

AUG 23 2018

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No. 2018

18-9242

IN THE  
SUPREME COURT OF THE UNITED STATES

JOEL HAYDEN,  
Petitioner

v.

STATE OF MAINE,  
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE  
MAINE SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

PETITION FOR A WRIT OF CERTIORARI

ORIGINAL

Joel Hayden  
Petitioner, Pro-se  
Maine State Prison  
807 Cushing Road  
Warren, Maine 04864

QUESTIONS PRESENTED

- 1) "WHEN A PARTY MOVES TO STRIKE A PROSPECTIVE JUROR FOR CAUSE BECAUSE OF A 'LANGUAGE BARRIER' WHAT SORT OF RECORD MUST THE COURT MAKE IN ORDER TO ENSURE THAT A 'LANGUAGE BARRIER' IS NOT A PROXY FOR A CONSTITUTIONALLY IMPERMISSIBLE STRIKE BASED ON RACE, ETHNICITY OR NATURAL ORIGIN"?
- 2) "DID THE MAINE SUPREME COURT VIOLATE DEFENDANT'S FOURTEENTH AMENDMENT RIGHTS BY REFUSING TO ENTERTAIN A DISCRETIONARY APPEAL OF THE TRIAL COURT'S REFUSAL TO APPLY STEP THREE OF THE BATSON ANALYSIS, AFTER DEFENSE COUNSEL STRUCK THE ONLY PROSPECTIVE JUROR OF COLOR BASED ON A 'LANGUAGE BARRIER' - WHEN THE DEFENDANT WAS HIMSELF A PERSON OF COLOR AND RACIAL BIAS AGAINST AFRICAN AMERICANS WAS ALREADY EXPOSED AMONGST THE PROSPECTIVE JURORS"?
- 3) "ONCE A DEFENDANT HAS INDICATED A DESIRE TO ATTEND BENCH, SIDEBAR OR IN CHAMBERS CONFERENCES, DOES HIS ABSENCE FROM THOSE CONFERENCES THAT HE IS CONSTITUTIONALLY ENTITLED TO ATTEND INDICATE A VALID WAIVER OF HIS RIGHT TO BE PRESENT"?
- 4) "IS IT A VIOLATION OF A DEFENDANT'S UNITED STATES CONSTITUTIONAL RIGHT TO ATTEND A CONFERENCE IN CHAMBERS FOR THE TRIAL COURT TO ACCEPT AS A VALID WAIVER OF DEFENDANT'S CONSTITUTIONAL RIGHT, DEFENSE COUNSEL'S REPRESENTATION TO THE COURT THAT THE DEFENDANT DID NOT NEED TO ATTEND - WHITHOUT CONSULTING WITH THE DEFENDANT"?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page:

"State of Maine"

Maine Attorney General

6 State House Station

Augusta, Maine 04333-0006

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

[ ] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is  
[X] unpublished.

The opinion of the state post conviction court appears at Appendix B to the petition and is  
[X] unpublished

The opinion of the state post conviction court denying reconsideration appears at Appendix A to the petition and is  
[X] unpublished

## JURISDICTION

[X] For cases from state courts:

The date on which the highest state court decided my case was April 9, 2018. A copy of that decision appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was sent to the Clerk of the United States Supreme Court on: June 8, 2018, but as of this date the Clerk of the Court has yet to respond. Sent letter of inquiry into the status of the motion on, 8/9/18.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### UNITED STATES CONSTITUTION

#### SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

#### FOURTEENTH AMENDMENT

"All persons born or naturalized citizens in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law".

### MAINE CONSTITUTION

#### Article I, Section 6

"Rights of persons accused." "In all criminal prosecutions, the accused shall have a right to be heard by the accused and counsel to the accused, or either, at the election of the accused;"

### MAINE STATUTES

#### 14 M.R.S. § 1211.

"A PROSPECTIVE JUROR IS DISQUALIFIED TO SERVE ON A JURY IF that prospective juror is not a citizen of the United States, 18 years of age and a resident of the county, or is unable to read, speak and understand the English language."

## STATEMENT OF THE CASE

On September 9, 2011, Petitioner, Joel Hayden, hereinafter Hayden, was charged by grand jury indictment with two counts of intentional or knowing murder, 17-A M.R.S. § 201(1)(A)(2011), a class A Crime. Allegedly taking place on July 25, 2011.

On December 29, 2011, Hayden's then attorney John Ney, Jr. filed a motion to suppress Hayden's statements to police on, July ~~26-27~~, 2011.

On April 12, 2012, Hayden's newly appointed attorneys filed a second motion to suppress Hayden's statements to police.

On September 11, 2012, Justice Nancy Mills granted the two motions to suppress filed by Hayden's former, and new attorneys.

On January 4, 2013, jury selection took place at the Cumberland County Unified Court, Portland, Maine. Justice Nancy Mills presiding.(Docket No. CR-11-4876). Regardless that Hayden is a person of color, his trial attorneys erroneously struck all the persons of color from the jury pool. Without the court conducting the required three step Batson analysis for the record.

On January 7, 2013, the court proceeded with Hayden's trial.

On January 11, 2013, the State rested its case, and Hayden's attorneys moved for judgement of acquittal on both counts of the indictment, Rule 29. The court denied the motion on both counts.

On January 14, 2013, the jury returned verdicts of guilty as to both counts of intentional or knowing murder.

On February 5, 2013, Justice Nancy Mill's sentenced Hayden to two concurrent terms of life imprisonment an the Maine Department of Corrections - Maine State Prison.

On February 5, 2013, Hayden's attorneys filed notice of appeal pursuant to M.R. App. P.2(a)(1) and 15 M.R.S. § 2115. State of Maine v. Joel Hayden, CUM-13-112. Hayden also filed an application to appeal sentence, M.R. App.P.20 and 15 M.R.S. § 2151.

On July 17, 2013, briefs were filed in the Maine Supreme Judicial Court-sitting as the Law Court.(Law Docket No.13-112).

On February 25, 2014 the Maine Law Court decided Hayden's direct appeal by affirming his two convictions for intentional or knowing murder and concurrent life sentences. see, State v. Hayden, 2014 Me. 31, 86 A.3d 1221.

On October 27, 2014, pursuant to 15 M.R.S. §§ 2121-2132(2013) Hayden mailed the Unified Criminal Court sitting as the post conviction court his petition for post conviction review, including a 31 page addendum raising 17 claims of violations of his United States Constitutional rights and one claim of cumulative error. The court filed said petition on November 20, 2014.(Dk.No.CR-14-8229).

On February 25, 2015, the post conviction justice assigned the case to the docket pending appointment of counsel based on Hayden's indigency application. See,(Appendix (F)). After appointment counsel failed to make any amendments to Hayden's pro-se petition.

On August 31, 2016, an evidentiary hearing was conducted at the Cumberland County Courthouse, at which Attorneys Clifford Strike Sarah Churchill, Jamie Holmes, Dr. Nadir Behrem and Petitioner Hayden testified.

On September 16, 2016, Hayden's attorney filed a Memorandum in Support of Petition for Post-Conviction relief. In response, the State filed its Post-hearing Memorandum on October 6, 2016.

After reviewing the State's Post Hearing Memorandum and the hearing transcripts. Hayden noted that the State conceded that his trial attorney's failed to retain a toxicologist at trial - instead relying on an unqualified forensic chemist. Consequently, rather than retaining a toxicologist to prove trial counsels ineffective assistance at trial, Hayden's post conviction attorney compounded the prejudice by retaining a psychologist - who the State effectively proved was also unqualified to testify concerning toxicology issues.

On November 18, 2016, Hayden, therefore, personally and not through counsel, filed a motion to re-open the hearing to take the testimony of a forensic toxicologist. To establish an otherwise unsupported intoxication defense.

On January 19, 2017, without acknowledging Hayden's motion to re-open. The post conviction court, following a very brief recitation of the law which erroneously intermingled the pre - Strickland and post Strickland standards for evaluating ineffective assistance of counsel claims - denied all of Hayden's claims. See, (Decision and Order on Petition for Post Conviction Review, Appendix ( )).

On February 6, 2017, Hayden's post conviction attorney filed a notice of appeal to the Maine Law Court. Regardless that Hayden advised him not to because it would interfere with the motion for reconsideration that Hayden intended to file with the court.

On February 7, 2017, unaware that his attorney had filed a notice of appeal. Hayden filed his motion with the post conviction court to reconsider its decision denying relief.

FN-1 M.R.App.P. Rule 3(b) states in relevant part: "The trial court shall take no further action pending disposition of the appeal by the Law Court..."

On February 27, 2017, the post conviction court made an entry in the docket, (CR-2014-8229) stating that: "An appeal was taken on 2/6/17. The court takes no action on subsequently filed motions and letter. see, M.R. App.P. 3(b)." Copy to defendant on 3/6/17.

On April 7, 2017, Hayden, personally and not through counsel, filed a motion to clarify with the Law Court. Which also requested that the Law Court suspend M.R. App. P.3(b), to allow the post conviction court to consider and rule on Hayden's motions to reopen dated: 11/18/16; and, his motion to reconsider dated: 2/7/17.

On April 28, 2017, the Law Court granted Hayden's motion to clarify, suspended Rule 3(b) and directed the post conviction court to act on Hayden's two motions. The Law Court also appointed substitute counsel, and Ordered Hayden's Memorandum Supporting a Certificate of Probable Cause to be filed 21 days after the post conviction court's disposition of Hayden's motion.

On August 8, 2017, in compliance with the Law Court's 4/28/17 directive. The post conviction court entered an order on Hayden's motion to reconsider pursuant to M.R. Civ. P. 7(b)(5). The Order stated in relevant part the following:

"Petitioner faults the performance of his post - conviction attorney. Petitioner does not suggest, however, that the materials he complains were not presented at the post conviction review hearing could not have been presented. The court's findings, challenged by petitioner, are supported by the record."

"The entry is"

"Petitioner's Motion for Reconsideration is DENIED!"

Consequently, however, the post conviction court failed to take any action on Hayden's motion to re-open as the Law Court had ordered.

On September 27, 2017, pursuant to the Law Court's 4/28/17 Order, Hayden's appellate counsel filed her Memorandum in Support of a Certificate of Probable Cause to appeal the post conviction court's denial of relief. Counsel focused her memorandum on two specific claims of the 18 denied by the court. To summarize, Hayden's attorney requested the Law Court accept review and issue an opinion that would:

"(1) recognize the strong correlation between English language proficiency and race, ethnicity and national origin, and endorse the use of the Batson analysis when a party seeks to remove a prospective juror because of a 'language barrier'; and, (2) clarifies a defendant's right to attend or waive attendance at sidebar or chambers conferences."

On September 28, 2017, to preserve his federal claims for 28 U.S.C. § 2254 habeas corpus review, and with the permission of the Law Court. Hayden, personally and not through counsel, filed his own Memorandum in Support of a Certificate of Probable Cause to appeal the remaining 16 claims denied by the post conviction court.

On April 9, 2017, the Maine Supreme Judicial Court - sitting as the Law Court - denied Hayden's request for a Certificate of Probable Cause to appeal the post conviction court's decision.

The Law Court's April 9, 2017 decision was the Maine state court of last resort triggering the running of the 90 day deadline for filing the Petition for a Writ of Certiorari to this Court. United States Supreme Court Rule 13(1).

On June 8, 2017, pursuant to Supreme Court Rule 13(5), Hayden mailed his "Motion For An Extension Of Time To File A Petition For A Writ Of Certiorari", to the Clerk of the Supreme Court for filing with the appropriate justice, under Supreme Court Rule 22(1).

Petitioner Hayden respectfully requested that pursuant to Supreme Court Rule 30(3), that the United States Supreme Court Justice allotted to the First Circuit Court of Appeals grant an extension of time of five weeks. Therefore, extending the due date from July 9, 2018, an additional five (5) weeks until August 16, 2018. Hayden also sent a copy to the Maine Attorney General, with Filing And Service Declaration - Certificate of Service. At the time of mailing the herein Petition For A Writ Of Certiorari, Petitioner Hayden had not heard back from the Clerk of this Supreme Court, and assumes this is the normal process.

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#### ACKNOWLEDGEMENT

I, Petitioner Joel Hayden, hereby submit that my court appointed appellate attorney Jamesa J. Drake, Esq. presented a comprehensive and compelling legal argument to the Maine Supreme Judicial Court - the Law Court, requesting the court issue a certificate of probable cause to appeal the post conviction court's decision to deny post conviction relief.

Accordingly, I hereby acknowledge that I have borrowed key portions of Attorney Drake's arguments and legal citations from her Memorandum of Law and combined them with the arguments I have presented herein to support my petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

ARGUMENT ONE

This Petition presents two issues that are highly important to Petitioner Hayden as well as to a wider audience. The first is that Maine requires English language proficiency as a condition of jury service (without regard to whether an interpreter is available to assist the juror). Petitioner Hayden assumes arguendo that striking a juror for cause because of a "language barrier" is constitutionally permissible. But, what if a "language barrier" strike is really a proxy for a strike based on race, ethnicity or national origin? What sort of record should the court and the parties create so that an appellate court can evaluate whether a "language barrier" strike is properly sustained? Here, the trial court and the post conviction court failed to apply the third step of the analysis required by, Batson v. Kentucky, 476 U.S. 79 (1986). See, (Appx.(B)). An egregious error essentially condoned when the Maine Supreme Judicial Court, (Law Court) declined to provide discretionary review. See, (Appx.(C)).

Maine has a growing non-English speaking population. Because a "language barrier" strike has the potential to mask nefarious reasons for exclusion - and the Maine Supreme Judicial Court declined to weigh in - guidance from this Supreme Court is needed, now more than ever, about the standard by which a "language barrier" may validly preclude jury service.

At Petitioner Hayden's trial, prospective jurors were asked to answer a terrible voir dire question: "Do you feel that too many defendants who stand trial in criminal cases in criminal cases are found not guilty?" Juror No. 3 answered: "I am not certain." Tr.166. Every one who answed this way-including a large number of English-speaking jurors- was subjected to individual voir dire. This is what occurred during juror 3's voir dire:

Juror: Okay, what do you want me to explain, exactly?  
The Court: Why you amswered that you are uncertain.  
Juror: Well, I'm not there basically, you know. So I wasn't sure how many people are guilty, how many are not.  
The Court: Okay.  
Juror: So - but I believe justice is fair; you know?  
The Court: I'm sorry.  
[Prosecutor] I didn't hear the last thing.  
Juror: Justice is fair, though. I believe that I wasn't exactly understanding the question well. But now I understand. I can change if you want me to.  
The Court: No, I just - wanted to understand why you answered the way you did. And that's why we brought you in

Tr.167. The prosecutor asked Juror No. 3:

[Prosecutor] Was it just a poorly worded question, do you think? Or did you have trouble?  
Juror: It is kind of a tricky question. I don't have the answer right away. You know?  
[Prosecutor] Did you have any trouble with any of the other questions?  
Juror: No, no.  
[Prosecutor] Okay.

Juror: No, it is kind of a tricky question. I don't have the answer right away. You know?  
[Prosecutor] Sure.  
Juror: I do understand very well all of the questions.  
[Prosecutor] Okay. Thank you.

Tr. 167-168. Defense counsel inquired:

[Defense Counsel]: Young man, what is your native language?  
Juror: My native language is Somali.  
[Defense Counsel]: Somali? How long have you been in the States?  
Juror: I have been in the States since '96.  
[Defense Counsel]: Since '96?  
Juror: Yes.

Tr. 168. When it came time to exclude jurors for cause, this happened:

[Defense Counsel]: My last one, Judge, for the same reason, although maybe not quite as bad, would be Juror Number 3 on the language issue. That was the last juror that we had.  
The Court: Um-hum. He has been stateside for about 15, 16 years. And it may not be quite as - he sounded a little better-spoken than the gentleman earlier<sup>2</sup> but I would still have some concerns. Emphasis added.

[Prosecutor]: I have some of those concerns, your Honor.  
The Court: All right, it's by agreement. I'll exclude 3.

Tr. 172. At the post conviction hearing, neither party asked either defense attorney anything regarding Juror No. 3. See, (Appx. (A) Post conviction court's denial of reconsideration.).

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**FN-1** The court was referring to juror no. 130, who was also struck for cause because of a "language barrier". Although not recited here, the individual voir dire of juror 130 appears at Transcript pages 141-144 and it provides an interesting comparison to juror no.3's voir dire. both jurors purportedly suffered from a "language barrier", although juror 130's "language barrier" appears to be more significant in terms of spoken language (any barrier regarding language comprehension is unclear on this record.).

Moreover, Petitioner Hayden contends that the Maine Courts failure to conduct a complete Batson analysis once a party relies on a "language barrier" to exclude a juror. Conflicts with the majority of U.S. Circuit Courts of Appeals addressing state courts failure to properly apply Batson. See, Sanchez v. Roden, 753 F.3d 279, 299(1st Cir. 2014);

("The Massachusetts Appellate Court indicated any discrimination must have been based on age, not race.."  
"Thus, in effect, recast Sanchez's race based challenge as an age based objection." "The MAC gave no consideration whatsoever to Sanchez's argument that no non discriminatory reason explained why the prosecutor struck juror 262..."  
"..All in all, there can be no doubt that the MAC failed to inquire into all the facts and circumstances relevant to Sanchez's claim of racial discrimination." "It followed up by applying Batson's first prong in such a way as to permit increased racial discrimination." "The MAC's treatment of Sanchez's Batson claim was...objectively unreasonable in light of clearly established federal law."). Emphasis added.

See also, Yee v. Duncan, 441 F.3d 852(9th Cir. 2009);

(prisoner granted habeas §2254 relief because state court determined the prosecutor satisfied her burden of production at step 2 of the 3 step Batson analysis...state court impermissibly compressed steps 2,3 of Batson's analysis into one single step by looking at the record as a whole and the composition of the jury - was contrary to clearly established federal law."). Emphasis added.;

Moody v. Quarterman, 476 F.3d 260,270(5th Cir. 2007);

(The U.S. Supreme Court admonished the circuit panel stating: "It is the 3rd step that the persuasiveness of the justification becomes relevant - the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." Id. citing Batson 476 U.S. at 98.

In this case, although Hayden is a person of color. His trial attorney erroneously struck all persons of color, under the guise of a "language barrier", particularly a Somali juror who Hayden had specifically requested be on his jury.

The state post conviction court's findings of fact on this issue were limited to the following three sentences in its Decision and Order: ("Two jurors were excluded because of language barriers!" "Petitioner's allegations regarding jury selection are not supported by the record.".."Excluding jurors because of a language barrier is not unreasonable.") See, (Decision and Order at 8,13-14. Appendix (B)). When the court's order is considered in conjunction with the voir dire excerpts, *supra*. It is reasonable to conclude that the state court record, and the court's determination that juror exclusion based on a purported "language barrier" is not unreasonable. Are both inadequate to fulfill Batson's requirements.

Therefore, contrary to Batson, the 1st, 5th and 9th Circuit Courts of Appeal. Without the necessary guidance of this Court, the Maine courts will egregiously continue to avoid applying the constitutional safeguard of Batson - by allowing parties to assert a purported "language barrier" as cause to exclude jurors. Thus, facilitating the nefarious masking of impermissible racial discrimination. *see, Sanchez, supra*. A clear violation of a jurors constitutional right not to be discriminated against. *See, United States v. Escobar - de Jesus*, 187 F.3d 148,165(1st Cir.1999).

As one scholar has observed:

("Approximately thirteen million U.S. citizens, mostly Latinos and other people of color, are denied the right to serve on juries due to English language requirements and despite the possibility (and centuries-old tradition) of juror language accommodation. This exclusion results in the underrepresentation of racial minorities on juries and has

a detrimental impact on criminal defendants, the perceived legitimacy of the justice system, and citizen participation in our democracy."

Jasmine B. Gonzales Rose, Language Disenfranchisement in Juries: A Call for Constitutional Remediation, 65 Hastings L.J. 811, 811 (2014)

By statute, 14 M.R.S. § 1211, Maine requires English-language proficiency (the ability to "read, speak and understand the English language") as a condition of jury service, without regard to whether an interpreter is available to assist the juror. Hayden assumes arguendo that this statute is constitutional. But, contrary to the post conviction court's reasoning, the fact that a "language barrier" strike is "not unreasonable" is the beginning point, not the end, of the analysis.

There is a strong correlation between English-language proficiency and race, ethnicity and national origin. See, Rose, Hastings L.J. at 823-24; see also, Hernandez v. New York, 500 U.S. 352, 371-72 (1991) (Kennedy J., plurality opinion); ("[A] policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination."). Because of that, an impermissible race-based challenge might masquerade as a "language barrier" strike for cause. This is exactly what Hayden had alleged.

In his petition for post conviction relief, Hayden alleged that his trial attorney erroneously struck all persons of color from the jury pool. In particular, Hayden alleged that his attorneys

erred by striking a Somali juror because of a purported "language barrier" and he suggested that the "language barrier" justification was a proxy for a race based strike.<sup>3</sup> The post-conviction court erred by summarily dismissing this Claim, concluding: "Excluding jurors because of a language barrier is not unreasonable." See, Order at 14, (Appx.(B); Herein page 14.

The post-conviction court's reasoning altogether ignored Hayden's allegation of racial discrimination, which was at the heart of this particular claim for post-conviction relief. And Batson claims are not so easily set aside. See, Sanchez, 753 F.3d at 299, *supra*; ("The MAC gave no consideration whatsoever to Sanchez's argument that no non discriminatory reason explained why the prosecution struck juror 261.." "Thus, the MAC disregarded the Supreme Court's exhortation that it must consider all circumstances bearing on potential discrimination.").

In this case, the juror in question - Juror No. 3 - provided responsive answers to every voir dire question in almost perfect English.<sup>4</sup> Importantly, Juror No. 3 was only asked to repeat himself once, because the court was unable to hear his answer. *Id.* pgs.11-12. Both of these things together suggest that Juror No. 3 was able to understand and speak English without any difficulty.

FN- 3 The post-hearing memorandum in Support of Post Conviction Relief alleges on page 11: "Finally, Petitioner's counsel failed to adequately object to Petitioner's jury not being comprised of his peers. In fact, his attorneys struck a black male, because he was Somalian and told Petitioner it was because of language issues. Use of peremptory strikes on the basis of race violates a defendant's constitutional rights. See, Batson v. Kentucky, 476 U.S. 79(1985); See also, Powers v. Ohio, 499 U.S. 400(1991)."

FN- 4 "Perfect English" is rarely achieved. As Maine Supreme Court Justice Gorman noted at oral argument in *State v. Roby*, SAG-17-5, at least one of the voir dire questions submitted by the attorneys was grammatically challenged.

Moreover, Juror No. 3's responses and conduct during his voir dire fall squarely within the parameters set forth in 14 M.R.S. §1211 to qualify for Maine jury service. See, (Appx.(D)). Stating in part that a person may be disqualified and exempted from jury service if they are unable to read, speak, and understand "English language". When considered with Juror No. 3's voir dire, this raises the specter that defense counsel's "language barrier" strike was constitutionally suspect. It should have set off alarm bells. A circumstance that would require Batson's third step as a constitutional safeguard.

In Batson v. Kentucky, 476 U.S. 79,89(1986), this Court held that a prosecutor violates the Equal Protection Clause when he challenges potential jurors on account of their race. In Georgia v. McCollum, 505 U.S. 42,59(1992), this Court extended the prohibition on race based challenges to defense attorneys. Although Batson and McCollum concern the use of peremptory challenges, it is axiomatic that the prohibition against race-based challenges also applies to challenges for cause. See, e.g. Strauder v. West Virginia, 100 U.S. 303,309-310(1897);(racial discrimination in jury selection violates the Equal Protection Clause).

Here, Hayden readily concedes that it is impossible to grasp the full flavor of what happened during jury selection from reading a cold transcript. But, Batson and its progeny provide an answer for that. There is no shortage of case-law about the record that a court must create to enable appellate review of Batson-type challenges. Id.

See, e.g. Miller-El v. Cockrell, 537 U.S. 322, 328-29(2003);

((1)"the opponent to the strike must make a *prima facia* showing that the challenge was exercised on the basis of race; (2) if that showing has been made, the movant must offer a race-neutral basis for striking the juror in question; and, (3)in light of the parties' submissions, the trial court must determine whether the opponent has shown purposeful discrimination.")

See also, Hernandez, 500 U.S. at 359(1991)(endorsing the use of the Batson analysis for challenges to prospective jurors who spoke Spanish). And, there is no question that such a record was not created in this case. Hayden contends that the Maine courts failure to provide this necessary record runs afoul of Supreme Court Jurisprudence. And is contrasted by the decisions of the First, Fifth and Ninth Circuit Courts of Appeal, *supra*. Moreover, the likelihood of a violation of a defendants and jurors constitutional rights by excluding prospective jurors based on a "language barrier" Without further scrutiny, has and will continue to effect every party of a jury trial in Maine; and, likely many other state courts throughout the country - without guidance from this Supreme Court.

Who is to blame for that? For starters the attorney who made the strike is to blame. An Attorney who makes a race-based strike renders deficient performance; prevailing norms require attorneys to refrain from blatantly violating the constitution. Strickland v. Washington, 466 U.S. 668(1984). In this case, because the strike caused the removal of a person of color - it is difficult to assume that Hayden somehow benefited from Juror No. 3's removal. Certainly, nothing on this record would allow a reviewing court to conclude as much, or for that matter this Court.

To the contrary, the record will show that the bias of the jurors against African Americans was evidenced by one juror indicating during jury selection that statistically blacks are more likely to be incarcerated for violent crimes.(Jury selection at 101). Would this not make it even more important in sustaining Hayden's constitutional right to a fair trial by an impartial jury. See, Irwin v. Dowd, 366 U.S. 717(1961); Sullivan v. Louisiana, 508 U.S. 275,277(1993). To comply with his request to have Juror No. 3 - the Somalian - seated on his jury. The only person of color on the jury, and Hayden being a person of color. Thus, showing the constitutional error of the Maine courts allowing jurors to be removed based only on a parties assertion of a "language barrier", and failing to provide the constitutional safeguard of Batson's 3rd step.

Therefore, the court at both the trial and post conviction stage is also to blame. Independant of what a party might do - in fact, especially when the suspect challenge comes from counsel for the defendant - the court has a duty to engage in the full Batson analysis. See, e.g. Edmonson v. Leesville Concrete Co., 500 U.S. 614,624(1991);

("By enforcing a discriminatory peremptory challenge, the court has not only made itself a party to the [biased act], but it has elected to pace its power, property, and prestige behind the [alleged] discrimination."); Powers v. Ohio, 499 U.S. 400,412(1991);("[T]he overt wrong [of excluding a juror based on race]...casts doubt over the obligation of the parties, the jury, and indeed the court, to adhere to the law throughout the trial of the cause.")(emphasis added); See also, Lemley v. State, 599 S.2d 64,70(Ala.1992);("The notion that by allowing discrimination to occur, the trial judge actually becomes a party of that discrimination is... applicable to a trial judge who, in a case with racial overtones, recognizes a racial pattern to counsel's strikes yet takes no steps to inquire into counsel's motivation.").

Accordingly, a review of the transcripts in this case will show that during Juror No.3's exclusion the trial court was focused solely on Juror No.3's "speech". With which the court had "some" concern. However, the transcripts are void of any findings that Juror No.3 was unable to comply with the "English language" criteria set-forth in Maine Statute 14 M.R.S. §1211. See, (Jury Selection at 172). Furthermore, the trial court knew that Hayden, being a person of color wanted Juror No.3 the only juror of color in the jury pool - on his jury. The court also knew that racial bias had already been exposed amongst Hayden's prospective jurors. (Jury Selection at 101). See, Mach v. Stewart, 137 F.3d 630(9th Cir. 1997);

(Finding that the statements of one prospective juror who was later dismissed were found to have had the potential of tainting the entire jury panel. Failure of the court to dismiss the entire panel or conduct further voir dire to ascertain the impact of the juror's statement was reversible error.). Emphasis added.

Therefore, with Hayden's constitutional right to a fair trial by an impartial jury of his peers in jeopardy. It was essential - and within the court's duty to protect Hayden's constitutional rights - for the trial court to further assess whether Juror No.3 was unable to read, speak and understand the "English language", 14 M.R.S. § 1211. Necessary under §1211, to exclude Juror No.3 - the only prospective juror of color - who could provide necessary balance to assure that potential racial bias on Hayden's jury did not result in a conviction. Under these exceptional circumstances seating Juror No.3 was a necessary element in sustaining Hayden's Sixth Amendment right to a fair trial by an impartial jury of his peers. See, Mu'Min v. Virginia, 421 U.S. 415,426(1991).

FN-5 14 M.R.S. §1211. Disqualification and Exemption from Jury Service.

Stating in relevant part that: "A prospective juror is disqualified to serve on a if that prospective juror is not a citizen of the United States, 18 years of age and a resident of the county, or is unable to read, speak and understand English language..."). See, (Appx.(D)). Emphasis added.

Accordingly, because the voir dire clearly shows Juror No.3 was able to speak English fulfilling the criteria of 14 M.R.S. § 1211. The trial court could not exclude Juror No.3 based only on a "concern" with his speech - not without further development of the record to satisfy §1211's requirements. Consequently, the trial court's decision to exclude Juror No.3, without developing the record and applying Batson's third step. Supports a conclusion that the trial court acquiesced in Juror No.3's exclusion and egregiously became part of the racial discrimination of Juror No.3. See, Edmonson, 500 U.S. at 624, *supra*.

Hayden acknowledges that a "language barrier" qualifies as a race-neutral basis for striking a juror (step one of the Batson analysis), but this alone does not absolve the court - either at the trial stage or at the post conviction stage - from engaging in the 3rd step of the Batson analysis. Indeed, if a court does not make an adequate record about why it denied a Batson challenge, the case can be remanded to allow for additional findings. See, e.g., United States v. McMath, 559 F.3d 657, 666 (7th Cir. 2009), cert. denied., 558 U.S. 881;

("Snyder makes clear that a summary denial does not allow us to assume that the [movant's] reason was credible; rather, the district court's silence leaves a void in the record that does not allow us to affirm the denial. We thus, conclude that the district court clearly erred in denying the Batson challenge without making findings regarding the credibility of the proffered race-neutral justification for the strike. We believe that remanding for further findings and a possible hearing on the Batson issue is the most appropriate step at this time.").

Hayden contends that the United States Supreme Court should accept review of this case because it will provide a vehicle for this Court to discuss the type of record a court should create when asked - either through a strike for cause or a peremptory challenge - to remove a juror because of a "language barrier". This Court should remind the bench and bar that because a strong correlation exists between English language proficiency and race, ethnicity and national origin, "language barrier" challenges deserve special scrutiny. And, this Court should - at a minimum - strongly encourage courts to clearly articulate the specific reasons why a prospective juror's English language proficiency falls below the level of competency(whatever that may be) for jury service here in Maine, and in state and federal courts throughout the country. This Court should require all state and federal courts to endorse and apply the three step Batson analysis as a way to create that record and, to reinforce that point, this Court should remand this case so that the Maine post conviction court may complete the third step of the Batson analysis. Lastly, this Court should reaffirm for all state and federal courts the importance of citizen participation in democracy through jury service, and its(presumed) desire to be as inclusive as possible; in other words, when in doubt, courts should err against tolerating "language barrier" strikes.

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FN-6 Hayden had a right to a jury of his peers; and being a person of color with no jurors of color on his jury. The one prospective juror of color became significant to realizing his constitutional rights. With that one juror facing exclusion under a language barrier challenge. The trial court must strictly and completely comply with Maine Statute 14 M.R.S. §1211, controlling jury selection before excluding the only juror of color from Hayden's jury. The trial court's failure to do so violated Hayden's 14th Amendment right. See, Connecticut Board of Pardons v. Dumshat 452 U.S. 458,463(1981);("A state created right can in some circumstances beget yet other rights to procedures essential to the realization of the parent right." See, Meachum v. Fano 427 U.S. 215,226(1976).")

## REASONS FOR GRANTING THE WRIT

### ARGUMENT TWO

One of the most egregious failures of Hayden's attorneys at trial was their failure to ensure that Hayden was present at all the meetings held in chambers. Hayden specifically pointed out each occasion in his pro-se post conviction petition when he was not told about and included in the in chambers meetings. Regardless that the trial court itself expressed concern that Hayden be present and the importance thereof. Hayden's trial attorneys failed to accomodate him or for that matter even inform him of the importance of him being present at the conferences. In one particular instance, when the court asked counsel if Hayden wanted to be present, the attorneys misrepresented Hayden by stating he did not. The court, not taking this for granted, checked with Hayden who emphatically stated that he wanted to be present. Subsequently, Hayden's trial attorneys testimony at the post conviction hearing regarding this issue was less than convincing. The credibility of Hayden's trial attorneys is critical in this case as it goes directly to their justification for excluding the only prospective juror of color from Hayden's jury. (step three of Batson's analysis). Regardless that Hayden - a person of color - wanted the Somalian juror on his jury.

Hayden contends that because his U.S. Constitutional rights were in issue during these conferences in chambers, and likewise his Maine Constitutional rights. The meetings in chambers were a critical phase of the criminal trial court proceeding.

Therefore, triggering Hayden's constitutional right to be present. See, Illinois v. Allen, 397 U.S. 337,338(1970); citing, Lewis v. United States, 146 U.S. 370,372(1892);("A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absense of the prisoner."). Emphasis added.

Moreover, by egregiously excluding Hayden from the in chambers conferences his trial attorneys effectively silenced him in violation of his right to be heard. See, Hamdi v. Rumsfeld, 542 U.S. 504,533 (2009);("Parties whose rights are to be affected are entitled to be heard."). Especially at a time when Hayden's participation would have greatly assisted in his defense. See, Hopt v. Utah, 110 U.S. 574(1884). Consequently, this violated Hayden's right to be heard guaranteed by the Maine Constitution Article I, Section 6, stating in relevant part:

("Rights of persons accused""In all criminal prosecutions the accused shall have a right to be heard by the accused and counsel to the accused or either, at the election of the accused."). Emphasis added.

See, Morrison v. Sayer, 2011 Me. 136;("court's failure to allow the defendant the ability to participate in hearing violated rights."). Hayden contends that the deprivation of a State Constitutional right violates a defendant's 14th Amendment guarantees. Dumshat, *supra*.

Concerning the issue of waiver in this case. Even though Hayden's trial attorneys' represented to the trial court that Hayden had no desire to attend the chambers conferences, when asked by the court, Hayden informed the court that he did, in fact, want to be

present during the proceedings in chambers. Therefore, counsel's representations to the court that Hayden did not want to attend are suspect and, aside from that, there is nothing in the state court record suggesting that Hayden was aware he had a right to attend some of the bench, sidebar and chambers conferences. Nor that he consciously chose not to attend the ones he was excluded from. On the contrary, the record shows that Hayden emphatically argued to participate during all portions of the trial.

The United States Supreme Court has recognized that a defendant's constitutional right to be present at trial is one of those "basic rights that an attorney cannot waive without the fully informed and publicly acknowledged consent of the defendant." See, Taylor v. Illinois, 484 U.S. 400,418,n.24(1987); citing, Cross v. United States, 117 U.S. App.D.C. 56, 325 F.2d 629(1963);(recognizing the right to be present during trial); Johnson v. Zerbst, 304 U.S. 458,464-465(1938). Accordingly, a constitutional right can only be waived when a defendant affirmatively, knowingly, and intelligently waives the rights. Carnley v. Cochran, 369 U.S. 506,516(1962); ("waiver of constitutional rights must never be presumed, and to be found must appear from the record to have been intelligently and understandably made."). Johnson v. Sherry, 589 F.3d 439(6th Cir.2009). The record in this case is entirely void of a waiver provided by Hayden.

Consequently, Hayden's trial attorneys' failure to advise him of his right to be present and their failure to obtain a waiver from him of the same was ineffective. Strickland v. Washington, 466 U.S. 668(1984), and progeny. Counsel's ineffectiveness prejudiced

Hayden because there were important discussions in chambers without him being present. Including a discussion in which Hayden's trial attorneys agreed not to mention felony when questioning John Michaud a prosecution witness. Mr. Michaud had previously stated the charges he was facing were not serious and he did not receive any favorable consideration for testifying. Instead of confronting Mr. Michaud with whether he was , in fact, charged with a felony facing five years incarceration. Without Hayden's knowledge his attorneys agreed not to impeach Mr. Michaud with the inconsistencies. This seriously deprived Hayden of the ability to confront and cross examine a witness used to convict him of double homicide.

Another discussion in chambers - and without Hayden - was with Dr. Ferenc, a prosecution witness and concerned elements of his testimony. At trial he testified as to the cause of the deaths and the manner in which they occurred. Without Hayden being present negatively impacted his ability to participate in the confrontation and cross examination of the State's expert, necessary to formulate an adequate defense against the evidence against him.

During another conference without Hayden being present. His trial attorneys' egregiously agreed to allow the prosecution to lead its witness, Jamie Holmes through an important part of her testimony against Hayden.

On another occasion, an in chambers conversation occurred involving the testimony of prosecution witness Todd Setlemire that regarded his mishandling of physical evidence. This was significant as it involved the proposed testimony of a witness who allegedly cross contaminated evidence in Hayden's case, yet Hayden was not present to assist in his own defense.

All of these conferences in chambers - from which Hayden was excluded - concerned significant testimonial and evidentiary issues regarding the prosecutions case against Hayden for double homicide. Thus, affecting Hayden's constitutional rights. Hamdi, *supra*. Accordingly, the conferences must be considered critical phases of the criminal trial in which Hayden had a constitutional right - both federal and state - to be present, participate, and to be heard. *Id.* Therefore, because Hayden's exclusion deprived him of the ability to participate and meaningfully confront and cross-examine witnesses against him, necessary to assist in his own defense. Hayden being excluded from the conferences violated his constitutional right to be present during the trial. Illinois, 484 U.S. at 418, *supra*.

This Court should grant review and reiterate that, in some circumstance, criminal defendants have a constitutional right to attend bench, sidebar or chambers conferences; they may not be excluded as a matter of habit or custom. Aside from what the law specifies, a general rule of thumb should be that if a trial court can make allowances for a court reporter to attend in chambers conferences, then there is little justification for excluding the very person whom the chambers conference concerns.

The U.S. Supreme Court established the ground rules in twin cases decided almost 35 years ago. This Court held in, United States v. Gagnon, 470 U.S. 522, 526 (1985);

("the constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, but we have recognized that this right is protected

by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." A defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Id. at 526(quoting Snyder v. Massachusetts, 291 U.S. 97, 105-106(1934)').

Two years later this Court reiterated in, Kentucky v. Stincer 482 U.S. 730,745(1987);("a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence could contribute to the fairness of the procedure."). Together, both cases make clear that a defendant's constitutional right to be present at a sidebar or chambers conference - either rooted in the Confrontation Clause or the Due Process Clause - depends on what will be discussed at that proceeding. This requires a conference by conference analysis; there is no blanket rule granting or prohibiting the defendant's presence-and yet, far too often, criminal defendants are excluded from every sidebar or chambers conference in chambers without any indication on the record(other than the fact of the defendants absence) that the defendant consciously acquiesced to his exclusion.

There were over 15 sidebar conferences and at least 10 in chambers conferences in this case, which Hayden was excluded. The trial court repeatedly indicated its willingness to allow Hayden to be present, see,e.g. Tr.49,1061. But, instead of ensuring Hayden's constitutional right to attend certain sidebar or chambers conferences, counsel either did nothing to secure his attendance or,

worse, counsel misrepresented to the trial court that Hayden did not want to participate in the conferences.<sup>7</sup> Trial counsel has a constitutional duty to ensure that a defendant's constitutional rights are protected and counsels' failure to fulfill that duty to Hayden constituted ineffective assistance that was prejudicial to Hayden. Strickland.

### CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully Submitted,

Joel Hayden

Dated: August 13, 2018

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FN-7 Hayden Respectfully Requests that in addressing Argument One, *supra*. That this Court give due consideration to the facts presented here - in Argument Two - showing that Hayden's trial attorneys credibility was highly questionable when advising the trial court that Hayden did not want to participate in the in chambers conferences, a critical stage of the trial. As pointed out by the trial court. This is of great importance as Hayden's trial attorneys questionable credibility is inextricably connected with the veracity of his trial attorneys purported justification for excluding Juror No.3 - under the guise of a "language barrier". At a time when racial bias towards African Americans was exposed amongst Hayden's prospective jurors. With Hayden being a person of color and Juror No.3 the only prospective juror of color qualified to sit on the jury. An issue of which its resolution by this Court is of great importance to defendants across the country.