2009

*Snyder v. Louisiana*: Continuing the Historical Trend Towards Increased Scrutiny of Peremptory Challenges

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NOTE

SYNDS V. LOUISIANA:
CONTINUING THE HISTORICAL TREND
TOWARDS INCREASED SCRUTINY OF
PEREMPTORY CHALLENGES

John P. Bringewatt*

In March 2008, the Supreme Court decided Snyder v. Louisiana, the latest in the line of progeny of Batson v. Kentucky. This Note demonstrates that Snyder is part of a historical pattern of Supreme Court decisions concerning the use of peremptory challenges in which the Court has moved away from permitting the unfettered use of the peremptory challenge in favor of stronger Equal Protection considerations. Snyder alters the requirements for trial judges in deciding Batson challenges by requiring them to provide some explanation of their reasons for accepting a prosecutor's justification of a peremptory challenge. Snyder is the latest step in the historical pattern of trying to create a more enforceable standard to prevent racial discrimination in jury selection and in keeping with this pattern should be broadly interpreted going forward.

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* J.D. Candidate, May 2010. Thanks to my Note Editors, Frances Lewis and Lance Phillips, for all of their advice and comments, as well as to Jordan Taylor for help in formulating an initial idea. I would especially like to thank my late grandmother, Mary Beemer, for all of her support.
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INTRODUCTION

The peremptory challenge is a longstanding jury selection tool that allows parties to remove prospective jurors without cause.1 The challenge has traditionally been thought of as a way to ensure an impartial jury by allowing parties to dismiss any prospective juror they suspect might be biased against them.2 In contrast to a challenge for cause, which requires showing a specific reason why a juror might not be impartial, no justification is required for a peremptory challenge.3 Historically, “[t]he essential nature of the peremptory challenge [was] that it [was] one exercised without a reason stated, without inquiry and without being subject to the court’s control.”4

“The peremptory challenge has very old credentials,” coming to the United States by way of English common law.5 Emphasizing the purely discretionary nature of the peremptory challenge, Blackstone described it as “an arbitrary and capricious species of challenge.”6 Blackstone nonetheless justified the challenge in terms of fairness and “tenderness and humanity” to defendants, asserting that a defendant should not have to be tried by anyone whom he suspects might be prejudiced against him.7 Blackstone wrote that the peremptory challenge could only be exercised by defendants, not by the Crown,8 but ultimately “[p]eremptories on both sides became the settled law of England.”9

The traditional unfettered, purely discretionary use of the peremptory challenge allowed attorneys to remove a prospective juror on the basis of race.10 An inherent and well-recognized tension therefore exists between this traditional operation of the peremptory challenge and the protections af-

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4. Swain, 380 U.S. at 220.
5. Id. at 212–14.
7. Id.
8. Id. at *353.
10. E.g., Swain, 380 U.S. at 220.
forded by the Equal Protection Clause of the Fourteenth Amendment.\footnote{11} Those who defend the longstanding power of attorneys to dismiss prospective jurors without any required justification argue that "[a]nalytically, there is no middle ground: [a] challenge either has to be explained or it does not."\footnote{12} In response, those favoring stronger Equal Protection principles for jury selection argue that the Fourteenth Amendment trumps the historical role of the peremptory challenge, which is not constitutionally compelled.\footnote{13}

In \textit{Batson v. Kentucky}, the Supreme Court held for the first time that it was unconstitutional to use peremptory challenges to dismiss individual prospective jurors on the basis of race.\footnote{14} The \textit{Batson} Court focused on the danger posed in criminal cases by a prosecutor using peremptory challenges in a racially discriminatory manner, which denies a defendant\footnote{15} an important aspect of his right to a jury trial and violates the Equal Protection Clause.\footnote{16} The \textit{Batson} Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race."\footnote{17} \textit{Batson} created a process for defendants to challenge a prosecutor's use of peremptory challenges.\footnote{18}

Concurring in \textit{Batson}, Justice Thurgood Marshall expressed his view that the danger posed by racially discriminatory use of the peremptory challenge justified the elimination of the challenge.\footnote{19} Nearly twenty years later, Justice Breyer noted the continued prevalence of racially motivated peremptory challenges and echoed Justice Marshall's call for the abolition of the challenge.\footnote{20} Despite \textit{Batson}'s requirement of racial neutrality, studies

\footnotesize{11. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.").}


\footnotesize{13. \textit{See, e.g., Swain}, 380 U.S. at 244 (Goldberg, J., dissenting).}

\footnotesize{14. 476 U.S. at 96-98. Prior to \textit{Batson}, a defendant was required to show a pattern of racially discriminatory usage of peremptory challenges across cases in order to establish an Equal Protection violation. \textit{Swain}, 380 U.S. at 227.}


\footnotesize{16. \textit{Batson}, 476 U.S. at 86. The Court eventually held that it was unconstitutional for any party to make peremptory challenges on the basis of race. \textit{See Georgia v. McCollum}, 505 U.S. 42 (1992) (holding that it is unconstitutional for criminal defendants to make peremptory challenges on the basis of race); \textit{Edmonson v. Leesville Concrete Co.}, 500 U.S. 614 (1991) (holding that it is unconstitutional for civil litigants to make peremptory challenges on the basis of race).}

\footnotesize{17. \textit{Batson}, 476 U.S. at 89.}

\footnotesize{18. \textit{Id.} at 93–94. See infra text accompanying notes 53–57 for an explanation of the \textit{Batson} standard.}

\footnotesize{19. \textit{Batson}, 476 U.S. at 102–08 (Marshall, J., concurring).}

suggest that peremptory strikes are routinely made on the basis of race.\textsuperscript{21} Contrary to the general societal goal of removing racial discrimination from the administration of our criminal justice system, some trial lawyers view the use of racial stereotypes in jury selection as a legitimate litigation strategy.\textsuperscript{22} Because of such views, "racial discrimination [in jury selection] continues to flourish with corrective judicial action likely in only the most extreme circumstances."\textsuperscript{23}

In March 2008, the Supreme Court decided \textit{Snyder v. Louisiana}\textsuperscript{24}, the latest in the line of \textit{Batson} progeny. \textit{Snyder} is the Court's most recent attempt to address the tension between the peremptory challenge and the Equal Protection Clause and to control the danger posed to a defendant's rights by the racially motivated use of peremptory challenges. At first glance, the \textit{Snyder} opinion is unremarkable. The majority opinion is short—about seven pages long—and does not explicitly claim to create a new legal standard for \textit{Batson} challenges. However, as the \textit{Snyder} dissent points out, \textit{Snyder} does in fact impose a standard for \textit{Batson} challenges that had not existed before.\textsuperscript{25}

This Note argues that \textit{Snyder} is part of a historical pattern of Supreme Court decisions concerning the use of peremptory challenges in which the Court has increasingly applied a more individualized focus in an effort to create a more enforceable standard, moving away from the unfettered use of the peremptory challenge to more heavily weigh Equal Protection considerations. Part I provides the historical context necessary to understand the \textit{Snyder} decision, discussing the line of Supreme Court cases dealing with racial discrimination in jury selection leading up to \textit{Snyder}, including \textit{Batson}, its predecessors, and its progeny. Part I demonstrates that over time the Supreme Court has applied increasingly detailed scrutiny in its analysis of such cases in an attempt to make Equal Protection principles more enforceable. Part II discusses the background of \textit{Snyder} and argues that it alters the requirements for trial courts in deciding \textit{Batson} challenges by requiring them to more carefully scrutinize the justifications proffered in support of peremptory challenges made by prosecutors. Part III shows that \textit{Snyder} is the latest step in the historical pattern of trying to create a more enforceable standard to prevent racial discrimination in jury selection and argues for a broad interpretation of \textit{Snyder} going forward.

\textsuperscript{21} See, e.g., Baldus et al., \textit{supra} note 3, at 10 (finding that racially motivated peremptory challenges were commonly used in capital trials in Philadelphia); Gregory E. Mize, Editorial, \textit{A Legal Discrimination; Juries aren't supposed to be picked on the basis of race and sex, but it happens all the time}, \textit{Wash. Post}, Oct. 8, 2000, at B8 (the author is a former D.C. Superior Court Judge).

\textsuperscript{22} See Baldus et al., \textit{supra} note 3, at 127.

\textsuperscript{23} \textit{id.} at 128.

\textsuperscript{24} 128 S. Ct. 1203 (2008).

\textsuperscript{25} \textit{Snyder}, 128 S. Ct. at 1213 (Thomas, J., dissenting).
I. THE BATSON LINE OF CASES: A PATTERN OF INCREASING SCRUTINY

*Snyder* is the latest in a line of cases in which the Supreme Court has addressed the issue of racially discriminatory jury selection procedures. The problem is not a new one; the Court first addressed it in 1880. The persistence of the issue over time suggests that it has been difficult to find a lasting solution to the problem.

This Part discusses the line of Supreme Court cases addressing the application of Fourteenth Amendment Equal Protection principles to racial discrimination in jury selection and suggests a pattern in the Court’s decisions. Section I.A offers a historical analysis of the line of cases leading up to *Snyder*, beginning with *Batson’s* predecessors, including *Strauder v. West Virginia* and *Swain v. Alabama*, and continuing up to recent *Batson* progeny. Section I.A also traces the Court’s discussion of the tension between Equal Protection principles and the sanctity of the traditional peremptory challenge. Section I.B argues that this line of cases presents a pattern in which the Supreme Court has, over time, applied a more individualized focus in its analyses of racial discrimination in jury selection in an effort to create a more enforceable Equal Protection standard.

A. Batson, its Predecessors, and its Progeny

The Supreme Court first considered the issue of Equal Protection in the context of jury selection in *Strauder v. West Virginia*. In *Strauder*, the appellant, a black man who had been convicted of murder, argued that his rights under the Fourteenth Amendment had been violated by a West Virginia law that prevented anyone besides white men from serving on a jury. The Court framed the issue as follows:

[T]he . . . question[] is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.

26. *See* *Strauder v. West Virginia*, 100 U.S. 303 (1880).
27. *Id.*
29. 100 U.S. 303.
30. *Id.* at 304–05.
31. *Id.* at 305.
The principles underlying this statement of the issue continue to be embraced in the Court's modern Equal Protection jurisprudence. The Strauder Court noted the importance of the right of a defendant to be tried by a jury "composed of the peers or equals of the person whose rights it is selected . . . to determine" and that "the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure." The Court concluded that a law excluding black citizens from jury service violated a black defendant's rights under the Equal Protection Clause.

Strauder established the basic principle that categorical racial discrimination in jury selection by law is unconstitutional. This restriction did not, however, end the practice of racial discrimination in jury selection.

In Swain v. Alabama, decided by the Supreme Court in 1965, the Court first considered whether racially based peremptory challenges could violate the Equal Protection Clause. Robert Swain was convicted of rape in the Circuit Court of Talladega County and sentenced to death. Although there was no statutory prohibition, the Court recognized that "no [African-American] had actually served on a petit jury [in Talladega County] since about 1950." Swain challenged his conviction on the grounds that the jury selection process violated the Equal Protection Clause. At Swain's trial, there were eight black venirepersons. None of them ultimately served on the jury. Six of the eight were excluded because the prosecutor used peremptory challenges to remove them. In evaluating the Equal Protection claim, the Court concluded that "the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against [African-

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32. See Batson v. Kentucky, 476 U.S. 79, 85–86 (1986) ("In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in Strauder recognized, however, that a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.' . . . But the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.") (citations omitted) (quoting Strauder, 100 U.S. at 305).
33. Strauder, 100 U.S. at 308.
34. Id. at 309–10.
35. Strauder's holding was framed in terms of discrimination in the selection of both grand and petit juries. See id. at 308 ("That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted."). This Note addresses Equal Protection issues related to the selection of petit juries. Defendants also have a constitutional right to a grand jury selected in a racially non-discriminatory way. See, e.g., Vasquez v. Hillery, 474 U.S. 254, 260–64 (1986).
38. Id. at 203.
39. Id. at 205.
40. Id. at 203–04.
41. Id. at 205. A venire is "a panel of persons selected for jury duty and from among whom the jurors are to be chosen." BLACK'S LAW DICTIONARY 1694 (9th ed. 2009).
42. Swain, 380 U.S. at 205.
Americans] over a period of time." The Court thus created a burdensome standard in which defendants were required to demonstrate—apparently by questioning the relevant prosecutors—that prosecutors had discriminated in jury selection across numerous cases. The difficulty criminal defendants face under this standard is demonstrated by the Court’s decision in *Swain*; despite the fact that there had been no black jurors in Talladega County in fifteen years, the Court did not find an Equal Protection violation and affirmed the conviction.

The *Swain* Court addressed the interaction between the peremptory challenge and the application of Equal Protection principles to jury selection, though it was unwilling to dive into the question of whether the prosecutors in *Swain* were racially motivated in making peremptory challenges. The majority opinion deferred to the tradition of the peremptory challenge as a purely discretionary device. The Court stated:

To subject the prosecutor’s challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards. The prosecutor’s judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.

In his dissent, however, Justice Goldberg (joined by Chief Justice Warren and Justice Douglas) recognized the tension between the peremptory challenge and the Equal Protection Clause. Justice Goldberg concluded that “[w]ere it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.” This tension continues to play an important role in the Supreme Court’s jurisprudence on this issue as the Court attempts to balance the competing principles.

The framework of the modern standard for applying Equal Protection principles to jury selection was established in 1986 in *Batson v. Kentucky*.

The petitioner in *Batson*, a black man, challenged the jury selection process at his burglary trial after the prosecutor used peremptory challenges to remove all four black venirepersons. The Supreme Court recognized that the case called for them to reconsider *Swain*, acknowledging that “*Swain* has

43. *Id.* at 227.
44. *See id.* at 227–28.
45. *Id.* at 228.
46. *Id.* at 221–22.
47. *Id.* at 244 (Goldberg, J., dissenting).
49. *Id.* at 83.
50. *Id.* at 82.
placed on defendants a crippling burden of proof.” As the Court explained in a subsequent decision:

Swain’s demand to make out a continuity of discrimination over time, however, turned out to be difficult to the point of unworkable, and in Batson v. Kentucky, we recognized that this requirement to show an extended pattern imposed a crippling burden of proof that left prosecutors’ use of peremptories largely immune from constitutional scrutiny.

The Court recognized the need to undertake a more thorough examination of the use of peremptory challenges if it intended to create an enforceable Equal Protection standard for jury selection. The Batson Court thus abolished the standard requiring a defendant to show a pattern of discrimination over multiple cases and concluded that “the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.” Batson created a three-step, burden-shifting process for determining whether a peremptory challenge was racially motivated:

First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties’ submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

In determining whether the defendant satisfies the prima facie showing required for a Batson challenge, the Court instructed trial courts to consider the prosecutor’s pattern of striking black venirepersons as well as any statements made and questions asked by the prosecutor as part of a consideration of “all relevant circumstances.” If the defendant makes the necessary prima facie showing, the Court noted that “[t]hough this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor’s explanation need not rise to the level justifying exercise of a challenge for cause.”

51. See id. at 92.
53. Batson, 476 U.S. at 96 (“[A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial.”).
54. Id. at 89.
57. Id. at 97. A challenge for cause is “[a] party’s challenge supported by a specified reason, such as bias or prejudice, that would disqualify that potential juror.” BLACK’S LAW DICTIONARY 261 (9th ed. 2009).
remanded *Batson* to the trial court to determine whether the removal of all the black venirepersons was unconstitutional.38

Although the *Batson* Court recognized some of *Swain*'s failings and attempted to create a more enforceable standard, in the mind of one Justice it did not do enough to address the threat that peremptory challenges pose to effective enforcement of Equal Protection principles in jury selection. In his concurring opinion, Justice Marshall noted that because “[a]ny prosecutor can assert facially neutral reasons for striking a juror,” there is a danger that courts could accept these post hoc rationalizations and “the protection erected by the Court . . . [would] be illusory.”59 Justice Marshall concluded that because of “[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds . . . the Court [should ideally] ban them entirely from the criminal justice system.”60

Two cases in the 1990s called into question whether the Court intended to provide meaningful protections to defendants under *Batson*. In *Hernandez v. New York*, the Supreme Court considered a *Batson* challenge by a Hispanic defendant who objected to the prosecutor using peremptory challenges against two Hispanic venirepersons.61 The prosecutor justified the challenges on the ground that he was uncertain whether the Spanish-speaking venirepersons could accept the statements of an interpreter as the definitive representation of what was said by Spanish-speaking witnesses.62 The Court held that “[u]nless a discriminatory intent is inherent in the prosecutor’s explanation [of a peremptory challenge], the reason offered will be deemed race neutral.”63 In *Purkett v. Elem*, the Court rejected a *Batson* claim where the prosecutor justified the peremptory challenges of two black venirepersons on the grounds that one had long hair and a goatee and the other also had facial hair.64 The Court held that a prosecutor’s race-neutral explanation for a challenge does not have to be “persuasive, or even plausible.”65

In 2005, the Court made a stronger effort to address the continuing problem of enforcing Equal Protection in jury selection under *Batson* in *Miller-El v. Dretke* (*Miller-El II*).66 In *Miller-El II*, the Court addressed, for the second time,67 the issue of whether the use of peremptory strikes

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58. *Batson*, 476 U.S. at 100.
59. *Id.* at 106 (Marshall, J., concurring).
60. *Id.* at 107 (Marshall, J., concurring).
62. *Id.* at 356–57.
63. *Id.* at 360.
65. *Id.* at 768.
against black venirepersons in Miller-El’s capital murder trial constituted a Batson violation.\textsuperscript{68} Although Miller-El II did not establish a new standard for interpreting Batson,\textsuperscript{69} the Court did recognize and discuss the fundamental problems inherent in enforcing Batson first recognized by Justice Marshall:

Although the move from Swain to Batson left a defendant free to challenge the prosecution without having to cast Swain’s wide net, the net was not entirely consigned to history, for Batson’s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give. If any facially neutral reason sufficed to answer a Batson challenge, then Batson would not amount to much more than Swain.\textsuperscript{70}

Beyond simply recognizing this issue, the Miller-El II Court began to provide a sense of how it thought this enforcement problem could be dealt with. The Court undertook a detailed analysis of the venirepersons removed by peremptory challenges, using tools such as side-by-side comparisons of black venirepersons who were struck from the jury pool with white venirepersons who were not challenged.\textsuperscript{71} The Court also undertook an analysis of “broader patterns of practice during the jury selection.”\textsuperscript{72} The Court conducted a detailed, fact-intensive analysis, providing a model for future lower-court inquiries.\textsuperscript{73} The detailed analysis undertaken by the Court ultimately led to the conclusion that “[i]t blinks reality to deny that the State struck [two of the black venirepersons] . . . because they were black.”\textsuperscript{74} The Court remanded the case with instructions to grant the habeas corpus relief sought by Miller-El.\textsuperscript{75}

Justice Breyer’s concurring opinion in Miller-El II adopted Justice Marshall’s concerns about the difficulties of balancing the continued existence of the peremptory challenge with an enforceable Equal Protection standard for jury selection.\textsuperscript{76} Justice Breyer noted the “practical problems of proof” under Batson, that “despite the strength of [Miller-El’s] claim . . . [it] resulted in 17 years of largely unsuccessful and protracted litigation.”\textsuperscript{77} Given this, Justice Breyer concluded that he “believe[s] it necessary to reconsider

\textsuperscript{68} Miller-El II, 545 U.S. at 236–37.

\textsuperscript{69} Diana L. Garguilo, Recent Decisions, The Batson Standard Remains the Applicable Test for Stating a Claim of Jury Discrimination Under the Fourteenth Amendment: Miller-El v. Dretke, 44 DUQ. L. Rev. 771, 794 (2006) (“Of note is the fact that there is no general issue resolved by the Supreme Court in the case.”).

\textsuperscript{70} Miller-El II, 545 U.S. at 239–40.

\textsuperscript{71} Id. at 240–52.

\textsuperscript{72} Id. at 253.

\textsuperscript{73} Heather Davenport, Note, Blinking Reality: Race and Criminal Jury Selection in Light of Ovalle, Miller-El, and Johnson, 58 BAYLOR L. Rev. 949, 979 (2006).

\textsuperscript{74} Miller-El II, 545 U.S. at 266.

\textsuperscript{75} Id.

\textsuperscript{76} Id. at 266–73 (Breyer, J., concurring); see also Rice v. Collins, 546 U.S. 333, 342 (2006) (Breyer, J., concurring, joined by Souter, J.).

\textsuperscript{77} Miller-El II, 545 U.S. at 267 (Breyer, J., concurring).
Batson’s test and the peremptory challenge system as a whole.78 Justice Breyer’s opinion suggests that the Court was still struggling to create a workable standard.

B. The Batson Line: Moving Towards a More Enforceable Equal Protection Standard

The cases discussed in Section I.A demonstrate the difficulty the Court has had over time in creating an enforceable Equal Protection standard for jury selection. This Section argues that over the course of time a pattern has developed in which the Court has moved progressively in the direction of a more individualized focus in attempting to prevent racial discrimination in jury selection. Over time, the Court has shifted its focus from discriminatory statutes, to patterns of cases, to individual cases, to detailed analyses of individual jurors.

In Strauder, the Court articulated the basic principle that systematically preventing people from serving as jurors on the basis of their race violates the Equal Protection Clause.79 The Swain Court applied a slightly more focused standard, recognizing that Equal Protection principles could be offended in the absence of a statute explicitly forbidding members of a certain racial group from serving as jurors, and holding that an Equal Protection violation exists if a defendant can show that, over a number of cases, a prosecutor used peremptory challenges on a racially motivated basis.80 More than twenty years later, the Batson Court finally recognized that Swain created “a crippling burden of proof”81 for defendants and for the first time addressed head-on the tension between peremptory challenges and Equal Protection principles, holding that an Equal Protection violation can be established by a prosecutor’s use of racially motivated peremptory challenges in the defendant’s case alone.82 Miller-El II recognized the danger under Batson that prosecutors could offer facially race-neutral justifications for racially motivated peremptory challenges83 and attempted to address this problem by conducting detailed analyses of the challenges made to individual prospective jurors as well as by considering broader patterns in jury selection and in the context of the entire trial.84 Thus, over time, the Court has applied an increasingly focused analysis in an attempt to root out racial discrimination in jury selection, moving towards increasingly detailed considerations of the challenges to individual prospective jurors.

78. Id. at 273 (Breyer, J., concurring).
82. Id. at 95.
83. Miller-El II, 545 U.S. at 239–40.
84. Id. at 240–52, 253–64.
Hernandez and Purkett seem to disrupt this pattern. Both of these cases weakened the enforcement mechanisms of Batson by allowing prosecutors to offer "[a]ny facially race-neutral reason, no matter how implausible" in support of their peremptory challenge to defeat a Batson objection made by a defendant. However, Miller-El II, decided a decade after Purkett, represented a clear turn away from these cases. The Miller-El II Court recognized that "[i]f any facially neutral reason sufficed to answer a Batson challenge, then Batson would not amount to much more than Swain." In an implicit rejection of Purkett, the Court plainly recognized that "[s]ome stated reasons are false." Thus, while the Miller-El II majority does not discuss Purkett, the Court appears to have abolished, or at least called into doubt, Purkett's low standard for a prosecutor's explanation. Miller-El II placed the Court back on its long-term trajectory of a more focused Equal Protection analysis with respect to jury selection.

The increasingly individualized focus of the Supreme Court's analysis over time has strengthened the application of Equal Protection principles to jury selection. In placing greater scrutiny on prosecutors' use of peremptory challenges, the Court seems to have moved towards Justice Goldberg's view that when the Equal Protection Clause and the peremptory challenge come into conflict, "the Constitution compels a choice of the former." However, the tension between these concepts remains and will continue to be an issue as the Court moves forward. Although Miller-El II recognized many of the problems inherent to the modern standard for applying Equal Protection principles to jury selection, it did not create a new legal standard. The fundamental enforceability problem of Batson—namely, the danger of prosecutors providing facially race-neutral explanations for racially motivated challenges—thus persists despite Miller-El II's call for a more detailed, individualized focus.

II. Snyder v. Louisiana: A New Legal Standard

Snyder v. Louisiana represents the Supreme Court's latest effort to address the problem of creating an enforceable Equal Protection standard to prevent racial discrimination in jury selection. The Snyder opinion was handed down in 2008, three years after the Miller-El II Court's extensive discussion of the problems inherent in enforcing the Batson standard. This

86. Miller-El II, 545 U.S. at 240.
87. Id.
88. Wais, supra note 85, at 454.
89. Swain v. Alabama, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting).
90. See Miller-El II, 545 U.S. at 266–73 (Breyer, J., concurring).
91. Garguilo, supra note 69, at 794.
Part delves deeply into the *Snyder* decision and the circumstances that led to the Supreme Court’s opinion. Section II.A details the factual background and procedural history of *Snyder*. An understanding of this background is essential to understanding the significance of the Supreme Court’s ultimate decision because the Court limited its focus to one narrow aspect of the case. Section II.B then undertakes a detailed analysis of the Court’s opinion and argues that *Snyder* presents a novel standard that imposes new requirements on courts for analyzing potential *Batson* violations.

### A. Factual and Procedural Background of *Snyder*

Allen Snyder was charged with first-degree murder in relation to an August 1995 attack in which Snyder repeatedly stabbed his estranged wife and the man she was dating, wounding his wife and killing her companion. An all-white Louisiana jury convicted Snyder, a black man, and sentenced him to death based on the sole aggravating factor of knowingly creating a risk of death or great bodily harm to more than one person. Snyder argued that the prosecutor used peremptory challenges to strike potential jurors on the basis of their race in violation of *Batson*.

One additional factual detail is essential to understanding the subsequent development of the case, although it may at first glance appear unrelated to the issue of peremptory challenges. Prior to trial, the prosecutor in *Snyder* made multiple public statements comparing the case to the O.J. Simpson murder trial. This resulted in a pretrial motion in which the defense counsel requested a ruling that the prosecutor not be permitted to mention the Simpson case at trial. The judge denied the defense attorney’s motion when the prosecutor assured the court that he would not mention the Simpson case to the jury. Despite this assurance, the prosecutor referenced the Simpson case in the penalty phase of the trial, stating that “O.J. Simpson ‘got away with it.’” Several dissenting justices of the Louisiana Supreme Court thought that making this argument to an all-white jury demonstrated that the prosecutor was attempting to play on racial bias as part of his trial strategy, especially given the unpopularity of the Simpson verdict with white citizens across the country, and thus suggested that the prosecutor’s use of peremptory challenges was racially motivated.

93. *Id.* at 1206.
94. *Id.*
95. *Id.*
96. State v. Snyder, 750 So. 2d 832, 864 (La. 1999) (Lemmon, J., concurring in part and dissenting in part); see also State v. Snyder, 942 So. 2d 484, 501 (La. 2006) (Kimball, J., dissenting).
97. *See Snyder*, 942 So. 2d at 500–05 (Kimball, J., dissenting); *Id.* at 506 (Johnson, J., dissenting); *Snyder*, 750 So. 2d at 864 (Lemmon, J., concurring in part and dissenting in part); *Id.* at 866–67 (Johnson, J., dissenting).
98. *Snyder*, 750 So. 2d at 864 (Lemmon, J., concurring in part and dissenting in part).
The Snyder case wove a circuitous path on its way to an eventual decision on the merits by the U.S. Supreme Court. The murder occurred in 1995 and Snyder was convicted in 1996.\(^99\) The case first reached the Louisiana Supreme Court in 1999.\(^100\) Among other issues, the court considered whether a Batson violation had occurred at Snyder’s trial, noting that “the prosecutor used peremptory challenges to strike every African American called as a prospective juror who survived challenges for cause.”\(^101\)

In determining whether a Batson violation occurred, the Louisiana Supreme Court cited the low standard for prosecutors’ justifications of peremptory challenges established by Purkett and Hernandez,\(^102\) but nevertheless looked beyond the Purkett standard and found that “[a]lthough not required by the caselaw, the State’s proffered reasons were plausible, supported by the record and race-neutral.”\(^103\) The court also addressed the O.J. Simpson issue, stating that it was “not firmly convinced that [the comments about the Simpson case] . . . influenced the jury or contributed to the verdict.”\(^104\) Two dissenting justices found that a Batson violation had occurred.\(^105\) Both dissenters cited the Simpson reference and the strikes of all the potential black jurors as evidence of a racially motivated trial strategy by the prosecution.\(^106\) The Louisiana Supreme Court denied Snyder’s Batson challenge, but remanded the case to the trial court for a hearing on an unrelated issue: whether it would be possible to determine if Snyder had been competent to stand trial at the time of his conviction.\(^107\)

Following the exhaustion of Snyder’s claims in the Louisiana courts,\(^108\) he turned to the U.S. Supreme Court. The Court granted certiorari, vacated the judgment, and remanded the case to the Louisiana Supreme Court “for further consideration in light of Miller-El [II],”\(^109\) which had been decided just two weeks before. Following the remand, in a four-to-three decision, the

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99. Snyder, 128 S. Ct. at 1206.
100. See Snyder, 750 So. 2d at 832. This decision was issued years before Miller-El II was decided by the Supreme Court.
101. Id. at 839.
102. Id. (“The second step does not require an explanation that is persuasive, or even plausible, and unless a discriminatory intent is inherent in the State’s explanation, the reason offered will be deemed race neutral.” (quoting Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam)); id. at 841 (“[A]ny response will qualify as race neutral ‘unless a discriminatory intent is inherent in the prosecutor’s explanation.’” (quoting Hernandez v. New York, 500 U.S. 352, 360 (1991))).
103. Id. at 841.
104. Id. at 846.
105. Id. at 863–64 (Lemmon, J., concurring in part and dissenting in part); id. at 866 (Johnson, J., dissenting).
106. Id. at 864 (Lemmon, J., concurring in part and dissenting in part); id. at 866–67 (Johnson, J., dissenting).
107. Id. at 863.
Louisiana Supreme Court once again held that there was no *Batson* violation in *Snyder*.110

Recognizing that *Miller-El II* called for a thorough review of both individual challenges and the totality of the circumstances of the trial, the Louisiana Supreme Court purported to engage in such an analysis on remand.111 The court concluded that "[a] review of this record compels a conclusion that race did not play an impermissible role in the exercise of these strikes."112 Two dissenting opinions both found that "the totality of the evidence" demonstrated that a *Batson* violation had occurred.113 One scholar sharply criticized the majority decision, arguing that "the *Snyder* [] court ignored *Miller-El II*’s counsel when it failed to consider the statistical import of the prosecutor’s use of peremptory challenges to remove every qualified African-American juror ... and ignored its insistence that a reviewing court examine the whole record."114 Specifically, this scholar criticized the court for "dismiss[ing] as irrelevant the prosecutor’s pretrial comments and penalty phase argument comparing this case to O.J. Simpson’s case by the incredible declaration that those comments lacked racial content."115 Following the Louisiana Supreme Court’s decision, the U.S. Supreme Court once again granted certiorari.116

**B. Imposing a New Standard for Reviewing Batson Objections**

In a March 2008 opinion written by Justice Alito, the U.S. Supreme Court reversed the Louisiana Supreme Court and, by a seven-to-two vote, held that a *Batson* violation had indeed occurred in *Snyder*.117 This Section undertakes a detailed analysis of that decision, arguing that the Court created a new standard affecting the way in which both trial and appellate courts must consider possible *Batson* violations. Although the Court did not explicitly state that it was creating a new legal standard, *Snyder* nevertheless continued the historical trend of the Court moving towards a more individualized analysis in addressing Equal Protection challenges to jury selection procedures in an effort to create a more enforceable standard.

After reviewing the factual and procedural history of Allen Snyder’s case,118 Justice Alito addressed the *Batson* standard and the standard of

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110. State v. Snyder, 942 So. 2d 484 (La. 2006).
111. See id. at 499.
112. Id.
113. Id. at 500-05 (Kimball, J., dissenting); id. at 505-09 (Johnson, J., dissenting).
115. Id. at 153.
118. See id. at 1206-07.
review for Batson claims on appeal.119 The Court stated that “a trial court’s ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous.”120 Because of the importance of evaluating the demeanor of the prosecutor and potential jurors in determining whether an explanation of a peremptory challenge is pretext for race-based motivations, the Court recognized that “these determinations of credibility and demeanor lie ‘peculiarly within a trial judge’s province.’”121 Despite this statement of deference at the beginning of the opinion, however, the Court ultimately applied a very nondeferential standard of review in Snyder.

The Supreme Court’s review was based on Snyder’s claim that Batson violations occurred in relation to two prospective black jurors.122 Despite recognizing that Miller-El II called for a review of all of the relevant circumstances of a trial, however, the Court stated at the beginning of its discussion of the merits of the case that “the explanation given for the strike of Mr. Brooks[, one of the prospective jurors in question,] is by itself unconvincing and suffices for the determination that there was Batson error.”123

Understanding the Court’s decision in Snyder thus requires understanding the specific nature of the peremptory challenge of Mr. Brooks. After defense counsel made a Batson objection to the challenge, the prosecutor offered two reasons in support of the challenge: that Mr. Brooks looked nervous throughout voir dire, and that he expressed concern over missing classes he was teaching as a student teacher to finish his college degree.124 The trial judge indicated that he would allow the challenge without providing any indication of whether he was accepting the nervousness justification, the concern over missing class justification, or both.125

The Court then examined both justifications offered by the prosecutor. In a remarkable paragraph that alters the Batson standard, the Court noted that “the record does not show that the trial judge actually made a determination concerning Mr. Brooks’ demeanor.”126 Pointing out that “the trial judge simply allowed the challenge without explanation,” the Court suggested that “the trial judge may not have recalled Mr. Brooks’ demeanor.”127 For these reasons, Justice Alito concluded that “we cannot presume that the trial judge credited the prosecutor’s assertion that Mr. Brooks was nervous.”128 Thus, the Court did not explicitly reject the prosecutor’s proffered explanation that Mr. Brooks appeared nervous, but rather concluded that the

119. Id. at 1207–08.
120. Id. at 1207.
121. Id. at 1208 (quoting Wainright v. Witt, 469 U.S. 412, 428 (1985)).
122. Id.
123. Id. (emphasis added).
124. Id.
125. See id.
126. Id. at 1209.
127. Id.
128. Id.
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trial court did not provide the Court with a sufficient basis for crediting the prosecutor’s explanation.

This conclusion is at odds with the deference paid by the Court earlier in the opinion to trial judges’ unique capability to decide Batson issues. Noting this inconsistency, the Snyder dissent pointed out that the Court had “never suggested that a reviewing court should defer to a trial court’s resolution of a Batson challenge only if the trial court made specific findings with respect to each of the prosecutor’s proffered race-neutral reasons.”

After disposing of the argument concerning Mr. Brooks’s demeanor, the Court addressed the prosecutor’s argument that Mr. Brooks was concerned that jury service would interfere with his student-teaching obligations. After conducting a thorough review of the circumstances of the strike as called for by Miller-El II, including comparisons to white jurors who also disclosed conflicts with jury service, the Court concluded that the explanation proffered by the prosecution was pretextual, giving rise to an inference of discriminatory intent. In rejecting one explanation proffered by the prosecutor for the challenge of Mr. Brooks and failing to credit the other, the Court found a Batson violation and reversed the Louisiana Supreme Court.

By failing to credit a trial court’s ruling that a peremptory challenge was legitimate in the absence of an explanation of the decision by the trial judge, Snyder thus established a new standard for the review of Batson objections. Rather than deferring to trial judges’ decisions on Batson violations, the Snyder Court created a standard that calls for appellate courts to apply greater scrutiny in reviewing their rulings. Given this increased scrutiny, trial judges who do not wish to risk reversal of their decisions must provide more complete, on-the-record explanations for their rulings on Batson objections. This more detailed focus by trial judges will likely also force prosecutors to offer more specific arguments in support of peremptory challenges they make that are subjected to Batson objections.

129. See id. at 1207–08 (“On appeal, a trial court’s ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous. The trial court has a pivotal role in evaluating Batson claims.”) (internal citations omitted).
130. Id. at 1213 (Thomas, J., dissenting).
132. Snyder, 128 S. Ct. at 1209–12.
133. Id. at 1212.
134. See id. at 1209; id. at 1213 (Thomas, J., dissenting).
135. See id. at 1207–08 (majority opinion).
136. In this regard, an analogy can be made to federal sentencing law. Federal district court judges are required to provide on-the-record explanations of their sentencing decisions. 18 U.S.C. § 3553(c) (2006). The Supreme Court has stated that “[t]he sentencing judge should set forth enough [of an explanation of his decision] to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority.” Rita v. United States, 551 U.S. 338, 356 (2007). However, these explanations do not necessarily have to be lengthy. Id. at 356–57.
The interpretation of this new standard going forward could lead to significant changes in the enforcement of Batson.

III. SNYDER AS AN ATTEMPT TO MAKE BATSON MORE ENFORCEABLE: HISTORICAL CONTEXT AND FUTURE IMPLICATIONS

Snyder represents a significant change to the standard of review for Batson objections. However, the history of the Supreme Court’s jurisprudence on this issue suggests that the direction in which the Court moved in Snyder should not be surprising. Snyder is the Court’s latest step in a pattern of cases moving towards a more individualized and enforceable Equal Protection standard for jury selection. This Part places Snyder in the historical pattern discussed above and discusses how the new Snyder standard will impact Batson challenges in the future. Section III.A argues that Snyder fits within the pattern of cases leading up to and following Batson as an attempt to apply a more individualized focus to Equal Protection analysis related to jury selection in order to create a more enforceable standard. Section III.B analyzes the diverging views of recent cases interpreting Snyder and argues for a strong interpretation of Snyder as courts address future Batson challenges.

A. Snyder as a Continuation of the Historical Pattern of Increasing Scrutiny of Peremptory Challenges

The Supreme Court’s decision in Snyder can be understood as the continuation of its efforts, from Strauder through Miller-El II, to create a workable standard for applying Equal Protection principles to jury selection. Snyder recognizes one of the fundamental problems in the Batson line and attempts to address this problem in a manner consistent with how the Court has historically addressed similar problems, by applying more individualized scrutiny in an effort to create a more enforceable standard.

The Court’s decision in Snyder was reached on the basis of a highly individualized focus. The Court concluded that “the explanation given for the strike of Mr. Brooks is by itself unconvincing and suffices for the determination that there was Batson error.” The Court thus based its decision on the improper peremptory challenge of one venireperson, ignoring the O.J. Simpson issue, despite acknowledging that Miller-El II “made it clear that in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted.”

The Court focused narrowly despite the broader analysis of the Louisiana Supreme Court and the petitioner’s brief to the Court. As ordered by the

137. See supra Section I.B.
138. Snyder, 128 S. Ct. at 1208.
139. Id. (citing Miller-El v. Dreike (Miller-El II), 545 U.S. 231, 239 (2005)).
Supreme Court,\textsuperscript{140} when considering the case for the second time the Louisiana Supreme Court purported to apply the Miller-El II standard and conduct its Batson analysis based on the complete circumstances of the case.\textsuperscript{141} In his brief to the Supreme Court, petitioner Snyder similarly focused on the broader context of racial discrimination in the case, including an argument that the O.J. Simpson references made by the prosecutor suggested that racial bias motivated his peremptory challenges of prospective black jurors,\textsuperscript{142} and concluded that "as in Miller-El II, when the 'evidence on the issues raised is viewed cumulatively, its direction is too powerful to conclude anything but discrimination.'\textsuperscript{143} The O.J. Simpson issue was discussed fairly extensively during oral arguments before the Court,\textsuperscript{144} with several justices appearing to give it significant weight.\textsuperscript{145}

In declining to address the other issues in play and electing instead to focus on the peremptory challenge of one potential juror, the Supreme Court demonstrated that detailed analysis of each peremptory challenge can be an effective way to address broader Equal Protection problems that apply in the context of an entire trial. This addresses the problem discussed in Miller-El II: "[i]f any facially neutral reason sufficed to answer a Batson challenge, then Batson would not amount to much more than Swain."\textsuperscript{146} Snyder took the type of "meticulous facts and circumstances review" called for by Miller-El II, applied it to the striking of a single venireperson, and raised the standard for justifying a peremptory challenge.\textsuperscript{147} In doing so, the Court made it more difficult for pretextual explanations of peremptory challenges to slide by, refusing to accept a reason (Mr. Brooks's alleged nervousness) that had not been sufficiently explained.

This approach does not render Miller-El II's analysis of a case's broader circumstances obsolete. There is nothing in the Snyder opinion that prevents a court from finding a Batson violation on the basis of the broad circumstances of a trial, as in Miller-El II. The Snyder Court cites Miller-El II favorably, noting that Miller-El II dictates that "all of the circumstances that bear upon the issue of racial animosity must be consulted" before a court

\textsuperscript{140} Batson, 545 U.S. 1137 (2005) (granting certiorari, vacating the judgment, and remanding for further consideration).

\textsuperscript{141} State v. Snyder, 942 So. 2d 484, 486 (La. 2006).


\textsuperscript{143} Id. at 48 (quoting Miller-El II, 545 U.S. at 265).


\textsuperscript{145} See, e.g., id. at 36–38 (Justice Souter, mocking the trial judge's disregard for this issue, noting that "we have to consider the O.J. Simpson remark in trying to evaluate what went on," and stating that he finds it "highly unlikely" that the O.J. Simpson comment would have been made had the defendant been white).

\textsuperscript{146} Miller-El v. Dretke (Miller-El I), 545 U.S. 231, 240 (2005); see also Batson v. Kentucky, 476 U.S. 79, 106 (Marshall, J., concurring).

\textsuperscript{147} Davenport, supra note 73, at 979.

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The Snyder Court simply determined that since the peremptory challenge of one juror constituted Batson error, no further analysis was required. Snyder adds to the Miller-El II mode of analysis by allowing for greater scrutiny of individual peremptory challenges and the reasons proffered in support of these challenges.

The highly individualized focus in Snyder fits squarely into the historical pattern of the Supreme Court continually applying greater scrutiny in its Equal Protection analysis related to jury selection in an effort to create a more enforceable standard. Snyder addresses the problem that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror" by applying a more probing analysis of any potentially pretextual explanation for a peremptory challenge. While not eliminating the danger that pretextual explanations for racially motivated peremptory challenges will be accepted by a court, Snyder, in a manner consistent with the historical arc of the Batson line, addresses one of the fundamental problems of the Equal Protection Clause as applied to jury selection and creates a standard that allows courts to better enforce it.

Snyder also fits into the historical pattern of how the Court has changed the way it addresses the tension between Equal Protection and peremptory challenges. In 1965 the Swain Court declined to submit prosecutors' peremptory challenges to an individualized review under the Equal Protection Clause. However, over time the Court moved towards the viewpoint expressed by Justice Goldberg's dissent in Swain, holding that the Constitution compels that the Equal Protection Clause trumps the sanctity of the traditional operation of the peremptory challenge when they come into conflict. The Court has thus moved away from the traditional idea that the peremptory challenge is a purely discretionary device. Snyder continues this trend by increasing the level of explanation required to support a challenge. Despite the suggestions of Justice Marshall, Justice Breyer, and other critics, the peremptory challenge has not been eliminated from our legal system. It has, however, developed to a point where the challenge is actually far from peremptory in nature.

149. Id. at 1208.
150. Id.
153. See Miller-El v. Dretke (Miller-El II), 545 U.S. 231, 239-40 (2005); Batson, 476 U.S. at 89; Swain, 380 U.S. at 244 (Goldberg, J., dissenting).
156. See Miller-El II, 545 U.S. at 273 (Breyer, J., concurring).
157. See, e.g., Garguilo, supra note 69, at 795-96; Straus, supra note 154, at 338-39.
B. The Impact of the Snyder Standard Going Forward

_Snyder v. Louisiana_ continues the Supreme Court’s trend towards more focused, individualized review in an effort to create an enforceable Equal Protection standard for jury selection. As discussed above, _Snyder_ creates a new standard for reviewing _Batson_ objections by refusing to accept a prosecutor’s proffered justification for a peremptory challenge absent some explanation of the decision by the trial judge. The question that remains is how exactly this new standard will be implemented.

Several commentators have argued that _Snyder_ will not effectively increase the scrutiny to which pretextual peremptory challenges are subjected. They argue that the _Snyder_ opinion “all but instruct[s] trial judges on how to usurp _Batson_” by instructing them that if they wish to receive deference to their rulings they need simply explain that they are crediting a demeanor explanation proffered by the prosecution. One scholar also criticizes the Court for not squarely addressing the overall context of racism present in the _Snyder_ prosecution, as indicated by the O.J. Simpson references. These commentators suggest that it may be time to abolish the peremptory challenge altogether.

It is true that _Snyder_ is not a cure-all for addressing the danger of pretextual explanations for peremptory challenges. However, it is clearly a step in the right direction. It has always been the case that trial judges are given deference under the _Batson_ standard. _Batson_ itself noted that “[w]e have confidence that trial judges, experienced in supervising _voir dire_, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a prima facie case of discrimination against black jurors.” Criticizing _Snyder_ on the grounds that it provides trial judges with a roadmap for circumventing _Batson_ misses the point. _Snyder_ did not create the standard in which trial judges’ determinations as to demeanor are given deference on appeal; it simply reaffirmed this fundamental reality under _Batson_. By requiring an explanation, _Snyder_ forces trial judges to consider whether there is some basis for an explanation proffered by a prosecutor, and thus might force prosecutors to further consider the

158. See supra Section II.B.
162. Id. at 1723–24; Leading Cases, supra note 160, at 353. Despite a number of opportunities, the Court has declined to take this route. See Miller-El v. Dretke (Miller-El II), 545 U.S. 231, 266–73 (2005) (Breyer, J., concurring); _Batson v. Kentucky_, 476 U.S. 79, 106–08 (1986) (Marshall, J., concurring).
163. _Batson_, 476 U.S. at 97. In his concurring opinion, Justice Marshall also recognized the central role trial judges would play, but did not share the majority’s faith in the ability of these judges to detect discrimination. Justice Marshall argued that “[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.” Id. at 106 (Marshall, J., concurring).
164. _Snyder_, 128 S. Ct. at 1207–08.
basis for their explanations of peremptory challenges. Furthermore, although Snyder reaffirms the general principle of deference to trial judges on demeanor-based decisions, requiring an on-the-record explanation by trial judges at least creates the potential for appellate review of these decisions if "exceptional circumstances" exist.\textsuperscript{165}

It is indeed surprising that the Snyder decision does not discuss the broader racial overtones of the case. However, by focusing narrowly, Snyder increased the level of scrutiny to which prosecutors' peremptory challenges are to be subjected.\textsuperscript{166} The Snyder Court could have considered all of the circumstances of the case and reversed under Miller-El II, but doing so would not have changed the Batson standard. While the Snyder Court was unwilling to eliminate the peremptory challenge, it did continue the trend of moving away from the truly peremptory character of the challenge.\textsuperscript{167}

Snyder increases the intensity with which courts must scrutinize potentially pretextual explanations of peremptory challenges. The Snyder opinion does not, however, clearly indicate under what circumstances its standard of review should be applied. It is possible that Snyder means that trial judges must explain the basis for their decisions on every Batson objection. It is also possible that such an explanation is only required if the reason proffered by the prosecutor in support of a peremptory challenge is not supported elsewhere in the record. Finally, it is possible that the standard only applies under identical circumstances to Snyder, where one of the prosecutor's explanations for a peremptory challenge is not accepted absent an explanation by the trial judge if another proffered explanation is found to be pretext for racially-motivated challenges.

Decisions in lower federal courts since Snyder have already begun to demonstrate the effect Snyder will have on the review of Batson objections. Although there have not been many authoritative courts of appeals decisions discussing how the Snyder standard will change Batson challenges going forward, several cases begin to provide a sense of the divergent interpretations of how Snyder should be applied.\textsuperscript{168} The Seventh Circuit has modeled a broad application of Snyder, while the Fifth Circuit, Eighth Circuit, and Eleventh Circuit have interpreted Snyder more narrowly.

A recent Seventh Circuit case illustrates what a broad application of Snyder might look like. In United States v. McMath, the prosecution challenged a venireperson on the sole grounds that he had an unhappy expression on his face, and the trial judge denied the defendant's subsequent Batson objection without explanation.\textsuperscript{169} This demeanor explanation was the

\begin{itemize}
\item[165.] See id.
\item[166.] See supra Section III.A.
\item[167.] See supra Section III.A.
\item[168.] See, e.g., Braxton v. Gansheimer, 561 F.3d 453 (6th Cir. 2009); United States v. McMath, 559 F.3d 657 (7th Cir. 2009); Smulls v. Roper, 535 F.3d 853 (8th Cir. 2008) (en banc); United States v. Prather, 279 F. App'x 761 (11th Cir. 2008) (per curiam); United States v. Reed, 277 F. App'x 357 (5th Cir. 2008) (per curiam).
\item[169.] 559 F.3d 657, 666 (7th Cir. 2009).
\end{itemize}
only justification for the challenge that was offered. The Seventh Circuit rejected the lack of explanation by the trial court, stating that “Snyder makes clear that a summary denial does not allow us to assume that the prosecution’s reason was credible” and concluding that “the district court clearly erred in denying the Batson challenge without making findings regarding the credibility of the proffered race-neutral justification for the strike.”

McMath provides a demonstration of a strong application of Snyder, clearly requiring a judge to provide an explanation for a ruling on a prosecutor’s justification for a challenge in a situation in which there was no second, pretextual reason offered by the prosecutor as in Snyder.

Several other circuits have interpreted Snyder more narrowly. In Smulls v. Roper, the Eighth Circuit reviewed the denial of appellant’s habeas corpus petition, based partly on a Batson claim. Although the court rejected the claim for procedural reasons, it nevertheless undertook a substantive analysis of appellant’s Batson claims, applying Snyder. Appellant argued that the trial court violated Snyder by not making any findings concerning the reasons proffered by the prosecutor in support of various peremptory challenges. In rejecting appellant’s claim, the Smulls court applied Snyder narrowly, suggesting that an explanation is required only if another justification offered by the prosecutor has been found invalid.

The Smulls dissent applied a much stronger reading of Snyder. The dissent argued that “Snyder teaches that an appellate court cannot presume a trial court correctly analyzed a Batson challenge when it is impossible to divine the court’s reasoning.” This opinion suggests that Snyder prevents an appellate court from affirming a trial court’s Batson decision absent some explanation indicating that “the trial court found the proffered reasons had a basis in fact” or if the reason can otherwise be confirmed in the record.

170. Id. at 661.
171. Id. at 666.
172. The Supreme Court’s recent decision in Thaler v. Haynes does not foreclose such a broad application of Snyder. The Haynes Court merely rejected a categorical rule that “a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalls the relevant aspects of the prospective juror’s demeanor.” Thaler v. Haynes, 559 U.S. 5, 5 (2010). The Court left open the possibility that Snyder “alter[ed] or add[ed] to Batson’s rule.” Id. at 5 n.2.
174. The Smulls court held that because Snyder was not clearly established law at the time the state court’s rejected appellant’s Batson claim, it could not serve as the basis for habeas corpus relief. Id. at 861.
175. Id. at 860.
176. Id. at 860–61.
177. Id. at 872 (Bye, J., concurring in part and dissenting in part) (internal quotation marks omitted).
178. Id.
179. The Smulls dissent argues that “had the Court been able to confirm the juror in Snyder appeared nervous, the trial court’s denial of the challenge would likely have been affirmed.” Id.
An Eleventh Circuit case, *United States v. Prather*, \(^{180}\) also applied a narrow interpretation of *Snyder*. The appellant argued that, following a *Batson* objection, the district court violated *Snyder* by accepting the prosecutor's justifications for peremptory challenges without explanation. \(^{181}\) The Eleventh Circuit did not accept this argument, stating that the *Snyder* Court did not reverse the trial court "because [it] failed to explain itself clearly, but because it was unclear whether the [trial] court’s finding rested on a plausibly implausible explanation." \(^{182}\) Like the majority in *Smulls*, this suggests a limited reading of *Snyder*, indicating that it only applies in similar factual circumstances where one proffered reason was found invalid and the trial judge did not explain the remaining reason.

The court in *United States v. Reed* also took a narrower view of *Snyder*. \(^{183}\) The appellant in *Reed* argued that the trial court violated *Snyder* by not providing explanations for why it accepted peremptory challenges made by the prosecutor. \(^{184}\) The court rejected this argument, stating that "neither of the government’s proffered reasons centered on a juror’s demeanor or appeared implausible in comparison with accepted jurors’ responses." \(^{185}\) This statement suggests a very narrow interpretation of *Snyder*, where it would only apply to situations nearly identical to *Snyder*, in which a prosecutor offered two arguments in support of a challenge, one was found invalid, and the other focused on demeanor and was not explained by the trial court.

The majority of federal appellate opinions handed down since *Snyder*, such as *Smulls, Prather*, and *Reed*, \(^{186}\) have limited the application of *Snyder* to narrow circumstances. The ultimate determination of how *Snyder* will be interpreted remains to be seen, however, as a split appears to be emerging on the interpretation of *Snyder* and, to date, discussion of the issues in published opinions has been relatively brief.

The history leading up to *Snyder* and the *Snyder* decision itself suggest that a proper reading of the case would more closely resemble *McMath* or the *Smulls* dissent. The *Snyder* Court held that absent an explanation, it could not assume that the trial judge credited the justification for the challenge proffered by the prosecutor. \(^{187}\) The Court did not hold that this failure to credit the prosecutor’s nervousness justification for the challenge of Mr. Brooks was dependent on the student-teaching justification, which the Court

\(^{180}\) 279 F. App ’x 761 (11th Cir. 2008) (per curiam).
\(^{181}\) Id. at 767.
\(^{182}\) Id.
\(^{183}\) 277 F. App’x 357 (5th Cir. 2008) (per curiam).
\(^{184}\) Id. at 364 n.6.
\(^{185}\) Id.
\(^{186}\) See also Braxton v. Gansheimer, 561 F.3d 453, 466 (6th Cir. 2009) (stating that “[a] determinative factor in the [*Snyder*] Court’s holding was its conclusion that the prosecution’s second reason proffered for the strike—the juror’s student-teaching obligations—was... ‘pretextual’”).
\(^{187}\) Snyder v. Louisiana, 128 S. Ct. 1203, 1209 (2008) ("[Where] the trial judge simply allowed the challenge without explanation... we cannot presume that the trial judge credited the prosecution’s assertion that Mr. Brooks was nervous.")
rejected. Instead, the Court noted that since “the trial judge simply allowed the challenge without explanation,” it was possible that “the trial judge may not have recalled Mr. Brooks’ demeanor” or that “the trial judge may have found it unnecessary to consider Mr. Brooks’ demeanor, instead basing his ruling completely on the second proffered justification for the strike.” The Court concluded that for all of these reasons it could not credit the nervousness explanation proffered by the prosecutor. The failure to credit the nervousness explanation was thus not based on the fact that the second explanation offered by the prosecutor was found to be pretextual, but the uncertainty as to how the trial judge viewed the nervousness explanation, caused by the fact that he provided no explanation for overruling the *Batson* objection.

This conclusion is further supported by the structure of the *Snyder* majority opinion. The Court fails to credit the nervousness explanation in part III.A of its opinion. It does not address the student-teaching explanation until part III.B of the opinion. The Court thus reaches its conclusion that it cannot credit the prosecutor’s nervousness explanation before reaching the student-teaching explanation, indicating that its conclusions in the two sections are independent.

Justice Thomas’s dissenting opinion in *Snyder* appears to share this understanding of the meaning of the *Snyder* majority. Justice Thomas argues that “we have never suggested that a reviewing court should defer to a trial court’s resolution of a *Batson* challenge only if the trial court made specific findings with respect to each of the prosecutor’s proffered race-neutral reasons.” Justice Thomas’s statement suggests that his interpretation of the *Snyder* majority is that it broadly requires trial judges to provide explanations.

Courts interpreting *Snyder* going forward would not need to always require trial judges to explain their *Batson* rulings in order to effectuate the purpose of the *Snyder* standard. Courts could adopt a standard similar to that suggested by the *Smulls* dissent in which appellate courts will not credit a prosecutor’s justification for a peremptory challenge unless the trial judge explains his basis for accepting the challenge or the reason offered by the prosecutor is otherwise supported in the record. By not accepting a reason without some sort of on-the-record support, this application of *Snyder* would still encourage trial judges to create a more thorough record for

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188. See id. at 1212.
189. Id. at 1209.
190. Id.
191. The *Snyder* Court declined to address the issue of which of the two reasons offered was the actual cause of the prosecutor challenging Mr. Brooks. See id. at 1212.
192. Id. at 1209.
193. Id.
194. Id. at 1213 (Thomas, J., dissenting).
appellate review, and in doing so would cause trial judges to take a closer
look at potentially pretextual justifications offered by prosecutors in support
of peremptory challenges. This would allow Snyder to serve as a tool for a
more focused Equal Protection analysis in seeking to root out racial dis-