

mistrial motion, the references at issue were not inadmissible other crimes evidence; thus, they were not even grounds for a mistrial. (Trial Court Record Vol. 54 of 60, 11/2/04 Tr., pp. 18-28).⁶

CLAIM VI: TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO INTRODUCE COMPELLING, READILY AVAILABLE EVIDENCE IN SUPPORT OF MR. REEVES'S CLAIM THAT THE STATE UTILIZED PEREMPTORY CHALLENGES TO PURPOSEFULLY DISCRIMINATE AGAINST AFRICAN-AMERICANS IN JURY SELECTION IN VIOLATION OF BATSON V. KENTUCKY.

The defendant contends his trial counsel was ineffective by failing to prevail on a *Batson* claim found meritless by the trial court. (Defendant's brief, pages 37-40). In *State v. Tyler*, 1997-0338 (La. 9/9/98), 723 So.2d 939, the Louisiana Supreme Court discussed the United States Supreme Court decision in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), a case in which the United States Supreme Court held that it was an Equal Protection violation for a prosecutor to exercise a peremptory challenge to exclude a black prospective juror on the basis of his or her race. *Tyler*, 723 So.2d at 942. The *Batson* decision has since been expanded to prohibit either the State or the defense from exercising racially based peremptory challenges. *Id.* The ultimate burden of proof on establishing the impermissible peremptory challenge rests on the party objecting to it, who must establish purposeful discrimination. *Id.*

In *State v. Sparks*, 1988-0017 (La. 5/11/11), 68 So. 3d 435, the Louisiana Supreme Court engaged in a thorough discussion of a *Batson* analysis:

Under *Batson* and its progeny, the defendant challenging the peremptory strike must first establish a prima facie case of purposeful discrimination. Second, if a prima facie showing is made, the burden shifts to the State to articulate a neutral explanation for the challenge. Third, the trial court then must determine if the defendant has carried the ultimate burden of proving purposeful discrimination. *Batson*, 476 U.S. at 94-98, 106 S.Ct. at 1721-724; *Johnson v. California*, 545 U.S. 162, 168, 125 S.Ct. 2410, 2416, 162 L.Ed.2d 129 (2005); *State v. Givens*, 99-3518, p. 5 (La.1/17/01), 776 So.2d 443, 448.

To establish a prima facie case, the defendant must show: (1) the prosecutor's challenge was directed at a member of a cognizable group; (2) the challenge was peremptory rather than for cause; and (3) relevant circumstances sufficient to raise an inference that the prosecutor struck the venireperson on account of his being a member of that cognizable group. *Batson*, 476 U.S. at 96, 106 S.Ct. at 1723; *Givens*, 776 So.2d at 449. This three-prong showing by the defendant gives rise to the 'necessary inference of purposeful discrimination' by the prosecutor. *State v. Duncan*, 2615, p. 12 (La.10/16/01), 802 So.2d 533, 544 (quoting *Batson*, 476 U.S. at 96, 106 S.Ct. at 1723), *cert. denied*, 536 U.S. 907, 122 S.Ct. 2362, 153 L.Ed.2d 183 (2002)). 'The inference is 'necessary' because if such an inference cannot be drawn from the evidence presented by the defendant, he is unable to make a prima facie case of purposeful discrimination and his *Batson* challenge expires at the threshold.' *Duncan*, 802 So.2d at 544 (quoting *State v. Green*, 94-0887, p. 28 (La.5/22/95), 655 So.2d 272, 290

⁶In particular, see *State v. Odom*, 33, 340 (La.App. 2 Cir. 5/10/00), 760 So.2d 576, 585, which correctly states that thoughts of a defendant are not other crimes evidence as contemplated by LSA-C.E. Art. 404(B).

n. 24). If the trial court determines the defendant failed to establish the threshold requirement of a *prima facie* case (step one), then the analysis is at an end and the burden never shifts to the prosecutor to articulate neutral reasons (step two). *Duncan*, 802 So.2d at 544.

Sparks, 68 So.3d at 468-69.

In *State v. Green*, 94-0887 (La. 5/22/95), 655 So.2d 272, the Louisiana Supreme Court discussed a defendant's *prima facie* case:

If the defendant is unable to make out a *prima facie* case of racial discrimination, then the *Batson* challenge fails and it is not necessary for the prosecutor to articulate 'race-neutral' explanations for his strikes. The defendant may offer any facts relevant to the question of the prosecutor's discriminatory intent to satisfy this burden. Such facts include, but are not limited to, a pattern of strikes by a prosecutor against members of a suspect class, statements or actions of the prosecutor which support an inference that the exercise of peremptory strikes was motivated by impermissible considerations, the composition of the venire and of the jury finally empaneled, and any other disparate impact upon the suspect class which is alleged to be the victim of purposeful discrimination.

Green, 655 So.2d at 287-288.

In *State v. Duncan*, 1999-2615 (La. 10/16/01), 802 So.2d 533, the Louisiana Supreme Court noted that if a defendant cannot present evidence showing the required inference of deliberate discrimination, then he fails to establish a *prima facie* case and "his *Batson* challenge expires at the threshold." *Duncan*, 802 So.2d at 544, quoting from *State v. Green*, 94-0887 (La. 5/22/95), 655 So.2d 272, 290, fn. 24.

In this case, the trial judge properly noted that the defendant's *Batson* challenge failed at the outset. Based on the numbers and the percentages of jurors selected, the defendant could not establish a *prima facie* case. (Direct Appeal R. Vol. XXXVII, R. pp. 9033-9045). In addition, the defense could have been accused of exercising its peremptory challenges in a discriminatory manner, since it struck eleven white jurors and only one black juror in its exercise of twelve peremptory challenges. (Direct Appeal R. Vol. XXXVII, R. pp. 9031-9032). The defendant's challenge was not even timely made in accordance with LSA-Cr.P. Art. 841, as the trial judge noted. (Direct Appeal R. Vol. XXXVII, R. pp. 9028-9029). Moreover, the final racial composition of the jury featured a higher percentage of African-Americans than were in the jury venire itself. (Direct Appeal R. Vol. XXXVII, R. pp. 9034, 9041; Trial Court Record Vols. 50 & 51, Tr. pp. 343-351). The record offers no support for this defendant's belated *Batson* challenge, and the trial judge did not err in finding that the defendant failed to establish the requisite *prima*

facie case. For these reasons, defense counsel cannot be gauged ineffective for failing to prevail on a meritless *Batson* claim.

CLAIM VII: DEFENDANT'S SENTENCE SHOULD BE VACATED BECAUSE HE SUFFERS MENTAL RETARDATION AND THEREFORE IS NOT ELIGIBLE FOR THE DEATH PENALTY UNDER *ATKINS V. VIRGINIA*.

The defendant now claims that he is mentally retarded, and that his mental retardation prohibits his execution. (Defendant's brief, pages 41-50). In *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002), the United States Supreme Court held that execution of a mentally retarded individual violated the Eighth Amendment's prohibition against cruel and unusual punishment. The *Atkins* Court left to the states the criteria and procedure to assess mental retardation. Louisiana has done so via LSA-Cr.P. Art. 905.5.1 & LSA-R.S. 15:567.

The State previously addressed the procedure to assess the defendant's claim, which it submits is a specious one designed solely to try to prevent his execution, in two pretrial briefs filed with this Court. The State herein incorporates the arguments made within those filings by reference. The State welcomes the opportunity to refute the claims of this defendant, who does not even exhibit the minimal requisite criteria for a mental retardation diagnosis, and was not considered mentally retarded by his school teachers, family, friends, or even his parents until post conviction. The State herein reserves the right to file a full and detailed brief on the merits regarding the evidence and testimony presented by both the defense and the State at the evidentiary hearings that this Court has indicated it will conduct on this specific issue. At this time, without explicit record evidence and witness testimony, it would be premature for the State to comment further on the specifics of this topic, and the State does not wish to reveal its defense to the defendant at this time.

CLAIM VIII: TRIAL COUNSEL WAS INEFFECTIVE DUE TO THEIR FAILURE TO INVESTIGATE EVIDENCE OF EXTENSIVE FAMILIAL DYSFUNCTION AND SEXUAL ABUSE PERPETRATED AGAINST MR. REEVES AS A CHILD, AS WELL AS SEXUAL ABUSE OF MR. REEVES'S SISTER WITNESSED BY MR. REEVES AS A CHILD, FOR PRESENTATION AS MITIGATION EVIDENCE IN THE PENALTY PHASE OF THE TRIAL.

The defendant claims that trial counsel was ineffective for failing to investigate and put forth more testimony of his experiences as a sex abuse victim as mitigation evidence. The defendant contends that his trial counsel should have conducted further investigation into the background of his adolescence and family, along with presenting additional testimony from the outcome of that investigation. (Defendant's brief, pages 51-61). The defendant goes into great detail describing his traumatic childhood, including his alleged witness of abuse of his sister Renee. In reality, the jury was informed of the defendant's sister's death and its impact on him. The jury also knew that the defendant had witnessed Renee being physically abused, and that she was molested by Dennis Mott, the defendant's stepfather. (Trial Court Record Vol. 58 of 60,