *Batson* objection where the trial court did not make an explicit step-three ruling, that is, one crediting the prosecution's reasons and finding no purposeful discretion.[281] Since *Angelo*, Kansas courts have placed themselves

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[279] *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003) (*Miller-El I*) ("[T]he critical question in determining whether a [defendant] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike.")

[280] Notwithstanding its holding, in *Angelo*, the Kansas Supreme Court quoted almost identical language from its earlier opinion in *State v. Pham*: "'*Finally, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination*.'" *Angelo*, at 271 (quoting *Pham*, 281 Kan. 1227, 1236, 136 P.3d 919 (Kan. 2006)) (emphasis added by the court in *Angelo*). The state supreme court in fact engaged in this practice long before *Pham*. For instance, in *State v. Gadelkarim*, the State struck two of only three "members of a racial minority" in the pool, one of whom was Mr. Jamison. 256 Kan. 671, 691, 887 P.2d 88 (Kan. 1994). The State's reasons were that Mr. Jamison "was single and the State preferred married individuals and those from a more stable background," and that the juror appeared to be tired and therefore would be inattentive. *Id*. The district judge did not explain his ruling, i.e., did he deny the *Batson* objection because he observed the juror's lack of attention or found the prosecutor was credible as to one or both reasons? Gadelkarim argued that the judge failed to make a "finding of fact concerning whether Jamison was in fact inattentive." *Id*. at 693. The prosecution pivoted, insisting that it only struck the juror because he was single. *Id*. at 693. The court wrote, "Once a trial court has determined the State removed a prospective juror for race-neutral reasons, appellate court review is limited to whether the trial court abused its discretion." *Id*. at 692 (citing *Walston*, 256 Kan. 372; *Sledd*, 150 Kan. 15). In so doing, the Kansas Supreme Court relieved itself and trial judges of the requirement that there be a credibility finding, that is, a factual determination at *Batson*'s third step.

[281] *See People v. Williams*, 156 Cal. Rptr. 3d 214, 299 P.3d 1185, 1238-48, 1254 (Cal. 2013) (Liu, J., dissenting) (discussing the split of authority); *Semel, supra* note 166, at 336-341 (discussing the split of authority).

squarely on the side of the divide that defers to implicit step-three rulings. Like California, Kansas has

> aligned itself with one side of this split, but not the side that reflects the United States Supreme Court's teachings on the careful scrutiny that trial courts and reviewing courts must apply to ferret out unlawful discrimination in jury selection a harm that "compromises the right of trial by impartial jury," perpetuates "group stereotypes rooted in, and reflective of, historical prejudice," and "undermines public confidence in adjudication."[282]

4. Constraining Comparative Juror Analysis at Step 3: Undermining *Batson*'s Most Effective Tool

Since 2003, the United States Supreme Court has placed comparative juror analysis at the center of the ultimate *Batson* determination.[283] This powerful analytic approach was key to the court's grant of relief in *Miller-El II* and in its three most recent *Batson* opinions: *Snyder v. Louisiana, Foster v. Chatman*, and *Flowers v. Mississippi*.[284] Notably, in both *Miller-El I* and *II* the Supreme Court conducted a comparative juror analysis even though no such analysis was done by any of the Texas courts below. And the majority flatly rejected the dissent's assertion that these comparisons were "not properly before this Court," explaining: "There can be no question that the transcript of *voir dire,* recording the evidence on which Miller-El bases his arguments and on which we base our result, was before the state courts, nor does the dissent contend that Miller-El did not "fairly presen[t]" his *Batson* claim to the state courts.[285]

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[282] *People v. Williams*, 299 P.3d at 1236 (Liu, J., dissenting) (quoting *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 237-38 (2005)).
[283] *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 343-45 (2003); *Miller-El II*, 545 U.S. at 241-48 (2005).
[284] *Snyder v, Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 578 U.S. 488 (2016); *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).
[285] *Miller-El II*, 545 U.S. at 241 n.2; *see also id*. (adding that "the dissent conflates the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence").

Despite the fact that the United States Supreme Court has repeatedly endorsed and utilized comparative juror analysis, including when raised for the first time on appeal, the Kansas Supreme Court's 1994 decision in *Walston* erected an almost insurmountable obstacle to comparative analysis, refusing to consider the analysis on appeal where the defendant did not present the precise theory to the district judge.[286] For example, in *State v. Kleypas*, a capital case, the defendant objected that the State impermissibly struck a juror based on her gender.[287] The State offered several reasons for its strikes, including the struck juror's death-penalty views.[288] On appeal, Kleypas argued that some of the seated men's views on capital punishment were even less favorable to the State.[289] The Kansas Supreme Court declined to consider the comparison because Kleypas did not make the argument at trial.[290]

The Kansas Supreme Court issued *State v. Pham* the year after the decision in *Miller-El II*.[291] The defendant unsuccessfully objected to the State's strikes against four Latinx venirepersons and raised two of his *Batson* objections on appeal[292] The State offered two reasons for striking Juror J.C.: his "nonresponsive body language" during voir dire and failure to

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[286] *Walston*, 256 Kan. at 383; *see also id*. at 382-83 (engaging in but rejecting the defendant's comparisons in this case). *See, e.g*., *Campbell*, 268 Kan. at 535 (refusing to consider a comparative juror analysis because the defendant failed to offer it at trial, declaring that "comparability forms a poor basis for attacking the trial court's decision on appeal") (citing *Walston*, 256 Kan. at 381-83, for the rule that "the defendant has the burden to create the record of relevant facts and to prove its case to the trial court"); *State v. Hollmon*, 2000 WL 36746392, at *1 (Kan. Ct. App., June 30, 2000) (per curiam) (unpublished) (declining to consider a comparative theory where the defendant raised the argument for the first time on appeal) (relying on *Campbell* and *Walston*).
[287] 272 Kan. 894, 997-98, 40 P.3d 139 (Kan. 2001) (per curiam), *overruled in part on other grounds* by *State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (Kan. 2004).
[288] *Id*. at 998.
[289] *Id*. at 1000.
[290] *Id*.
[291] 281 Kan. 1227,136 P.3d 919 (Kan. 2006).
[292] *Id*. at 1236, 1239.

answer any questions from either party.[293] On appeal, Pham compared Juror J.C. to some of the seated white jurors who also failed to respond to questions.[294] But the court, citing *Walston*—with no mention of *Miller-El II*—refused to consider the comparative juror analysis because Pham did not raise it at trial.[295] Kansas appellate courts have repeatedly relied on *Walston and State v. Campbell* to preclude the defendant's comparative juror analysis for the first time on appeal.[296]

In *Miller-El II*, the Court declared that to be "[s]imilarly situated," jurors need not be "identical in all respects," explaining that such a requirement "would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."[297] If the prosecutor's reason for the strike "applies just as well" to a struck and "otherwise-similar" seated juror, "that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step"[298] In the few

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[293] *Id*. at 1238-39.
[294] *Id*. at 1239.
[295] *Id*.
[296] *State v. Campbell*, 268 Kan. 529, 534, 537, 997 P.2d 726 (Kan. 2000). For example, in *State v. Munoz*, over objection, the State used eight of 12 peremptory challenges to remove Latinx jurors. 401 P.3d 684, 2017 WL 4081374, at *7 (Kan. Ct. App., Sept. 15, 2017) (per curiam) (unpublished). At trial, Munoz rebutted some of the prosecution's reasons but did not do so for each of the eight struck jurors. *Id*. at *7-10. On appeal, for the first time, he offered a comparison between struck juror C.C. and a seated white juror. *Id*. at *10. The appeals court acknowledged *Miller-El II*'s holding that a comparison such as the one Munoz presented "is evidence tending to prove racial discrimination." *Id*. (citing *Miller-El II*, 545 U.S. at 241). However, relying on *Campbell*, 268 Kan. at 535, the court refused to consider the argument. *Id*. In *State v. Trotter*, decided the year after *Miller-El II*, the Kansas Supreme Court, also relying on *Campbell*, refused to consider the defendant's comparison of seated white jurors to the struck Black jurors. 280 Kan. 800, 818-19, 127 P.3d 972 (Kan. 2006) (citing *Campbell*, 268 Kan. at 535); *State v. Brooks*, 492 P.3d 507, 2021 WL 3578009, at *10 (Kan. Ct. App., Aug. 13, 2021) (unpublished) (finding that "the timing of [the comparison] is a problem because Brooks never presented the comparator argument for the district court's consideration," but examining and rejecting the comparison). *And see* Semel, et al. *supra* note 1, at 61-65 (discussing the California Supreme Court's grudging acceptance of the holding in *Miller-El II* and failure to engage in comparative analysis in the manner prescribed by the United States Supreme Court).
[297] *Miller-El II*, 545 U.S. at 247 n.6.
[298] *Id*. at 241.

cases before *Miller-Ell II* in which Kansas courts decided the merits of a comparative theory on appeal, they appear to have applied the cookie-cutter test. For instance, in *State v. Washington*, the prosecution exercised peremptories against 12 venirepersons, 10 of whom were Black.[299] The State explained that it struck Ms. Bullock because she filled out the juror questionnaire incorrectly—writing that she was single, but including her husband's employment and listing her children's names instead of their ages—indicating that "she could not follow directions."[300] On appeal, the defendant pointed to four seated white jurors who also filled out the questionnaire incorrectly.[301] Two wrote in their children's names, and another two included their children's genders, though all four seated white jurors also gave their children's ages.[302] The state supreme court rejected the comparison between Bullock and the four seated jurors because the four seated white jurors had listed their children's ages.[303] At step three, the similarities and differences that are the points of comparison concern a prosecutor's proffered reason for the strike. Here, the State's reason was its concern that the Ms. Bullock "could not follow directions."[304] The errors made by the four seated jurors on their questionnaires were similarly indicative of an inability of to follow directions. The court, however, required the jurors to be identical in all respects, which, as *Miller-El II* later held, "left *Batson* inoperable."[305]

In my review, it was difficult to assess whether, following *Miller-El II, Snyder, Foster,* and *Flowers*, Kansas appellate courts have taken heed of the Supreme Court's directive that to be

[299] *State v. Washington*, 275 Kan. 644, 654, 68 P.3d 134 (Kan. 2003). On appeal, the defendant raised the peremptory challenges of six of the 10 Black jurors. *Id*. at 654–55.
[300] *Id*. at 657.
[301] *Id*. at 658.
[302] *Id*.
[303] *Id*.
[304] *Washington*, 275 Kan. at 657.
[305] *Miller-El II*, 545 U.S. at 247 n.6.

"[s]imilarly situated," jurors need not be "identical in all respects,"[306] in part because the courts still rely on their oft-repeated precedent that precludes a comparative analysis for the first time on appeal. Of the cases decided since 2005 in which the defendant raised a comparative analysis on appeal, the state supreme court or the appeals court considered the argument in some cases.[307]

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[306] *Miller-El II*, 545 U.S. at 247 n.6.

[307] In listing these cases, I erred on the side of over-inclusion, i.e., in a quite a few opinions, only by using the most generous definition can one characterize the analysis on appeal as "comparative." *See State v. Pham*, 281 Kan. at 1239; *State v. Munoz*, 2017 WL 4081374 at *10; *State v. Gonzalez*, 348 Kan. at 303-04 (citing *Campbell*, but nonetheless reviewing the defendant's comparative approach made on appeal for the first time); *State v. Fleming*, 195 P.3d 291, 2008 WL 4849086, at *5 (Kan. Ct. App., Nov. 7, 2008) (per curiam) (unpublished) (conducting a comparative analysis based on arguments the defendant apparently made at trial); *State v. Ellis*, 205 P.3d 791, 2009 WL 1036110, at *7 (Kan. Ct. App., Apr. 7, 2009) (unpublished) (although stating that the court was not required to consider the defendant's comparative theory because he did not present it to the trial court, finding that the struck Black juror and seated white juror were not "similarly situated"); *State v. Gann*, 308 P.3d 31, 2013 WL 4778151, at *6, *8 (Kan. Ct. App., Sept. 6, 2013) (per curiam) (unpublished) (acknowledging that a comparison of similarly situated jurors would be appropriate, but finding that defense counsel failed to offer specific examples of similar jurors at trial to permit a meaningful comparison); *State v. Avila*, 2014 WL 1795818, at *4 (Kan. Ct. App., May 2, 2014) (per curiam) (unpublished) (where the appeals court speculated about comparisons that the State did not make, *i.e.*, comparing struck Latina juror Y.R to two "presumably non-Hispanic jurors struck by the State" who were similar to Y.R. and to two unidentified seated white jurors whom the court described as different from Y.R.); *State v. Miller*, 321 P.3d 36, 2014 WL 1193376, at *5-6 (Kan. Ct. App., Mar. 21, 2014) (per curiam) (unpublished) (where the appeals court acknowledged that the district court "struggled with the State's reasoning for striking juror 13" who was Black, criticizing the defendant's comparative analysis offered for the first time on appeal, but allowing the defense and State to make first-time comparisons); *State v. Howard*, 345 P.3d 295, 2015 WL 1402825, at *5-6 (Kan. Ct. App., Mar. 20, 2015) (unpublished) (in a case in which the State, over objection, struck all Black venirepersons, considering on appeal the comparative arguments made at trial with regard to the one strike at issue on appeal and finding that the "timing" of juror's answer was sufficient to distinguish the juror from other white seated jurors who answered the question); *State. v. Sanchez*, 379 P.3d 1143, 2016 WL 4582544, at *8 (Kan. Ct. App., Sept. 2, 2016) (per curiam) (unpublished) (acknowledging "that the State appeared to strike a Hispanic member of the venire for a particular reason but failed to strike a non-Hispanic venire person despite marked similarities," but faulting defense counsel for failing to prove purposeful discrimination and deferring to the district court's "implicit credibility determination"); *Parker*, 2016 WL 3570512, at *9-10 (considering, in part, the similarity between the answers of the struck Black juror and seated white jurors, holding that the district court erred in not finding that the defendant had made a prima facie showing with regard to the State's strike of the only Black venireperson, and remanding for a hearing); *State v. Rodriguez*, 409 P.3d 874, 2018 WL 559797, at *6 (Kan. Ct. App., Jan. 26, 2018) (per curiam) (unpublished) (criticizing defense

In at least several of the cases, the difference between the struck jurors of colors and the seated white jurors suggests that, contrary to well-established Supreme Court precedent, the Kansas courts require a defendant "to identify an *identical* white juror for the side-by-side comparison to be suggestive of discriminatory intent."[308]

In addition to effectively foreclosing comparative juror analysis for the first time on appeal, Kansas courts appear to disregard *Miller-El II* in yet another way, improperly relying on the State's post-hoc reasons to deny *Batson* claims. In *Miller-El II*, when the defense refuted the State's "misdescription" of a juror's attitude, the prosecutor offered an altogether different reason (the juror's brother had a prior conviction).[309] The Supreme Court declared that the "State's new explanation . . . reeks of afterthought."[310] *State v. Lewis* illustrates the problem in Kansas.[311] Over the defendant's objection, the State exercised a peremptory challenge against a Black woman who was one of only three Black prospective jurors.[312] The prosecutor's reasons

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counsel for failing to rebut the State's reasons at trial, but considering the one comparison he made on appeal, and, based on the court's reading of the record, finding an "obvious difference" between the struck Latinx juror and the white seated juror); *State v. Williams*, 308 Kan. 1320, 1330-31, 429 P.3d 201 (Kan. 2018) (faulting defense counsel raising a comparison between Juror 19's employment as a "para-educator" and that of seated white jurors, but, based on the court's review of the record, considering and rejecting the comparison because the seated jurors, who also worked with children, were not "para-educators"); *State v. Webb*, 461 P.3d 862, 2020 WL 1969438, at *7 (Kan. Ct. App., Apr. 24, 2020) (per curiam) (unpublished) (criticizing defense counsel for failing to raise a comparative analysis at trial, but considering the comparisons and, based on its reading of the record, rejecting them).

[308] *Flowers*, 139 S. Ct. at 2249 (citing *Miller-El II*, 545 U.S. at 247 n.6). *See, e.g., supra* note 307, citing *Howard*, *Sanchez*, and *Williams*.

[309] 545 U.S. at 246-47.

[310] *Id. See also United States v. Atkins*, 843 F.3d 625, 638 (6th Cir. 2016) (where the government initially stated that it struck a Black juror because it "'didn't get a good feeling about' [him]" and then added several other reasons related to the juror's brief employment history and child care needs, concluding that "the government's reasons 'reek[ ] of afterthought' and suggest a lack of reasoned consideration in striking [the juror]") (quoting *Miller-El II*, 545 U.S. at 246).

[311] 38 Kan. App. 2d 91, 161 P.3d 807 (Kan. Ct. App. 2007).

[312] *Id*. at 98.

were that she was "a nursing student who was unemployed; therefore [he] did not know the source of the juror's livelihood" and she "visited the crime scene four times per week."[313] He stated that he struck the only other unemployed prospective juror.[314] There was, however, a white seated juror who "admitted he frequently drove by the crime scene."[315] After defense counsel contested the State's explanations, "the prosecution gave an additional reason: the challenged juror's young age and lack of life experience."[316] The Kansas Court of Appeals held that the trial court did not abuse its discretion in denying the *Batson* objection because "the record supports" the juror's unemployed status and her youth.[317] The opinion conflicts with the Supreme Court's rejection of post-hoc explanations and the requirement that "when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives."[318]

5. Disregarding Evidence of Pretext: Failure to Require that the State Engage in Meaningful Voir Dire and Judicial Speculation

In *Johnson v. California*, the Supreme Court reiterated the prohibition against judicial speculation at *Batson*'s first step.[319] The Court explained that "[t]he *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process."[320] Therefore, judges are precluded from hypothesizing, that

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[313] *Id*. at 99.
[314] *Id*.
[315] *Id*.
[316] *Id*. The appellate opinion includes no information about the basis for the district court's denial of the *Batson* objection. *Id*. at 99-100. The trial judge initially found no prima facie showing, but the appeals court complimented the judge for "[taking] the additional precaution of requiring the State to provide a race-neutral reason." *Id*. at 99.
[317] *Id*. at 100.
[318] *Miller-El II*, 545 U.S. at 252.
[319] *Johnson*, 545 U.S. at 172.
[320] *Id*. (citing *Batson*, 476 U.S. at 97-98 & 98 n.20).

is, coming up with "'good reasons'" the State "'might have had'" for a strike; they are limited to considering "'the real reason.'"[321] When the defendant has raised an inference of discrimination, the trial court must obtain "a direct answer" from the prosecutor "by asking a simple question."[322]

The same prohibition applies at step three. The Supreme Court reaffirmed the rule in *Miller-El II*, faulting the Fifth Circuit's "substitution" of its own reason for the prosecution's strike of one of the African-American jurors.[323] The Court, wrote, "If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."[324] There is a relationship between reviewing courts' willingness to defer to unexplained step-three rulings and what Justice Liu has characterized as the California Supreme Court's indulgence in "speculative inference" and "overreliance on gap-filling presumptions" about the prosecution's reasons and the trial judge's conclusions.[325]

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[321] *Id*. (quoting *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004)).
[322] *Id.*
[323] *Miller-El II*, 545 U.S. at 252.
[324] *Id.*
[325] *Mai*, 305 P.3d at 1232 (Liu, J., concurring). *Id*. at 1231 (criticizing the majority for speculating about the meaning of a juror's statements during voir dire to shore up the prosecutor's reasons for his strike); *id*. at 1238 (stating that deference to unexplained *Batson* rulings "tends to foster judicial rationalization of a prosecutor's strikes in a manner that *Batson* does not permit. It is all too tempting for a reviewing court, in speculating on the possible dynamics in the courtroom, to posit reasons in support of a trial court's *Batson* ruling that the prosecutor did not give."); *see also People v. Jones*, 121 Cal. Rptr. 3d 1, 247 P.3d 82, 112 (Cal. 2011) (Werdegar, J., dissenting) (where the prosecution's stated reasons "were unsupported by the record," criticizing the majority for disregarding the rule stated in *Miller-El II* by "assuming that other, possibly neutral reasons actually motivated the three peremptory challenges in question").

My review of Kansas *Batson* opinions suggests that judicial speculation occurs primarily when reviewing courts assess trial judges' step-three determinations, rather than at step one,[326] and that this is a long-standing practice. *In State v. Campbell*, the defense objected to the State's strike of four jurors, at least three of whom were Black, including Mr. Blackman.[327] The State offered only this reason: "[V]ery simply because he's divorced. And in this case there is evidence of marital discord."[328] The defendant pointed to a white woman who was divorced and seated on the jury.[329] In order to conclude that the explanation was "race-neutral and bore relevance to the case," the Kansas Supreme Court relied on a its own speculative basis, not argued by the State below that (1) "a divorced male might be more likely to side with the male defendant than a divorced female" and (2) the "marital perspective" between the excluded man and the seated woman was "not comparable."[330]

In *State v. Garland*, the defense objected to the prosecution's strike of four Black potential jurors, leaving only one Black juror on the panel.[331] The prosecution struck Mr.

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[326] A caveat to my observation: From my initial review of appellate opinions, Kansas trial courts seem to reach step three more often than California trial judges, i.e., there appears to be more contention about the prima facie showing in California appellate litigation than in Kansas. It may be, therefore, that Kansas courts have less incentive to speculate about why the State might have struck a juror of color when ruling on the step-one question. *But see State v. Timley*, 255 Kan. 286, 303, 875 P.2d 242 (Kan. 1994) (where the State struck two of the three men seated on the panel, resulting in only one seated male juror, affirming the district judge's ruling that the defendant failed to make a prima facie showing of gender discrimination based in part on the Kansas Supreme Court's conclusion that "[t]he transcript of voir dire suggestions valid reasons, other than gender").

[327] 997 P.2d 726, 268 Kan. 529, 534 (Kan. 2000). From the opinion, it seems likely, though not certain, that the defendant's fourth objection was to the State's strike against the remaining Black prospective juror. *Id*. at 533-34.

[328] *Id*. at 536.

[329] *Id*. All the seated jurors were married, except for one who was single and one, a woman, who was divorced. *Id*.

[330] *Id*.

[331] *Garland*, 2004 WL 1176615, at *1.

Sanders because he was unemployed and had a disabled wife; the prosecution asserted that both circumstances would affect Sanders's concentration.[332] The defendant compared Mr. Sanders with white seated Mrs. Cooprider, a retired widow who did not work outside the home.[333] The State "never asked Mr. Sanders about any details of his unemployment status or his wife's disability," nor did Mr. Sanders ask to be excused when the jury pool as a whole was questioned about possible hardships.[334] The Kansas Court of Appeals interjected its own basis for distinguishing between the jurors, speculating that the seated white juror's situation was different because there was no evidence Mrs. Cooprider had to support someone or that she would be unable to fulfill her domestic duties due to jury service.[335] There was no more "evidence" that Mr. Sanders would be distracted than would Mrs. Cooprider. The Court of Appeals filled in the gaps with a race-based assumption that the Black juror's domestic situation was less financially stable and more demanding than that of the seated white juror.[336]

VII. The Insidious Relationship Between Death Qualification and Peremptory Challenges

In capital cases, the discriminatory impact of peremptory strikes is layered on top of the death qualification, itself a discriminatory feature of jury selection. As the nation's capital punishment system is inextricably linked to the legacy of slavery, so too is death qualification.

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[332] *Id.* at *4.
[333] *Id*.
[334] *Id*. Brief of Appellant at *22, *State v. Garland*, No. 03-90447-A (Kan. Ct. App., Sept. 2, 2003), 2003 WL 25969362.
[335] *Garland*, 2004 WL 1176615, at *4.
[336] *See Mai*, 305 P.3d at 1232 (Liu, J., concurring) (observing that these "habits of unwarranted deference, speculative inference, and overreliance on gap-filling presumptions have been entrenched in our *Batson* jurisprudence for some time now"); *see also Foster*, 578 U.S. at 505-06 (finding the prosecution's explanations "difficult to credit" "because the State willingly accepted white jurors with the same traits that supposedly rendered [the struck Black juror] . . . unattractive").

"Neither at common law, nor in Blackstone's England, did the death-qualification of jurors exist."[337] The first "challenges to jurors with 'conscientious scruples' against a particular law" appear in cases involving slaves.[338] The trial of abolitionist John Brown in Virginia in 1859 is one of the earliest reported cases in which a judge death qualified the jury.[339]

Fifty years of empirical study of death qualification leave no doubt that the process produces the following outcomes: the disproportionate removal of Black people from the jury pool; a seated jury that is more conviction- and death-prone than the original venire; and a jury that is susceptible to the influence of racial bias. For purposes of brevity, I adopt the discussion by Professor Mona Lynch regarding this research in her report, which is on file in these proceedings.[340]

"More insidious than the direct removal of Black jurors is their indirect removal through the facially race-neutral practice of death qualification in capital trials."[341] There is nothing new about prosecutors' use of peremptory challenges to exclude prospective jurors who survive death qualification but whose capital-punishment views are less favorable to the State than others. Before *Batson*, prosecutors did so successfully without objection.[342] After *Batson*, prosecutors

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[337] G. Ben Cohen & Robert J. Smith, *The Death of Death Qualification*, 59 Case W. Rsrv. L. Rev. 87, 92 (2008).
[338] *Id*. at 93 (citation omitted).
[339] *Id*. at 96.
[340] I am well-acquainted with Dr. Lynch's publications in this area and, in general, with other social science research on the topic.
[341] Kathryn E. Miller, *The Eighth Amendment Power to Discriminate*, 95 Wash. L. Rev. 809, 846 (2020).
[342] *See, e.g*., Bruce Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 Mich. L. Rev. 1, 6 (1982) (reporting on an empirical study "which reveals both a systematic use of prosecution peremptory challenges against death-scrupled jurors and their resulting underrepresentation on juries actually selected"). The study examined capital trials in a Florida judicial district over a five-year period, 1974 through 1978. *Id*. at 21. The research was conducted before the decision in *Wainwright v. Witt*, 469 U.S. 412 (1986); the standard set in *Witherspoon v. Illinois* governed the exercise of cause challenges

have continued to do so successfully because "[c]ourts have deemed even mild opposition to or discomfort with the death penalty as a valid, non-racial reason to exercise a peremptory strike, and death qualification requires jurors to voice these opinions."[343]

during death qualification. 391 U.S. 510, 519-23 and n.21 (1968). Consistent with *Witherspoon*, Winick's definition of "scrupled" jurors included individuals who voiced any death penalty reservations; some of whom would have been subject to a cause challenge under *Witherspoon* and some would not. Winick, at n.94; *see Witherspoon*, 391 U.S. at 513-15, 519-23 and n.21. The study showed that "death penalty opponents were substantially underrepresented . . . [and] that this underrepresentative result is due to the systematic use by prosecutors of their peremptory challenges to eliminate those expressing opposition to the death penalty who were not previously removed for cause." Winick, at 74; *see also id.* at 35-36 (analyzing the data).

[343] Miller, *supra* note 341, at 848 (citing Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 L. & Pol'y 148, at 19). *See, e.g.*, *People v. Lomax*, 234 P.3d 377, 411 (Cal. 2010) (observing that the prosecution was not required to take a face value a Black juror's stated "neutral" position on the death penalty, upholding the prosecution's strike, and affirming precedent that "demonstrated reluctance [to impose the death penalty] is a race-neutral reason that can justify a peremptory challenge"); *Lingo v. State*, 437 S.E. 2d 463, 666-68 (Ga. 1993) (upholding the prosecutor's exercise of all 11 of his strikes to remove Black jurors and obtain an all-white jury, and agreeing with the trial court that the prosecutor's reasons, which were largely based on jurors' death-penalty reservations, were "race-neutral"); *State v. Jacobs*, 803 So. 2d 933, 941-42 (La. 2001) (upholding the prosecutor's strikes of several Black prospective jurors whose view on capital punishment the prosecutor described as weak, inarticulate, or indefinite); *State v. Waring*, 354 N.C. 443, 701 S.E.2d 615, 638-39 (N.C. 2010) (holding that the prosecutor's strike of a Black juror who opposed the death penalty, but said that she could follow the law, did not make out a prima facie showing); *State v. Jones*, 788 S.W.2d 545, 549 (Tenn. 1990) (holding that the State's reasons for striking a Black female juror, which included her weak views on the death penalty, were "neutral"); *Lizcano v. State*, 2010 WL 181772, at *4 & n.17 (Tex. Crim. App. May 5, 2010) (unpublished) (deciding that a response indicating death-penalty reservations "can be valid grounds for a peremptory challenges" and citing other similar opinions). Often death qualification reduces the number of jurors of color, especially Black jurors, to few enough that those remaining can be eliminated by the prosecutor with peremptory strikes. Even when jurors survive death qualification, the prosecutor can successfully justify his or her strikes based on any reservations those jurors express about imposing capital punishment. *Miller*, *supra* note 341, at 848 and nn.261-64; *see also* David Baldus, George Woodworth, David, Zuckerman, Neil Alan Weiner, & Barbara Brofitt, *The Use of Peremptory Challenge in Capital Murder Trials: A Legal and Empirical Analys*is, 3 U. Pa. J. Const. L. 3, 126 (2001) (finding that "prosecutors appear to have been more successful in striking life-prone black venire members than were defense counsel in striking death-prone non-black venire members").

Kansas is no exception. Since 1986, when *Batson* was decided, the Kansas Supreme Court has reviewed the cases of only three defendants in which the death penalty was imposed.[344] The court reviewed another two cases in which the defendants were tried for capital murder, but the defendant was not sentenced to death, and a third case in which the guilt and penalty phases were bifurcated.[345] In several cases, jurors' views on capital punishment were, at least in part, the basis for the State's peremptory challenges, prompting the defendant to object under *Batson*.[346] My inquiry was: Does the Kansas Supreme Court consider a juror's views on capital punishment to be a "race-neutral" reason for a peremptory challenge? As follows, in each case I reviewed, the answer was "yes":

In *State v. Trotter*, the State used nine of its 16 peremptories against the 10 African Americans in the jury pool.[347] In each instance at issue on appeal, the Kansas Supreme Court agreed that the State's reliance on jurors' reservations about capital punishment was "race-neutral."[348]

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[344] *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (Kan. 2001); *State v. Reginald Carr*, 300 Kan. 1, 331 P.3d 544 (Kan. 2014) (per curiam), *reversed and remanded by Kansas v. Carr*, 577 U.S. 108 U.S. (2016); *opinion on remand*, 314 Kan. 615, 502 P.3d 546 (Kan. 2022); *State v. Jonathan Carr*, 300 Kan. 340, 329 P.3d 1195 (Kan. 2014) (per curiam), *reversed and remanded by Kansas v. Carr*, 577 U.S. 108 U.S. (2016), *opinion on remand*, 314 Kan. 744, 502 P.3d 511 (Kan. 2022).

[345] *State v. Trotter*, 280 Kan. 800, 127 P.3d 972 (Kan. 2006); *State v. Bradford*, 272 Kan. 523, 34 P.3d 434 (Kan. 2001). The court reviewed Trotter's conviction and/or sentence in subsequent cases in which peremptory challenges were not at issue. In *State v. Hill*, 290 Kan. 339, 355, 228 P.3d 1027 (Kan. 2010), the defendant was tried and convicted of capital murder, but the guilt trial was bifurcated from the penalty trial, and the State later withdrew its death notice.

[346] In the first appeals on behalf of both defendants in *State v. Carr*, the Kansas Supreme Court decided—consistent with its holdings in the other cases discussed in this section—that a juror's death-penalty view is a "race-neutral" reason for the exercise of a peremptory challenge. 300 Kan. at 129; 300 Kan at 357. The issue in *Carr*, however, involved whether the erroneous *denial* of the defendants' peremptory challenge required reversal. 300 Kan. at 130-39 (applying *Rivera v. Illinois*, 556 U.S. 148 (2009); 300 Kan. at 357).

[347] *Trotter*, 280 Kan. at 811. On appeal, the defendant raised *Batson* claims only as to some the struck African-American prospective jurors. *Id*. at 815.

[348] *Id*. at 816-17.

In *State v. Bradford*, the defendant objected to the State's removal of juror T.B., who is Latina and was "the only minority individual remaining in the venirepanel at the time she was stricken."[349] One of the prosecution's reasons was her view on the death penalty, which were neutral (neither for nor against).[350] The state supreme court found other reasons "race neutral" and did not address the juror's views on capital punishment.[351]

In *State v. Kleypas*, the State struck juror Wheeler for two reasons, one of which was her uncertainty about the death penalty as "a necessary punishment."[352] The Kansas Supreme Court, citing a number of state and federal opinions, held that "such a practice [is] not . . . improper."[353]

In *State v. Hill*, the prosecution exercised a peremptory challenge against all three African-American venirepersons.[354] The trial judge granted the defendant's *Batson* objection to one prospective juror, and he was seated.[355] On appeal, Hill raised only the State's removal of juror S.B, who the State had unsuccessfully challenged for cause.[356] It appears that the jury was not formally death qualified because it was agreed that a different jury would hear the penalty phase.[357] However, the questionnaire asked jurors their views on capital punishment.[358] The prosecutor explained that he struck juror S.B. for two reasons, one of which was her opposition to the death penalty.[359] The State did not ask Ms. Barker any questions about her death-penalty

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[349] *Bradford*, 272 Kan. at 529.
[350] *Id*. at 529.
[351] *Id*. at 530.
[352] *Kleypas*, 272 Kan. at 998. The defendant objected to the strike on the basis of gender. *Id*.
[353] *Id*. at 1000.
[354] *State v. Hill*, Brief of Appellant, 2009 WL 1527652, at *21 (2009).
[355] *Id.*
[356] *Hill*, 290 Kan. at 359-60.
[357] *Id*. at 360; Brief of Appellant at *23, *State v. Hill*, No. 05-94589-S (Kan., May 6, 2009), 2009 WL 1527652.
[358] *Hill*, 290 Kan. at 360.
[359] *Id*. at 360.

views.[360] The court rejected the defendant's argument that the State, in order to obtain a conviction-prone jury, was improperly death qualifying the jury when death was not on the table.[361] The court relied on *Trotter*'s holding that the reason was "race-neutral" and further held that the State did not need to inquire of the juror during voir dire about her answers on the questionnaire.[362]

VIII. Conclusion

Both a quantitative and qualitative review of the application of the *Batson* framework in Kansas reveals that it has failed to accomplish the goals identified by the United States Supreme Court when *Batson* was decided in 1986. In practice, the inquiry has neither eliminated nor even significantly reduced the disproportionate exclusion of jurors of color—especially Black jurors—from Kansas juries. My findings are consistent with those of studies conducted in other state and federal jurisdictions. They reflect the shortcomings Justice Marshall identified in his concurring opinion in *Batson*, in the standard itself, and in the resistance (explicit and implicit) to enforcing it on the part of prosecutors and judges.

[360] *Id*. at 361.
[361] *Id*. at 360.
[362] *Id*. at 360-61. The court also relied on *Lockhart v. McCree*, 476 U.S. 162, 173 (1986) for the proposition that even if a death-qualified jury is more likely to convict, this circumstance does not offend the federal Constitution.