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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| JAVAGHN WAPLES, | ) | |
| | ) | |
| Defendant-Below, | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. 368, 2021 |
| | ) | |
| STATE OF DELAWARE | ) | |
| | ) | |
| Plaintiff-Below, | ) | |
| Appellee. | ) | |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

# APPELLANT'S OPENING BRIEF

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DATED: February 1, 2022

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:**



**Constitutional Provisions:**



**Rules:**

## NATURE AND STAGE OF THE PROCEEDINGS

Javaghn Waples, a black man, was charged with attempted murder, possession of a firearm during commission of a felony, possession of firearm by person prohibited, terroristic threatening, and 2 counts of reckless endangering first degree.[1] In January 2020, the court granted Waples' motion to sever the charges and a jury trial was held on the "person prohibited" charge.[2] Before the jury was sworn, defense counsel moved to strike the all-white jury, noting the State had struck the only black juror. While the State gave a race-neutral reason for the strike, the judge made no findings as to the truth of that claim.[3] Ultimately, the all-white jury found Waples guilty. Sentencing in this case and resolution in his second case were repeatedly rescheduled due to conflicts and the pandemic.

Later, a potential *Brady* issue arose in the second case when Waples learned of about 80 prison calls between him and Shameka Johnson, the alleged victim in that case. Thereafter, Waples pled to one count of reckless endangering and received 5 years in prison suspended after 1 1/2 years. In this case, he received 15 years in prison suspended after 7 1/2 years. Both sentences are followed by probation.[4] This is his Opening Brief in support of a timely-filed appeal.

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[1] A7-8.
[2] A1-2
[3] A59-64.
[4] See November 12, 2021 Sentence Order, Attached as Ex. A; He was also declared a habitual offender. A-6.

## SUMMARY OF THE ARGUMENT

1. The *Batson* analysis requires the trial court to address and evaluate all evidence introduced by both parties tending to show that race was or was not the real reason for the State's exercise of its peremptory challenges and determine whether the defendant has met his burden of persuasion of purposeful discrimination. In our case, Javaghn Waples made a *prima facie* showing of purposeful discrimination in the State's exercise of a peremptory challenge that struck the only black juror. The State responded by claiming the juror was struck because she had a misdemeanor record. However, the State provided no information regarding her record nor did it provide any information as to the existence and/or extent of such records of any of the white jurors who were seated or who were struck by the State. While the trial court noted that the State's reason was "arguably" satisfactory, it did not engage in any analysis to decide whether that reason was, in fact, satisfactory in this case, (i.e., nondiscriminatory). Had the trial court conducted the analysis mandated by *Batson*, it would have found that Waples met his overriding burden of persuasion that race was the basis for the State's challenge. Thus, Waples' conviction must be reversed for a new trial. Alternatively, the trial court's failure to conduct the third step in the analysis, requires the case to be remanded for the trial court to make findings.

## STATEMENT OF FACTS

On December 24, 2018, Javaghn Waples and his girlfriend, Shameka Johnson, were at home with their two children and with Johnson's older son and his girlfriend.[5] After shopping earlier in the day, Waples and Johnson wrapped gifts and prepared food.[6] According to Johnson, she and Waples were also drinking and smoking marijuana that day. By the evening, she was tired, and the couple was arguing.[7] Later that night or early the next morning, the couple retired to their bedroom. It was early that next morning that a single bullet was fired in their room.[8] It grazed Waples' abdomen, then went through his hand fracturing several bones.[9] That same bullet hit Johnson then, apparently, lodged itself in a bedroom wall.[10]

Johnson claimed that the shot was fired after she told Waples their relationship was over and he needed to leave after Christmas day.[11] She and Waples had been in bed. However, she got up to get a blanket from the closet. She claimed that her back was turned away from the bed as she turned on the light. She then felt a burning sensation, turned toward Waples and saw smoke. She then said, "you shot me, you

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[5] A72-73.
[6] A67, 73-74.
[7] A68-70, 74.
[8] A90.
[9] A88-89.
[10] A30, 91-92.
[11] A68-70.

shot me." Waples immediately denied it.[12] While Johnson provided some testimony that Waples took the gun out of the desk drawer prior to the shooting, it is unclear whether she saw that or she made that assumption based on her understanding that he typically kept a gun on him.[13] However, she never saw a gun at the time of the shooting or at any point thereafter.[14]

Johnson stated that the family had previously suffered a home invasion and that the children had been scared and frightened.[15] Johnson also testified that she had previously moved the gun so the kids would not find it.[16] Sometimes, she put it in the heating vent,[17] which is where the police found it later that morning.[18] Johnson's older son testified that while he had seen Waples with a gun a long time ago, he did not see him with a gun that night. He also said that Waples told him that he did not mean to shoot Johnson.[19] While the State attempted to obtain fingerprints from the gun, none were retrieved. And, while a sample revealed that Waples' DNA profile was contained in a mixture found on the grip and cylinder release of the gun, it did not provide information as to when that DNA was left behind.[20]

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[12] A71, 83.
[13] A77-78.
[14] A71, 77, 79-80.
[15] A76.
[16] A75, 81-82.
[17] A81.
[18] A91.
[19] A85-87.
[20] A93-95.

## I. THE TRIAL COURT DENIED JAVAGHN WAPLES EQUAL PROTECTION OF THE LAWS WHEN, AFTER HE MADE A *PRIMA FACIE* SHOWING THAT THE STATE EXERCISED A PEREMPTORY CHALLENGE ON THE BASIS OF RACE, IT FAILED TO ASSESS THE STATE'S PROFFERED RACE-NEUTRAL REASON FOR STRIKING THE ONLY JUROR OF WAPLES' RACE TO DETERMINE WHETHER IT WAS A PRETEXT FOR PURPOSEFUL DISCRIMINATION.

### *Question Presented*

Whether the trial court denied Waples his right to equal protection under the 14th Amendment of the United States Constitution when, after he presented a *prima facie* case of race discrimination and the State offered a race-neutral reason for the exercise of its peremptory challenge to exclude the only juror of Waples' race, the trial court failed to engage in any analysis, let alone make any findings as to the presence or absence of discriminatory intent in the exercise of that challenge.[21]

### *Standard and Scope of Review*

This Court "review[s] *de novo* whether the prosecutor offered a race-neutral explanation for the use of peremptory challenges."[22] If the trial court made any findings with respect to discriminatory intent, they are reviewed under a "clearly erroneous" standard of review.

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[21] A59-64.

[22] *Jones v. State*, 938 A.2d 626, 631–32 (Del. 2007).

## *Argument*

"[T]he State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded."[23] Thus, because "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate[,]"[24] if a black defendant alleges that the State exercised its peremptory challenges in a manner to impermissibly exclude members of his own race, the trial court must engage in the following "tripartite analysis" mandated in *Batson v. Kentucky*:

> First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race.... Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question.... Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination....[25]

The *Batson* analysis requires the trial court to address and evaluate "all evidence introduced by [both parties] tending to show that race was or was not the real reason for the State's exercise of its peremptory challenges and determine whether the defendant has met his burden of persuasion" of purposeful discrimination.[26]

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[23] *Batson v. Kentucky*, 476 U.S. 79, 85 (1986). See U.S.Const., Amend. XIV.
[24] *Batson*, 476 U.S. at 96.
[25] *Jones*, 938 A.2d at 631 (quoting *Robertson v. State*, 630 A.2d 1084, 1089 (Del. 1993)).
[26] *Id.* at 629.

In our case, Waples alleged the State exercised a peremptory challenge in a manner that excluded the only juror of his race. He then made a *prima facie* showing of purposeful discrimination in the State's exercise of that peremptory challenge. The State responded by claiming the juror was struck because she had a misdemeanor record. However, the State provided no information regarding her record nor did it provide any information as to the existence and/or extent of such records of any of the white jurors who were seated or who were struck by the State. While the trial court noted that the State's reason was "arguably" satisfactory, it did not engage in any analysis to decide whether that reason was, in fact, satisfactory in this case, (i.e., nondiscriminatory). Had the trial court conducted the analysis mandated by *Batson*, it would have found that Waples met his overriding burden of persuasion that race was the basis for the State's challenge. Thus, Waples' conviction must be reversed for a new trial. Alternatively, the trial court's failure to conduct the third step in the analysis, requires the case to be remanded for the trial court to make findings.

***Waples' Prima Facie Showing of Purposeful Discrimination***

Before the jury was sworn, defense counsel moved to strike the jury because there was "not a single minority" on it and his "client is African-American."[27] He told the court that he did not "think that [Waples] feels like this is a fair reflection of

[27] A59, 65-66.

a jury by his peers. There was only one minority called as a juror. I think that was Juror No. 1. She was struck. Obviously, it is hard to show a pattern because there is only one, but I would argue that is a 100-percent pattern."[28]

Pursuant to *Batson*, Waples made out a "*prima facie* case of purposeful discrimination by showing that the totality of the relevant facts g[ave] rise to an inference of discriminatory purpose."[29] There is no dispute that Waples, a black man, "is a member of a cognizable racial group"[30] and that the State exercised a peremptory challenge to remove from the jury the only member of that group.[31] It is "permissible to conclude that a *prima facie* case of discrimination has been made out" based on the fact "the State use[d] peremptories in a manner that assure[d] that no black jurors" served on Waples' jury.[32] Specifically, striking the "last remaining juror of defendant's race[,]" as occurred in this case, "is sufficient to 'raise an inference' that the juror was excluded 'on account of [her] race[.]"[33]

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[28] A59.
[29] *Batson*, 476 U.S. at 93–94.
[30] Neither the State nor the court challenged or questioned the fact that Waples is a member of a cognizable group.
[31] *Batson*, 476 U.S. at 96.
[32] *Stanley v. State*, 542 A.2d 1267, 1285 (Md. 1988). See *Mejia v. State*, 616 A.2d 356, 364 (Md. 1992).
[33] *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir.1987).

As defense counsel explained to the trial court, out of 115 individuals in the jury pool, only 14 potential jurors, or 12%, identified as black.[34] Approximately seven of those 14 were struck for cause.[35] Following the trial court's elimination of potential jurors for cause, but prior to any peremptory challenges, the first jury panel "seated" contained no black jurors.[36] However, after each party exercised one peremptory challenge, one black juror was seated.[37] The State then executed only one more of its 5 remaining challenges[38] and it was used to strike the black juror.[39] As jury selection continued, defense counsel exhausted all of his strikes. Throughout that process, none of the other 6 black potential jurors ever reached the panel. Thus, Waples was left with an all-white jury.[40] The two alternates accepted were also white. Fifty percent of the challenges the State made were to black jurors. "That

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[34] A55, 60, 64. Neither the State nor the court challenged or questioned the numbers advanced by defense counsel. These numbers can be confirmed by reviewing the Jury Profile for the case that, due to confidentiality reasons, is kept on file at Sussex County Superior Court Jury Services.

[35] A60.

[36] A54.

[37] A55.

[38] In noncapital cases, each party "shall be entitled to a total of 6 peremptory challenges." Del. Super.Ct. Rule Crim. Pro. 24 (b) (1). The defendant has the first challenge, then "the parties shall thereafter challenge alternately until all parties have exhausted their challenges." Del. Super.Ct. Rule Crim. Pro. 24 (b) (3) (B).

[39] A55.

[40] A55-56.

challenge rate is more than double the percentage of minorities in the original jury pool. Such a statistical disparity supports the first prong of *Batson.*"[41]

***The State's Race-Neutral Explanation***

Because Waples met his *prima facie* showing of discrimination, the State was required to "articulate a neutral explanation related to th[is] particular case[.]"[42] Here, the State responded to Waples' motion to strike the jury as follows:

> Your Honor, as to the striking of the one minority juror, the State does not contend that is a pattern at all. We had a cause for that. The actual juror did have a criminal record that ***we felt was reflective of somebody we wouldn't want on the jury panel***.[43]

The prosecutor had actually informed defense counsel that the juror "had a misdemeanor record."[44] Lacking from the prosecutor's justification was any cogent explanation as to why that potential juror's misdemeanor record led to a "feeling" that she was "reflective of somebody" the State "would not want on the jury panel." In fact, that statement raises more questions than it answers.[45]

The prosecutor also stated that, "[t]o consider that a pattern, striking one juror would have a convert [sic] effect on us having a juror based on their skin color. We

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[41] *Jones*, 938 A.2d at 632.
[42] *Batson*, 476 U.S. at 98. See *Jones*, 938 A.2d at 632.
[43] A60. (emphasis added).
[44] A60.
[45] *Hernandez v. New York*, 500 U.S. 352 (1991) (prosecutor explaining reason for peremptory challenge based on Spanish-language ability was related on ability to accept translators' testimony even though may have disproportionate impact).

believe that is not what a *Batson* Challenge is for."[46] Yet, he provided no information regarding the criminal history of the white jurors who were selected or of the one white juror the State excluded. Thus, without further information, the fact that the State struck the only black juror because she had a misdemeanor record provides no insight into whether the "misdemeanor record" was actually a pretext for purposeful discrimination.

Because the State failed to offer a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising his peremptory challenge, the trial court should have struck the jury panel at this stage without any further analysis.

***The Trial Court Failed To Make Findings of Fact as to The Presence or Absence of Discriminatory Intent***

Assuming, *arguendo*, the State adequately articulated a race-neutral reason, the trial court was required to assess the persuasiveness of that justification "by considering the 'totality of the relevant facts.'"[47] However, the trial court failed to do that. Rather, the judge "simply noted in response to [the] *Batson* challenge that the State gave a race-neutral response."[48]

> at least now on the record we have [the prosecutor]'s explanation, which would ***appear to*** be satisfactory, ***arguably***, as a good reason to strike somebody even

[46] A60-61.
[47] *Jones*, 938 A.2d at 632.
[48] *Id.* at 636.

> though this we don't know their reason to strike somebody when they are doing those strikes.[49]

This statement, while acknowledging the "arguable" viability of the State's justification, contains no findings as to whether the peremptory strike was actually exercised for good reason in this case. Thus, the judge ignored the dictate of *Batson* that he consider, at that stage, "all evidence introduced by [both parties] tending to show that race was or was not the real reason for the State's exercise of its peremptory challenges and determine whether the defendant has met his burden of persuasion" of purposeful discrimination.[50] Had the trial court conducted the required analysis, it would have found that Waples did meet his burden.

Here, the peremptory challenge that resulted in the disproportionate exclusion of members of Waples' race is "evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination."[51] The equivocal and overbroad language of the State's proffered reason itself also speaks to its pretextual nature. The State never explained why that juror's misdemeanor record led to a "feeling" that she was "reflective of somebody" the State "wouldn't want on the jury panel" in this case.

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[49] A62. (emphasis added).
[50] *Jones*, 938 A.2d at 629.
[51] *Id.* at 633 (quoting *Hernandez,* 500 U.S. at 363).

Further, a side-by-side comparison of black members of the jury who were struck with white members who were accepted by the prosecutor may have provided insight into the prosecutor's intent. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step."[52] However, the State did not provide any information with respect to the misdemeanor records of any of the white jurors who were permitted to serve or of the white juror it struck. As defense counsel noted and the court acknowledged, the State had exclusive access to the records of the jurors.[53] So, defense counsel was not in a position to

> do a fair comparison to know whether the State is properly exercising its strike. For example, if there were any jurors that were not stuck that had similar records. We are not able to get into that because we don't have access to those records and are not permitted to have those.[54]

The trial court acknowledged that the "fight" over access to the criminal records "came up years ago[.]" The matter had been "litigated" and "the defense bar lost." Ultimately, rather than requiring the State to produce that information (even *ex parte*), the judge simply said, "[s]o that is what it is and we are left with

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[52] *Miller-El v. Drake*, 545 U.S. 231, 241 (2005).
[53] A61-62.
[54] A62. *See Yancey v. State*, 813 So. 2d 1, 7 (Ala. Crim. App. 2001) (noting prior holding that the failure to strike both whites and blacks because of prior criminal records is evidence of disparate treatment, in violation of *Batson*).

the way things were and are."[55] The court failed to recognize that for purposes of jury selection, it can order the State to disclose the criminal history of the potential jurors for purposes of fairness.[56] Here, without a side-by-side comparison, the reason offered by the State for striking the only black juror shed no light on the prosecutor's underlying intent. It is unknown whether the proffered race-neutral reason was equally applicable to any of the white jurors the State allowed to remain on the panel.[57]

Another troubling consideration in determining whether the peremptory challenge was exercised with a discriminatory purpose is the prosecutor's incorrect assertion that, "[a]s to the fairness of the jury panel, I would say that there is no constitutional right to a fair jury panel, only a constitutional right to a fair chosen panel, which is chosen randomly in this case."[58] As an initial matter, the inarticulate nature of this sentence renders it unclear the exact distinction being made between the "jury panel" and the "chosen panel." But, what *is* absolutely clear is that in addition to a fair jury, "the jury venire from which a jury is selected must represent

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[55] A62.

[56] *Garden v. State*, 815 A.2d 327, 336 (Del. 2003) (superseded by statute on other grounds) (finding no abuse of discretion when trial court required State to share criminal histories of potential jurors with the defense, "as a matter of fairness, to balance the information available to both parties").

[57] *Riley v. Taylor*, 277 F.3d 261, 282 (3d Cir. 2001) ("[C]omparison between a stricken black juror and a sitting white juror is relevant to determining whether the prosecution's asserted justification for striking the black juror is pretextual.")

[58] A61.

a fair cross-section of the community."[59] Thus, it is troubling that the prosecutor was operating under the impression that Waples was not entitled to an entirely fair jury selection process.

Had the trial court conducted the analysis mandated under prong 3 of *Batson*, it would have considered all of these circumstances and found that Waples satisfied his burden of proving purposeful discrimination when the State struck the only black juror from Waples' jury. This fundamental error requires this Court to remand Waples' conviction for a new trial.[60]

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[59] *Edwards v. State*, 157 A.3d 1233 (Del. 2017) (citing *Duren v. Missouri*, 439 U.S. 357, 363–64 (1979));

[60] *Harrison v. Ryan*, 909 F.2d 84, 88 (3d Cir. 1990) (reversing for a new trial due to "exclusion of one black juror from the jury on the basis of race).

## CONCLUSION

For the reasons and upon the authorities cited herein, Waples' conviction must be reversed.

Respectfully submitted,

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DATED: February 1, 2022