No. 111, September Term, 1993
Gary Gilchrist v. State of Maryland

[Whether The Holding By The Supreme Court In *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), Applies To Peremptory Challenges Aimed At Excluding White Prospective Jurors From The Venire Based On Their Race]

IN THE COURT OF APPEALS OF MARYLAND

No. 111

September Term, 1993

GARY GILCHRIST

v.

STATE OF MARYLAND

Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker,

JJ.

Opinion by Eldridge, J.
Chasanow and Bell, JJ., concur.

Filed: November 28, 1995

The principal issue in this criminal case is whether the holding by the Supreme Court in *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), applies to peremptory challenges aimed at excluding white prospective jurors from the venire based on their race.

I.

Gary Gilchrist was charged with distribution of cocaine and possession of cocaine with intent to distribute. On August 3, 1992, he was tried before a jury in the Circuit Court for Baltimore City.

Jury selection at Gilchrist's trial was done in accordance with the following procedure. The trial judge conducted voir dire of the prospective jurors. After the roll of prospective jurors was called, voir dire commenced, the attorneys made their challenges for cause to the trial judge, and the stricken jurors were dismissed. The clerk then called off the names and numbers of the remaining prospective jurors one at a time, proceeding down the jury list from the top. Both sides exercised their peremptory challenges to each prospective juror immediately after his or her name was called. If a prospective juror was not challenged, that

person was seated in the jury box until twelve jurors were seated. Once twelve jurors were seated in the box, the court then offered the parties a second opportunity to exercise peremptory challenges against the jurors who were already seated. If any jurors were then struck by the parties' attorneys, the process would begin again with the clerk calling off the name of the next prospective juror on the list. Jury selection continued in this fashion until twelve unchallenged jurors were ultimately seated.

Prior to the jury box becoming filled the first time, the State and the defense had each exercised one peremptory challenge. Once twelve jurors were seated, the defendant's attorney then exercised a peremptory challenge against one of the seated jurors, resulting in that juror's dismissal. The clerk then called off the next prospective juror on the list. This process continued, with the box continually filling and the defense exercising peremptories, directed either at a seated juror or at the next prospective juror on the jury list, until defense counsel had exercised seven peremptory challenges. All of the prospective jurors struck by the defense counsel to this point had been white. After the seventh prospective juror was challenged by defense counsel, the State raised an objection, arguing that the defense was attempting to remove all white prospective jurors from the jury in violation of the principles set forth in *Batson v. Kentucky, supra.* The prosecuting attorney stated:

> "ASSISTANT STATE'S ATTORNEY: I don't know the name of the case, but it is the case that came down after [*Batson*] which indicates that there are -- there is no right to any racially motivated strikes. And every strike so far exercised by the defense counsel has been of white jurors.
>
> "Some of those jurors have not answered questions so it cannot be based on the fact that they gave answers that would indicate --
>
> "THE COURT: Which juror are you questioning or do you want to go through a reason for each one of them?
>
> "ASSISTANT STATE'S ATTORNEY: For each one.
>
> "THE COURT: All right. That's seven jurors you've struck. They were all white. Let's go through them one by one and give me the reasons you struck them."

The court found the defendant's reasons for striking three of the jurors to be acceptable.[1] With respect to the remaining jurors, the following colloquy ensued:

Juror 3

> "DEFENSE COUNSEL: Judge, I personally, by looking at her -- I see jurors in the box and I look at the way they relate to each other.
>
> "THE COURT: Well, how did she look?
>
> "DEFENSE COUNSEL: [S]he reminded me of my Catholic School teacher that I didn't particularly like . . . . Her look . . . at

[1] Two of the jurors were challenged by the defendant because they were crime victims, and the other juror was challenged because the defendant was uncomfortable with the way the juror stared at him.

the other people who were in the [jury] box.

"THE COURT: That's not a satisfactory explanation."

Juror 5

"DEFENSE COUNSEL: Judge, he was young. I didn't think particularly he would be a strong juror for my case by looking at him.

"THE COURT: And why was that?

"DEFENSE COUNSEL: Because I look at the way he fits into the persons that are on the panel. And what I'm trying to accomplish from the look of him, from the way he sat --

"THE COURT: Well, how did he look from the way he was sitting that made you feel he was not good, other than the fact he was white and young?

"DEFENSE COUNSEL: Well, he -- number one, most of the jurors would look at my client and look over at the table. He was just like sitting there not relating to anything in the room.

"THE COURT: Because he wasn't relating to your client?

"DEFENSE COUNSEL: Not relating to anything or anyone in the room. Frankly, I don't think [he] even wanted to be here.

"THE COURT: I don't think that's a satisfactory explanation either."

Juror 137

"THE COURT: Why?

"DEFENSE COUNSEL: Oh why? He was -- I don't have anything written on here.

"THE COURT: Let the record reflect he was a young white male in a navy blazer and khaki slacks.

"DEFENSE COUNSEL: I believe he was -- I remember him, Judge, and . . . we say he was unacceptable.

"THE COURT: And [why] was that?

* * *

"DEFENSE COUNSEL: His clothing, his manner.

"THE COURT: What was wrong with his clothing and his manner?

"DEFENSE COUNSEL: Well, his manner and his clothing suggest to me . . . that he wouldn't be able to relate to my client because in this particular case there are -- there is the police officer's word against my client's word. My client may very well testify. And because of those things --

"THE COURT: Well, how do his clothing have anything to do with it? I don't make the connection.

"DEFENSE COUNSEL: The clothing, Judge, means when you go to Brooks Brothers and buy a suit, and maybe not the suit --

"THE COURT: The people who go to Brooks Brothers are more likely to believe police than defendants; is that what you're saying?

"DEFENSE COUNSEL: Not necessarily so. But given the little information I have about them, I must make judgments about these individuals.

"THE COURT: Well, what -- well, all right. That's right. So what information did you have . . . that required you to strike him?

"DEFENSE COUNSEL: . . . [H]e's a student. We don't know what he's studying --

"THE COURT: Well, we could have asked him.

"DEFENSE COUNSEL: Well, some courts don't let you bring them up and ask them.

"THE COURT: But you didn't ask.

"DEFENSE COUNSEL: He seems rather studious.

"THE COURT: Well, so what if he's studious? He's 21 years old.

"DEFENSE COUNSEL: Right. He has 16 years of education.

"THE COURT: Right.

"DEFENSE COUNSEL: That means he's done his college.

"THE COURT: Right.

"DEFENSE COUNSEL: . . . But for those reasons, Judge, --

"THE COURT: That's an unacceptable reason.

"DEFENSE COUNSEL: Those are my reasons.

"THE COURT: I mean, that's no reason at all. You're just citing his biography and saying those are reasons.

"DEFENSE COUNSEL: I have nothing else. Is the Court saying I can't strike him at all because --

"THE COURT: The Court is saying you have to, when you have struck seven jurors, potential jurors, . . . and they are all white and they all have different profiles, you're going to have to come up with a satisfactory explanation that persuades me that your reason for striking him was not racial. I mean, that's what the case law is saying.

"DEFENSE COUNSEL: I know, Judge. But I haven't said anything to you now that would

> suggest that the reasons were racial. Nothing.
>
> "THE COURT: Well, I'm not quite sure. . . . When you say that someone comes in a navy blazer and khaki slacks, and because he's a student and because of his address that's a reason for striking him --
>
> "DEFENSE COUNSEL: I said I don't know anything about his address because I don't know the address. But, Judge, that could have been a black man. Are we saying that black men don't wear blazers and khaki pants?
>
> "THE COURT: All right. That's -- I don't buy that as a satisfactory explanation.
>
> "DEFENSE COUNSEL: Very well."

With regard to the final juror struck, Juror Number 155, defense counsel was unable to recall her reasons for exercising the peremptory challenge. The court found that "that's not a satisfactory reason at all." In summation, the court said,

> "She [defense counsel] did give satisfactory reasons for [the two jurors] who are victims.
>
> "On the other hand, the other people she's struck, all of them are white, none of them have particular profiles. She hasn't seemed to come up with adequate answers."

The court excused the entire jury pool, including those members of the jury already chosen, and started jury selection anew with an entirely different pool of potential jurors. A second jury was chosen, and defense counsel answered affirmatively when the court asked if it was acceptable. The defendant was convicted of

both charges by the second jury, and the court sentenced him to serve five years imprisonment for each conviction, the terms to run concurrently.

Gilchrist took an appeal to the Court of Special Appeals, which affirmed. *Gilchrist v. State,* 97 Md. App. 55, 627 A.2d 44 (1993). His principal argument was that the *Batson* holding was inapplicable to peremptory challenges against white potential jurors. The defendant argued, alternatively, that even if *Batson* were applicable, the trial court erred in determining that the prosecution had made a *prima facie* showing of discrimination. The State both disagreed with the defendant's contentions and, alternatively, argued that any error which may have occurred was not preserved for appellate review because defense counsel waived her objections to the first jury panel when she stated that the second jury panel was acceptable to the defendant. Moreover, according to the State, any error that the trial court may have committed was harmless because the remedy for a violation would have been a new trial, which is essentially what the defendant received when the trial court impaneled the second jury.

The Court of Special Appeals held that the *Batson* issue was not waived by defense counsel's acceptance of the second jury. Nonetheless, the intermediate appellate court held that *Batson* was applicable to peremptory strikes exercised against white prospective jurors. The appellate court went on to hold that the

trial court did not err in finding that a *prima facie* case of discrimination had been established and that the reasons offered by defense counsel were unsatisfactory. Furthermore, the Court of Special Appeals determined that the trial court ordered the proper remedy when it dismissed the first jury pool and started jury selection anew.

The defendant petitioned this Court for a writ of certiorari, raising essentially the same issues which he had raised in the intermediate appellate court. The State filed a conditional cross-petition for a writ of certiorari, reiterating its contention that the *Batson* issue was waived when the defense counsel stated that the second jury was acceptable. We granted both petitions, 332 Md. 741, 633 A.2d 102 (1993).

II.

As a threshold matter, we consider the State's contention that the defendant waived or abandoned his objection to discharging the first jury pool when his counsel unequivocally stated that the jury chosen from the second pool was "acceptable."

This Court in a series of cases has taken the position that a defendant's claim of error in the inclusion or exclusion of a prospective juror or jurors "is ordinarily abandoned when the defendant or his counsel indicates satisfaction with the jury at the conclusion of the jury selection process." *Mills v. State*, 310 Md. 33, 40, 527 A.2d 3, 6 (1987), *vacated on other grounds*, 486

U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). *See Foster v. State,* 304 Md. 439, 450-451, 499 A.2d 1236, 1241-1242 (1985), *reconsideration denied,* 305 Md. 306, 503 A.2d 1326, *cert. denied,* 478 U.S. 1010, 106 S.Ct. 3310, 92 L.Ed.2d 723 (1986); *Thomas v. State*, 301 Md. 294, 310, 483 A.2d 6, 14 (1984), *cert. denied,* 470 U.S. 1088, 105 S.Ct. 1856, 85 L.Ed.2d 153 (1985); *White v. State,* 300 Md. 719, 729-731, 481 A.2d 201, 205-207 (1984), *cert. denied,* 470 U.S. 1062, 105 S.Ct. 1779, 84 L.Ed.2d 837 (1985); *Calhoun v. State,* 297 Md. 563, 579-580, 468 A.2d 45, 52 (1983), *cert. denied,* 466 U.S. 993, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984); *Couser v. State,* 282 Md. 125, 129, 383 A.2d 389, 391, *cert. denied,* 439 U.S. 852, 99 S.Ct. 158, 58 L.Ed.2d 156 (1978); *Glover, Robinson & Gilmore v. State,* 273 Md. 448, 330 A.2d 201 (1975); *Neusbaum v. State,* 156 Md. 149, 143 A. 872 (1928).

The principle set forth in the above-cited cases, however, relates to a complaint about the exclusion of a prospective juror from, or the inclusion of a prospective juror in, the jury which tried the defendant. None of these cases involved the situation where there were two separate jury pools, where the complaint related to the tentative jury panel drawn from the first pool, and where the jury which heard the case was drawn from the second pool.

When a party complains about the exclusion of someone from or the inclusion of someone in a particular jury, and thereafter states without qualification that the same jury as ultimately

chosen is satisfactory or acceptable, the party is clearly waiving or abandoning the earlier complaint about that jury. The party's final position is directly inconsistent with his or her earlier complaint.

Nevertheless, where the objection was not directly "aimed at the composition of the jury ultimately selected," we have taken the position that the objecting party's "approval of the jury as ultimately selected . . . did not explicitly or implicitly waive his previously asserted . . . [objection, and his] objection was preserved for appellate review." *Couser v. State*, *supra*, 282 Md. at 130, 383 A.2d at 392.

In the case at bar, when Gilchrist's attorney said that the second jury panel was "acceptable," her statement related only to the second jury panel. Having no objections to the manner in which the second jury was selected and to the composition of the second jury is not inconsistent with the complaints relating to the first jury. We agree with the Court of Special Appeals that defense counsel's finding the second jury panel acceptable "has no bearing on whether . . . error occurred in dismissing the first panel." 97 Md.App. at 71, 627 A.2d at 52.

III.

The defendant contends that white persons do not constitute "a cognizable racial group" within the meaning of that phrase as used by the Supreme Court in *Batson v. Kentucky, supra,* 476 U.S. at

96, 106 S.Ct. at 1723, 90 L.Ed.2d at 87. To be a cognizable racial group, Gilchrist contends, the group's members must "have been or are currently subjected to discriminatory treatment," *U.S. v. Bucci,* 839 F.2d 825, 833 (1st Cir.) (holding that Italian-Americans are not a cognizable group for purpose of *Batson* principle), *cert. denied,* 488 U.S. 844, 109 S.Ct. 117, 102 L.Ed.2d 91 (1988). He argues that *Batson* was intended to serve merely as a remedial measure to address historical discrimination in jury selection. In particular, he cites the long history of discrimination against African-Americans in jury selection, and concludes that "white persons are not entitled to the application of *Batson* since they are clearly not a group that has been `subjected to discriminatory treatment.'" (Petitioner's brief at 21).

"The function of the [peremptory] challenge is . . . to eliminate extremes of partiality on both sides, [and] to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." *Swain v. State of Alabama,* 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759, 772 (1965). *Accord: J.E.B. v. Alabama ex rel. T.B.,* 114 S.Ct. 1419, 1425-1426 and n. 8, 128 L.Ed.2d 89, 102 and n. 8 (1994); *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 620, 111 S.Ct. 2077, 2083, 114 L.Ed.2d 660, 673 (1991); *Vaccaro v. Caple,* 33 Md. App. 413, 416, 365 A.2d 47, 49-50 (1976).

Historically, a party has been given wide latitude in making

peremptory challenges. *See Batson v. Kentucky, supra,* 476 U.S. at 91, 106 S.Ct. at 1720, 90 L.Ed.2d at 84; *Parker v. State,* 227 Md. 468, 470, 177 A.2d 426, 427 (1962); *Turpin v. State,* 55 Md. 462 (1881). The Supreme Court observed in *Swain v. State of Alabama, supra,* 380 U.S. at 220, 85 S.Ct. at 836, 13 L.Ed.2d at 772, that "[t]he 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. . . . [T]he peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable" than that required for a challenge for cause.

The right to exercise peremptory challenges, however, is not absolute.[2] The Supreme Court has long recognized that jurors "should be selected as individuals, on the basis of individual qualifications, and not as members of a race." *Cassell v. State of Texas,* 339 U.S. 282, 286, 70 S.Ct. 629, 631, 94 L.Ed. 839, 847 (1950) (Reed, J., announcing judgment of the Court). In *Swain v. State of Alabama, supra,* 300 U.S. at 203-205, 85 S.Ct. at 826-827, 13 L.Ed.2d at 763-764, the Supreme Court recognized that the

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[2] There is no constitutional right to a peremptory challenge. *J.E.B. v. Alabama ex rel. T.B.,* 114 S.Ct. 1419, 1426 n. 7, 128 L.Ed.2d 89, 102 n. 7 (1994); *Georgia v. McCollum,* 112 S.Ct. 2348, 2358, 120 L.Ed.2d 33, 50 (1992); *King v. State Roads Comm'n,* 284 Md. 368, 396 A.2d 267 (1979). In Maryland, the right to exercise peremptory challenges in criminal cases is granted by Maryland Code (1974, 1995 Repl. Vol.), § 8-301 of the Courts and Judicial Proceedings Article, and Maryland Rule 4-313.

State's exercise of peremptory strikes to exclude potential jurors from the venire on the basis of race was unconstitutional. It was not until the Supreme Court's opinion in *Batson v. Kentucky, supra,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, however, that the Court established the means for a party to challenge alleged racially motivated peremptory challenges by the other party based solely on the latter's actions in that case.

The Supreme Court in *Batson* articulated at least three separate rationales underlying its determination that race-based peremptory challenges are unconstitutional. First, "[t]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race. . . ." *Batson v. Kentucky, supra,* 476 U.S. at 86, 106 S.Ct. at 1717, 90 L.Ed.2d at 80. Second, the excluded juror's equal protection rights are violated when the juror is challenged because of his or her race. 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81. Third, the Court explained, the harm that stems from race-based peremptory challenges "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. . . . [It] undermine[s] public confidence in the fairness of our system of justice." *Ibid.*

The majority of courts throughout the country which have considered *Batson's* applicability to excluded white prospective jurors have determined that the same reasoning underlying the

Court's decision in *Batson* applies with equal force to race-based peremptory challenges exercised against white prospective jurors. *See Government of Virgin Islands v. Forte,* 865 F.2d 59, 64 (3d Cir. 1989); *State v. Knox,* 609 So.2d 803 (La. 1992); *State v. Davis,* 830 S.W.2d 469 (Mo. App. 1992); *People v. Davis,* 142 Misc.2d 881, 892-893, 537 N.Y.S.2d 430, 436-437 (1988); *People v. Gary M.,* 138 Misc.2d 1081, 1090, 526 N.Y.S.2d 986, 994 (1988). *See also Elliott v. State,* 591 So.2d 981, 982-984 and n. 3 (Fla. App. 1992) (deciding on state constitutional grounds that whites may not be peremptorily stuck from the jury pool based on race). *Cf. Roman v. Abrams,* 822 F.2d 214, 227-228 (2d Cir. 1987) (whites constitute a cognizable racial group for purposes of the Sixth Amendment fair cross-section guarantee), *cert. denied,* 489 U.S. 1052, 109 S.Ct. 1311, 103 L.Ed.2d 580 (1989). *See also Georgia v. McCollum,* 505 U.S. 42, 112 S.Ct. 2348, 2360 n.2, 120 L.Ed.2d 33, 53 n.2 (1992) (Thomas, J., concurring) (stating that the majority's opinion, which extended *Batson* to a white defendant's peremptory challenges aimed at removing all African-Americans from the jury, would apply with equal force to the case of a minority defendant's exercise of peremptory challenges to remove white prospective jurors); 505 U.S. at 58, 112 S.Ct. at 2364, 120 L.Ed.2d at 58 (O'Connor, J., dissenting); *Edmonson v. Leesville Concrete Co., Inc., supra,* 500 U.S. at 644, 111 S.Ct. at 2095, 114 L.Ed.2d at 689 (Scalia, J., dissenting).

Although, in the instant criminal case, the defendant rather than the prosecution exercised peremptory strikes in a racially discriminatory manner, the Supreme Court has held that *Batson's* holding applies to peremptory challenges exercised by the defendant in a criminal proceeding, *Georgia v. McCollum, supra,* 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33. Justice Blackmun, announcing the judgment of the Court in *Georgia v. McCollum,* explained (505 U.S. at 50, 112 S.Ct. at 2353-2354, 120 L.Ed.2d at 45):

> "Be it at the hand of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could undermine the very foundation of our system of justice -- our citizens' confidence in it. Just as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal."

Furthermore, the excluded jurors' equal protection rights are affected regardless of who exercises the race-based peremptory challenges which result in their removal. *See Georgia v. McCollum, supra,* 505 U.S. at 48-49, 112 S.Ct. at 2353, 120 L.Ed.2d at 44; *Batson v. Kentucky, supra,* 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81; *Strauder v. West Virginia,* 100 U.S. 303, 308, 25 L.Ed. 664, 666 (1880). *See also Carter v. Jury Commission of Greene County,* 396 U.S. 320, 329, 90 S.Ct. 518, 523-524, 24 L.Ed.2d 549,

557 (1970) ("People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion"). *Cf. Edmonson v. Leesville Concrete Co., supra,* 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (the *Batson* holding applies to peremptory challenges exercised by private parties in a civil case).

The Supreme Court's recent cases considering *Batson's* reach indicate the great importance that the Court places on the equal protection rights of the excluded jurors. *See, e.g., Georgia v. McCollum, supra,* 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33; Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service,* 61 U. Cin. L. Rev. 1139, 1142 (1993) ("The goal of protecting those summoned to serve, once a background feature, has now moved to the center of the analysis"). *See generally* Barbara D. Underwood, *Ending Discrimination in Jury Selection: Whose Right is it, Anyway?,* 92 Colum. L. Rev. 725 (1992). Very recently, Justice Blackmun, delivering the opinion of the Court in *J.E.B. v. Alabama ex rel. T.B., supra,* 114 S.Ct. at 1427-1428, 128 L.Ed.2d at 104-105, said:

> "In recent cases we have emphasized that individual jurors themselves have a right to nondiscriminatory jury selection procedures. . . . All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of

> historical discrimination. Striking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by law, an assertion of their inferiority.' *Strauder v. West Virginia,* 100 U.S. 303, 308, 25 L.Ed. 664 1880). It denigrates the dignity of the excluded juror. . . . The message it sends to all those in the courtroom, and all those who may later learn of the discriminatory acts, is that certain individuals, for no other reason than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree."

The Fourteenth Amendment's equal protection guarantee "cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Regents of University of California v. Bakke,* 438 U.S. 265, 289-290, 98 S.Ct. 2733, 2747-2748, 57 L.Ed.2d 750, 770-771 (1978).[3] Thus, over a hundred years ago, the Supreme Court in *Strauder v. West Virginia, supra,* 100 U.S. at 308, 25 L.Ed at 666, observed that

> "[i]f in those States where the colored people

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[3] "Although the Maryland Constitution does not contain an express guarantee of equal protection, it is well established that Article 24 embodies the same equal protection concepts found in the Fourteenth Amendment to the U.S. Constitution." *Verzi v. Baltimore County,* 333 Md. 411, 417, 635 A.2d 967, 969-970 (1994), and cases there cited. *See also Maryland Aggregates v. State,* 337 Md. 658, 671-672 n.8, 655 A.2d 886, 893 n.8 (1995). As such, we generally consider Supreme Court case law interpreting the Fourteenth Amendment as persuasive, although not controlling, authority when interpreting Article 24. *Maryland Aggregates v. State, supra,* 337 Md. at 671-672 n.8, 655 A.2d at 893 n.8.

> constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws."

The Supreme Court's opinion in *J.E.B. v. Alabama ex rel. T.B., supra,* 114 S.Ct. 1419, 128 L.Ed.2d 89, confirms that the *Batson* principle is not limited to the exclusion from juries of historically oppressed minorities. In *J.E.B.,* the Court considered whether the *Batson* principle could be invoked by a male defendant in a paternity and child support action, where the State had utilized its peremptory challenges to exclude all male prospective jurors. The basis for the Court's decision to apply the *Batson* principle to gender-based peremptory challenges was the heightened scrutiny of gender classifications under the Fourteenth Amendment's Equal Protection Clause.

Consequently, it is clear that "Blacks are not the only cognizable [racial] group to which *Batson* applies. . . ." *Mejia v. State,* 328 Md. 522, 530, 616 A.2d 356, 359 (1992). As we explained in *Tyler v. State,* 330 Md. 261, 266, 623 A.2d 648, 651 (1993)):

> "*Batson* held that equal protection guarantees forbid the State in a criminal prosecution to use peremptory challenges to exclude potential jurors solely on account of their race or on the assumption that because of their race they will be unable to be impartial."

This protection applies equally to white persons and black persons. A peremptory challenge based on race cannot be squared with equal protection principles. Thus, under both Article 24 of the Maryland Declaration of Rights and the Equal Protection Clause of the Fourteenth Amendment, peremptory challenges may not be exercised on the basis of race.

IV.

Finally, Gilchrist argues that even if the *Batson* holding is applicable to peremptory challenges against white prospective jurors, the trial court in the instant case improperly applied *Batson*. He contends that the court failed to make a finding of fact that there existed a *prima facie* showing of purposeful racial discrimination before requiring defense counsel to submit race-neutral reasons for her challenges. Moreover, the defendant asserts that the trial court erred in finding a *Batson* violation because the court merely disagreed with defense counsel's reasons. Our examination of the trial court's application of *Batson* reveals no error.

The Supreme Court in *Batson* articulated a three-step process to be utilized by trial courts in assessing claims that peremptory challenges were being exercised in an impermissibly discriminatory manner. *See also Purkett v. Elem*, 115 S.Ct. 1768, 1770-1771, 131 L.Ed.2d 834, 839 (1995); *Whittlesey v. State*, ___ Md. ___, ___, ___

A.2d ___, ___ (1995).

First, the complaining party has the burden of making a *prima facie* showing that the other party has exercised its peremptory challenges on an impermissibly discriminatory basis, such as race or gender. *See Batson*, 476 U.S. at 93-97, 106 S.Ct. at 1721-1723, 90 L.Ed.2d at 85-88. Moreover, "[w]hether the requisite *prima facie* showing has been made is the trial judge's call. . . . " *Mejia v. State, supra,* 328 Md. at 533, 616 A.2d at 361.

Second, once the trial court has determined that the party complaining about the use of the peremptory challenges has established a *prima facie* case, the burden shifts to the party exercising the peremptory challenges to rebut the *prima facie* case by offering race-neutral explanations for challenging the excluded jurors. The "explanation must be neutral, related to the case to be tried, clear and reasonably specific, and legitimate." *Stanley v. State, supra,* 313 Md. at 78, 542 A.2d at 1280. The reason offered need not rise to the level of a challenge for cause, *Batson v. Kentucky, supra,* 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88. "At this step of the inquiry, the issue is the facial validity of the . . . explanation." *Hernandez v. New York,* 500 U.S. 352, 360, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395, 406 (1991). It is insufficient, however, for the party making the peremptory challenges to "merely deny[] that he had a discriminatory motive or

. . . merely affirm[] his good faith." *Purkett v. Elem, supra*, 115 S.Ct. at 1771, 131 L.Ed.2d at 840. *See also Chew v. State,* 317 Md. 233, 242, 562 A.2d 1270, 1277 (1989); *Tolbert v. State,* 315 Md. 13, 19, 553 A.2d 228, 230 (1988).

Finally, the trial court must "determine[] whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Purkett v. Elem, supra,* 115 S.Ct. at 1771, 131 L.Ed.2d at 839; *Hernandez v. New York, supra,* 500 U.S. at 359, 111 S.Ct. at 1865, 114 L.Ed.2d at 405; *Batson v. Kentucky, supra,* 476 U.S. at 98, 106 S.Ct. at 1723, 90 L.Ed.2d at 88-89. This includes allowing the complaining party an opportunity to demonstrate that the reasons given for the peremptory challenges are pretextual or have a discriminatory impact. *Stanley v. State, supra,* 313 Md. at 61-62, 542 A.2d at 1272-1273. It is at this stage "that the persuasiveness of the justification becomes relevant. . . ." *Purkett v. Elem, supra,* 115 S.Ct. at 1771, 131 L.Ed.2d at 839. "At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett*, 115 S.Ct. at 1771, 131 L.Ed.2d at 839.

While the complaining party has the ultimate burden of proving unlawful discrimination, and therefore should be offered the opportunity to demonstrate that the reasons offered were merely pretextual, *Stanley v. State, supra,* 313 Md. at 62, 542 A.2d at 1272-1273, the court may find that the reasons offered were

pretexts for discrimination without such demonstration from the complainant. *See Purkett v. Elem*, *supra*, 115 S.Ct. at 1771, 131 L.Ed.2d at 839; *Hernandez v. New York*, *supra*, 500 U.S. at 363, 111 S.Ct. at 1868, 114 L.Ed.2d at 408.

These determinations made by the trial court are essentially factual, and therefore are "accorded great deference on appeal," *Hernandez v. New York, supra,* 500 U.S. at 364, 111 S.Ct at 1868-1869, 114 L.Ed.2d at 408-409; *Batson v. Kentucky, supra,* 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21, 90 L.Ed.2d at 89 n. 21; *Chew v. State, supra,* 317 Md. at 245, 562 A.2d at 1276. An appellate court will not reverse a trial judge's determination as to the sufficiency of the reasons offered unless it is clearly erroneous. *Stanley v. State, supra,* 313 Md. at 84, 542 A.2d at 1283. *See also Purkett v. Elem*, *supra*, 115 S.Ct. at 1771, 131 L.Ed.2d at 840.

In the present case, Gilchrist argues that the trial court improperly shifted the burden of proof onto him without determining whether a *prima facie* case of racial discrimination had been made. The trial judge's statements at the time the *Batson* challenge was raised refutes this argument. When the State's Attorney indicated that the defendant's peremptory challenges were suspect under the principles articulated in *Batson,* the trial judge said to the defendant:

> "All right. That's seven jurors you've struck. They were all white. Let's go

> through them one by one and give me the reasons you struck them."

Moreover, at a later colloquy between defense counsel and the court concerning counsel's explanation for striking prospective juror number 137, the court again said:

> "The court is saying you have to, when you have struck seven jurors, potential jurors, . . . and they are all white and they all have different profiles, you're going to have to come up with a satisfactory explanation that persuades me that your reason for striking [these jurors] was not racial."

In sum, the trial judge's statements clearly disclose that the court found that the defendant's exercise of seven peremptory challenges, all of which were directed at white prospective jurors, was sufficient to establish a *prima facie* case of racial discrimination. The court was neither required to make more detailed findings nor to use the precise words "*prima facie.*"

Moreover, we note that the issue of whether a *prima facie* case was properly made before the trial court has been treated as moot once the party making the peremptory challenges has offered explanations for the discriminatory challenges, and "the trial court has ruled on the ultimate question of intentional discrimination." *Hernandez v. New York, supra,* 500 U.S. at 359, 111 S.Ct. at 1866, 114 L.Ed.2d at 405. *See, e.g., U.S. v. Perez,* 35 F.3d 632, 635 (1st Cir. 1994); *U.S. v. Koon,* 34 F.3d 1416, 1440

(9th Cir. 1994); *U.S. v. Pofahl,* 990 F.2d 1456, 1465 n. 4 (5th Cir. 1993); *U.S. v. Johnson,* 941 F.2d 1102, 1108 (10th Cir. 1991); *U.S. v. Forbes,* 816 F.2d 1006, 1010 (5th Cir. 1987); *Safeway Stores, Inc. v. Buckmon,* 652 A.2d 597, 602 (D.C. App. 1994).

Lastly, the trial court's findings, that the defendant's reasons for exercising his peremptory challenges were insufficient to overcome the *prima facie* case of racial discrimination, were not clearly erroneous. With respect to one of the challenged jurors, defense counsel could offer no reasons. As to three other jurors, the reasons given by defense counsel were that one looked like a former school teacher whom defense counsel did not like, one did not "relate to" anyone or anything in the courtroom, and one was dressed in a navy blazer and khaki slacks. Under all of the circumstances, the trial judge was warranted in holding that these reasons were pretextual.[4]

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[4] Judge Chasanow in his concurring opinion asserts that the discussion of the waiver or abandonment issue in Part II of this opinion is "unnecessary," and he states that it is "unclear" why the majority deals with the issue. Judge Chasanow points out that the error-free selection of a new acceptable jury from a second jury pool rendered any errors in the earlier jury selection harmless or, in Judge Chasanow's terminology, "moot." Of course, the same comment could be made with regard to the discussion and resolution of the equal protection issue in Part III of this opinion and the discussion and resolution of the other issue raised by the defendant in Part IV of this opinion. The discussion of waiver and abandonment in Part II is no more "unnecessary" than the discussions in Parts III and IV. Nevertheless, Judge Chasanow agrees with the discussion of the equal protection issue in Part III, and he separately presents his views regarding the issue dealt with in Part IV.

(continued...)

JUDGMENT AFFIRMED, WITH COSTS.

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[4](...continued)
The reasons for deciding the three issues raised by the parties in this case are not "unclear." As previously discussed, the defendant Gilchrist presented in a certiorari petition the two issues decided in Parts III and IV of this opinion. The State filed a cross-petition for a writ of certiorari, presenting *only* the waiver/abandonment issue. This Court could have denied the petitions on the ground that, if there were any errors in the initial jury selection process, the later error-free selection from a second pool of a jury acceptable to the defendant clearly rendered such earlier errors harmless. Nonetheless, the Court, believing that resolution of the three questions presented was important and in the public interest, granted both the defendant's petition and the State's cross-petition.

The State in the Court of Special Appeals had alternatively argued that any errors committed by the trial judge, in connection with the initial jury selection and discharge of the first jury pool, were harmless. The State's brief in this Court, however, did not include a harmless error argument. Analytically, the issue of whether error is prejudicial or harmless only arises if there is error. If an appellate court finds no error, there is no issue of harmless error. We have held that none of the errors claimed by Gilchrist was in fact committed by the trial judge; consequently the issue of prejudicial or harmless error does not logically arise.

We wish to emphasize, however, that if the State had raised the question of harmless error in its brief or if the Court should have decided to address the matter sua sponte, and if we had concluded that the trial judge had committed either of the errors claimed by the defendant, we would hold that the error-free selection of a second jury acceptable to the defendant rendered harmless any earlier error. *See Dorsey v. State*, 276 Md. 638, 350 A.2d 665 (1976).