IN THE SUPREME COURT OF THE STATE OF DELAWARE

ISAIAH W. McCOY,	)	
Defendant Below-	)	**Nos. 558/595, 2012**
Appellant,	)	**[CONSOLIDATED]**
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
Plaintiff Below-	)	
Appellee,	)	

STATE'S ANSWERING SUPPLEMENTAL MEMORANDUM

Pursuant to this Court's October 1, 2014 Order following en banc oral argument on September 24, 2014, this consolidated direct appeal was remanded to the Kent County Superior Court to conduct an explicit analysis pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), and to identify the basis of its May 23, 2012 jury selection ruling (A-2151) on the State's reverse-Batson challenge. McCoy v. State, 2014 WL 4980371 (Del. Oct. 1, 2014) (Exhibit A). The Superior Court trial judge has now issued his Report on Remand. State v. McCoy, Del. Super., ID No. 1005008059A, Witham, R.J. (Oct. 27, 2014)(OPINION) (Exhibit B). The trial judge correctly applied the law to this reverse-Batson contention, and his factual determination of a discriminatory intent by the defendant in exercising a peremptory jury challenge is not clearly erroneous and should be upheld on appeal. See generally Burton v. State, 2007 WL 1417286 (Del. May 15, 2007) at * 1 (reverse-Batson challenge); Jones v. State, 940 A.2d 1, 9 (Del. 2007) ("The record

of the trial court's credibility determinations . . . and the trial court's findings with respect to discriminatory intent will stand unless they are clearly erroneous."); Sykes v. State, 953 A.2d 261, 269 (Del. 2008).

A three step analysis is utilized in assessing claims of racially discriminatory use of peremptory jury challenges. See Jones v. State, 938 A.2d 626, 631 (Del. 2007) (cited in McCoy, supra at * 2 (Exhibit A)). First, the moving party (in this case, the State) must make a prima facie showing that the opposing party (pro se defendant Isaiah W. McCoy) has exercised a peremptory jury strike (A-2151) on the basis of race. Second, if that prima facie showing is made, the burden shifts to the party exercising the strike (McCoy) to offer a race-neutral explanation for the peremptory challenge. Finally, the trial judge must determine if the State has carried its burden in a reverse-Batson challenge of proving purposeful discrimination. See Jones, 938 A.2d at 631. See also Robertson v. State, 630 A.2d 1084, 1089 (Del. 1993); Johnson v. California, 545 U.S. 162, 168 (2005); Boston v. Brown, 2014 WL 726683 (E.D.N.Y. Feb. 24, 2014) at * 12 (reverse-Batson). The Superior Court Judge on remand recognized and correctly applied this 3 step analysis. McCoy, supra at p. 8 (Exhibit B).

The third part of the 3 step Batson analysis requires the trial judge to make "an ultimate determination on the issue of discriminatory intent based on all the facts and circumstances." United States v. Thompson, 528 F.3d 110, 115 (2d Cir.

2008) (reverse-Batson) (quoting United States v. Alvarado, 923 F.2d 253, 256 (2d Cir. 1991)). "The standard of review applied to the ultimate determination of whether there was purposeful discrimination . . . is clearly erroneous." Burton, supra at * 1 (citing Hernandez v. New York, 500 U.S. 352, 372 (1991)). "The issue of intent to discriminate is a 'pure issue of fact.'" Coombs v. DiGuglielmo, 2014 WL 4179950 (3d Cir. Aug. 25, 2014) at * 4 (quoting Hernandez, 500 U.S. at 364). This determination of discriminatory intent "turns on the fact finder's evaluation of the witness's credibility." Coombs, supra at * 4 (citing Batson v. Kentucky, 476 U.S. 79, 98 n. 21 (1985)).

In his Opening Supplemental Memorandum, McCoy argues at page 3 that a reverse-Batson challenge "was not raised." This is incorrect. On the fifth day of jury selection (May 21, 2012), after McCoy used an eighth peremptory challenge to remove another white potential juror (A-1934), the State did make a reverse-Batson challenge. (A-1934). The State pointed out that "The defendant struck eight people, all of which have been white, and we would like to hear some justification for the strikes, particularly the last juror." (A-1934). McCoy responded by saying that he removed the last potential juror "because his son is a police officer," and added, "His son is Caucasian, he's a police officer." (A-1934). The State replied that McCoy was evaluating potential jurors on the basis of "their race." (A-1934). McCoy, supra at * 1 (Exhibit A). The State's reverse-Batson challenge was clearly

before the trial court, and the trial judge gave McCoy "a warning" that he could not remove prospective jurors on the basis of race. (A-1943).

On remand, the trial judge found, "With regard to the first prong, a prima facie showing was made that Defendant exercised a peremptory challenge on the basis of race when he attempted to strike a 15th Caucasian juror, Mr. Hickey." McCoy, supra at p. 11 (Exhibit B). While McCoy complains at pages 3-4 of his Opening Supplemental Memorandum that the Superior Court "engaged in no statistical analysis," the statistics in McCoy's case are simple and not helpful to the accused. McCoy used 100% of his peremptory jury challenges to remove 14 Caucasian potential jurors. Compare United States v. Thompson, 528 F.3d 110, 115 (2d Cir. 2008) (85% defense challenges against white jurors, none against African American jurors). When McCoy attempted to remove á fifteenth Caucasian potential juror (A-2151), the trial judge asked McCoy to state his reason for the challenge. (A-2151). Perhaps the only other relevant statistic in this case is the final guilt phase jury composition of 6 Caucasians, 5 African Americans, and 1 Hispanic. The statistics in the case are of no assistance to McCoy.

As to the second step in the Batson analysis, the trial judge did find that McCoy articulated a "non-discriminatory" reason for attempting to remove Hickey from the jury. McCoy, supra at pp. 11-12 (Exhibit B). Turning to the third and final step of the Batson analysis, the trial judge noted that he had "to determine if

[McCoy's] reasoning was mere pretext for a discriminatory purpose." McCoy, supra at p. 12 (Exhibit B). In deciding whether the State had established purposeful discrimination and a reverse-Batson violation by McCoy, the trial judge on remand wrote:

> In so evaluating, this Court took into account the preceding peremptory challenges of all Caucasian jurors, as well as the Defendant's weak reasoning for striking Mr. Hickey. It is here that the Court took into account the behavior of the Defendant as well as his previously stated discriminatory reasons for racial preference. Defendant smirking at the prosecutor during peremptory challenges illuminated Defendant's duplicity. Defendant's peremptory strike of Mr. Hickey was nothing other than an attempt to remove an acceptable juror because of a racial classification that was not yet verbalized.

McCoy, supra at p. 12 (Exhibit B).

The trial judge correctly followed the 3 step Batson paradigm on remand, and his factual findings are based upon competent evidence and are not clearly erroneous. There was no error in refusing to permit McCoy to remove a qualified Caucasian potential juror by use of a fifteenth peremptory jury strike.

Although proceeding pro se at trial, Isaiah McCoy's behavior at times was argumentative (A-1348), disrespectful to the prosecution (A-1341 – "I hate it when she lies blatantly like this."), and contemptuous to the trial judge. (A-1097, 1354, 1358, 2159). McCoy's referring to the trial judge as "Boss" and "Master" was both racially charged and reprehensible. (A-2159).

"The Equal Protection Clause forbids both the prosecution and the defense from engaging in purposeful discrimination on the basis of race in exercising peremptory challenges." Long v. Norris, 2007 WL 2021839 (E.D. Ark. July 10, 2007) at * 10. See Georgia v. McCollum, 505 U.S. 42, 55, 59 (1972). Engaging in purposeful racial discrimination in exercising peremptory jury strikes is exactly what McCoy did. See Powers v. Ohio, 499 U.S. 400, 407 (1991) ("a member of the community may not be excluded from jury service on account of his or her race."). Potential jurors have an interest in nondiscrimination in the jury selection process. Note, "Selecting a Jury in Federal Criminal Trials After Batson and McCollum," 95 Colum. L. Rev. 888, 903 (May 1995).

"Critical to any decision applying Batson are determinations of credibility and historical fact." Jones, 938 A.2d at 634. The trial judge's remand factual findings are based upon competent evidence and should be upheld because they are not clearly erroneous. See Robertson v. State, 630 A.2d 1084, 1090 (Del. 1993). See also Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574-75 (1985) ("only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of, and belief in what is said."). McCoy committed a reverse-Batson violation and his lead argument in this direct appeal must be rejected.

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DATE: November 17, 2014

Slip Copy, 2014 WL 4980371 (Del.Supr.)
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 2014 WL 4980371 (Del.Supr.))

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NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER.

Supreme Court of Delaware.
Isaiah W. **McCOY**, Defendant Below–Appellant,
v.
STATE of **Delaware**, Plaintiff Below–Appellee.

Nos. 558, 2012, 595, 2012.
Submitted: Sept. 24, 2014.
Decided: Oct. 1, 2014.

Background: Defendant was convicted in the Superior Court, Kent County, of two counts of first degree murder, first degree robbery, second degree conspiracy, and two counts of possession of a firearm during the commission of a felony (PFDCF), and he appealed.

Holding: The Supreme Court, Henry DuPont Ridgely, J., held that, because appellate court had incomplete record, case would be remanded to trial court with instructions to identify the basis for its ruling refusing to accept defendant's peremptory challenge of juror.

Remanded.

West Headnotes

Criminal Law 110 ⚖1181.5(2)

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(2) k. Remand for Amplification of Record. Most Cited Cases

Because appellate court had incomplete record, murder case would be remanded to trial court with instructions to identify the basis for its ruling refusing to accept defendant's peremptory challenge of juror; trial court did not articulate a rationale for its ruling other than there was no legitimate reason why defendant would exclude the juror, and if the ruling was based upon *Batson*, a full *Batson* analysis had to be conducted by the trial court.

Court Below: Superior Court of the State of Delaware in and for Kent County, ID No. 1005008059A.

Before STRINE, Chief Justice, HOLLAND, RIDGELY, VALIHURA, Justices, and BOUCHARD,[FN*] Chancellor, constituting the Court en Banc.

FN* Sitting by designation pursuant to art. IV, § 12 of the Delaware Constitution and Supreme Court Rules 2 and 4(a) to fill up the quorum as required.

ORDER

HENRY DuPONT RIDGELY, Justice.

*1 On this 1st day of October 2014, it appears to the Court that:

(1) In this capital murder case, Defendant–Below/Appellant Isaiah McCoy ("McCoy") appeals from a Superior Court jury conviction of two counts of First Degree Murder, First Degree Robbery, Second Degree Conspiracy, and two counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"). McCoy raises a total of five claims on appeal that he argues require reversal of his conviction and death sentence. His lead argument is that the trial court erred by *sua sponte* re-

Exhibit A

fusing to accept one of his peremptory challenges. McCoy argues that the court violated his right to a fair trial by seating a juror with significant potential bias over his objection. In response, the State argues that McCoy's peremptory challenge was made in a racially discriminatory manner, contrary to *Batson v. Kentucky,*[FN2] and that the trial court's refusal to accept McCoy's peremptory challenge was appropriately premised on a reverse *Batson* violation.[FN3] Because we find an incomplete record to review the trial court's application of *Batson,* we remand this case for completion of the record and retain jurisdiction.

FN2. 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

FN3. *See Burton v. State,* 925 A.2d 503, 2007 WL 1417286 (Del.2007).

(2) In July 2010, McCoy was charged with two counts of First Degree Murder, First Degree Robbery, Second Degree Conspiracy, two counts of PFDCF, and one count of Motor Vehicle Theft in connection with the shooting death of James Munford. In May 2012, the trial court granted McCoy's request to proceed *pro se* with standby counsel.

(3) During jury selection, McCoy, who is African–American, used peremptory strikes to remove fourteen Caucasians from the jury. When McCoy exercised a peremptory challenge to remove his eighth Caucasian juror from the panel, the prosecution made a reverse *Batson* challenge, asking that McCoy provide some justification for his peremptory strike. McCoy responded by stating that the juror's "son is Caucasian, he's a police officer."[FN4] The trial court then performed a *Batson* analysis and ultimately concluded that there was no reverse *Batson* violation. But the trial court issued a warning to McCoy, telling him that he "must show that [his] challenges are non-purposeful in terms of simply seeking the removal of a prospective juror on the basis of racial classification...."[FN5]

FN4. Appellant's Op. Br.App. at A1934.

FN5. Appellant's Op. Br.App. at A1943.

(4) On the seventh day of jury selection, McCoy used a peremptory challenge to remove David Hickey ("Hickey"), a Caucasian male. Hickey's wife had retired five years earlier as a counselor at the Smyrna Department of Corrections, where McCoy was an inmate. It was at this point that the trial court, referencing McCoy's challenge, stated: "Mr. McCoy, I'm going to need some justification because I can't think of a reason."[FN6] McCoy responded with two justifications for his challenge. First, he explained to the court that Hickey had paused when answering whether he could find McCoy not guilty. Second, he stated:

FN6. Appellant's Op. Br.App. at A2151.

> [Hickey's] wife is a counselor at DCC. I'm familiar with how inmates treat these counselors at times, some of the issues that went down. As he said, about five years ago, that's around the time when the lady was raped, the counselor lady, was raped in Smyrna. So I'm pretty sure he probably heard about that. His wife probably heard about that. So the counselors get an outlook that they have and their spouses, it may trickle onto their spouses things that they may have heard and for that it doesn't sit right.... I know on a day-to-day basis being back at the prison how people treat these counselors and very disrespectful way, throwing things on them like feces and things of that nature. So I don't know if he's ever told her—if she's ever told him anything about that but that just gives me a lot of pause in allowing the juror to sit on a trial while I have peremptory strikes to use, Your Honor.[FN7]

FN7. Appellant's Op. Br.App. at A2151.

***2** The trial court rejected McCoy's explanations, and found that that there was "no legitimate reason why [McCoy] would exclude the juror ."[FN8] The trial court reasoned that Hickey's wife had been retired for five years and that, although she had spoken to him generally about her work as a

counselor at the prison, she did not speak to him about "specific case[s]." FN9

FN8. Appellant's Op. Br.App. at A2151.

FN9. Appellant's Op. Br.App. at A2151.

(5) At the conclusion of trial, the jury found McCoy guilty on all counts except Motor Vehicle Theft. In accordance with 11 *Del. C.* § 4209(b), FN10 the trial court held a penalty hearing. At the conclusion of the hearing, the jury found that there were statutory aggravating factors present, making McCoy eligible for the death penalty under 11 *Del. C.* § 4209(c). FN11 The jury also found that the aggravating circumstances outweighed the mitigating circumstances and recommended the death penalty. In October 2012, the trial judge sentenced McCoy to death. This appeal followed.

FN10. 11 *Del. C.* § 4209(b) ("Upon a conviction of guilt of a defendant of first-degree murder, the Superior Court shall conduct a separate hearing to determine whether the defendant should be sentenced to death or to life imprisonment....").

FN11. 11 Del. C. § 4209(c).

(6) This Court has stated that " '[o]ne of the primary safeguards for impaneling a fair and impartial jury is a defendant's right to challenge prospective jurors, either peremptorily or for cause.' " FN12 In *Batson v. Kentucky,* the Supreme Court of the United States held that peremptory challenges can be used " 'for any reason at all, as long as that reason is related to [a] view concerning the outcome' of the case to be tried ... [and not based] solely on account of [the jurors'] race ... ." FN13 The Court went on to announce a tripartite analysis to be used when addressing a claim of racially-discriminatory peremptory challenges. As this Court reiterated in *Jones v. State,* FN14 the three analytical steps are as follows:

FN12. *Schwan v. State,* 65 A.3d 582, 587 (Del.2013) (quoting *Banther v. State,* 823 A.3d 467, 482 (2003)).

FN13. *Batson,* 476 U.S. at 89 (quoting *United States v. Robinson,* 421 F.Supp. 467, 473 (Conn.1976)).

FN14. *Jones v. State,* 938 A.2d 626, 631 (Del.2007).

"First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race.... Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question.... Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination...." FN15

FN15. *Id.* (quoting *Robertson v. State,* 630 A.2d 1084, 1089 (Del.1993)).

As to the second step of the analysis, "[a] 'legitimate reason is not a reason that makes sense, but a reason that does not deny equal protection.' " FN16 The reason is race-neutral "[u]nless a discriminatory intent is inherent in the [defendant's] explanation...." FN17 The Supreme Court of the United States has found that even "silly or superstitious" justifications are acceptable as legitimate reasons under the second step of *Batson.* FN18 "It is not until the *third* step that the persuasiveness of the justification becomes relevant-the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." FN19

FN16. *Dixon v. State,* 673 A.2d 1220, 1224 (Del.1996) (quoting *Purkett v. Elem,* 514 U.S. 765, 769, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)).

FN17. *Hernandez v. New York,* 500 U.S. 352, 360, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

FN18. *Purkett,* 514 U.S. at 768.

FN19. *Id.* (emphasis in original).

(7) Here, the trial court did not expressly refer to *Batson* when it refused to accept McCoy's peremptory challenge nor did it articulate a rationale for its ruling other than there was "no legitimate reason why [McCoy] would exclude the juror." If the ruling was based upon *Batson,* a full *Batson* analysis must be conducted by the trial court. We therefore conclude, consistent with our holding in *Jones v. State,* that this case must be remanded with the instruction that the trial court identify the basis for its ruling.

*3 NOW, THEREFORE, IT IS ORDERED pursuant to Rule 19(c) that this matter is **REMANDED** to the Superior Court for further proceedings consistent with this Order. The Superior Court shall file its Report with the Clerk within thirty days. A request for additional time shall be granted upon a showing of good cause. Jurisdiction is retained.

Del.Supr.,2014.
McCoy v. State
Slip Copy, 2014 WL 4980371 (Del.Supr.)

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EFiled: Oct 27 2014 03:47PM EDT
Filing ID 56251487
Case Number Multi-Case

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	Superior Court
	:	I.D. No. 1005008059A
v.	:	
	:	Supreme Court
ISAIAH W. MC COY,	:	Nos. 558 and 595,2012
	:	
Defendant.	:	

Submitted: October 1, 2014
Decided: October 27, 2014

OPINION

Report on Remand.

Appearances:

John Williams, Esquire, Department of Justice, Dover, Delaware; attorney for the State of Delaware.

Herbert W. Mondros, Esquire of Margolis Edelstein, Wilmington, Delaware and Erek L. Barron, Esquire, *Pro Hac Vice*, of Whiteford Taylor & Preston, LLP, Bethesda, Maryland; attorneys for Defendant.

WITHAM, R.J.

Exhibit B

On October 1, 2014, the Delaware Supreme Court (hereinafter "Supreme Court") heard Defendant's appeal for reversal of both his conviction and the death penalty. In sum, Defendant raises five (5) claims in his appeal, however his principal argument regards the use of his peremptory challenges. Defendant argues that this Court erred by *sua sponte* refusing to accept one of his peremptory challenges, and that this violated his right to a fair trial because a juror was seated with "significant potential bias over his objection."[1] The State argued that Defendant's peremptory challenge violated *Batson v. Kentucky*[2] because it was racially discriminatory. The State also contended that this Court was correct in refusing to accept Defendant's peremptory challenge.[3]

The Supreme Court found the record was incomplete with respect to this Court's application of *Batson*, and remanded the case for further analysis of this issue.

I. FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

Jury selection first began on January 9, 2012 in the trial of Isaiah W. McCoy (hereinafter "Defendant"). After eleven (11) jurors had already been seated, a new scheduling order was issued setting jury selection for a second trial starting on May

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[1] *McCoy v. State*, Nos. 558, 2012, 595, 2012, slip op. (Del. Oct. 1, 2014).

[2] *Batson v. Kentucky*, 476 U.S. 79, 106 (1986).

[3] *McCoy v. State*, Nos. 558, 2012, 595, 2012, slip op. (Del. Oct. 1, 2014).

14, 2012 due to the unexpected illness of one of McCoy's trial counsel. Thereafter the Defendant sought to remove his attorney and represent himself. After an extensive and appropriate colloquy with the Defendant, the Court issued an order allowing him to proceed *pro se* on May 16, 2012, the second day of jury selection.

On June 29, 2012, after a three-week-long jury trial, Defendant was convicted of two counts of Murder in the First Degree; two counts of Possession of a Firearm During Commission of a Felony; and one count each of Robbery in the First Degree and Conspiracy in the Second Degree. Defendant represented himself throughout the guilt and penalty phases of his trial with the assistance of standby counsel from the Office of the Public Defender.

Trial and Sentence

The Supreme Court remanded the case so that this Court could revisit its rationale for refusing to accept Defendant's peremptory challenge. The Supreme Court requests that this Court identify the basis for denying Defendant his peremptory challenge.

During the second day of jury selection, Defendant decided to appear *pro se*. After the Court conducted an extensive colloquy, and despite the strong advice of counsel, his desire to appear *pro se* was granted. After eight (8) Caucasians, including men and women, were struck by Defendant (including two by previous counsel), a reverse *Batson* challenge was made by the State. This Court went through the appropriate *Batson* analysis and concluded that the State did not meet its burden, yet warned the Defendant that in light of the apparent pattern, the Court would

require him to articulate his reasoning to avoid a finding that he was intentionally excluding jurors because of their racial classification. Defendant's nonverbal behavior in court, including his facial expressions consisting of smirks at the Prosecutor and Court, made the Court consider that the Defendant was well aware of the deviant and deceptive nature of his behavior. At this juncture during the jury selection process, this Court was placed on notice as to the possibility that Defendant was attempting to select jurors based on race by subterfuge. Defendant was aware of what a *Batson* (or reverse *Batson*) challenge consisted of and understood that racially motivated jury selections were improper.

Before discussing the juror whose peremptory challenge is at issue, it is recognized that the environment of the courtroom during the jury selection process is always intense, made more so because of a capital *pro se* Defendant. Aside from describing Defendant's nonverbal behavior, consisting of smirking at the Court while making his peremptory challenges, a summary of the jurors that the Defendant wanted to exclude is helpful in order to adequately convey the climate of the courtroom.

The Defendant used peremptory challenges on jurors that all shared the same commonality, they were all Caucasian. Also, a majority of the jurors had at least a tangential relationship to someone in law enforcement. All jurors that were subject to Defendant's peremptory challenge were deemed fit to serve, but for the peremptory challenge. Thirteen (13) potential jurors were Caucasian, while one (1) was a mix of Hispanic and Caucasian. Further, all of the jurors were considered death-qualified. Nine (9) potential jurors had ties to law enforcement. Of the nine (9), only three (3)

of the jurors had personal careers in law enforcement. The remaining six (6) jurors had members of either an immediate or extended family member in law enforcement. The Defendant admitted that he was asking African-American men as jurors for his case and excluding Caucasian jurors, and if possible, African-American women as well.

Eventually, the Court came to David Hickey (hereinafter "Mr. Hickey"), a Caucasian male whose juror seating is at issue. Defendant exercised his 15th peremptory challenge on this Caucasian male who, based on the responses to the *voir dire*, was fit to serve. Mr. Hickey was questioned regarding his wife working for the Department of Corrections in Smyrna as a counselor.[4] Mr. Hickey stated that his wife had been retired for five (5) years, and that he was not affiliated with any other law enforcement officers. Defendant stated he wanted to exercise a peremptory strike and the Court asked him for a justification because it could not think of one. The Defendant's reasoning was that Mr. Hickey's wife was a former corrections counselor who, based on her career, had prejudice toward those imprisoned, and that this bias would be acquired by her husband. There was no logical reason to strike Mr. Hickey, especially since previous individuals were approved for the jury who had relatives who were involved in law enforcement. Defendant stated "[a]s long as I have peremptory strikes, I won't let a person like that, just the possibility that a person like that, would possibly have bias based on something their spouse may have told them

[4] Trial Tr. (May 23, 2012) at 162.

pertaining to inmates."[5]

No cause was made by either party, and the State did not exercise any challenge. The Court had previously engaged in an intensive, and somewhat exhausting discussion in open court with the Defendant to ensure he understood what he could and could not do in asserting challenges. A factor in the Court's thinking process was, due to the Defendant's previous misguided attempt to stock the jury with African American males, and the complex nature of the jury selection process, the *pro se* Defendant was given the benefit of the doubt. The Court continued to let Defendant make peremptory challenges, waiting to hear the rationale for each one, even if this approach was not verbalized on the record to the parties. It was clear to the Court that Defendant did not follow the direction of the Court and continued his presumed pattern by a crafty bit of legerdemain. This resulted in a finding by the Court that he intentionally sought to exclude Caucasian jurors from the panel by exercising his peremptory challenge.

The next juror, seated juror number 12, was when Defendant became hostile toward the Court once the prospective juror stepped outside the courtroom. When it became Defendant's turn to state if he wanted to make any peremptory challenges, Defendant stated "It's obvious it's your decision. I have nothing to say. It's obvious it's your decision. I have nothing to say....You tell me whether or not I have it. I

[5] Trial Tr. (May 23, 2012) at 179.

don't know...It's your decision."[6] And although the transaction between Defendant and the Court happened after Mr. Hickey's confirmed seat as a juror, Defendant struck up a poor attitude with this Court, best exemplified in the following exchange after one juror asked if she could recuse herself based on a financial hardship:

"**The Court:** What's your position, Mr. McCoy?
The Defendant: Whatever you say, Boss.
The Court: Sir, I'm not a boss, I'm a judge."
The Defendant: Whatever you say, Master
The Court: I would appreciate you address the Court properly
The Defendant: Whatever you say, Master. If you're not a boss, you get Master."[7]

The Court responded by noting Defendant's attitude, and that it "gave him some leeway " because he was on trial for his life. Defendant's poor attitude was cause enough for the Court to note that if his attitude continued his right to self-represent would be revoked.[8] The Defendant's attitude is indicative of his irritation with the Court over the halting of his racially-motivated peremptory challenges.

II. STANDARD FOR BATSON

The United States Supreme Court in *Batson v. Kennedy*[9] designed a tripartite analysis to ensure persons are protected by the Equal Protection Clause during the juror selection process. In Delaware, the standard was adopted in *Robertson v.*

[6] Trial Tr. (May 23, 2012) at 205.

[7] Trial Tr. (May 23, 2012) at 212.

[8] Trial Tr. (May 23, 2012) at 214.

[9] *Batson v. Kentucky,* 476 U.S. 79, 106 (1986).

State.[10]

1. The defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race....

2. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question....

3. The trial court must determine whether the defendant has carried his burden of proving purposeful discrimination...."[11]

The Supreme Court expanded upon step three in *Dixon v. State*:[12] Once the State offers race-neutral explanations for its use of peremptory challenges, the burden shifts to the opponent of the strikes to prove purposeful discrimination. This is the stage at which the trial judge assesses the persuasiveness of the facially race-neutral justification by considering the "totality of the relevant facts."[13] Specifically, courts have suggested that the following factors be evaluated:

1. Credibility and historical fact.[14]

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[10] *Robertson v. State*, 630 A.2d 1084, 1089 (Del. 1993).

[11] *Id.*

[12] *Dixon v. State*, 673 A.2d 1220 (Del.,1996).

[13] *Id.* at 1224 (citations omitted) (quoting *Hernandez v. New York*, 500 U.S. 352, 369 (1991) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, (1985)). Accord *Robertson v. State*, Del.Supr., 630 A.2d 1084, 1090 (1993)). *See* Jones v. State, 2007 WL 666333, *4 (Del., 2007) (citing *Hernandez* at 353).

[14] Critical here is the trial court's direct contact with the witnesses to determine credibility accurately. Also critical is the trial court's unique position to observe and evaluate prospective jurors

2. Percentage of African Americans who are the subject of the state's strikes.

3. Side-by-side comparisons of some African American venire panelists who were struck and Caucasian panelists who were allowed to serve.

4. Procedural mechanisms used to move African American venire persons to the back of the panel where they are less likely to be selected.

5. Evidence of contrast between the state's voir dire questions posed respectively to African American and non-African American panel members.

6. Evidence of a systematic policy or practice within the prosecutor's office of excluding minorities from jury service.

7. The experience of the prosecutors, how many cases tried, how many were murder cases, and the seasoning of the defense counsel.[15]

If the State or the Defendant used equal numbers of strikes against African Americans and non-African American or they retained remaining strikes and other minorities were allowed to remain, this is evidence of no pretextual strikes.[16] Additionally, an individual with multiple charges on his record may give rise to a valid challenge because this shows a disregard for the law.[17] Finally, if the

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and counselor's questions and answers.

[15] *Jones v. State*, 938 A.2d 626, *4-5 (Del., 2007).

[16] *Barrow v. State*, 749 A.2d 1230, 1239 (Del. 2000). *See also Jones*, supra note 19 at *5 ("the prosecution's decision not to use an available challenge against minority veniremen is also a relevant circumstance to be weighed." *U.S. v. Alvarado*, 923 F.2d 253, 256 (2d Cir. 1991)).

[17] *See Dixon v. State*, 673 A.2d 1220, 1224 (Del. 1996).

individuals experienced arrests or convictions that are similar to or the same as the charges pending, these are also considered good reasons as they may trigger emotion and bias in that individual that is beyond the individual's control.[18]

When the Supreme Court is satisfied that the party has provided a race-neutral explanation as to the choosing of a juror, "[The Supreme Court] will apply a more deferential standard of review to the trial court's ultimate conclusions regarding discriminatory intent. The record of the trial court's credibility determinations ... and the trial court's findings with respect to discriminatory intent will stand unless they are clearly erroneous."[19]

The Supreme Court instructed a *Batson* analysis be prepared in accordance with *Jones v. State*[20] if *Batson* was the basis for the Court's ruling.

III. FACTUAL ANALYSIS

The Supreme Court took issue with this Court not expressly referring to *Batson* when refusing to accept Defendant's peremptory challenge. The Supreme Court also found that this Court did not articulate a reason for its ruling, other than to say there was "no legitimate reason why [McCoy] would exclude the juror." The Supreme Court asks that this Court conduct a full *Batson* analysis if that is what the reasoning

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[18] *Dixon,* 673 A.2d 1220, at 1224.

[19] *Sykes v. State*, 953 A.2d 261, 269 (Del. 2008) (citing *Jones v. State* 938 A.2d 626 (Del., 2007)).

[20] *Jones v. State*, 938 A.2d 626, (where the State exercised 75% of its peremptory strikes on minorities and the case was remanded to the trial court to complete the third step of Batson).

was to keep the Juror.

It was noted earlier in this remand response that even though the Court did not make note on the record, it was obvious to those in the courtroom that Defendant was engaging in wily behavior to make race-based exclusions of jurors. Based on the fact that this Court engaged in a *Batson* analysis, even though it was not explicitly placed on the record, it shall be analyzed here. With regard to the first prong, a *prima facie* showing was made that Defendant exercised a peremptory challenge on the basis of race when he attempted to strike a 15th Caucasian juror, Mr. Hickey. The Court questioned the Defendant saying "I'm going to need some justification because I can't think of a reason."[21] This is because Mr. Hickey's responses as a juror indicated he was fit to serve as a juror.[22]

In regard to the second and third prongs of *Batson*, we must evaluate Defendant's explanation of a racially neutral reason for excluding Mr. Hickey. Defendant offered that because Mr. Hickey's wife was formerly employed by the Smyrna corrections facility, she would have a bias against prisoners which would likely create the same bias for her husband. This insubstantial line of reasoning was discussed on the record by the Court at length. The Court made note of the fact that Mr. Hickey's wife had not worked at the corrections facility in five years, and that she had never discussed either a specific prisoner or case with her husband. After hearing

[21] Trial Tr. (May 23, 2012) at 178.

[22] Trial Tr. (May 23, 2012) at 179.

Defendant's explanation for seeking to strike Mr. Hickey, the trial court found that the reasons were not race neutral and therefore, ordered that Mr. Hickey be seated as a juror. The Court concluded "[...]I have to draw the conclusion that there's no legitimate reason why [the Defendant] would exclude this juror [...]"[23]

Upon hearing Defendant's reasoning for excluding Mr. Hickey based on his wife's prior job experience, even though the articulated reason was non-discriminatory, it is up to the Court to evaluate the credibility of the Defendant to determine if his reasoning was mere pretext for a discriminatory purpose.[24] In so evaluating, this Court took into account the preceding peremptory challenges of all Caucasian jurors, as well as the Defendant's weak reasoning for striking Mr. Hickey. It is here that the Court took into account the behavior of the Defendant as well as his previously stated discriminatory reasons for racial preference. Defendant smirking at the prosecutor during peremptory challenges illuminated Defendant's duplicity. Defendant's peremptory strike of Mr. Hickey was nothing other than an attempt to remove an acceptable juror because of a racial classification that was not yet verbalized.

IV. CONCLUSION

While this Court concluded that the State did not meet its burden after the initiated reverse *Batson* challenge, it continued to analyze the rationale of the

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[23] Trial Tr. (May 23, 2012) at 181.

[24] *Johnson v. California,* 545 U.S. 162, 171, 125 (2005).

Defendant and his methodology in the execution of choosing jurors. The Defendant was unable to provide credible reasoning as to why only Caucasian jurors were peremptorily challenged, and could not meet his burden to satisfy prong three (3) of *Batson.* However, this Court continually gave the Defendant leeway due to his status as a *pro se* Defendant in a capital murder trial, even after the Defendant was warned that he would lose the right to self-represent. His overt behavior continued as he made exiguous peremptory challenges to only Caucasian jurors while smirking at the Court and the prosecutor. The Court determined that Defendant's behavior of removing Caucasian panelists from the jury fatally suggested that his motivation was racially discriminatory. The Defendant failed to provide plausible and race-neutral reasons for striking each challenged panelist. Evaluation and analysis of all considerations surrounding rejecting the strike of David Hickey as a juror unquestionably lead to the conclusion that Defendant's peremptory challenge should be overruled.

This case is returned to the Supreme Court.

/s/ William L. Witham, Jr.
Resident Judge

oc: Prothonotary
xc: Supreme Court
All Counsel of Record via *e-file*

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ISAIAH W. McCOY,	)	
Defendant Below-	)	**Nos. 558/595, 2012**
Appellant,	)	**[CONSOLIDATED]**
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
Plaintiff Below-	)	
Appellee,	)	

AFFIDAVIT OF MAILING

BE IT REMEMBERED that on this 17th day of November, 2014, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on November 17, 2014, she did electronically serve the attached State's Answering Supplemental Memorandum properly addressed to:

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Margolis Edelstein
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Erek L. Barron, Esquire
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7501 Wisconsin Avenue, Suite 700W
Bethesda, MD 20814

Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

Notary Public