Michigan Law Review

Volume 108 | Issue 7

2009

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

John P. Bringewatt
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

 Part of the Civil Rights and Discrimination Commons, Courts Commons, Fourteenth Amendment Commons, and the Law and Race Commons

Recommended Citation

John P. Bringewatt, *Snyder v. Louisiana: Continuing the Historical Trend Towards Increased Scrutiny of Peremptory Challenges*, 108 MICH. L. REV. 1283 (2010).
Available at: https://repository.law.umich.edu/mlr/vol108/iss7/2

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTE

SNYDER 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.*

TABLE OF CONTENTS

---

* 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.

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-

---

1. *E.g.*, Brian W. Stoltz, Note, *Rethinking the Peremptory Challenge: Letting Lawyers Enforce the Principles of* Batson, 85 TEX. L. REV. 1031 (2007).

2. Swain v. Alabama, 380 U.S. 202, 219 (1965).

3. *E.g.*, David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 11–12 (2001).

4. *Swain*, 380 U.S. at 220.

5. *Id.* at 212–14.

6. WILLIAM BLACKSTONE, 4 COMMENTARIES *353–54.

7. *Id.*

8. *Id.* at *353.

9. *Swain*, 380 U.S. at 213. The Criminal Justice Act of 1988, however, abolished the peremptory challenge in England. Criminal Justice Act, 1988, c. 33, § 118 (Eng.), *available at* http://www.opsi.gov.uk/acts/acts1988/ukpga_19880033_en_13.

10. *E.g.*, *Swain*, 380 U.S. at 220.

forded by the Equal Protection Clause of the Fourteenth Amendment.[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."[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.[13]

In *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.[14] The *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[15] an important aspect of his right to a jury trial and violates the Equal Protection Clause.[16] The *Batson* Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race."[17] *Batson* created a process for defendants to challenge a prosecutor's use of peremptory challenges.[18]

Concurring in *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.[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.[20] Despite *Batson*'s requirement of racial neutrality, studies

---

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.").

12. Batson v. Kentucky, 476 U.S. 79, 127 (1986) (Burger, C.J., dissenting).

13. *See, e.g.*, *Swain*, 380 U.S. at 244 (Goldberg, J., dissenting).

14. 476 U.S. at 96–98. Prior to *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. *Swain*, 380 U.S. at 227.

15. Prospective jurors excluded from jury service by racially discriminatory practices also may challenge jury selection procedures under the Equal Protection Clause. Carter v. Jury Comm'n, 396 U.S. 320, 329 (1970). A defendant may also assert the Equal Protection rights of excluded jurors. Powers v. Ohio, 499 U.S. 400, 415 (1991). This Note, however, focuses exclusively on the rights of criminal defendants to challenge the discriminatory use of peremptory challenges on their own behalf.

16. *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. *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); 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).

17. *Batson*, 476 U.S. at 89.

18. *Id.* at 93–94. See *infra* text accompanying notes 53–57 for an explanation of the *Batson* standard.

19. *Batson*, 476 U.S. at 102–08 (Marshall, J., concurring).

20. Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 266–73 (2005) (Breyer, J., concurring).

suggest that peremptory strikes are routinely made on the basis of race.[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.[22] Because of such views, "rac[ial] . . . discrimination [in jury selection] continue[s] to flourish with corrective judicial action likely in only the most extreme circumstances."[23]

In March 2008, the Supreme Court decided *Snyder v. Louisiana*[24], the latest in the line of *Batson* progeny. *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 *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 *Batson* challenges. However, as the *Snyder* dissent points out, *Snyder* does in fact impose a standard for *Batson* challenges that had not existed before.[25]

This Note argues that *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 *Snyder* decision, discussing the line of Supreme Court cases dealing with racial discrimination in jury selection leading up to *Snyder*, including *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 *Snyder* and argues that it alters the requirements for trial courts in deciding *Batson* challenges by requiring them to more carefully scrutinize the justifications proffered in support of peremptory challenges made by prosecutors. Part III shows that *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 *Snyder* going forward.

---

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

22. *See* Baldus et al., *supra* note 3, at 127.

23. *Id.* at 128.

24. 128 S. Ct. 1203 (2008).

25. *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.[26] 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*[27] and *Swain v. Alabama*,[28] 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*.[29] 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.[30] 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.[31]

---

26. *See* Strauder v. West Virginia, 100 U.S. 303 (1880).

27. *Id.*

28. 380 U.S. 202 (1965).

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.[32] 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."[33] The Court concluded that a law excluding black citizens from jury service violated a black defendant's rights under the Equal Protection Clause.[34]

Strauder established the basic principle that categorical racial discrimination in jury selection[35] by law is unconstitutional.[36] 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.[37] Robert Swain was convicted of rape in the Circuit Court of Talladega County and sentenced to death.[38] Although there was no statutory prohibition, the Court recognized that "no [African-American] ha[d] actually served on a petit jury [in Talladega County] since about 1950."[39] Swain challenged his conviction on the grounds that the jury selection process violated the Equal Protection Clause.[40] At Swain's trial, there were eight black venirepersons.[41] None of them ultimately served on the jury. Six of the eight were excluded because the prosecutor used peremptory challenges to remove them.[42] 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-

---

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).

36. *Strauder*, 100 U.S. at 309–10.

37. 380 U.S. 202, 210–28 (1965).

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."[43] 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.[44] 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.[45]

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.[46]

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."[47] 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*.[48] 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.[49] The Supreme Court recognized that the case called for them to reconsider *Swain*,[50] 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).

48. 476 U.S. 79 (1986).

49. *Id.* at 83.

50. *Id.* at 82.

placed on defendants a crippling burden of proof."[51] 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.[52]

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[53] 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."[54] *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[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.[55]

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."[56] 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."[57] The Court

---

51. *See id.* at 92.

52. Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 239 (2005) (internal quotation marks omitted).

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.

55. Miller-El v. Cockrell (*Miller-El I*), 537 U.S. 322, 328–29 (2003) (citations omitted).

56. *Batson*, 476 U.S. at 96–97.

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.[58]

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

58. *Batson*, 476 U.S. at 100.

59. *Id.* at 106 (Marshall, J., concurring).

60. *Id.* at 107 (Marshall, J., concurring).

61. 500 U.S. 352, 355–56 (1991).

62. *Id.* at 356–57.

63. *Id.* at 360.

64. 514 U.S. 765, 766 (1995) (per curiam).

65. *Id.* at 768.

66. 545 U.S. 231 (2005).

67. The Court previously granted certiorari in the case and concluded that Miller-El was entitled to a certificate of appealability. Miller-El v. Cockrell (*Miller-El I*), 537 U.S. 322, 348 (2003).

against black venirepersons in Miller-El's capital murder trial constituted a *Batson* violation.[68] Although *Miller-El II* did not establish a new standard for interpreting *Batson*,[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*.[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.[71] The Court also undertook an analysis of "broader patterns of practice during the jury selection."[72] The Court conducted a detailed, fact-intensive analysis, providing a model for future lower-court inquiries.[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."[74] The Court remanded the case with instructions to grant the habeas corpus relief sought by Miller-El.[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.[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."[77] Given this, Justice Breyer concluded that he "believe[s] it necessary to reconsider

---

68. *Miller-El II*, 545 U.S. at 236–37.

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.").

70. *Miller-El II*, 545 U.S. at 239–40.

71. *Id.* at 240–52.

72. *Id.* at 253.

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).

74. *Miller-El II*, 545 U.S. at 266.

75. *Id.*

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.).

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 challenges[83] 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).

79. Strauder v. West Virginia, 100 U.S. 303, 309–10 (1880).

80. *See* Swain v. Alabama, 380 U.S. 202, 227 (1965).

81. Batson v. Kentucky, 476 U.S. 79, 92 (1986).

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.[85] 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*."[86] In an implicit rejection of *Purkett*, the Court plainly recognized that "[s]ome stated reasons are false."[87] 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.[88] *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."[89] However, the tension between these concepts remains[90] 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.[91] 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[92] 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

85. Brian W. Wais, Note, *Actions Speak Louder than Words: Revisions to the* Batson *Doctrine and Peremptory Challenges in the Wake of* Johnson v. California *and* Miller-El v. Dretke, 45 BRANDEIS L.J. 437, 448 (2007).

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.

92. 128 S. Ct. 1203 (2008).

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.[93] 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.[94] Snyder argued that the prosecutor used peremptory challenges to strike potential jurors on the basis of their race in violation of *Batson*.[95]

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.' "[96] 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,[97] especially given the unpopularity of the Simpson verdict with white citizens across the country,[98] 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

---

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.

108. *See* State v. Snyder, 874 So. 2d 739, 745 (La. 2004).

109. Snyder v. Louisiana, 545 U.S. 1137 (2005).

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

---

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).

114. Sheri Lynn Johnson, *Race and Recalcitrance: The* Miller-El *Remands*, 5 OHIO ST. J. CRIM. L. 131, 151 (2007).

115. *Id.* at 153.

116. Snyder v. Louisiana, 551 U.S. 1144 (2007) (granting certiorari).

117. Snyder v. Louisiana, 128 S. Ct. 1203, 1206 (2008).

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.*

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.[129] 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."[130]

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*,[131] 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.[132] 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.[133]

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.[134] Rather than deferring to trial judges' decisions on *Batson* violations,[135] 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.[136] 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).

131. *See* Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 240–52 (2005).

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[137] 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."[138] 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."[139]

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. Dretke (*Miller-El II*), 545 U.S. 231, 239 (2005)).

Supreme Court,[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.[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,[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.' "[143] The O.J. Simpson issue was discussed fairly extensively during oral arguments before the Court,[144] with several justices appearing to give it significant weight.[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*."[146] *Snyder* took the type of "meticulous facts and circumstances review"[147] called for by *Miller-El II*, applied it to the striking of a single venireperson, and raised the standard for justifying a peremptory challenge.[148] 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

---

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

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

142. Brief of Petitioner at 40, Snyder v. Louisiana, 128 S. Ct. 1203 (2008) (No. 06-10119), 2007 WL 2605447.

143. *Id.* at 48 (quoting *Miller-El II*, 545 U.S. at 265).

144. *See* Transcript of Oral Argument at 3–4, 25–28, 36–43, Snyder v. Louisiana, 128 S. Ct. 1203 (2008) (No. 06-10119).

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).

146. Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 240 (2005); *see also* Batson v. Kentucky, 476 U.S. 79, 106 (Marshall, J., concurring).

147. Davenport, *supra* note 73, at 979.

148. *See* Snyder v. Louisiana, 128 S. Ct. 1203, 1208–12 (2008).

can dismiss a *Batson* claim.[149] The *Snyder* Court simply determined that since the peremptory challenge of one juror constituted *Batson* error, no further analysis was required.[150] *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"[151] 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.[152] 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.[153] The Court has thus moved away from the traditional idea that the peremptory challenge is a purely discretionary device.[154] *Snyder* continues this trend by increasing the level of explanation required to support a challenge. Despite the suggestions of Justice Marshall,[155] Justice Breyer,[156] and other critics,[157] 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.*

151. *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

152. Swain v. Alabama, 380 U.S. 202, 221–22 (1965).

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).

154. *See* Garguilo, *supra* note 69, at 791; Alexis Straus, Note, *(Not) Mourning the Demise of the Peremptory Challenge: Twenty Years of* Batson v. Kentucky, 17 TEMP. POL. & CIV. RTS. L. REV. 309, 337–39 (2007).

155. *Batson*, 476 U.S. at 107 (Marshall, J., concurring).

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,[158] *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.[159] 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.[160] 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.[161] These commentators suggest that it may be time to abolish the peremptory challenge altogether.[162]

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."[163] 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*.[164] 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.

159. Snyder v. Louisiana, 128 S. Ct. 1203, 1209 (2008).

160. Camille A. Nelson, Batson, *O.J., and* Snyder: *Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1722 (2008); *accord The Supreme Court, 2007 Term-Leading Cases*, 122 HARV. L. REV. 276, 355 (2008) [hereinafter *Leading Cases*].

161. Nelson, *supra* note 160, at 1718–19.

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.[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.[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.[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.[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.[169] This demeanor explanation was the

---

165. *See id.*

166. *See supra* Section III.A.

167. *See supra* Section III.A.

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).

169. 559 F.3d 657, 666 (7th Cir. 2009).

only justification for the challenge that was offered.[170] 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."[171] *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*.[172]

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.[173] Although the court rejected the claim for procedural reasons,[174] 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.[175] 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.[176]

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."[177] 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"[178] or if the reason can otherwise be confirmed in the record.[179]

---

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 (2010). The Court left open the possibility that *Snyder* "alter[ed] or add[ed] to *Batson*'s rule." *Id.* at 5 n.2.

173. Smulls v. Roper, 535 F.3d 853, 855–57 (8th Cir. 2008) (en banc).

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 plausible or 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.[188] 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."[189] The Court concluded that for all of these reasons it could not credit the nervousness explanation proffered by the prosecutor.[190] 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.[191]

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.[192] It does not address the student-teaching explanation until part III.B of the opinion.[193] 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."[194] 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.[195] 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

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).

195. *See* Smulls v. Roper, 535 F.3d 853, 872 (8th Cir. 2008) (en banc) (Bye, J., concurring in part and dissenting in part).

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 discrimination in jury selection.

CONCLUSION

The Supreme Court has grappled with the problem of how to effectively enforce the Equal Protection Clause in the jury selection context for many years. Over time, a pattern has emerged in which the Court has applied a continuously more focused approach to this problem, moving from striking down statutory provisions that forbid African Americans from serving as jurors[196] to detailed analyses of peremptory challenges made against individual venirepersons, to determine whether an Equal Protection violation occurred.[197] *Snyder v. Louisiana* is the latest step in this progression, requiring trial judges to explain the basis for their rulings on *Batson* challenges. This rule helps smoke out whether facially race-neutral reasons proffered by prosecutors are a pretext for racially motivated challenges. Although it is not yet clear how the *Snyder* standard will be applied going forward, a proper application of *Snyder* would require upholding a defendant's *Batson* challenge absent some explanation by the trial judge of his reason for accepting a prosecutor's justification of a peremptory challenge or at least other proof on the record that the justification proffered by the prosecutor was legitimate.

196. *See* Strauder v. West Virginia, 100 U.S. 303 (1880).

197. *See* Miller-El v. Dretke *(Miller-El II)*, 545 U.S. 231 (2005).