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True Lies: The Role of Pretext Evidence Under Batson v. Kentucky in the Wake of St. Mary's Honor Center v. Hicks

David A. Sutphen

INTRODUCTION

During the course of voir dire in State v. McRae,1 a prosecutor questioned the only African-American veniremember regarding her views on the fairness of the justice system:

[Prosecutor:] Did you also understand that there may be certain jurors who have certain feelings or attitudes about whatever ... that[ ] they couldn't for example, find somebody guilty because they just don't think the system is fair .... [Veniremember:] I understand that.

[Prosecutor:] Okay. Knowing what you know about, you know, your belief that the system maybe isn't perfect, should I be concerned? Is it something where you don't think you could convict him if he's proven—[Veniremember:] No, no, no. [Prosecutor:] Okay. [Veniremember:] I would base my judgment on the evidence.2

After responding to this line of inquiry, which was not posed to any of the white veniremembers, the prospective juror was peremptorily challenged by the State.3 Concerned that the prosecutor’s strike was racially motivated, defense counsel raised an objection under Batson v. Kentucky.4

After determining that the defendant had established a prima facie case of discrimination,5 the trial judge afforded the prosecutor an opportunity to proffer a legitimate nondiscriminatory reason for the peremptory challenge. In his defense the prosecutor offered two justifications. First, that the stricken veniremember “had an attitude that where she thought that basically, the system is unfair to minorities, and the defendant’s being black is — and her being black would over compensate by basically letting this guy off.”6

1. 494 N.W.2d 252 (Minn. 1992).
2. 494 N.W.2d at 254-55.
3. See 494 N.W.2d at 253.
4. 476 U.S. 79 (1986). In general, Batson prohibited state actors from exercising racially motivated peremptory challenges on the grounds that they violate the Equal Protection Clause of the Fourteenth Amendment.
5. At a minimum, this initial burden of production requires that the moving party demonstrate that he is a member of a protected class and that the state has exercised one or more of its peremptory challenges against a member of this protected class. For a more detailed discussion of the production requirements for Batson objections, see infra text accompanying notes 51-64.
6. 494 N.W.2d at 256.
Second, that she "thinks the whole jury process is [a] fraud."7 Notwithstanding the defendant's claim that these explanations were pretextual, the trial judge concluded that there "was an articulable basis for the prosecutor's challenge in this case."8 Thus, the case proceeded to trial, and the defendant was eventually convicted of second-degree criminal sexual conduct.9 On appeal to the Minnesota Supreme Court, however, the trial judge's ruling was reversed on the ground that the prosecutor's explanation for the challenged strike was unworthy of credence because it was unsupported by the voir dire transcript.10

The facts of *State v. McRae* are representative of a large number of *Batson* cases in which the validity of a prosecutor's explanation for a peremptory challenge is the main point of inquiry both during the trial and on appeal.11 This emphasis is largely a function of the fact that, under *Batson*, proof of pretext is the legal equivalent of proof of intentional discrimination.12 In other words, if a defendant

7. 494 N.W.2d at 256.
8. 494 N.W.2d at 256.
9. See 494 N.W.2d at 253.
10. In particular, the state supreme court noted that "the record of the prosecutor's examination of the juror in question fails to support the explanation given by the prosecutor for striking the juror." 494 N.W.2d at 257. Accordingly, "[t]o allow the striking of this juror . . . in effect would allow a prosecutor to strike any fair-minded, reasonable black person from the jury panel who expressed any doubt that 'the system' is perfect." 494 N.W.2d at 257.
11. Although *Batson* itself only dealt with the constitutionality of race-based peremptory challenges by the State in question cases where the defendant and struck juror shared the same race, the Supreme Court has since greatly expanded its scope. Consequently, as the law currently stands, *Batson* applies in all cases — criminal and civil — to race or gender-based peremptory challenges exercised by either party, regardless of whether that party shares the same race or gender as the excluded juror. See J.E.B. v. Alabama *ex rel.*, 114 S. Ct. 1419 (1994) (extending *Batson* to gender); Georgia v. McCollum, 505 U.S. 42, 59 (1992) (extending *Batson* to peremptory challenges exercised by criminal defendants); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991) (extending *Batson* to civil trials); Powers v. Ohio, 499 U.S. 400, 415 (1991) (holding that *Batson* applied regardless of whether the criminal defendant and excluded juror were of the same race). Notwithstanding this wide scope of *Batson*, this Note relies exclusively on the original *Batson* circumstances both for convenience and because it is representative of the largest number of cases alleging the discriminatory use of peremptory challenges.
12. See, e.g., Johnson v. Vasquez, 3 F.3d 1327, 1330 (9th Cir. 1993) (holding that "Johnson carried his burden of proving intentional discrimination by establishing that the prosecutor's four race-neutral explanations were a pretext"); Jones v. Ryan, 987 F.2d 960, 962 (3rd Cir.
challenging a peremptory strike can convince a trial judge during the final stage of the Batson hearing that the explanation offered by a prosecutor in support of a peremptory strike is pretextual, then she will prevail as a matter of law.

In the process of determining whether a peremptory strike is valid, lower courts rely on the Title VII burden-shifting framework originally laid out by the Supreme Court in McDonnell Douglas Corp. v. Green. As a result, the order and presentation of proof in Batson cases deliberately parallels the order and presentation of proof in Title VII intentional discrimination suits. In light of this similarity, the Supreme Court's recent Title VII ruling in St. Mary's Honor Center v. Hicks — that proof of pretext under the McDonnell Douglas framework is not the legal equivalent to proof of intentional discrimination — raises questions regarding the role of pretext evidence in the operation of the present Batson proof structure.

This Note argues that notwithstanding Batson's reliance on the McDonnell Douglas burden-shifting framework, the current standard of proof under Batson should not be altered along the lines suggested by Hicks. Part I contends that Batson and its progeny are an affirmative effort by the Court to eliminate racism in jury selection. Part II analyzes the Court's ruling in Hicks and specifically focuses on the Court's reasons for rejecting proof of pretext as the legal equivalent of proof of intentional discrimination in Title VII cases. Finally, Part III argues that there are fundamental differences between the Title VII employment discrimination context and Batson cases, and as such, the logic underlying Hicks breaks


Throughout this Note I use the terms pretext, pretext evidence and proof of pretext interchangeably. In all cases, they are intended to refer to the circumstance in which a defendant raising a Batson objection offers evidence to prove or actually establishes that a prosecutor's explanation for a peremptory challenge, for whatever reason, is unworthy of credence.

13. In a recent per curiam opinion, Purkett v. Elem, 115 S. Ct. 1769 (1995), the Supreme Court clarified the stage at which it is appropriate for a trial judge to rule on the legitimacy of a prosecutor's explanation for a peremptory challenge. In particular, the Court held that so long as the prosecutor's reason(s) is facially valid then the trial court must withhold judgment until the final stage of the Batson hearing in which the defendant is provided an opportunity to establish that the prosecutor's explanation is pretextual. 115 S. Ct. at 1770-71.


down when applied in cases alleging the discriminatory use of peremptory challenges.

I. Batson: Its Purpose and Application

This Part examines the Court's landmark ruling in Batson and describes how lower courts have applied it. Section I.A argues that Batson was a reaction to Swain v. Alabama, and was intended to ease the burden of proof on criminal defendants challenging the States' use of peremptories. Section I.B explores the operation of Batson's three-part proof structure. Section I.C argues that establishing pretext is presently the critical question in Batson cases.

A. An Interpretation of Batson

To understand Batson it is important to recognize that Batson was a direct response to an earlier, much maligned, peremptory challenge case: Swain v. Alabama.17 The decision in Batson was a clear rejection of the notion embraced by the Court in Swain that it was reasonable to assume that a prosecutor's strikes were based on legitimate considerations. Section I.A.1 argues that Batson eased Swain's excessive burden of proof and reversed Swain's presumption regarding the discriminatory potential of peremptory challenges. Section I.A.2 contends that in addition to relieving Swain's excessive burden of proof, Batson sought to alleviate two other harms caused by discriminatory peremptories: harm to the excluded juror, and harm to the integrity of the justice system.

1. Batson as a Reaction to Swain

For over a century the Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment forbids race-based exclusion of blacks from service on grand and petit juries.18 It was not until 1965, however, that the Court first addressed the specific question of whether race-based peremptory challenges violate the Fourteenth Amendment. In Swain v. Alabama,19 the Court

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17. 380 U.S. 202 (1965). For criticism of Swain, see, e.g., Commonwealth v. Soares, 387 N.E.2d 499, 510 n.12 (Mass.) ("In light of the extensive criticism of Swain, and in recognition of the negligible protection that decision offers to a defendant asserting the right to trial by jury of peers, we take this opportunity to depart from applying its rule perfunctorily . . . "). cert. denied, 444 U.S. 881 (1979); State v. Crespin, 612 P.2d 716, 717 (N.M. Ct. App. 1980) ("[T]he challenge allowed in Swain may be too limited. . . . [T]he California experience with the Swain rule has resulted in numerous attempts to meet the Swain burden with no success . . . ." (citations omitted)); Albert W. Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Cn. L. Rev. 153, 164 (1989) ("Under Swain, the Constitution guaranteed minorities only an opportunity to reach the finals before a government officer discriminated against them.").


recognized that, in principle, proof of the systematic exclusion of blacks through the State’s use of peremptory challenges was sufficient to establish a violation of the Constitution.20

Nevertheless, in practice, the burden of proof required to prevail under *Swain* was nearly insurmountable. In order to show a constitutional violation, a defendant had to demonstrate that the prosecutor challenged blacks “in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be.”21 As a result, *Swain* did little, on a case-by-case basis, to deter prosecutors from challenging veniremembers solely on the basis of race.22

By the mid-1980s, faced with compelling evidence of the continued use of racially motivated peremptory challenges,23 the Supreme Court decided to reconsider its primary holding in *Swain*. In *Batson*...

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20. Although the Court embraced the principle that “‘[j]urymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race,’” 380 U.S. at 204 (quoting Cassell v. Texas, 339 U.S. 282, 286 (1950)), it appeared reluctant to lessen the evidentiary burden placed on defendants challenging peremptory strikes. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. 380 U.S. at 224 (emphasis added).

21. 380 U.S. at 223. One of the most disturbing aspects of the Court’s ruling in *Swain* was that although “there never ha[d] been a Negro on a petit jury in either a civil or criminal case in Talladega County,” the majority nonetheless ruled against Swain on the grounds that he lacked sufficient evidence to establish that discrimination occurred at his trial. 380 U.S. at 223-24. In fact, Justice Goldberg noted in his dissent that “[s]ince it is undisputed that no Negro has ever served on a jury in the history of the county, and a great number of cases have involved Negroes, the only logical conclusion ... is that in a good many cases Negroes have been excluded by the state prosecutor.” 380 U.S. at 235 (Goldberg, J., dissenting).

22. At least one commentator noted that “[a]lthough courts are inclined to say that the defendant’s burden of showing ... systematic exclusion by the prosecutor is ‘not insurmountable,’ experience has clearly indicated the ‘virtual impossibility’ of doing so.” 2 WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.3(d), at 739 (1984) (footnote omitted). In fact, during the two decades before the Court decided *Batson*, there were only two reported cases in which a plaintiff prevailed under the *Swain* evidentiary standard. See ACLU Amici Curiae Brief for Petitioner at 45, *Batson* (No. 84-6263) (citing State v. Brown, 371 So. 2d 751 (La. 1979)), microformed on U.S. Supreme Court Records and Briefs (Congressional Info. Serv.); and see State v. Washington, 375 So. 2d 1162 (La. 1979).

23. One clear illustration can be found in the Dallas County, Texas, District Attorney’s Office’s instruction manual provided to new prosecutors. In particular, the instructions regarding jury selection read:

III. What to look for in a juror

A. Attitudes

1. You are not looking for a fair juror but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree.

2. You are not looking for any member of a minority group which may subject him to oppression — they almost always empathize with the accused.

3. You are not looking for free-thinkers and flower children . . .

son v. Kentucky, the Court held that race-based peremptory challenges in a criminal case where the defendant and struck juror are both black violate the Equal Protection Clause of the Fourteenth Amendment.

James K. Batson, a black man, was arrested and charged by the State of Kentucky with second-degree burglary and receipt of stolen goods. During the course of jury selection, the State used four of its six peremptory challenges to excuse all four black veniremembers. In response, Batson moved to discharge the jury on the ground that the State’s challenges violated his constitutional rights under the Fourteenth Amendment. The trial judge, however, rejected Batson’s argument noting that the parties could “strike ‘anybody they want to.’” The Supreme Court ultimately granted certiorari and ruled that race-based peremptory challenges were unconstitutional and that, in order to prevail, a criminal defendant need not prove that the individual prosecutor had a history of exercising discriminatory strikes.

The Court in Batson clearly rejected the notion underlying Swain, that it was reasonable — even if the State had peremptorily challenged all black veniremembers — to assume that a prosecu-
tor's strikes were based on legitimate considerations.\(^30\) In fact, \textit{Batson} explicitly recognized that peremptory challenges allow "those to discriminate who are of a mind to discriminate."\(^31\) and that \textit{Swain}'s "crippling burden of proof" essentially had immunized such challenges from constitutional review.\(^32\)

\textit{Batson} recognized that the burden in \textit{Swain} had been insurmountable and established a new three-stage analysis, based on Title VII, which was clearly aimed at making objections to discriminatory peremptory challenges more viable.\(^33\) Furthermore, the Court stated that in meeting \textit{Batson}'s lower burden of proof, the objecting party could rely on the fact that the peremptories offered the opportunity to discriminate.\(^34\) The \textit{Batson} Court's decision to lessen the standard of proof required to show a constitutional violation makes it substantially easier for a defendant to prevent a prosecutor from exercising racially motivated peremptory challenges.

\textbf{2. \textit{Batson}'s Three Harms}

Although \textit{Batson} primarily focused on the constitutional harm suffered by the criminal defendant as a result of race-based peremptory challenges,\(^35\) the Court also identified two additional harms arising from discriminatory peremptory challenges: the harm to the excluded juror, and the harm to the integrity of the justice system as a whole.\(^36\) In the cases that expanded \textit{Batson—Powers v. Ohio,}\(^37\) \textit{Edmonson v. Leesville Concrete Co.,}\(^38\) \textit{Georgia v.}

\begin{itemize}
\item \textit{Batson}, 476 U.S. at 96 (quoting \textit{Avery v. Georgia,} 345 U.S. 559, 562 (1953)).
\item \textit{See} 476 U.S. at 92-93 (noting that "since ... \textit{Swain} has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny").
\item \textit{See} 476 U.S. at 92-93 (rejecting \textit{Swain}'s "crippling burden of proof" in favor of Title VII's three-part test). For a discussion of \textit{Batson}'s three-part test see infra section 1.B.
\item \textit{See} 476 U.S. at 96 ("[T]he defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" (quoting \textit{Avery,} 345 U.S. at 562)).
\item \textit{See} 476 U.S. at 86 (holding that "[p]urposeful racial discrimination in the selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure").
\item \textit{See} 476 U.S. at 87-88; \textit{see also J.E.B. v. Alabama ex rel.,} 114 S. Ct. 1419, 1427 (1994) (reasoning that "[t]he community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders").
\item 499 U.S. 400 (1991) (holding that \textit{Batson} applies regardless of whether the criminal defendant and excluded juror are of the same race).
\item 500 U.S. 614 (1991) (ruling that \textit{Batson} applies in the context of civil as well as criminal trials).
\end{itemize}
McCollum, and J.E.B. v. Alabama ex rel.—the Court specifically focused upon the impact of these two harms. Essentially, what emerges from these four subsequent cases is the fundamental principle that the legitimacy of our system of justice is severely undermined by the continued existence of racial discrimination in the jury selection process. More specifically, the Court reasoned that:

Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law — that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. . . . When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.

The Court's unwavering adherence to this important principle illustrates the significance it places on the struggle to eradicate racial discrimination from the process by which we select juries.

B. Batson's Three-Stage Analysis

In order to lessen Swain's burden of proof and to facilitate the consideration of indirect and circumstantial evidence in cases alleging the discriminatory use of peremptory challenges, Batson adopted the three-stage Title VII disparate treatment burden-shifting proof structure established by the Court in McDonnell Douglas Corp. v. Green. The Court's choice of this framework reflected its recognition of two important principles. First, that the ultimate burden of proving intentional discrimination under the Fourteenth Amendment remains with the criminal defendant.

40. 114 S. Ct. 1419 (1994) (holding that the principles underlying Batson also apply to gender-based peremptory challenges).
41. 114 S. Ct. at 1430.
42. In light of the Supreme Court's decision in McCleskey v. Kemp, 481 U.S. 279 (1987) (upholding the constitutionality of the death penalty notwithstanding undisputed evidence of its disparate impact on blacks), it would be disingenuous to argue that the Court's grave concern over eradicating racial discrimination in the jury-selection process extends equally to all phases of our justice system.
43. 411 U.S. 792 (1973); see also Batson v. Kentucky, 476 U.S. 79, 94 n.18 (1986) ("[O]ur decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of the prima facie burden of proof rules." (citing McDonnell Douglas)). The plaintiff in McDonnell Douglas was a black civil rights activist who had been refused reemployment as a mechanic on the grounds that he had participated in a series of illegal protests.
44. See 476 U.S. at 93 (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967)). Those bringing a challenge under the equal protection clause of the Fourteenth Amendment must establish discriminatory intent in order to prevail. See Washington v. Davis, 426 U.S. 229 (1976). In other words, the "'invidious quality' of governmental action [i.e. peremptory challenges] claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose.'" Batson, 476 U.S. at 93 (quoting Washington, 426 U.S. at
Second, that it is inherently difficult to prove intentional discrimination without reference to circumstantial evidence. As a result, the Court noted that in weighing whether a defendant has carried his burden of persuasion, courts should make a careful and searching inquiry into any evidence that may be relevant to establishing discriminatory intent. To facilitate this inquiry, the Court borrowed the Title VII proof structure.

This section examines the workings of this burden-shifting scheme. It explores first how the scheme operates in its original Title VII context and then how it works under Batson.

1. The Roots of Batson's Proof Structure

In McDonnell Douglas, the Supreme Court established a burden-shifting proof structure for resolving Title VII intentional discrimination cases. Under this framework, a plaintiff initially
must prove a prima facie case\textsuperscript{48} of intentional discrimination in order to state a valid Title VII claim.\textsuperscript{49}

If the plaintiff is successful at this first stage, the burden of production shifts to the employer at the second stage to come forward with a "legitimate non-discriminatory reason" for its adverse employment action.\textsuperscript{50} For example, at this second stage an employer might contend that the plaintiff was fired because of poor performance evaluations or frequent tardiness. It does not matter, for purposes of stage two analysis, if the proffered reason is credible, or if it was the real reason for the employer's action. All that matters is that the reason asserted be facially nondiscriminatory.

Once the employer offers a facially valid justification, stage three of the \textit{McDonnell Douglas} framework affords the plaintiff an opportunity to demonstrate that the reason proffered is pretextual and that race was the real reason for the adverse employment action.\textsuperscript{51} During this final "pretext" stage of proof, plaintiffs can pre-

\textsuperscript{48}The term \textit{prima facie case} in the Title VII context "denote[s] the establishment of a legally mandatory, rebuttable presumption," rather than "the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981). According to the Court:

A prima facie case under \textit{McDonnell Douglas} raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.


\textsuperscript{49}In particular, the plaintiff must prove the following four elements: (1) he "belongs to a racial minority"; (2) "he applied and was qualified for a job for which the employer was seeking applicants"; (3) "despite his qualifications, he was rejected"; and (4) "after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." \textit{McDonnell Douglas}, 411 U.S. at 802.

\textsuperscript{50}In \textit{Burdine}, 450 U.S. at 248, (1981), the Supreme Court clarified the exact nature of this second-stage burden. Specifically at issue in \textit{Burdine} was whether the employer's second-stage burden is one of production or persuasion. In other words, the Court was asked to decide whether the \textit{McDonnell Douglas} standard required that a Title VII defendant persuade the court that it was "actually motivated" by the reason(s) proffered; or, whether it was sufficient for an employer simply to introduce evidence that "raises a genuine issue of fact as to whether it discriminated against the plaintiff." 450 U.S. at 254-55.

The distinction between these two production requirements is significant. Under the former, an employer would be required not only to come forward with a legitimate nondiscriminatory reason for its action but also to convince the factfinder by a preponderance of the evidence that it actually was motivated by the proffered reason. By contrast, under the latter production requirement, an employer would satisfy its burden simply by articulating a legitimate nondiscriminatory reason, regardless of whether it proved to be the "true" motivation behind the adverse employment action. \textit{See St. Mary's Honor Ctr. v. Hicks}, 113 S. Ct. 2742, 2748 (1993) (holding that "[b]y producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners [defendants] sustained their burden of production").

\textsuperscript{51}\textit{See McDonnell Douglas}, 411 U.S. at 804. This final stage does not occur, however, if the defendant is unable to articulate a "legitimate nondiscriminatory" reason for the adverse employment action, namely one that on its face does not violate Title VII. In such circumstances, the plaintiff is entitled to judgment as a matter of law in her favor because the de-
vail either directly, by showing that a discriminatory purpose more likely than not motivated the employer, or indirectly, by proving that the employer's explanation lacks credibility. For instance, under the first option, a plaintiff might offer evidence establishing that his employer had a history of using racial epithets to refer to him and other black employees. By contrast, under the second option a plaintiff could establish that his firing was racially motivated because white employees with equally poor or worse performance evaluations or similar tardiness problems did not lose their jobs.

2. How Batson's Proof Structure Operates

Under Batson's first stage, a criminal defendant, like a Title VII plaintiff, must establish a prima facie case of discrimination. In particular, the Batson Court stated that:

[T]he defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove veniremembers of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremembers from the petit jury on account of their race.


52. See Burdine, 450 U.S. at 256. Marina C. Sztteinbok provides a helpful explanation of these two avenues of proof. She notes the following:

[U]nder McDonnell Douglas, both the type of evidence the plaintiff introduces and the method of proof itself are indirect. The distinction Burdine established between "direct" and "indirect" modes of proving pretext must be understood in this context. The plaintiff uses circumstantial evidence whether pretext is proved directly or indirectly. By invoking the "more likely" strand of Burdine, the plaintiff proves discrimination affirmatively (i.e. "directly") through the introduction of circumstantial evidence. By invoking the "unworthy of credence" strand, however, the plaintiff proves discrimination "indirectly," without needing to build an affirmative case that the defendant more likely than not discriminated.


If successful, at the second stage of proof the burden of production then shifts to the State to offer a facially valid race-neutral explanation for the strike.

Recently, in *Purkett v. Elem*, the Supreme Court clarified the exact nature of this second stage burden under *Batson*. The Court specifically addressed the question of whether a criminal defendant, at the second stage of the *Batson* framework, is entitled to judgment in his favor if a prosecutor's explanation for a peremptory challenge appears implausible on its face. In reversing the Eighth Circuit, which had ruled in favor of the defendant, the Court held that the Court of Appeals erred "by ... requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive." Essentially, therefore, *Elem* represents the *Burdine* of the *Batson* line of cases, insofar as it stands for the proposition that at the second stage of proof the challenged party bears a burden of production, not persuasion.

Notwithstanding *Elem*, a prosecutor will not succeed in rebutting the prima facie case at the second *Batson* stage merely by asserting that he sensed that a black juror would be partial to the defendant because they were both black. *Batson* cautioned that prosecutors may not overcome the inference of discrimination simply by stating that their strike was in good faith and not motivated

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54. Among the considerations the Court mentioned as relevant to the determination whether a prima facie case has been established were "a 'pattern' of strikes against black jurors included in the particular venire" and the "prosecutor's questions and statements during voir dire examination and in exercising his challenges." 476 U.S. at 97.

The Court also noted that, in weighing the evidence in support of a prima facie case, "the trial court must undertake a 'factual inquiry' that 'takes into account all possible explanatory factors' in the particular case." 476 U.S. at 95 (quoting Alexander v. Louisiana, 405 U.S. 625, 630 (1972)).

55. 476 U.S. at 97. Although the state is required to come forward with some nondiscriminatory reason for its action, the "explanation need not rise to the level justifying exercise of a challenge for cause." 476 U.S. at 97.


57. In *Elem*, the prosecutor had justified his strike on the ground that the veniremember "had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair." 115 S. Ct. at 1770.

In reaction to the majority's ruling, the dissenters noted that:

The Court's unnecessary tolerance of silly, fantastic, and implausible explanations, together with its assumption that there is a difference of constitutional magnitude between a statement that "I had a hunch about this juror based on his appearance," and "I challenged this juror because he had a mustache," demeans the importance of the values vindicated by our decision in *Batson*.

115 S. Ct. at 1775-76 (Stevens, J., dissenting).

58. 115 S. Ct. at 1771.

59. See *supra* note 50 (discussing the Court's ruling in *Burdine*).

60. *See Batson v. Kentucky*, 476 U.S. 79, 97 (1986); *see supra* notes 1-10 and accompanying text.
by a discriminatory animus. Instead, the prosecutor must offer a race-neutral explanation that is relevant to the case at hand.

Ultimately, if a trial or reviewing court determines at the third stage that the reasons asserted by the prosecutor at stage two are insufficient to overcome the inference of discrimination, the criminal defendant is entitled to the appropriate relief. For example, a prosecutor might claim that her peremptory challenge was based on her belief that a black veniremember's prior criminal record would make him a bad juror for the State's case. Although this explanation is legitimate on its face, and therefore satisfies the State's second-stage burden under Elem, a defendant could still prevail at the third stage if he could establish that the prosecutor's explanation was pretextual. In other words, if the defendant could prove that the black veniremember who was struck did not actually have a criminal record, or that white veniremembers with similar records had not been struck, then the defendant would be entitled to relief under Batson.

In many cases, the presence of one or more of the following five factors will support a defendant's conclusion that the prosecutor's explanation is pretextual:

1. The reason given for the peremptory challenge is not related to the facts of the case; 2. There was a lack of questioning to the challenged juror or a lack of meaningful questions; 3. Disparate treatment — persons with the same or similar characteristics as the challenged juror were not struck; 4. Disparate examination of members of the venire, i.e., questioning a challenged juror so as to evoke a certain response without asking the same question of other panel members; and 5. An explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically.

Consequently, under the Batson proof structure, if the defendant is successful in proving pretext by establishing one of these factors, he is entitled to judgment as a matter of law.

C. Pretext Evidence in the Batson Proof Structure

In accordance with the explicit mandate of Batson, lower courts have employed the McDonnell Douglas framework in cases alleging the discriminatory use of peremptory challenges. Increasingly, the

61. See 476 U.S. at 98 (quoting in part Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

62. See 476 U.S. at 98.

63. See 476 U.S. at 100; see also State v. Singfield, No. 16253, 1994 WL 30482, at *3 (Ohio Ct. App. Jan. 26, 1994) (“The third step of the Batson analysis requires the court to reach the ultimate issue of whether the prosecutor's race-neutral explanation was merely a pretext . . . .”).

focus of inquiry in such cases has shifted away from the prima facie case toward an assessment of the adequacy of the prosecutor's proffered reasons for the challenged strike.\textsuperscript{65}

One explanation for this high degree of scrutiny at the pretext stage is the standard of proof that is required to prevail under \textit{Batson}. Because proof of pretext under \textit{Batson} is the legal equivalent to proof of intentional discrimination, many state and federal judges, in order to expedite \textit{Batson} hearings, ask prosecutors to offer a race-neutral explanation for their challenges even before a prima facie case is established.\textsuperscript{66} The enormous significance that trial judges place on pretext evidence means that an increasing number of \textit{Batson} motions are decided solely on the basis of whether the trial judge is convinced that the prosecutor's proffered reasons are pretextual.\textsuperscript{67}

In light of the wide range of explanations considered race-neutral under \textit{Batson},\textsuperscript{68} however, prosecutors readily can succeed in exercising discriminatory peremptory challenges.\textsuperscript{69} For example, a prosecutor legitimately can justify a strike based on the fact that the excluded juror has a relative who has been prosecuted for a crime,\textsuperscript{70} lives in the same county as the defendant,\textsuperscript{71} wears dark glasses,\textsuperscript{72} wears a hat,\textsuperscript{73} or is young or unmarried,\textsuperscript{74} all of which make it extremely difficult for defendants to prevail on \textit{Batson} motions at trial. Moreover, due to the factual nature of a trial judge's ruling

\textsuperscript{65.} See Jeffery S. Brand, \textit{The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters}, 1994 Wis. L. Rev. 511, 583 n.380 (arguing that this shift in focus "reflects the desire for quick determination of \textit{Batson} objections").

\textsuperscript{66.} See id. (listing examples of circuit court opinions that have benefited from this practice).

\textsuperscript{67.} A failure on the part of the defendant to "respond or offer any rebuttal to the prosecutor's reasons precludes appellate consideration of the issue of pretext." \textit{Id.} at 590.

\textsuperscript{68.} For a detailed discussion of the wide range of reasons considered legitimate under \textit{Batson}, see Michael J. Raphael & Edward J. Ungvarsky, \textit{Excuses, Excuses: Neutral Explanations Under \textit{Batson} v. Kentucky}, 27 U. Mich. J.L. Ref. 229 (1993) (arguing in particular that prosecutors' strikes can be classified into 12 basic categories — Age, Occupation, Unemployment, Religion, Demeanor, Relationship with a Trial Participant, Lack of "Intelligence," Socioeconomic Status, Residence, Marital Status, Previous Involvement with the Criminal Justice System, and Jury Experience — many of which serve as pretexts for racial discrimination).

\textsuperscript{69.} See generally \textit{Id.}. In particular, Raphael & Ungvarsky argue that [I]n almost any situation a prosecutor can readily craft an acceptable neutral explanation to justify striking black jurors because of their race. This is especially true when only a single or a few jurors are struck because it is less obvious that a pattern of striking blacks is involved.

\textit{Id.} at 236.

\textsuperscript{70.} See People v. Chambie, 234 Cal. Rptr. 308, 312 (Ct. App. 1987).

\textsuperscript{71.} See Johnson v. State, 529 So. 2d 577, 583 (Miss. 1988).


\textsuperscript{73.} See Lockett v. State, 517 So. 2d 1346, 1351 (Miss. 1987).

regarding whether a proffered reason is pretextual, reviewing courts are required to grant enormous deference to these findings. Although the exact standard varies from state to state, generally a reviewing court cannot reverse a ruling below unless, after assessing the entire voir dire transcript, it "is left with the definite and firm conviction that a mistake has been committed." Notwithstanding this extremely deferential standard of review, 20% of state and 10% of federal Batson cases in which the legitimacy of the prosecutor's explanation was an issue on appeal, were reversed on the ground that the trial judge committed clear error in accepting — as nondiscriminatory — the proffered explanation for the peremptory challenge. In other words, in all of these cases, the reviewing court was convinced after assessing the voir dire transcript that the prosecutor's reasons for the strike were pretextual, which under Batson is the legal equivalent to proof of intentional discrimination.

II. Hicks: Altering the McDonnell Douglas Framework

Prior to the Supreme Court's decision last term in St. Mary's Honor Center v. Hicks, the federal circuits were sharply divided

75. See Batson v. Kentucky, 476 U.S. 79, 98 n.21 (1986) ("[A] finding of intentional discrimination is a finding of fact entitled to appropriate deference by a reviewing court. Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." (citation omitted)). In particular, the Supreme Court has held that a trial court's factual findings — of which a finding of pretext is one — may not be reversed on appeal even if the reviewing court is "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985).


77. As of May 1, 1994, there were 378 state and 79 federal Batson cases in which the appellant alleged that the trial judge committed clear error in accepting the prosecutor's ostensibly race-neutral explanation for the challenged peremptory strike. Of the Batson cases in state courts where pretext was an issue on appeal, 74 out of 378 were reversed because the reviewing court concluded that the prosecutor's explanation for the challenged peremptory strike was pretextual. This search was accomplished by first searching the Allstates-Allfeds directories on Westlaw for all cases which included the words Batson and pretext. From this list of cases, the author counted those cases which were reversed for pretext.

78. As of May 1, 1994, 8 out of 79 Batson cases in federal court where pretext was an issue on appeal were reversed because the reviewing court concluded that the prosecutor's explanation for the challenged peremptory strike was pretextual.

79. One possible conclusion that can be drawn from these reversal rates is that federal and state trial judges are not adequately upholding the mandate of Batson. In fact, some judges have expressed open hostility toward Batson. See, e.g., United States v. Johnson, 721 F. Supp. 1077, 1079-82 (E.D. Mo. 1989); People v. Banks, 609 N.E.2d 864, 871-72 (Ill. App. Ct. 1993).

80. 113 S. Ct. 2742 (1993).
on the question whether proof of pretext in a Title VII disparate treatment case was equivalent, as a matter of law, to proof of intentional discrimination. In general, the appellate courts that addressed the issue adopted one of two distinct standards. Some circuits embraced a "pretext-only" approach, treating proof of pretext by the plaintiff as the legal equivalent to proof of intentional discrimination. In practice, this approach is the functional equivalent to the current standard of proof in Batson cases. Other circuits, however, advocated a pretext-plus approach that only en-


82. See, e.g., Dister v. Continental Group, 859 F.2d 1108, 1113 (2d Cir. 1988) (ruling that "a plaintiff may prevail upon a showing that the employer's given legitimate reason is unworthy of credence"); MacDissi v. Valmont Indus., 856 F.2d 1054, 1059 (8th Cir. 1988) (finding that "a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred"); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir.) (holding that "[i]f the plaintiff [shows] that it is more likely than not that the employer did not act for its proffered reason, then the employer's decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent"); cert. dismissed, 483 U.S. 1052 (1987); Thornbrough, 760 F.2d at 647 (arguing that the plaintiff "is not required to prove that the [defendant] was motivated by bad reasons; he need only persuade the factfinder that the [defendant's] purported good reasons were untrue"); see also Lanctot, supra note 81, at 71-81 (discussing in greater depth the arguments in favor of a "pretext-only" approach).

83. See, e.g., Spencer v. General Elec. Co., 894 F.2d 651, 659 (4th Cir. 1990) (holding that "[i]f the presumption is rebutted, the burden of production returns to the plaintiff to show that the defendant's proffered nondiscriminatory reasons are pretextual and that the employment decision was based on a sexually-discriminatory criterion"); Hawkins v. Ceco Corp., 883 F.2d 977, 981 n.3 (11th Cir. 1989) (finding that "merely establishing pretext, without more, is insufficient to support a finding of racial discrimination"); Keyes v. Secretary of Navy, 853 F.2d 1016, 1026 (1st Cir. 1988) (ruling that "it was plaintiff's burden not only to show that the defendant's proffered reasons for hiring someone else were apocryphal, but that those reasons were pretexts aimed at masking sex or race discrimination"); Benzie, 810 F.2d at 148 (ruling that plaintiffs have "the ultimate burden of persuading the court that the reasons advanced . . . are a pretext and that the substantial or motivating factor in the defendant's decision was discrimination and but for that discrimination, the plaintiff would have been appointed"); see also Lanctot, supra note 81, at 81-91 (addressing the arguments in favor of a "pretext-plus" standard).
abled the factfinder to draw a permissible, rather than mandatory, inference of discrimination from a finding of pretext. In practice, pretext-plus courts often required the plaintiff not only to prove that the employer's reason was pretextual, but also to offer additional evidence that discrimination was the real motivation behind the adverse employment action. In contrast, pretext-only courts presumed that discrimination was the real reason as soon as the plaintiff proved that the employer's explanation was unworthy of credence. In *Hicks*, the Supreme Court resolved this conflict in favor of the pretext-plus courts, holding that proof of pretext alone does not mandate a finding of intentional discrimination.

This Part analyzes the Court's decision in *Hicks* with particular attention paid to its reasons for rejecting the principle that proof of pretext under the *McDonnell Douglas* framework is legally equivalent to proof of intentional discrimination. This Part concludes that the Court was concerned that a "pretext-only" standard subjected employers to an unreasonable risk of unwarranted liability.

Prior to an administrative shake-up at St. Mary's Honor Center, Melvin Hicks, a black shift commander, consistently received satisfactory job performance evaluations. Following a series of supervisory changes, however, he was subjected to "repeated, and increasingly severe, disciplinary actions" which ultimately resulted in his dismissal from the job. In response to his termination, Hicks filed a race discrimination suit against St. Mary's. At the trial, the court concluded that the justifications St. Mary's offered for firing Hicks — the severity and accumulation of rules violations — were merely pretextual because similarly situated white coworkers were not subjected to comparable disciplinary actions. Notwithstanding this evidence of disparate treatment, the trial judge ruled in favor of St. Mary's on the ground that Hicks had not proven that the crusade to terminate him "was racially rather than personally motivated." The Eighth Circuit reversed the lower court ruling, concluding that by offering a pretextual reason for its actions, St. Mary's had failed to rebut the prima facie case of discrimination.

84. See *Hicks*, 113 S. Ct. at 2752.
85. 113 S. Ct. at 2746.
86. See 113 S. Ct. at 2748.
88. Relying on existing precedent, Hicks argued on appeal that because he had successfully discredited St. Mary's proffered explanations for his termination, he was entitled to judgment as a matter of law.

In agreeing with Hicks, the Eighth Circuit reasoned that because "all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions." *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 492 (8th Cir. 1992),
The specific question presented to the Court in *Hicks*\(^89\) was whether the trier of fact in a Title VII disparate treatment case was compelled to find for the plaintiff if it disbelieved the employer's proffered reasons for taking an adverse employment action.\(^90\) A sharply divided Court ruled that proof of pretext within the *McDonnell-Douglas* framework did not, as a matter of law, mandate a judgment for the plaintiff.\(^91\) Rather, according to the majority, discrediting the defendant's proffered reasons for its action only permits the trier of fact to draw a *permissible* inference that the defendant intentionally discriminated against the plaintiff.\(^92\)

The Court's ruling in *Hicks* established the principle that an employer's unpersuasive or contrived justifications for an adverse employment action are not the equivalent to proof of intentional discrimination.\(^93\) Implicit in the Court's holding was the view, previously expressed by various lower courts, that a wide variety of reasons might exist for terminating an employee, none of which rise to the level of violating Title VII.\(^94\) For example, an employer might feel compelled to offer an explanation that it knows to be false rather than admit in pleadings or open court that its actions were actually the result of personal favoritism, dislike, politics, an arbitrary decision, or clerical or administrative mistakes.\(^95\) Moreover, it is often the case that the defendant is a company that is forced to rely on the testimony and recollection of various employees regarding their state of mind or the actions and motivations of other employees,\(^96\) all of which makes it extremely difficult specifically to identify the "real" motivation for the adverse employment action. Referring to this problem, the *Hicks* Court noted:

> [T]he employer's 'proffered explanation,' his 'stated reasons,' his 'articulated reasons,' [do not] somehow exist *apart from the record* — in some pleading, or perhaps in some formal, nontestimonial statement made on behalf of the defendant to the factfinder. ("Your honor, \(^97\)

\(^{89}\). See 113 S. Ct. at 2742.

\(^{90}\). See 113 S. Ct. at 2746.

\(^{91}\). See 113 S. Ct. at 2748.

\(^{92}\). See 113 S. Ct. at 2749.

\(^{93}\). See 113 S. Ct. at 2756.


\(^{95}\). See 810 F.2d at 148; see also EEOC v. Flasher Co., 986 F.2d 1312, 1319 (10th Cir. 1993) (arguing that "[h]uman relationships are inherently complex [and] ... employers must deal with a multitude of employment decisions, involving different employees, different supervisors, different time periods, and an incredible array of facts that will inevitably differ even among seemingly similar situations").

\(^{96}\). See *Hicks*, 113 S. Ct. at 2754.
pursuant to *McDonnell Douglas* the defendant hereby formally as-
serts, as *its* reason for the dismissal at issue here, incompetence of the
employee.”) Of course it does not work like that.97 Relying on this reasoning, the Court concluded that a proof stan-
nard that regards pretext evidence as the legal equivalent to proof
of intentional discrimination risks unnecessarily subjecting faultless
employers to liability under Title VII.98

III. THE ARGUMENT AGAINST APPLYING HICKS TO BATSON

Part III addresses the question of whether the *Hicks* standard of
proof should be applied in the *Batson* context. Section III.A argues
that because of the practical differences between Title VII and *Bat-
son* cases, the reasoning in *Hicks* is inapplicable when applied to
cases alleging the discriminatory use of peremptory challenges.
Section III.B argues that the principles that motivated the Court’s
ruling in *Batson* also would be undermined if its current proof
structure were altered along the lines suggested by *Hicks*.

A. An Argument Against Applying *Hicks* to *Batson*

As argued in Part II, two primary concerns motivated the
Court’s decision in *Hicks*. First, in light of the wide variety of rea-
sons for why an employer might fire an employee — many of which
may be considered illegitimate but nevertheless do not rise to the
level of violating Title VII — proving pretext should not carry
enormous evidentiary weight.99 In other words, even though an
employer may have offered an “incredible” reason for an adverse
employment action, it is too great a leap of logic to assume that
therefore the real motivation was racial animus.100 Second, because
proof of pretext is not necessarily affirmative proof of an intent to
discriminate, it is wrong to hold employers liable under Title VII
simply based on such a showing, because to do so would unfairly
result in liability for employers that may have acted arbitrarily but
not in violation of Title VII.101

The problem with applying the logic of *Hicks* to *Batson* cases
simply because they both operate under the same *McDonnell
Douglas* burden-shifting proof structure is that Title VII and *Batson*
cases are contextually distinct.

97. 113 S. Ct. at 2755.

98. See 113 S. Ct. at 2756 (noting that “Title VII does not award damages against employ-
ers who cannot prove a nondiscriminatory reason for adverse employment action, but only
against employers who are proven to have taken adverse employment action by reason . . . of
race”).

99. See supra notes 91-93 and accompanying text.

100. See supra notes 93-96 and accompanying text.

101. See supra notes 94-95 and accompanying text.
First, unlike a Title VII disparate treatment case, *Batson* objections do not require factfinders to analyze employment relationships, which by their nature often include individual personal relationships that could factor — positively or negatively — into employment decisions. Prosecutorial peremptory strikes are rarely based on a personal relationship with the juror, virtually eliminating personal animosity as a factor.

Furthermore, the scope of evidence available on which to determine intentional discrimination differs greatly from the employment context to *Batson*. The issues raised in *Batson* hearings do not require the parties to conduct depositions and interrogatories, read lengthy evidentiary records or hear from a multitude of witnesses. Rather, they only require the prosecutor to offer an explanation for his or her own strikes based on the transcribed voir dire testimony of potential jurors, which itself has been taken in the presence of all of the relevant parties. Equally important, however, is the fact that in *Batson* cases the individuals that are called upon to proffer an explanation for their actions are actually those responsible for exercising the peremptory challenge. Thus, *Batson* stands in stark contrast to Title VII cases where employers are often required to rely on the testimony of individuals who were not actually responsible for the adverse employment action. In *Hicks*, the majority emphasized the fact that Title VII employers are not required to stand before the court and claim "[y]our honor, pursuant to *McDonnell Douglas* the defendant hereby formally asserts, as its reason for the dismissal at issue here, incompetence of the employee." But this is exactly what occurs in *Batson* hearings: under *Batson*, there is a concrete, contemporaneous justification given directly to the court by the individual responsible for the strike.

Finally, it is clear that applying a *Hicks* standard in the context of *Batson* has the potential to allow prosecutors successfully to mis-

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102. See Raphael & Ungvarsky, *supra* note 68, at 252. Moreover, the existence of such a personal relationship would more than likely give rise to a challenge for cause.


In assessing whether criticisms of *McDonnell Douglas-Burdine* in employment discrimination cases are relevant to *Batson* cases, it is important to note the very significant differences between the two types of cases. *Batson* cases have no pretrial phase: no pleading, no discovery, no pretrial memoranda. They therefore present none of the usual methods for "smoking out" evidence and narrowing disputed issues. For that reason alone, it is dangerous to simply transfer doctrine from one setting to the other.

104. See *supra* note 96 and accompanying text.

105. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2754 (1993); see also *supra* notes 96-97 and accompanying text.
lead, and even blatantly to lie, to a trial judge regarding their reasons for exercising a peremptory challenge. As the Supreme Court has noted, however,

It is difficult to imagine that . . . intentional violations of defendants’ constitutional rights by Government prosecutors who are officers of the court charged with upholding the law would not have a considerable detrimental effect on the integrity of the process and call for judicial action designed to restore order and integrity to the process.106

With this principle in mind, it is difficult to imagine — in light of the long history of prosecutorial abuse of the peremptory challenge — that altering the *Batson* proof structure along the lines suggested by *Hicks* would have anything but a “detrimental effect on the integrity of the process” of selecting juries.

B. *The Implications of Applying Hicks to Batson*

Part I of this Note focused on the *Batson* Court’s purpose in lowering the standard of proof required for a criminal defendant to establish that the State has exercised a racially motivated peremptory challenge. It noted that the Court’s ruling was influenced, at least in part, by a concern over the widespread use of race-based peremptory challenges, a practice that the Court clearly intended *Batson* to counteract.107 The Court’s decision to apply the *McDonnell Douglas* proof structure in *Batson* cases, therefore, can and should be understood as a means of facilitating this goal.108 But altering the *Batson* framework in accordance with *Hicks* would, like *Swain*, have the practical effect of placing a higher burden of proof on criminal defendants, thus making it more difficult to prove that the State has exercised a racially motivated peremptory challenge.

Furthermore, application of *Hicks* to the peremptory challenge framework appears to conflict with *Batson’s* premise that the peremptory challenge is “a practice ‘providing the opportunity for discrimination.’ ”109 Unlike in the employment discrimination context, where any number of legitimate reasons might explain an employer’s pretextual justification for dismissing an employee, *Batson* recognizes that pretextual justifications for peremptory strikes almost certainly reveal discriminatory animus.110

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107. See *supra* notes 36, 41-42 and accompanying text.
108. See *supra* notes 44-47 (discussing why this proof structure is beneficial to parties trying to establish intentional discrimination without direct proof).
110. See 476 U.S. at 96.
If Hicks were applied to Batson, it would essentially reintroduce a Swain-like presumption to peremptory challenge cases. By requiring more than a showing of pretext in the Title VII context, Hicks creates a presumption, akin to that in Swain, that employment decisions, even those that are justified by pretextual reasons, are presumptively nondiscriminatory unless intentional discrimination is affirmatively proven. The Batson presumption is the exact opposite: the peremptory “permits those to discriminate who are of a mind to discriminate.”

Application of Hicks to the peremptory challenge setting, for example, would create uncertainty about the proper outcome in a case like State v. Reliford where the government’s explanation for a strike proved to be pretextual. In Reliford, a state prosecutor claimed that he removed a black juror because the juror knew the defendant from church. The Missouri Court of Appeals found that this explanation was pretextual because the prosecutor had not struck a white juror who knew the defendant from work. Under the current Batson standard, Reliford is entitled to a new trial because it is presumed that the prosecutor’s pretextual justification for the peremptory challenge concealed a discriminatory intent. But if Batson were altered along the lines suggested by Hicks, the outcome in cases like Reliford, where the reason given is facially neutral but pretextual, would be less than certain. What more would the defendant need to show?

For a more extreme illustration, consider United States v. Guevera. In Guevera, a federal prosecutor claimed that he used a peremptory challenge to excuse a black woman from the jury panel because she was an unemployed, single mother. On appeal the Ninth Circuit reversed and remanded the case for a new trial on the ground that the prosecutor’s reason was pretextual because the struck juror was “married, childless, and employed at the same casino as other [white] jurors who were not challenged.” Under a Hicks framework, the trial judge or reviewing court could have found that the prosecutor’s explanation was wholly unsupported by the record, yet still rule in favor of the prosecutor on the ground that the defendant had only proven pretext and not racial discrimination.

111. See supra note 30.  
112. 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).  
113. 753 S.W.2d 9, 11 (Mo. Ct. App. 1988).  
114. See 753 S.W.2d at 11.  
117. 1993 WL 68944, at *1.
In practice, therefore, a prosecutor could offer a patently false justification for a strike and then argue, notwithstanding the lack of a credible explanation for his actions, that the defendant is not entitled to judgment because he has failed to offer sufficient evidence to support a finding that the strike was race-based. Such a standard clearly has the potential to enable prosecutors to mask racial discrimination in the jury selection process by relying on a tool — a peremptory challenge — that is by its nature susceptible to misuse.\(^\text{118}\)

Finally, it is important to note that in the vast majority of cases, the most that the defense can prove is pretext. Hicks calls for a direct showing of intentional discrimination,\(^\text{119}\) which would be impossible in the Batson context because aside from pretext there is little evidence available to the defendant. Barring a prosecutor’s use of a racial slur during voir-dire, or some similarly improbable misstep, it is hard to imagine what evidence of discrimination could exist aside from proof of pretext.

**CONCLUSION**

Batson v. Kentucky and its progeny are a powerful statement by the Court regarding the importance of eradicating racial discrimination from the jury selection process. In overruling Swain, a twenty-one year old unanimous precedent,\(^\text{120}\) the Batson Court decried Swain’s “crippling burden of proof”\(^\text{121}\) and adopted a new standard of proof specifically aimed at easing the burden on criminal defendants.

Although Batson itself has not succeeded fully, in practice it has proven far more effective than Swain in the struggle to combat the use of discriminatory peremptory challenges.\(^\text{122}\) As a result, it is particularly important that the decision in Hicks not be extended to the Batson context. Applying Hicks to Batson, in effect, would reestablish a Swain-like presumption in cases alleging the discriminatory use of peremptory challenges. Prosecutors’ peremptory strikes would once again become “largely immune from constitu-

\(^{118}\) See supra notes 109, 112 and accompanying text. Although some may take offense to the implication that prosecutors would intentionally exercise racially motivated peremptory challenges, one need only look to the plethora of cases in recent years in which race has been an underlying or explicit element in the case to realize the influence that a consideration such as race must play in the selection of jurors.

\(^{119}\) See supra Part II.

\(^{120}\) The parties were so confident that the Court would not overrule Swain that the equal protection issues were not even briefed. See Batson v. Kentucky, 476 U.S. 79, 112-16 (1986) (Burger, C.J., dissenting).

\(^{121}\) 476 U.S. at 92.

\(^{122}\) See Raphael & Ungvarsky, supra note 68; Barton, supra note 44, at 214 (describing Batson as a “virtual sieve”).
tinal scrutiny."123 As a result, both the jury selection process and our system of justice would suffer from the debilitating effects of regularly exercised discriminatory peremptory challenges, and the project begun in *Batson* — the elimination of discrimination from the selection of juries — would be endangered.

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123. 476 U.S. at 92.