No. ____

IN THE
Supreme Court of the United States

CHARMELL BROWN,
Petitioner,

v.

ALEX JONES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Ishan K. Bhabha
Counsel of Record
Jason T. Perkins
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
ibhabha@jenner.com

QUESTION PRESENTED

The Court's *Batson v. Kentucky* framework "is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process" by motivating a prosecutor's peremptory strike. *Johnson v. California*, 545 U.S. 162, 172 (2005) (explaining *Batson*, 476 U.S. 79, 97-98 (1986)). The *Batson* framework involves three steps: once a criminal defendant "has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike [*i.e.* the prosecution] to come forward with a race-neutral explanation (step two)." *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curiam). The prosecutor's explanation can be "implausible or fantastic," or "silly or superstitious," as long as it is facially race-neutral. *Id.* at 767-68. "If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the [defendant] has proved purposeful racial discrimination." *Id.* at 767. "At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Id.* at 768.

The question presented is:

Whether, at *Batson*'s first step and in the absence of any explanation from the prosecutor, a court may rely on factors apparent in the record to explain a prosecutor's seemingly discriminatory peremptory strike.

RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the State of Illinois, the United States District Court for the Central District of Illinois, and the United States Court of Appeals for the Seventh Circuit:

- *People v. Brown*, No. 4-10-0409, 2011 WL 10481896 (Ill. App. June 10, 2011) (affirming conviction on direct review and denying *Batson v. Kentucky* claim), which is reproduced in the attached appendix at Pet.App. 49a-86a.

- *People v. Brown*, No. 4-13-0412, 2015 IL App (4th) 130412-U (Ill. App. May 15, 2015) (affirming denial of post-conviction petition that raised other issues not related to the *Batson* claim).

- *Brown v. Lawrence*, No. 2:17-cv-02212, 2019 WL 11815324 (C.D. Ill. Oct. 8, 2019) (denying petition for a writ of habeas corpus, but granting certificate of appealability regarding *Batson* claim), which is reproduced in the attached appendix at Pet.App. 13a-48a.

- *Brown v. Jones*, 978 F.3d 1029 (7th Cir. 2020) (affirming dismissal of habeas petition regarding *Batson* claim), which is reproduced in the attached appendix at Pet.App. 1a-12a. The electronic versions of that opinion have been updated to reflect the amendment made to the background section on denial of

rehearing and rehearing *en banc*. *See* 2020 WL 6154211 *and* 2020 U.S. App. LEXIS 33226.

- *Brown v. Jones*, No. 19-3172, (7th Cir. Nov. 17, 2020) (order denying rehearing and rehearing *en banc* and correcting factual error in opinion), which is reproduced in the attached appendix at Pet.App. 87a-88a. This order is available electronically at 2020 U.S. App. LEXIS 36028.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Charmell Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinion as amended on denial of rehearing is reported at 978 F.3d 1029 (7th Cir. 2020). The district court's opinion denying habeas relief was not reported but is available electronically and from the Central District of Illinois, No. 2:17-cv-02212, 2019 WL 11815324 (C.D. Ill. Oct. 8, 2019), ECF No. 28. Pet.App. 13a-48a.

JURISDICTION

The Seventh Circuit issued its decision on October 21, 2020 and denied a timely petition for rehearing and rehearing *en banc* on November 17, 2020, while also amending its opinion. Pet.App. 1a-12a (opinion); *see also* Pet.App. 87a-88a (order on rehearing). On March 19, 2020, the Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment provides in relevant part: "[N]or 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 laws." U.S. Const. amend. XIV, § 1.

INTRODUCTION

In the American criminal justice system, parties are typically permitted to strike potential jurors from service without providing a reason. Peremptory strikes can be used "'for any reason at all, as long as that reason is related to' … the case to be tried." *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (citation omitted).

Only when it appears that there may be a violation of "equal protection through the State's use of peremptory challenges to exclude members of" a protected class (*Batson* step one) will the prosecutor be required as a matter of federal law to state a reason for exercising a peremptory challenge (step two) and have that reason scrutinized by the court (step three). *Id.* at 82, 97-98. This analysis must be done juror-by-juror, and at the third step, reason-by-reason. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.") (citation omitted).

This case concerns a clear circuit split and state-circuit split that exists regarding the application of *Batson's* three-step analysis. In the Seventh Circuit, First Circuit, and in the California courts, a trial court may deny a *Batson* challenge at step one and excuse the prosecutor from supplying their actual race-neutral reason for the strike if the court finds that the record suggests a *potential* race-neutral reason the prosecutor may have had. In the Ninth and Third Circuits, a trial court at step one may not rely on factors apparent in the record to explain a seemingly discriminatory peremptory strike—the *Batson* analysis must continue and the prosecutor herself must provide an explanation.

Specifically in the Ninth Circuit, "it does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the *real* reason they were stricken" and whether that reason was the prospective juror's race or gender. *Paulino v. Castro*, 371 F.3d 1083, 1089-90 (9th Cir. 2004). Because that statement was relied upon by this Court in *Johnson v. California*, 545 U.S. 162, 172 (2005) (quoting *Paulino*, 371 F.3d at 1090); *see also id.* (directing courts to avoid "engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question"), the Ninth Circuit has continued to apply and reinforce its rule in subsequent cases, despite the differing opinions of the Seventh and First Circuits, and the California Supreme Court. This stark difference in opinion should be resolved by this Court.

This case is an ideal vehicle for addressing the question presented and deciding which of these *Batson* approaches is correct. Mr. Brown's case involves a *Batson* challenge regarding only one potential juror, who was immediately excused without any explanation or indication whatsoever regarding the reasons for the strike, or even any questions from the prosecutor about the juror's *voir dire* statements.

Applying its rule, the Seventh Circuit hypothesized that the prosecutor was concerned about one of the juror's *voir dire* answers to an initial screening question asked by the state trial court. Thus it found that the Illinois courts applied *Batson* "correctly." Pet.App. 2a. Far from being correct, that result would have been an unreasonable application of clearly established federal law had this case arisen in the Ninth Circuit.

Importantly, no other claim remains in Mr. Brown's case, and the decades-old *Batson* framework is clearly established here for federal habeas review purposes.

Finally, the Seventh Circuit's decision is wrong and perpetuates confusion in the law about the proper application of the *Batson* framework. When a group of potential jurors is assembled for jury selection in a criminal trial, those individuals bring with them all types of personal backgrounds, experiences, and ideas. Indeed, "potential jurors are not products of a set of cookie cutters," *Miller-El v. Dretke*, 545 U.S. 231, 246 n.6 (2005) ('*Miller-El II*')—these individuals reflect the diversity of the communities they would serve as jurors, in numerous ways. Properly applied, the *Batson* framework requires real answers rather than speculation when jurors in a protected class are suspiciously stricken.

But that is not the rule everywhere. If any one of the idiosyncrasies exhibited by the stricken juror can be interpreted to negate a suspicion of discrimination at step one (as is the rule in California), or if the court believes some compelling alternate explanation should be conclusively credited instead (as in the Seventh Circuit), the protection against discrimination in the jury selection process will depend primarily on the imagination of the trial judge, rather than the process set forth in *Batson*.

The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

A. State Court Proceedings.

1. The Incident at the American Legion and Pre-Trial Proceedings.

On the night and early morning of December 29-30, 2007, the American Legion Hall on North Hickory Street in Champaign, Illinois hosted several boisterous birthday parties. Dkt. 22-17 at 21-26, 55-57.[1] That night the Legion "had a nightclub-like atmosphere complete with a dance floor, bar, and disc jockey." Dkt. 22-8 at 7. Shortly after midnight, outside in the parking lot, Mr. Tyrone Greer and two other individuals were shot.[2] Mr. Greer did not survive. Pet.App. 17a.

Several days later, Champaign police arrested petitioner Charmell Brown, Dkt. 24-1 at 265, who pleaded not guilty to one count of murder and two counts of aggravated battery with a firearm (one count was later dismissed). Pet.App. 16a-17a; 88a. After nearly two years of pre-trial proceedings, the case finally went to trial in December 2009. Pet.App. 18a. With no murder weapon, no gunshot residue evidence, and no fingerprints on the shell casings found at the scene, the case "boil[ed] down to eyewitness testimony," and which side's eyewitness identifications would persuade the

---

[1] Citations to "Dkt. __" are to the district court docket in this case, *Brown v. Lawrence*, No. 2:17-cv-02212 (C.D. Ill.).

[2] *See* Pet.App. 16a-17a.

jury.[3]

2. Jury Selection and the Initial *Batson* Challenge.

On the first day of trial, the state trial court assembled sixty venirepersons for jury selection.[4] Although approximately 11.2% of Champaign County's voting-age population was African-American,[5] only two members of the venire assembled for Mr. Brown's case were African-American.[6] Having only two African-Americans out of sixty members of the venire (3.3%), was an unusually low number given the demographics of the surrounding community.[7]

---

[3] *See* Dkt. 24-1 at 176-77; Dkt. 24-2 at 152-53, 164-75, 194-95; Dkt. 24-3 at 1, 139.

[4] *See* Dkt. 25-3 at 82; Pet.App. 117a; Dkt. 22-16 at 8-10.

[5] U.S. Census Bureau, *Citizen Voting Age Population by Race and Ethnicity–2010, CVAP 2006-2010 5 Year ACS Data* (CSV Format County File, Lines 7854, 7858) (Feb. 24, 2020) (estimating African-American citizen voting-age population in 2006-2010 as 16,245 out of a total voting-age population of 145,190, or 11.18%), https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.2010.html.

[6] Pet.App. 117a; 148a-149a; Dkt. 25-3 at 82; Dkt. 22-3 at 38 (State brief on direct appeal).

[7] Assuming that the venire selection procedures fairly represented the community at-large, such a low percentage of African-Americans should occur in only one out of every twenty cases. For a venire of sixty people, in a community that is 11.2% African-American, randomly-selected venires would include, on average, 6.72 African-American potential jurors, and 53.28 jurors of other races. With that understanding, an observation of only two African-Americans and fifty-eight jurors of other races (*i.e.* 4.72 African-American jurors fewer than expected) should occur only 5.3% of the

Based on the record evidence, only one of those two African-American venirepersons was questioned for service on the jury: Mr. Devon Ware.[8] No African-Americans served on the jury, however, because the prosecution "immediately" struck Mr. Ware at its very first opportunity.[9]

At *voir dire*, questioning proceeded in panels of four, with the state trial judge asking more than a dozen standard screening questions of venirepersons, supplemented by counsel.[10] Mr. Ware was seated in the first panel of four and only two of his responses to screening questions prompted a further colloquy with the bench. The first colloquy pertained to Mr. Ware's juror questionnaire responses:

> THE COURT: You've indicated that you or a close family member had been the victim of a crime. Did that have anything to do with a crime of violence, like we're dealing with here?

---

time. *See* David Diez et al., *OpenIntro Statistics* 229-30, 234-35 (4th ed. 2019) (discussing use of chi-square goodness of fit test in assessing random sampling of jurors), https://leanpub.com/openintro-statistics; Social Science Statistics, *Chi-Square Calculator for Goodness of Fit* (last accessed Apr. 7, 2021) (observed values of 2 and 58 in one column and expected values of 6.72 and 53.28 in another column, with one degree of freedom, yields a test statistic of 3.733 and p-value of .05334), https://www.socscistatistics.com/tests/goodnessoffit/default2.aspx.

[8] *See* Pet.App. 90a-99a, 117a; 148a-149a.

[9] Pet.App. 3a, 9a-11a; 148a-150a.

[10] *See, e.g.*, Pet.App. 90a-116a.

> JUROR WARE: That -- it was just DUI's and stuff.
>
> THE COURT: Okay. There's nothing about that situation that would make it difficult for you to be fair and impartial in this case. Is that correct?
>
> JUROR WARE: No.
>
> THE COURT: And as you sit there now, can you think of any reason why you could not be fair and impartial?
>
> JUROR WARE: No, I can't.

Pet.App. 93a.

The second colloquy pertained to the specifics of the case and a question the defense proposed, *see* Dkt. 25-2 at 141:

> THE COURT: ... The offense is alleged to have occurred at the American Legion post on Hickory Street. Are any of you familiar with that location?
>
> JUROR WARE: Yes.
>
> THREE JURORS: (Indicating in the negative).
>
> THE COURT: Mr. Ware, you are?
>
> JUROR WARE: Yes.
>
> THE COURT: And have you had occasion to visit the Legion on North Hickory?
>
> JUROR WARE: Been on the outside. Not inside.

> THE COURT: Is there anything about what you know from that limited contact, that's going to make it difficult for you to be fair and impartial in this case?
>
> JUROR WARE: No.
>
> THE COURT: The fact that testimony is going to be presented that this offense occurred at the Legion, will you base your decision only on what you see and hear in this courtroom and not be affected by the fact that you've seen the outside of the place and you're familiar with where it is. You'll base your decision on what you see and hear in the courtroom. Is that correct?
>
> JUROR WARE: Yes, sir.

Pet.App. 97a-98a.

The prosecution went first in asking follow-up questions of the first panel, and the prosecutor asked multiple follow-up questions covering each juror's occupation—a recurring set of questions regarding occupations, whether the juror knew other jurors or venirepersons, and additional follow-up questions. *See* Pet.App. 102a-109a. Indeed, over the course of jury selection that day and the next, the same prosecutor would ask as many as nine,[11] fifteen,[12] sixteen,[13] or even twenty follow-up questions of potential jurors to probe

[11] Pet.App. 113a-115a (Heinrichs).
[12] Pet.App. 119a-122a (Ka. Young).
[13] Pet.App. 136a-139a (Kr. Young).

potential sources of bias,[14] going so far in one exchange as to ask which University of Illinois sports teams a potential juror worked with on a day-to-day basis.[15] That prosecutor exercised only one other peremptory strike, after asking that potential juror (Mr. Rossman) eleven questions, including four about his past jury service.[16]

Regarding Mr. Ware however, the prosecutor proceeded differently. She declined to ask any questions at all of the only African-American potential juror questioned for service, deciding instead to immediately excuse Mr. Ware without comment. In this instance, she departed from her typical, exhaustive routine. At the end of the trial judge's questioning of Mr. Ware's panel, the judge said:

> THE COURT: ... Ms. Carlson, I'll let you supplement.

---

[14] Pet.App. 109a-113a (Gomez).

[15] *See* Pet.App. 114a-115a:

> MS. CARLSON: ... In your capacity as an employee within the [University of Illinois] Athletic Department... [i]s there a particular sport that you focus on? … …What about men's basketball?
>
> JUROR HEINRICHS: I do not work with men's basketball…
>
> MS. CARLSON: What about men's football?
>
> JUROR HEINRICHS: … I don't have contact with any of the ball players.
>
> MS. CARLSON: Okay. Your Honor, may I have one moment?
>
> THE COURT: You may.
>
> MS. CARLSON: Your Honor, we would accept [the second panel] and tender.

[16] Pet.App. 139a-141a, 145a (Rossman).

> MS. CARLSON: Thank you, your Honor. At this time, we would thank but excuse Mr. Ware.

Pet.App. 99a. No reason was ever given for Mr. Ware's excusal.

At the end of the first day of jury selection, defense counsel mounted a detailed *Batson* challenge:

> THE COURT: ... Mr. Cross, I believe after Mr. Ware was excused on a peremptory challenge by the State, you indicated an objection .... As to your objection, sir.
>
> MR. CROSS: Well Judge, Devon Ware is an African American male. The Defendant is an African American male. There are only two African Americans, both young African American males, of which the Defendant is a young African American male, in the entire venire. Devon Ware was excused without any questions being asked of him by the State. Devon Ware, under questioning by the Court, indicated that he understood the Court's statements to the panel, that he could follow the instructions of the Court regarding issues that might be before the jury. He was asked one question by the Court, actually a series of questions by the Court regarding the American Legion. Devon Ware appeared to respond appropriately to all the questions that were put to him by the Court, regarding his knowledge of the American Legion….

> Judge, there was nothing of a race neutral indication that Devon Ware should have been excused by the State. Particularly where the panel that is before the Court only has two young African American males, which the Defendant is. Because we don't see any race neutral reason for excluding Devon Ware, particularly where the State did not ask him any questions before excusing him.[17]

Rather than asking the prosecution for an explanation, or considering the defense's *prima facie* case in any more detail, the trial judge immediately overruled the objection without a specific explanation:

> THE COURT: The issue on a *Batson* challenge, the first issue is, is there a *prima facie* case that a discriminatory practice is being conducted by the State. And we don't get to a race neutral explanation until the Court has made a determination of a *prima facie* case. It's the Court's opinion that there is not a *prima facie* case, and I am not going to require the State to provide a race neutral explanation. So the motion -- the objection is overruled. And Mr. Ware is, I believe, properly excused.[18]

3. Renewed *Batson* Challenge After Trial.

Again after trial, after the jury had deliberated for four hours on the eyewitness testimony and returned a

---

[17] Pet.App. 116a-117a.
[18] Pet.App. 117a-118a.

guilty verdict,[19] defense counsel renewed the *Batson* challenge, explaining that it was:

> ...a request to have the State *present some justification* for exercising a peremptory challenge against Mr. Ware, who was a young African-American male…, and the entire panel of jurors, which consisted of about 60 jurors, included only one other young African-American male, or one other African-American, period. ... [F]or the State to exercise their challenge against Mr. Ware, without asking Mr. Ware a single question, we feel that that was an intentional, race based exclusion of Mr. Ware.[20]

The state trial judge again summarily denied the *Batson* challenge without requiring an explanation from the prosecutor. Pet.App. 150a. However, this time the trial judge went further regarding his conclusions, and speculated about what could potentially have been a race-neutral reason for Mr. Ware's excusal:

> Another issue was basically a *Batson* challenge. We had an African-American juror who, unlike every other juror that was questioned, not only knew where the Legion was, but had been there. Now I'm not sure he had been inside, but had spent time either in the parking lot, which seemed a bit odd, but all of the other -- all of the other jurors either didn't know where the Legion was, or at least

---

[19] *See* Dkt. 24-3 at 241-44.

[20] Pet.App. 148a-149a (emphasis added).

> knew where it was and that was their only connection to the Legion. I don't believe that a *prima facie* case was made concerning discrimination, and that is why the court denied the *Batson* challenge.[21]

The trial court later sentenced Mr. Brown to the maximum possible term of imprisonment—90 years.[22]

4. State Court Appeal and Collateral Review.

On appeal in state court, Mr. Brown raised a number of claims, though all were denied by the Illinois Appellate Court. Pet.App. 49a-52a; 82a-85a. Regarding the *Batson* claim, Mr. Brown renewed all of the same arguments presented to the trial court,[23] however the Appellate Court seized upon the same hypothetical logic advanced by the state trial court judge (the only reason the trial judge had even suggested for his ruling)—that Mr. Ware had been excused not because of his race but instead because he had "[b]een on the outside" and "[n]ot inside" the American Legion. Pet.App. 81a-82a.

Of course, this was not the reason the prosecution had actually given—no reason had ever been given. But, relying on a *Batson* step three precedent, the Appellate Court found that a mere hypothesis about what reasonably *could* have motivated the prosecutor was enough to divine her intent, find it to be race-neutral, and affirm the trial court:

---

[21] *Id.* (italics added).
[22] Dkt. 24-4 at 100, 103; Pet.App. 2a.
[23] *See* Dkt. 22-2 at 45-51; Dkt. 22-4 at 15-16 (citing *Johnson*, 545 U.S. at 170).

> It is reasonable to expect the prosecution to seek to excuse any person who had a familiarity with the scene of the crime. A juror who had been to the scene before could possibly possess preconceived ideas related to the location and layout that the State would prefer to avoid, if possible. This is especially true when the shooting took place outside, the only part of the American Legion with which Ware was familiar. ... The *voir dire* questions posed to Ware and his responses thereto indicated there were significant and legitimate differences that distinguished him from other potential jurors, making them a better choice for the State.[24]

After the Appellate Court's ruling, Mr. Brown unsuccessfully sought review at the Illinois Supreme Court, and then unsuccessfully pursued state post-conviction relief, which was denied by the same trial judge, again affirmed by the Appellate Court, and not reviewed by the Illinois Supreme Court.[25]

---

[24] Pet.App. 81a-82a; *see also People v. Davis*, 233 Ill. 2d 244, 262 (2009) (prior Illinois Supreme Court case assessing prosecutor's actual explanation and concluding "there were significant and legitimate differences that distinguished Hicks from those jurors, making them a better choice for the State").

[25] Pet.App. 26a-27a; *People v. Brown*, 968 N.E.2d 1067 (Ill. 2012); *People v. Brown*, 2015 IL App (4th) 130412-U; *People v. Brown*, 39 N.E.3d 1005 (Ill. 2015) (Table). A successive post-conviction petition filed in state court in 2016 was also unsuccessful. *See* Pet.App. 27a.

B. Federal Proceedings.

1. District Court Decision.

In September 2017, Mr. Brown filed a *pro se* habeas petition under 28 U.S.C. § 2254 in the Central District of Illinois. Dkt. 1. Although the State moved to dismiss his petition as untimely, Dkt. 8, and although the district court initially granted that dismissal, Dkts. 9; 10, the district court later vacated its dismissal after it received a handwritten response from Mr. Brown.[26] The State subsequently agreed to address the petition's merits rather than litigate a statute of limitations defense through an evidentiary hearing. *See* Pet.App. 6a-7a.

After receiving briefing, the district court examined whether, under § 2254(d)(1), the state court decisions in Mr. Brown's case were based on "an unreasonable application of clearly established federal law." *See* Pet.App. 29a. The district court denied all claims, but granted a certificate of appealability regarding *Batson*. Pet.App. 42a-43a, 47a-48a.

2. Seventh Circuit Decision Below.

On appeal, the Seventh Circuit rejected the State's attempt to revive its statute of limitations defense,[27] but ruled for the State on the merits. It found that the "case turns on *Batson*'s first step"—where "rais[ing] a mere

---

[26] *See* Text Orders of May 15, 2018 and June 25, 2018, No. 2:17-cv-02212 (C.D. Ill.) (vacating Dkts. 9 & 10 and directing the State to address whether an evidentiary hearing would be needed regarding timeliness or whether the State would prefer to proceed on the merits).

[27] *See* Pet.App. 6a-7a (describing the State's course of conduct as "textbook waiver" in light of *Wood v. Milyard*, 566 U.S. 463 (2012)).

inference of a discriminatory purpose" entitles a defendant to an explanation from the prosecutor. *See* Pet.App. 8a ("The burden at this stage is light." (citations omitted)). However, in the Seventh Circuit's view, "the Illinois Appellate Court applied *Batson* correctly" in denying Mr. Brown an explanation from the prosecutor, principally because "an apparent reason for [Mr. Ware's] excusal" could otherwise be found in the record. Pet.App. 8a-11a.

Like the state courts before it, the Seventh Circuit gave controlling significance to Mr. Ware's *voir dire* answer regarding the American Legion. Far from being an "unreasonable" consideration at *Batson*'s first step and under § 2254(d)(1), the Seventh Circuit found "just the opposite"—this "apparent reason for [Mr. Ware's] excusal" was "a highly relevant circumstance for the court to consider" at step one because it offered such a convenient and persuasive explanation. Pet.App. 10a-11a.

Though the prosecutor never endorsed this explanation, she did not need to, because the court found that "apparent reason" so persuasive at *Batson*'s first step that it was in fact conclusive and not rebuttable. *Id.* Indeed, in the Seventh Circuit's view, no other reason for the strike was even possible: "the prosecutor's strike was 'clearly attributable' to that circumstance because the prosecutor used the strike immediately upon learning of it." *Id.*

To the Seventh Circuit, the nature of Mr. Ware's statement and timing of the strike meant that the strike was necessarily free from discrimination, even though all that the record discloses is that the strike was

exercised "immediately" against the only African-American to advance that far in the jury selection process. *See* Pet.App. 3a, 10a-11a; *see also id.* 9a (the fact that the prosecution struck the only African-American "merely highlighted a minor anomaly in the venire" and "did not shed any light" on the "strike").

Going further, because there was a persuasive "apparent reason for his excusal," the existence of that possible motivation also explained away the pattern of disparate questioning. Pet.App. 9a-10a. That the prosecutor treated Mr. Ware differently "was unremarkable because Ware distinguished himself by stating that he had been to the crime scene." *Id.* 9a

In other words, to the Seventh Circuit, Mr. Ware's answer regarding the American Legion defeated any possibility of discrimination, regardless of what the prosecutor might have said had she been asked to explain her strike. Mr. Ware's statement, and logical inferences about what a prosecutor *might* do in response to it, meant that regardless of this prosecutor's actual state of mind, "there is no longer any suspicion, or inference, of discrimination" and the *Batson* challenge must fail. *See* Pet.App. 9a-11a (citation omitted).

Mr. Brown subsequently sought rehearing and rehearing *en banc*, noting the conflict with the Ninth Circuit, but on November 17, 2020, rehearing and rehearing *en banc* were denied.[28]

---

[28] Though it denied rehearing, the Seventh Circuit panel corrected a factual error in its opinion, acknowledging that Mr. Brown was convicted of only one count of murder, not three. Pet.App. 87a-88a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SPLIT OF AUTHORITY ON THE QUESTION PRESENTED.

A. In the Ninth and Third Circuits, Judicial Speculation Does Not Satisfy *Batson*.

The Ninth Circuit has squarely and repeatedly addressed the question presented and answered it in the negative: courts in its circuit may not speculate as to a prosecutor's mindset at *Batson*'s first step. Ninth Circuit courts may not rely on factors merely present in the record to explain away a prosecutor's seemingly discriminatory peremptory strike.

1. *Johnson* Adopted the Ninth Circuit's Approach.

In *Paulino v. Castro*, "after listing possible reasons why the prosecutor struck" the potential jurors at issue, including that one prospective juror "knew a lot of people [that] had been arrested," the state trial court concluded: "I find no prima facie case because I can see the objective reasons that seem to be present here"; "I can see why [the prosecutor] would be uncomfortable with each one of them." 371 F.3d 1083, 1089 (9th Cir. 2004).

Without hesitation, the Ninth Circuit found that this "process employed by the trial court … clearly contravened the procedure outlined in *Batson*," as the court "offered, sua sponte, its speculation as to why the prosecutor may have struck the five potential jurors in question. But it does not matter that the prosecutor might have had good reasons to strike the prospective

jurors. What matters is the *real* reason they were stricken." *Id.* at 1089-90.

The following year, this Court in *Johnson* faced the same circumstance and specifically relied on *Paulino*. In *Johnson*, the state trial judge conducted "her own examination of the record" which "had convinced her that the prosecutor's strikes *could be* justified by race-neutral reasons"—the "equivocal or confused answers" jurors gave. 545 U.S. at 165 (emphasis added).[29]

This Court reversed, finding the state court's analysis plainly deficient because "it does not matter that the prosecutor might have had good reasons, what matters is the real reason [the prospective jurors] were stricken." *Id.* at 172 (quoting *Paulino*, 371 F.3d at 1090) (alterations omitted). The same day, this Court also explained that a "*Batson* challenge does not call for a mere exercise in thinking up any rational basis" that could have been given, it involves examining "the stated reason" instead. *Miller-El II*, 545 U.S. at 252.

2. Post-*Johnson* Ninth Circuit Decisions Continue to Reject Judicial Speculation.

Following *Johnson* and *Miller-El II*, the Ninth Circuit implemented those decisions, recognizing that speculation on a cold record that a juror "may be a 'loner'" and might not "effectively function in a group decision-making process" was mere "speculation" that

---

[29] *See also People v. Johnson*, 30 Cal. 4th 1302, 1325-28 (2003) (finding no *prima facie* case despite *Batson* evidence of "statistical disparity" and "no questions"), *reversed by Johnson v. California*, 545 U.S. 162 (2005).

did not measure up to this Court's standard. *Williams v. Runnels*, 432 F.3d 1102, 1109 & n.12 (9th Cir. 2006).

The *Williams* court found that it is not enough that "the record would support race-neutral reasons for the questioned challenges" at step one—under *Batson* it is "*the state's* responsibility to create a record that dispels the inference" of discrimination at step two, not the challenger's responsibility to disprove every alternative at step one. 432 F.3d at 1108, 1110 (emphasis added); *see also Gonzalez v. Brown*, 585 F.3d 1202, 1207 (9th Cir. 2009) ("we will not supply a reason for the prosecutor to have exercised her strike because we cannot know what were her true motives").

Several years later in *Johnson v. Finn*, the Ninth Circuit reaffirmed that the mere existence of a possible reasonable premise "does not suffice to defeat an inference of racial bias at the first step of the *Batson* framework." 665 F.3d 1063, 1069 (9th Cir. 2011). That is true even where those possible premises would be "red flags to trial attorneys." *See People v. Johnson*, No. C036080, 2002 WL 31430524, at *4 (Cal. App. Oct. 31, 2002) (discussing prospective juror who was "a high school dropout" and another who had "possible sympathies for gang members … through familiarity from his neighborhood"), *vacated by Finn*, 665 F.3d 1063. Analyzing the persuasiveness of possible race-neutral explanations cannot be done at the first *Batson* step because that question "belongs at the later steps of the *Batson* inquiry":

> The existence of 'legitimate race-neutral reasons' for a peremptory strike … can rebut at *Batson*'s second and third steps the prima facie

> showing of racial discrimination that has been made at the first step. But it cannot negate the existence of a prima facie showing in the first instance, or else the Supreme Court's repeated guidance about the minimal burden of such a showing would be rendered meaningless.

Finn, 665 F.3d at 1071 (explaining *Williams*, 432 F.3d at 1108).

And finally, in *Currie v. McDowell*, the Ninth Circuit held that a "state appellate court violate[s] clearly established Federal law in its *Batson* step one analysis" by deciding the challenge based on "reasons [not] proffered." 825 F.3d 603, 609 (9th Cir. 2016). It was not enough in *Currie* that "the record suggest[ed] grounds upon which the prosecutor might reasonably have challenged the jurors in question," such as "ha[ving] a close relative who has been prosecuted." *Id.* at 608-09 (citation omitted). Those potential grounds were not enough because the critical question is "whether or not those were the reasons proffered" by the prosecution—"what matters is the real reason [the prospective jurors] were stricken." *Id.* at 609-10 (emphasis added and citation omitted).

On this point, the Third Circuit agrees, "holding that":

> [T]he inquiry required by *Batson* must be focused on the distinctions actually offered by the State in the state court, not on all possible distinctions we can hypothesize. Apparent or potential reasons do not shed any light on the prosecutor's intent or state of mind when making the peremptory challenge.

Hardcastle v. Horn, 368 F.3d 246, 257 n.4 (3d Cir. 2004) (quoting *Riley v. Taylor*, 277 F.3d 261, 282 (3d Cir. 2001)). Thus both the Ninth and Third Circuits agree that "[a]pparent or potential reasons," *id.*, are not sufficient grounds to dismiss a *Batson* claim.

B. In the Seventh Circuit, First Circuit, and in California, Judicial Speculation Satisfies *Batson*.

1. The Seventh Circuit and First Circuit Credit 'Apparent' Reasons.

The Seventh Circuit interprets *Batson* differently. From *Batson*'s command to consider whether "the totality of the relevant facts gives rise to an inference of discriminatory purpose" at step one, 476 U.S. at 93-94, the Seventh Circuit has found that it may consider whether "there are race-neutral reasons for the disparity apparent in the record" at *Batson*'s first step, *United States v. Stephens*, 421 F.3d 503, 515 (7th Cir. 2005). The Seventh Circuit rule is that:

> [C]ourts considering *Batson* claims at the *prima facie* stage may consider apparent reasons for the challenges discernible on the record, *regardless of whether those reasons were the actual reasons* for the challenge.

Id. at 515-16 (emphasis added) (citing *Mahaffey v. Page*, 162 F.3d 481, 483 n.1 (7th Cir. 1998) (hypothesizing example where all stricken jurors were attorneys)).

Going further, the Seventh Circuit has found that an "apparent explanation could negate an inference of race discrimination regardless of whether the [apparent reason] was the actual reason for the strike." *Id.* This is

of course the opposite of the Ninth Circuit's approach, where the "existence of 'legitimate race-neutral reasons' for a peremptory strike. … cannot negate the existence of a prima facie showing." *Finn*, 665 F.3d at 1071 (explaining *Williams*, 432 F.3d at 1108).

The Seventh Circuit has acknowledged that this Court's decision in *Johnson* speaks to this very issue and admits that when it comes to apparent explanations, "[a]fter *Johnson* … this is a very narrow review." *Stephens*, 421 F.3d at 516. Nevertheless, the Seventh Circuit interprets *Johnson* to specifically allow apparent explanations to have decisive effect in the *Batson* analysis, so long as the reviewing court is convinced of its logic:

> In light of *Johnson*, an inquiry into apparent reasons is relevant only insofar as the strikes are so clearly attributable to that apparent, non-discriminatory reason that there is no longer any suspicion, or inference, of discrimination in those strikes.

Id. The Seventh Circuit, however, has not identified where in *Johnson* that rule was adopted. *See id.* (no citation to *Johnson*).

Up until now, that interpretation of *Johnson* did not control the outcome of a case at the Seventh Circuit. In two cases prior to Mr. Brown's, the Seventh Circuit declined to invoke this possibility because those strikes were not "clearly attributable to [an] apparent, non-discriminatory reason." *See id.*; *see also Franklin v. Sims*, 538 F.3d 661, 665-66 (7th Cir. 2008). In *Stephens*, the court refused to credit the "government's post hoc

reasons, which consisted of a combination of the stricken jurors' encounters with law enforcement officials, their criminal histories, and their litigation histories." *Franklin*, 538 F.3d at 665-66 (citing *Stephens*, 421 F.3d at 517-18). In *Franklin v. Sims*, the court noted that "potential reasons for the strikes, such as the fact that [one juror] had family members who were crime victims and [another juror] had been initially unwilling to disclose his DUI conviction" were not decisive. *Id.* at 665.

Here, however, the Seventh Circuit took that additional step and found that Mr. Ware's answer regarding the American Legion negated even any possibility of discrimination, regardless of what the prosecutor was actually thinking. The Seventh Circuit found it "not unreasonable" to consider "Ware's history with the crime scene as an apparent reason for his excusal—just the opposite." Pet.App. 10a. "Ware's statement that he, unlike any other jurors, had been to the crime scene was a highly relevant circumstance for the court to consider. And the prosecutor's strike was 'clearly attributable' to that circumstance," meaning that there was "no longer any suspicion … of discrimination" and the *Batson* challenge failed. Pet.App. 10a-11a (quoting in part *Franklin*, 538 F.3d at 665).

The First Circuit has followed the Seventh Circuit's lead on this issue. It too has considered "whether there are any 'apparent non-discriminatory reasons for striking potential jurors based on their voir dire answers.'" *Sanchez v. Roden*, 753 F.3d 279, 302 (1st Cir.

2014) (quoting *Aspen v. Bissonnette*, 480 F.3d 571, 577 (1st Cir. 2007) and citing *Stephens*, 421 F.3d at 515-16).

On the facts there, the *Sanchez* court concluded that "the record fail[ed] to disclose any obvious infirmity … that would translate to an apparent reason" to strike a particular African-American juror, and thus the court did not rely on apparent reasons speculation. *See id.* at 303. However, the *Aspen* court affirmatively concluded that "the prosecutor did not issue peremptory challenges on the basis of gender" in that case. 480 F.3d at 579. That was in part because "seven of the jurors challenged by the prosecutor provided voir dire answers that could reasonably have been" concerning to the prosecution. *Id.* at 578. ("the jurors may have been inclined to acquit the defendant even if he committed the conduct alleged" which may have alienated the prosecution).

Thus in both the Seventh and the First Circuits—but not in the Ninth or the Third Circuits—a prospective juror's *voir dire* statements can be used to negate a *Batson* claim at the *prima facie* stage, regardless of whether or not the prosecutor in fact struck the prospective juror over those statements.

2. California, in Conflict with Its Regional Circuit, Routinely Credits 'Apparent' Reasons at *Batson's* First Step.

The Seventh Circuit approach is also followed by the California Supreme Court, who in no less than ten capital cases in the last decade has credited "apparent race-neutral reasons for the prosecutor's excusals" even where those circumstances merely indicate what the prosecutor "reasonably could have concluded" about the

prospective jurors, not what the prosecutor in fact concluded. *People v. Harris*, 306 P.3d 1195, 1221-22 (Cal. 2013) (applying *Batson*, 476 U.S. at 96).[30] Indeed, if a California "prosecutor *could* have reasonably been concerned that [a venireman] was potentially too closely connected to the case to sit as an impartial juror" given their *voir dire* statements, that is enough to defeat a *Batson* challenge in California regardless of what the prosecutor in fact thought of that potential juror. *Id.* at 1222.[31] (emphasis added).

---

[30] *E.g. People v. Rhoades*, 453 P.3d 89, 121-26, 143-44 (Cal. 2019) (suspicion of bias necessarily dispelled by juror statements about capital punishment, family obligations, and history); *People v. Woodruff*, 421 P.3d 588, 628-30 (Cal. 2018) (same regarding capital punishment, religion, the police, autopsy photos, and even perceived juror demeanor); *People v. Reed*, 416 P.3d 68, 79-81 (Cal. 2018) (same regarding capital punishment, and family experiences); *People v. Parker*, 395 P.3d 208, 229-30 (Cal. 2017) (same regarding capital punishment, and reluctance to serve as juror); *People v. Zaragoza*, 374 P.3d 344, 362 (Cal. 2016) (same regarding personal history, thoughts on criminal justice system, religion, and capital punishment); *People v. Sánchez*, 375 P.3d 812, 837 (Cal. 2016) (no discrimination given juror statements on capital punishment, and personal history); *People v. Cunningham*, 352 P.3d 318, 360 (Cal. 2015) (same where prospective juror was interested in working with inmates); *People v. Scott*, 349 P.3d 1028, 1043-44 (Cal. 2015) (juror opinions about police, and capital punishment); *Harris*, 306 P.3d at 1222-23 (potential juror knew several people involved in the case and another had a sibling charged with a crime); *People v. Pearson*, 297 P.3d 793, 821-22 (Cal. 2013) (four separate grounds for one strike).

[31] Other post-*Johnson* state courts have relied on pre-*Johnson* cases or on the Seventh Circuit's decision in *Stephens* for the idea that "the existence of plausible, racially neutral bases … apparent on the record, is sufficient to nullify any inference of discrimination that

Specifically, the California Court looks for race-neutral reasons that "necessarily dispel any inference of bias," a standard that can be met by any reason at all "so long as those reasons are apparent from and clearly established in the record." *People v. Woodruff*, 421 P.3d 588, 628 (Cal. 2018) (citation omitted); *see also People v. Scott*, 349 P.3d 1028, 1043 (Cal. 2015) (collecting cases and quoting *Stephens*, 421 F.3d at 516).

The California Court has also denied *Batson* challenges "where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question." *People v. Pearson*, 297 P.3d 793, 821-22 (Cal. 2013) (citation omitted). Seemingly *any* reason that might potentially indicate a juror is not favorably disposed to the prosecution can be deemed sufficient—in that regard the California rule is even more permissive than the Seventh Circuit's. *See id.* at 822 (reciting prospective juror's *voir dire* statements—about her religious beliefs, employment, views on and experience with psychologists and psychiatrists, and two personal acquaintances—any one of which "would

---

otherwise might be drawn." *Lightfoot v. Commonwealth*, 653 S.E.2d 615, 619 (Va. App. 2007) (quoting *Capers v. Singletary*, 989 F.2d 442, 446 (11th Cir. 1993) and collecting cases including *Stephens*); *id.* at 620 ("Once again, evidence in the record of 'entirely plausible reasons, independent of race,' for exercising a peremptory strike implies that racial bias did not motivate the prosecutor, thus negating a claim of purposeful racial discrimination under step one of a *Batson* challenge." (quoting *Wade v. Terhune*, 202 F.3d 1190, 1198 (9th Cir. 2000))); *see also State v. Williams*, 199 So. 3d 1222, 1237 (La. App. 2016) ("We find no error in the district court's consideration of the apparent reasons in confirming … that Mr. Williams failed to establish a prima facie case."); *id.* (relying on *Stephens*, 421 F.3d at 515-16).

provide an adequate reason other than racial discrimination to support the prosecutor's challenge").

The fact that California's approach is at odds with the one charted in *Johnson* has not gone unnoticed by members of that Court: "while correctly stating the *Johnson v. California* standard," the California Supreme Court "has found no prima facie case in a variety of circumstances" including those "not very different from those in *Johnson*." *Harris*, 306 P.3d at 1245 (Liu, J. concurring). It has credited "reasons that a prosecutor might have given—but did not actually give—for striking a minority juror," allowing them "to negate an inference of discrimination." *Id.* "In so doing, our *Batson* step one jurisprudence commits the very mistake that *Johnson v. California* warned against: we routinely and erroneously 'rely[ ] on judicial speculation to resolve plausible claims of discrimination'" and "employ judicial speculation in a conspicuously lopsided way"—for the prosecution. *Id.* (quoting *Johnson*, 545 U.S. at 173).

The California Court has been reminded that the difference between deciding a case based on "speculation" instead of on "actual answers" is plain, that it "cannot be reconciled with the *Batson* framework," and that it "risks weakening the constitutional prohibition on racial discrimination in jury selection." *Scott*, 349 P.3d at 1060, 1063 (Liu, J. concurring) (citation omitted). This "mode of analysis—hypothesizing reasons for the removal of minority jurors as a basis for obviating inquiry into the prosecutor's actual reasons—has become a staple of our *Batson* jurisprudence, and it raises serious concerns." *People v. Rhoades*, 453 P.3d 89,

139 (Cal. 2019) (Liu, J. dissenting); *see also id.* (in 42 merits cases reviewing first-stage *Batson* denials in California death penalty appeals since *Johnson* "[n]ot once did this court find a prima facie case of discrimination").

C. Only This Court Can Resolve the Conflict.

This ongoing difference in opinion amounts to "substantial disagreement" between the Circuits and States that should be resolved by this Court. *See Wheat v. United States*, 486 U.S. 153, 158 & n.2 (1988). It also shows that "the question presented by this case is not only important, but … also … frequently arises." *See Perry v. Leeke*, 488 U.S. 272, 277 & n.2 (1989).

In fact, given the opposing views of the Ninth Circuit and the California Supreme Court, the very reason for granting the petition in *Johnson v. California* has since re-emerged—that the "Supreme Court of California and the United States Court of Appeals for the Ninth Circuit have provided conflicting answers to the" question presented, even though "both of those courts regularly review the validity of convictions obtained in California criminal trials." 545 U.S. at 164. Though this case arose from Illinois instead of California, given that this factually-straightforward case is an ideal vehicle for resolving the question presented, the Court should grant the petition here and address it.

Had Mr. Brown's petition been filed in the federal system in the Ninth Circuit instead of within the Seventh Circuit, it would have turned out differently. And if his case had arisen in California, the specific forum of his trial—*i.e.* whether Mr. Brown had been tried in state court or in federal court—would have

dictated the outcome of the *Batson* analysis on these facts. This Court should grant the petition and resolve the question presented.

II. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

The question presented is outcome determinative here. While Mr. Brown's direct appeal and habeas petition challenged numerous aspects of his trial, only the *Batson* claim remains. The district court's narrow grant of a certificate of appealability was limited to the *Batson* issue, and the Seventh Circuit rejected the State's belated timeliness argument as "textbook waiver." Pet.App. 5a-7a; 47a-48a. Thus all that remains to be decided in this case at this point is whether 'apparent' reasons may have decisive effect at the first stage of the *Batson* analysis, as the Seventh Circuit found here.

In deciding that question, the Court would not be sidetracked by the standard for granting habeas relief under 28 U.S.C. § 2254(d)(1). Unlike many other federal habeas cases involving state convictions, this case does not require a fine-grained analysis about whether the rule has been "clearly established" by the Court for purposes of § 2254(d)(1)—the gulf between the competing views outlined above is much wider than that, and relates to the proper application of the *Batson* framework that has been in place for decades.

The Seventh Circuit believes that the correct application of *Batson*'s first step requires consideration of persuasive 'apparent' reasons when they are compelling and decisive, as it found here. Pet.App. 9a-

11a. The Ninth Circuit has held not only that the opposite is true—apparent reasons cannot be given decisive effect at the first step—but that failing to apply *its* approach to *Batson* is unreasonable under § 2254(d)(1). *Currie*, 825 F.3d at 609-10. Only one of these *Batson* conclusions can be correct, and regardless of which is correct, *Batson* clearly established its namesake framework decades ago.[32]

Nor does this case, unlike some other *Batson* cases, require complex analysis of many different juror circumstances or volumes of information. This case concerns only one unexplained peremptory strike, one 'apparent' reason, and a detailed and timely *Batson* challenge. All courts to have substantively analyzed this claim have either emphasized or expressly rested their analysis on the 'apparent' reason for Mr. Ware's excusal—indeed, that 'apparent' reason was the only ground even *considered* by the judge who presided at trial. Pet.App. 9a-11a; 43a; 79a-82a; 117-118a; 150a. This case turns on whether the lower courts' reasoning is consistent with *Batson*.

---

[32] The Ninth Circuit cited *Johnson* as the decision that "clearly established for [habeas review] purposes" that "[w]hat matters is the real reason" for the strike, not "that the prosecutor might have had good reasons." *Currie*, 825 F.3d at 609-10 (citations omitted). But under the circumstances here, it is immaterial whether it was *Batson* or *Johnson* that clearly established this point. Mr. Brown's trial occurred years after both *Batson* and *Johnson* were decided, and the Illinois courts were required to follow both.

III. THE DECISION BELOW IS WRONG.

The Seventh Circuit's reasoning is not consistent with *Batson* and thus it erred in siding with the California Court instead of the Ninth Circuit.

As *Johnson* and the Ninth Circuit have held, it is a fundamental misapplication of the *Batson* framework to decide a challenge on the basis of a reason that the prosecution never endorsed. "The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson*, 545 U.S. at 172. "[I]t does not matter that the prosecutor might have had good reasons" for striking an African-American juror—"[w]hat matters is the *real* reason they were stricken" and whether the real reason was the juror's race. *Id.* (quoting *Paulino*, 371 F.3d at 1090 (emphasis added)). Where the prosecutor is never asked to explain, this Court has held that "needless and imperfect speculation" by judges seeking to fill that void on a prosecutor's behalf "does not aid our inquiry into the reasons the prosecutor actually harbored" and misapplies *Batson*'s careful "three-step process." *Id.* (citation omitted).

All that a *Batson* challenger must do to clear the first step of the framework is to "produc[e] evidence sufficient to *permit* the trial judge to draw an inference that discrimination has occurred"; the challenger does not need to persuasively rebut all other possibilities. *Id.* at 170 (emphasis added). After all, deciding a *Batson* challenge does not "call for a mere exercise in thinking up any rational basis" for the strike, and a court's "substitution of a reason for excluding [a juror] does nothing to satisfy the prosecutors' burden of stating a

racially neutral explanation for their own actions." *Miller-El II*, 545 U.S. at 233. Only the prosecutor can do that. *Batson*, 476 U.S. at 94. "The inherent uncertainty" involved in filling in the gaps on behalf of the prosecutor imperils the reliability of the *Batson* analysis; instead of engaging in that inherently uncertain speculation, trial judges should obtain "a direct answer" from the prosecutor "by asking a simple question." *Johnson*, 545 U.S. at 172.

The Seventh Circuit's decision thus cannot be reconciled with *Johnson* and is wrong. There is no indication in *Johnso*n that speculation is somehow appropriate simply because the court feels that its speculation is unassailable—"[w]hat matters is the real reason" for a peremptory strike, not a hypothesized one, as the Ninth and Third Circuits had found before *Johnson*. *See id.* (citation omitted).

In fact, before its decision here, the Seventh Circuit had twice noted this issue and resisted the urge to speculate. *See Stephens*, 421 F.3d at 515, 517-18; *Franklin*, 538 F.3d at 665-66. It understood that *Johnson* found a "*prima facie* case established even though [the] trial judge's examination of the record convinced him that the prosecutor's strikes could be justified by race-neutral reasons." *Stephens*, 421 F.3d at 516 (citing *Johnson*, 545 U.S. at 165-72). But in this case, and without discussing *Johnson*, it found that *this* potential race-neutral reason negated a suspicion of discrimination. Pet.App. 9a-11a.

In contrast, the Ninth Circuit approach is correct and based in *Batson* itself: the burden to "offer 'permissible race-neutral justifications for the strike'" lies with *the*

State, and only the State can know with certainty what those justifications are. *Currie*, 825 F.3d at 605, 609-10 (citations omitted).[33] Given that burden, and the *Batson* framework's interest in producing answers rather than mere speculation, the "inquiry required by *Batson* must be focused on the distinctions actually offered by the State in the state court, not on all possible distinctions we"—*i.e.* the court—"can hypothesize." *Riley v. Taylor*, 277 F.3d 261, 282 (3d Cir. 2001). Rendering judgment on hypothetical reasons "clearly contravene[s] the procedure outlined in *Batson*," *Paulino*, 371 F.3d at 1089; *see also Batson*, 476 U.S. at 94.

The basis for the Seventh Circuit's approach, however, is tenuous at best. The Seventh Circuit has claimed that its "consideration of 'apparent reasons' is in fact nothing more than a consideration of 'all relevant circumstances'" at the first step, which in extraordinary circumstances can be consistent with *Batson*. *See Stephens*, 421 F.3d at 516.[34]

However, the Seventh Circuit has also admitted that relying on apparent, hypothetical reasons to actually decide a *Batson* challenge is "an attempt to short-circuit the *Batson* process," *id.*, and "risk[s] collapsing all three of *Batson*'s steps into the prima facie inquiry," *Franklin*, 538 F.3d at 666. That is precisely what happened here:

---

[33] *See also Batson*, 476 U.S. at 94 (explaining that the framework expects "the State to explain adequately the racial exclusion" and "mere general assertions that its officials did not discriminate" cannot suffice to explain a "monochromatic result" (citation omitted)).

[34] California does not require the circumstances to be extraordinary—it routinely bases *Batson* decisions on apparent reasons. *See* above at 26-30.

Mr. Brown had to not only advance evidence giving rise to a suspicion of discrimination, he also had to rebut the trial judge's unstated hunches as well. *See* above at 11-15. It is an unreasonable application of *Batson* to have held the defense to that high of a standard at step one.

In addition, this reliance on intuition rather than explanation is an important and recurring problem in implementing *Batson*, as shown by the California Court. There is a subtle but critically important difference between a trial judge analyzing each circumstance of jury selection at *Batson* step one for consistency with a hypothesis of discrimination (which is appropriate under *Johnson*), or instead testing the circumstances against a specific alternative hypothesis the prosecution has not yet endorsed (not appropriate after *Johnson*—wait for the state's explanation). *See* 545 U.S. at 170-73.

The Seventh Circuit here believed that the *best* explanation for the peremptory strike was that this prosecutor was concerned about Mr. Ware's personal history. But it had nothing but silence and its own intuition to support that conclusion. This leap of faith misapplies *Batson*, and *Johnson* reaffirmed that 'apparent' reasons cannot have decisive effect until and unless they are honestly adopted and explained by the prosecutor. *See* 545 U.S. at 171-73. If that were not the rule, then any number of unique variations and idiosyncrasies—differences that will *always* be present to distinguish between jurors—could be marshaled to "spar[e] the government the second and third steps of *Batson*" regardless of the prosecutor's actual state of mind. *See Stephens*, 421 F.3d at 516.

And on the facts of this case, there is no basis on which any court could have divined this prosecutor's actual intent. The record here is at least as consistent with discrimination as with the Seventh Circuit's preferred innocuous alternative. Mr. Ware was unique in two ways among the potential jurors questioned: he had been to the American Legion *and* he was African-American. The prosecutor's decision to strike him immediately could have been because of either of those unique traits, or because of something else known only to the prosecutor. The timing of the strike merely indicates that the prosecutor's mind was made up, not that it was made up *and* free from discriminatory intent. And the noticeably disparate questioning here tips the balance in favor of a suspicion of discrimination—this prosecutor asked more, not fewer, questions when she was concerned about potential sources of bias. There is no reason here to decide that speculation satisfies *Batson*.

The key distinction in the *Batson* analysis between real and hypothetical reasons was lost here. And because of that mistake, the Seventh Circuit's decision exacerbates ongoing division and confusion in the law. It also stands as an invitation for prosecutors and lawyers entertaining an impermissible reason for a peremptory strike to go ahead and exercise that strike whenever they think the trial judge may be inclined to helpfully speculate about their intentions. That practice defies *Batson*, and the Court should end it here.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

Ishan K. Bhabha
Counsel of Record
Jason T. Perkins
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
ibhabha@jenner.com

April 9, 2021

APPENDIX

Appendix A

In the

United States Court of Appeals

For the Seventh Circuit

No. 19-3172

CHARMELL BROWN,

Petitioner-Appellant,

v.

ALEX JONES, Acting Warden,

Respondent-Appellee.

Appeal from the United States District Court for the Central District of Illinois.
No. 17-2212 — **Sue E. Myerscough**, *Judge*.

ARGUED SEPTEMBER 24, 2020 – OCTOBER 21, 2020

Before EASTERBROOK, MANION, and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. When selecting jurors for Charmell Brown's murder trial in Illinois state court, the prosecution struck venireperson Devon Ware who had been to the crime scene. As it happens, Ware is also African American. In his petition for habeas relief now before us, Brown argues that the prosecution struck Ware on the basis of his race and that the Illinois Appellate Court unreasonably applied *Batson v. Kentucky*, 476 U.S. 79 (1986), when holding otherwise in Brown's direct appeal.

The court made no such error. It correctly noted the prosecution's apparent reason for striking Ware — that he had been to the crime scene — and found no circumstances giving rise to an inference that the prosecution engaged in racial discrimination. We therefore affirm the district court's decision denying Brown's petition for a writ of habeas corpus.

I. BACKGROUND

In 2008, a jury convicted Charmell Brown of three counts of first-degree murder[1] and one count of aggravated battery with a firearm for shooting three people outside of the American Legion building in Champaign, Illinois. The court sentenced Brown to 90 years' imprisonment. Since his sentencing, Brown has

---

[1 Petitioner note: The Seventh Circuit later corrected this statement on denial of rehearing to read: "one count of first-degree murder." *See* Pet. App. 88a below.]

filed two postconviction motions, a direct appeal, and the petition for federal habeas relief now before us. Brown's only remaining claim is that the Illinois Appellate Court unreasonably applied *Batson* when reviewing his claim that the prosecutor in his case struck potential juror Devon Ware because of Ware's race.

Ware was one of two African Americans in the sixty-person venire gathered for Brown's trial. The clerk called Ware as a potential juror in the first panel of four venirepersons. The court then asked the panel general questions regarding their fitness as jurors. One question inquired whether anyone was familiar with the American Legion where Brown's crime took place. Ware said yes, and the other three venirepersons said no. The court followed up and asked Ware if he had visited the Legion. Ware answered, "Been on the outside. Not inside." But he denied that his familiarity with the American Legion would affect his service as a juror. The court then tendered questioning to the prosecutor, who immediately requested that Ware be excused. The court obliged.

Brown objected that Ware's excusal violated *Batson*. The court overruled the objection and found that Ware was "properly excused" because Brown failed to make "a prima facie case that a discriminatory practice was being conducted by the State." The court thus did not ask the prosecution to provide "a race neutral explanation" for its strike.

Brown raised this issue before the trial court again in his post-trial motions. Once more, the trial court denied the claim. The court explained that Ware, "unlike every

other juror that was questioned," had been to the American Legion, and therefore Brown failed to establish a prima facie *Batson* case.

On direct appeal, Brown raised his *Batson* issue a third time, but the Illinois Appellate Court rejected it. The court noted the relevant factors for establishing a prima facie *Batson* case, considered the record pertaining to Brown's *voir dire* proceedings, and determined that the trial court did not clearly err in ruling that Brown failed to establish a prima facie case of racial discrimination in the jury selection process. To support this conclusion, the court explained that there was no evidence of a pattern of striking African Americans from the jury or of a disproportionate number of strikes used against African Americans and that the other factors "were unremarkable in the overall context of this case." The court further noted that Ware meaningfully distinguished himself from the other potential jurors by stating that he was familiar with the crime scene. Brown petitioned for leave to appeal the court's decision, but the Illinois Supreme Court denied his request.

Brown then sought federal habeas relief. The district court denied Brown's habeas petition but granted a certificate of appealability on the *Batson* issue. The district court noted that the prosecutor struck one of two African-American venirepersons but held that Brown "must do more than point to the fact that the prosecutor exercised a peremptory strike on an African American venireperson to establish a prima facie case." Brown now appeals the district court's decision.

II. ANALYSIS

Brown seeks habeas relief under 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Federal courts may only grant habeas relief under AEDPA if a state court's last reasoned opinion on a defendant's claim (1) was contrary to, or relied on an unreasonable application of, clearly established federal law or (2) rested on an unreasonable factual determination. 28 U.S.C. § 2254(d)(1)-(2).

A state court's decision relies on an "unreasonable application of clearly established federal law" if it identifies the correct legal rule but applies the rule in an objectively unreasonable way. *Bynum v. Lemmon*, 560 F.3d 678, 683 (7th Cir. 2009). Regarding factual determinations, a petitioner "bears the burden of rebutting the state court's factual findings 'by clear and convincing evidence,'" and "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion." *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (first quoting 28 U.S.C. § 2254(e)(1); and then quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)).

This standard "erects a formidable barrier to federal habeas relief." *Id.* at 19. AEDPA requires "a state prisoner [to] show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error ... beyond any possibility for fairminded disagreement." *Id.* at 19-20 (alterations in original) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

In this case, Brown contends that he is entitled to habeas relief because the Illinois Appellate Court unreasonably applied *Batson* and based its decision on unreasonable factual determinations. In response, the State argues that Brown's petition is untimely and meritless. We disagree with the State's timeliness argument but agree that Brown's petition is merit-less.

A. The State waived its timeliness argument.

AEDPA imposes a one-year statute of limitations. 28 U.S.C. § 2244(d)(1). But this limitations period is not jurisdictional. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012). A state respondent may waive the defense by "expressing its clear and accurate understanding of [a] timeliness issue" yet "deliberately steer[ing] the District Court away from the question and towards the merits of [the] petition." *Id.* And a federal appellate "court is not at liberty ... to bypass, override, or excuse a State's deliberate waiver of a limitations defense." *Id.* at 466. For example, in *Wood*, "the State twice informed the District Court that it 'w[ould] not challenge, but [is] not conceding' the timeliness of [the] petition." *Id.* at 474 (second alteration in original). The Supreme Court held that the court of appeals was therefore required to reach the merits of the petition rather than decide the case on timeliness grounds. *Id.*

Much like the state respondent in *Wood*, the State in this case waived its statute of limitations defense. Initially, the State did file a motion to dismiss arguing that Brown's petition was untimely. But after the court set an evidentiary hearing on timeliness and appointed counsel to represent Brown, the State asked the court to

set a briefing schedule on the merits of the petition instead. The State informed the court that "consideration of the merits and any procedural bars to the claims raised in the instant petition may be more efficient than continued litigation of [Brown's] equitable tolling argument."

This was textbook waiver. The state "express[ed] its clear and accurate understanding of [a] timeliness issue" yet "deliberately steered the District Court away from the question and towards the merits of [Brown's] petition." *Id.* And the district court acknowledged as much by deciding the merits of this case. We too will therefore consider the merits of Brown's petition.

B. The Illinois Appellate Court reasonably applied Batson.

"In *Batson*, the Supreme Court established a three-step framework for determining whether [a] prosecut[or] violated [a] defendant's Equal Protection rights by exercising peremptory challenges in a racially discriminatory manner." *Bennett v. Gaetz*, 592 F.3d 786, 791 (7th Cir. 2010).

> First, the defendant must make out a prima fade case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Second, if the defendant establishes a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" ... . Third, the trial court must evaluate the plausibility of the prosecution's reasons, in light of all of the surrounding circumstances, to decide

> whether the defendant has proved purposeful discrimination.

Id. (citations omitted) (quoting *Batson*, 476 U.S. at 94, 98).

This case turns on *Batson's* first step—the prima facie case. "[A] defendant may establish a prima facie case by offering a wide variety of evidence that raises a mere inference of a discriminatory purpose." *Id.* (citing *Johnson v. California*, 545 U.S. 162, 169 (2005); *United States v. Stephens*, 421 F.3d 503, 512 (7th Cir. 2005)). For example, a defendant may establish a prima facie *Batson* case by offering proof of a pattern of strikes against African Americans or showing that the prosecutor's questions and statements during *voir dire* support an inference of discrimination. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2246 (2019); *Batson*, 476 U.S. at 96-97.

"The burden at this stage is light." *Bennett*, 592 F.3d at 791. A challenger must only point to "circumstances raising a suspicion that discrimination occurred." *Franklin v. Sims*, 538 F.3d 661, 665 (7th Cir. 2008). Nevertheless, "the prima facie burden is an essential part of the *Batson* framework, and trial courts may justifiably demand that defendants carry this burden before requiring prosecutors to engage in the difficult task of articulating their instinctive reasons for peremptorily striking a juror." *Bennett*, 592 F.3d at 791 (7th Cir. 2010) (citing *Miller-El v. Drekte*, 545 U.S. 231, 267-68 (2005) (Breyer, J., concurring)).

In this case, the Illinois Appellate Court applied *Batson* correctly. To start, the court identified the wide

swath of factors to consider in determining whether a defendant has made a prima facie *Batson* claim. Then the court found that, in Brown's case, there "was no evidence of any pattern of striking African-Americans from the jury, nor was there any evidence of a disproportionate number of strikes used against African-Americans," and "[t]he facts pertaining to the other factors were unremarkable in the overall context of this case."

Brown takes issue with this analysis on three grounds, but none prevails. First, Brown argues that the Illinois Appellate Court failed to consider (1) that, because only two members of the venire were African American, striking Ware dramatically increased the chance that no African Americans would serve on Brown's jury and (2) that the prosecutor's decision not to question Ware before excusing him differed from the prosecutor's treatment of other venirepersons.

This argument is not persuasive because the Illinois Appellate Court did consider these circumstances and correctly noted that they "were unremarkable in the overall context of this case." Though striking Ware decreased the chance that African Americans would serve on Brown's jury, that merely highlighted a minor anomaly in the venire. It did not shed any light on the prosecutor's strike. Moreover, the prosecutor's decision to ask more questions of other jurors was unremarkable because Ware distinguished himself by stating that he had been to the crime scene.

Second, Brown argues that the Illinois Appellate Court improperly considered that Ware was familiar

with the crime scene to explain the prosecution's strike. Courts considering *Batson* claims at the prima facie stage may consider "apparent" reasons for a strike. *See Stephens*, 421 F.3d at 515 ("[I]n considering 'all relevant circumstances,' courts may consider distinctions such as [a venireperson's] attorney status in determining whether the inference of discrimination is demonstrated."). This "normally works to the government's advantage, showing that a seemingly discriminatory pattern of peremptories is readily explained by factors apparent in the record." *Id.* (citing *Mahaffey v. Page*, 162 F.3d 481, 483 n.1 (7th Cir. 1998); *Johnson v. Campbell*, 92 F.3d 951, 953 (9th Cir. 1996); *Capers v. Singletary*, 989 F.2d 442, 446 (11th Cir. 1993)). But the Supreme Court has made clear that the persuasiveness of a *Batson* challenge is to be determined at the third *Batson* stage, not the first, and has rejected efforts by courts to supply reasons for questionable strikes. *Miller-El*, 545 U.S. at 252. An inquiry into apparent reasons is thus "relevant only insofar as the strikes are so clearly attributable to that apparent, nondiscriminatory reason that there is no longer any suspicion, or inference, of discrimination." *Franklin*, 538 F.3d at 665 (quoting *Stephens*, 421 F.3d at 516).

Here, the Illinois Appellate Court was not unreasonable in considering Ware's history with the crime scene as an apparent reason for his excusal —just the opposite. Ware's statement that he, unlike any other jurors,[2] had been to the crime scene was a highly

---

[2] Brown notes that another juror, who was not stricken, stated that she knew the address of the American Legion. This comparator

relevant circumstance for the court to consider. And the prosecutor's strike was "clearly attributable" to that circumstance because the prosecutor used the strike immediately upon learning of it.

Third, Brown argues that the Illinois Appellate Court imposed too high of a burden at the prima facie stage. For the reasons already stated, this is incorrect. The court reasonably determined that the circumstances of Ware's excuse did not "rais[e] a suspicion that discrimination occurred." *Id.* (quoting *Stephens*, 421 F.3d at 512).

In sum, we see nothing unreasonable —much less any error beyond the possibility for fairminded disagreement—in the Illinois Appellate Court's application of *Batson*. Brown is therefore not entitled to habeas relief on this ground.

C. The Illinois Appellate Court's decision did not rest on any unreasonable factual determinations.

Brown argues that the Illinois Appellate Court relied on the unreasonable factual determination that the prosecution *in fact* did not strike Ware because of his race. Brown leans heavily on the trial court's statement that Ware was "properly excused" and the Illinois Appellate Court's affirmance of that purported "finding."

---

juror does not reveal anything about the strike used against Ware because she, unlike Ware, had not been to the scene of the crime.

There are several issues with this argument. First, the trial court made clear that Ware was "properly excused" because Brown did not establish a prima facie *Batson* case. The trial court never purported to determine any facts about his excuse. Second, the Illinois Appellate Court did not reiterate this "finding" when reviewing the trial court's decision. The Illinois Appellate Court made clear that it only held that the trial court did not err insofar as it found that Brown failed to establish a prima facie *Batson* case. For those reasons, the Illinois Appellate Court did not rely on the allegedly unreasonable "factual finding" that Brown complains of.

III. CONCLUSION

We AFFIRM the decision of the district court.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

CHARMELL BROWN,

Petitioner,

v. No. 17-cv-2212

FRANK LAWRENCE,
Acting Warden of Menard
Correctional Center,

Respondent.

OPINION

SUE E. MYERSCOUGH, U.S. District Judge.

This cause is before the Court on Petitioner Charmell Brown's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Petition) (d/e 3) and Amended Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (d/e 18). The Petition and Amended Petition are DENIED.

I. PROCEDURAL BACKGROUND

In September 2017, Petitioner filed a pro se Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person in State Custody (d/e 1). In October 2017, Petitioner filed a corrected petition (d/e 3). The Court directed Respondent to file an answer, motion, or otherwise respond to the § 2254 Petition.

In February 2018, Respondent filed a Motion to Dismiss (d/e 8), asserting that the § 2254 Petition was time barred. Petitioner did not respond, and the Court sua sponte extended Petitioner's time to respond. In May 2018, the Court granted the motion after Petitioner failed to respond and entered judgment. *See* d/e 9, d/e 10.

Three days later, Petitioner filed a response with a certificate of service signed under penalty of perjury reflecting Petitioner timely placed the response in the prison mail. The Court vacated the opinion and judgment.

In June 2018, the Court directed Respondent to address Petitioner's newly raised claim that the lack of library access impeded his ability to file his Petition. The Court also directed Respondent to address the necessity of an evidentiary hearing on the issue of statutory tolling and whether Respondent wished to proceed on the merits instead. Respondent failed to respond, even after the Court sua sponte extended the time to respond. The Court denied the motion to dismiss without prejudice, set the matter for an evidentiary hearing on whether Petitioner was entitled to statutory or equitable tolling, and appointed counsel to represent Petitioner.

Respondent thereafter filed a motion for leave to file a reply, which the Court denied. In August 2018, Respondent asked the Court to set a briefing schedule for an Answer on the merits of the Petition. *See* Response (d/e 15). Respondent asserted that consideration of the merits and any procedural bars may be more efficient than continued litigation of Petitioner's equitable tolling argument. *Id.* The Court set a briefing schedule. *See* Minute Entry of August 28, 2018.

In January 2019, Petitioner (through counsel) filed an Amended Petition (d/e 18) clarifying Petitioner's Petition (d/e 3) but not abandoning any claims. Respondent has filed an Answer, and Petitioner has filed a Reply.

Petitioner raises the following claims[1]:

(1) The State's late disclosure of a mislabeling error on documents concerning a witness's photo array identification and the trial court's failure to grant Petitioner's request for a continuance:

   (a) denied Petitioner the due process guaranteed to him by the Fifth and Fourteenth Amendments to the United States Constitution, and

[1] Respondent identified these issues as those raised by Petitioner in his Petition (d/e 3) and Amended Petition (d/e 18). Petitioner does not assert otherwise in his Reply or indicate that Respondent missed any of the issues raised in either the Petition (d/e 3) or the Amended Petition (d/e 18).

(b) deprived Petitioner of effective assistance of counsel guaranteed him by the Sixth Amendment of the United States Constitution because of counsel's lack of adequate time to prepare for trial.

(2) The State's peremptory challenge to an African American male violated *Batson v. Kentucky*, 476 U.S. 79 (1986).

(3) The Court erred in failing to ask potential jurors if they accepted the principles enumerated in Illinois Supreme Court Rule 431(b).

(4) The trial court's admission of other crimes evidence denied Petitioner his right to due process and a fundamentally fair trial.

II. FACTUAL BACKGROUND

The underlying facts of this case are detailed in the Illinois Appellate Court's decision affirming Petitioner's conviction. *People v. Charmell D. Brown*, No. 4-10-0409 (June 10, 2011) (Fourth District) (Ex. D) (2018 WL 2187441). Because Petitioner has not rebutted those facts by clear and convincing evidence, those facts are presumed correct. 28 U.S.C. § 2254(e); *Tayborn v Scott*, 251 F.3d 1125, 1126 (7th Cir. 2001).

In January 2008, Petitioner was indicted on three counts of first-degree murder (720 ILC 5/9-1(a)(1), (a)(2) (West 2006) and two counts of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006) for

shooting three people outside of the American Legion in Champaign, Illinois. Ex. D at 3. One victim, Tyrone Greer, died. Two other victims, Eric Lucas and Johnny Valcourt, were injured. Prior to the start of defendant's trial, the State moved to dismiss one count of aggravated battery with a firearm as it related to the shooting of Valcourt.

The evidence presented at trial showed that, on December 29, 2007, Greer and his friends were at the American Legion celebrating a friend's birthday:

> At approximately 1 a.m., the bouncers working security asked Greer, who was involved in some type of verbal altercation either (there were varying reports) with a female patron, defendant, or defendant's brother, Charnell Brown, who was wearing a black fur coat that evening, to leave the club. [LaWayne] Johnson [(Greer's friend)] approached as one security employee was talking with Greer. Johnson assured the employee that Greer would leave without incident. In the meantime, [Tamika] Kirkwood and the rest of their group, including Tegan Milam, gathered each other and their belongings to leave with Greer. As Greer and Johnson were standing outside of the club at the front door and while other patrons were waiting in a line to enter, Greer was shot three times in the upper body. Two other people standing in line were shot in the leg. Greer stumbled into the club, collapsed on the floor, and died.

Ex. D at 5.

A. Facts Pertaining to the Late Disclosure of a Mislabeling Error and the Denial of a Continuance

One of Petitioner's claim is that he was denied his right to due process and effective assistance of counsel when the State disclosed a mistake in the labeling of two photo arrays and the trial court denied Petitioner's request for a continuance. One photo array contained Petitioner's photograph. The other photo array contained Petitioner's brother, Charnell Brown's, photograph. The Illinois Appellate Court provided the following facts pertaining to the late disclosure of the mislabeling error:

> On December 7, 2009, the first day of defendant's trial, before jury selection, the parties presented the trial court with various preliminary matters. The State indicated there had been a typographical error on the two photo arrays shown to one of the State's witnesses [(Tawanda Handy)]. Apparently, defense counsel had not known there was an error and claimed the State had violated the rules of discovery. The State insisted that defense counsel had been produced everything regarding the witness's identification of defendant as the shooter. Noting that the parties' explanations were "incredibly confusing," the trial court stated that it would allow the State to present an "offer of proof before the jury hears any of this testimony." Defense counsel requested a continuance. The court assured counsel that should the offer of proof indicate the State had committed a discovery violation, or what the court called "a violation of the *Brady* material" (referring to *Brady v. Maryland*, 373 U.S. 83 (1963)), it would

> impose sanctions, which could include barring the evidence, a mistrial, or "any number of things." However, "on the eve of trial," the court wanted to hear "what it is we're talking about." The State again insisted that counsel had "all the documents" and this was something the State had "figured out in trial preparation."

Ex. D at 3-4.

Before Tawanda Handy testified, the Court heard the offer of proof outside the presence of the jury:

> The State called Tawanda Handy, who testified that she was sitting at the bar at the club when she heard an argument between two males, later identified as defendant and Greer. She said she did not pay much attention to them, as Greer walked away from the argument. However, she then heard defendant say to the man in the fur coat that security had not searched him at the door and he had a "mf pistol" in his sock. She said the comment alarmed her, so she retrieved her friend and started to leave.
>
> A few days after the incident, detectives showed her a photo array, asking if any of those pictured were the men she saw at the American Legion that night. She recognized photo number four as the man who made the comment about the gun in his sock. From the second photo array, she recognized photo number two as the man with the black fur coat. She said she was not shown a list of names of the individuals that appeared in the photo arrays. She acknowledged signing the instruction sheets after

she made her identifications. Those sheets and photo arrays were introduced into evidence.

Detective Donald Shepard testified that he and Detective Mary Bunyard showed Handy the photo arrays two days after the incident at her place of employment. The arrays were compiled by another detective, who used two because there were two suspects, defendant and his brother. The array identified as photo lineup number one contained defendant's photo in the number four spot. Detective Shepard said Handy pointed to photo number four and identified him as the man who made the comment that he had a pistol in his sock. Photo lineup number two contained Charnell Brown's [(Petitioner's brother)] photo in the number-two spot. Handy pointed to Charnell's photo, identified him as the man in the fur coat, and said she knew of him by his street name "Stretch." Shepard said Handy did not show any hesitancy in identifying either suspect. The photos and the corresponding names are correct. He watched Handy pick out the photos herself and she completed the forms correctly.

Detective Shepard explained that the instruction and answer sheets for each photo array got mixed up or mislabeled. The instruction or answer sheet which indicated that Handy had selected photo number four had "photo array number two" written on top, when it should have been labeled as "photo array number one." Detective Bunyard testified consistently with Detective Shepard's testimony, stating that Handy had selected the photos of defendant and his brother and the mistake occurred in the labeling of the responding instruction/answer sheets.

After considering this testimony, the trial court found that, based on the testimony presented, it was the instruction sheet that was in error and not the fact that Handy had identified people other than defendant and his brother. Defense counsel argued that the State acted in bad faith in not revealing the error until the day of trial. Counsel accused the State of intentionally preventing him from making an argument of misidentification and of violating the discovery rules. The court held that the State had not committed a *Brady* violation, as it did not want "to go that far," but it had committed a discovery violation. The court decided it would allow Handy to testify at trial for the State about what she saw that night, but bar any testimony regarding her identification of defendant or his brother from the photo arrays.

Ex. D at 5-7.

B. Facts Pertaining to Petitioner's *Batson* Claim

The Illinois Appellate Court detailed the following facts that are relevant to Petitioner's *Batson* claim:

> Devon Ware was called by the clerk as a potential juror in the first panel of four. [Ware was one of only two African American males in the entire venire. *Id.* at 24.] The trial court began questioning and asked Ware general questions regarding (1) whether he had heard anything about the case, (2) whether he knew anyone related to the case, (3) whether he knew anyone that was a police officer or an attorney, and (4) if there was any reason why he would not be

> fair and impartial. Ware answered "no" to each question.
>
> The trial court noted that Ware had indicated on a questionnaire that he or a close family member had been a victim of a crime. He denied the crime was one of violence and denied that it would affect his service as a juror. The court then asked a panel of four if anyone was familiar with the American Legion. Ware said yes, and the other three indicated no. The court asked Ware if he "had occasion to visit the Legion on North Hickory?" Ware answered: "Been on the outside. Not inside." Ware denied that his familiarity with the American Legion would affect his service as a juror. The court tendered questioning to the prosecutor, who immediately requested that Ware be excluded, and the court obliged.

Ex. D at 27. Following Petitioner's objection to the exclusion of Ware, the trial court found Petitioner had not made "a prima facie case that a discriminatory practice is being conducted by the State." Ex. M, Transcript of Voir Dire at 126 (d/e 22-16 p. 141 of 325).

C. Evidence Presented at Trial

The Illinois Appellate Court did not summarize the testimony of all of the witnesses but only that testimony that was pertinent to the issues raised or necessary to understanding of the circumstances surrounding the incident. As is relevant herein:

> Milam testified to the events fairly consistently with the other witnesses. She said once she learned Greer

had been asked to leave, she got the car keys from Kirkwood. She walked out of the club toward the parking lot, walking past Johnson and Greer. She turned around to say something to Johnson when she saw defendant and the man in the fur coat exit the club from the side door. She saw defendant reach into his clothes, lift his right arm, and start shooting. She said the first shot hit Greer in the shoulder. Defendant kept walking and shooting and eventually stood in front of Milam while firing. The man in the fur coat ran into the club. He came out and got into a white car that was parked in front of the building. Two other people standing outside were shot as well. Milam watched defendant, who she identified in court as the gunman, get into his car, a red or maroon newer model car. Milam yelled at him that "he wouldn't get away with this one." Defendant drove off. Milam memorized defendant's license plate number by repeating it over and over until the police arrived.

Milam testified that a few days after the incident, Detective Nathan Rath spoke with her and showed her a photo array. Milam chose number four as the photo of the person who had shot Greer. She did not recognize anyone from the second set of photographs.

Ex. D at 9-10.

Handy testified before the jury as follows:

Handy testified that she was at the American Legion that night. As she was sitting at the bar, she

> heard two men arguing, but "didn't think anything of it." One was wearing a green jacket. [(Other testimony established that Greer was wearing a green jacket.)]. The other, she identified in open court as defendant. A man in a black fur coat approached. Defendant made a statement to the man in the fur coat "that he had a pistol in his sock." She said his exact words were "the mother*** didn't search me, I have a pistol in my sock." She said she immediately "got up and grabbed [her] girlfriend, and it was time to go." By the time she had found her girlfriend and proceeded to the front door, security was not allowing anyone to leave. She saw the man in the green jacket stagger into the club from the front door. When she was able, she proceeded to her vehicle. She said she did not see defendant or the man in the fur coat.
>
> On cross-examination, defendant's counsel questioned Handy about how she could characterize the interchange between the two men as an argument when she was unable to hear the exact words exchanged and when the music was so loud. Handy responded that the two men were very loud and "it was apparent that they were arguing." Handy believed it was approximately 10 to 15 minutes before the man in the fur coat approached defendant.

Ex. D at 11-12.

Defendant presented testimony of several witnesses, including Jamila Thomas, who testified that she saw the man in the black fur coat have words with a man in a green vest (presumably Greer) outside the American

Legion. She saw the man in the fur coat walk around the corner, come back without a coat on and wearing a white T-shirt, and open fire. Ex. D at 12. Thomas testified that defendant was not the shooter because the shooter's skin tone was darker. Thomas could not pick the shooter out of a photo array because she did not see his face. Ex. D at 12-13.

The jury returned guilty verdicts. Petitioner filed two posttrial motions, preserving the issues he raised on appeal with the exception of the Rule 431(b) issue. The trial court denied Petitioner's posttrial motions and sentenced Petitioner to 60 years for first-degree murder and 30 years for aggravated battery with a firearm, to be served consecutively. Ex. D at 13.

D. Petitioner Files a Direct Appeal and Post-Conviction Petitions

Petitioner filed a direct appeal, arguing:

(1) the trial court erred by rejecting Petitioner's continuance request on the day of jury selection where the State disclosed for the first time that previously provided critical identification discovery was substantially flawed because:

   (a) Petitioner was denied due process (discovery and continuance) where critical identification information was known to the prosecution two months before trial but not tendered to the defense until immediately before jury selection;

(b) Petitioner was deprived of effective assistance of counsel when the trial court denied Petitioner's continuance request based on the day-of-trial disclosure that a prosecution witness identified defendant from a photo spread when all prior pretrial discovery disclosed the witness had not identified Petitioner;

(2) the trial court failed to admonish the jury concerning their understanding and acceptance of Rule 431(b);

(3) the trial court erred by finding that Petitioner failed to present a prima facie foundation for a *Batson* violation;

(4) the trial court erred by allowing the introduction of other crimes evidence by the State's pivotal witness, Milam; and

(5) the cumulative prosecutorial misconduct undermined Petitioner's right to a fair trial.

Petitioner's Appellate Brief, Ex. A (d/e 22-2).

On June 10, 2011, the Illinois Appellate Court affirmed. Ex. D. The bases for the Appellate Court's rulings will be addressed in more detail when the Court addresses Petitioner's claims below.

Petitioner filed a petition for leave to appeal to the Illinois Supreme Court (Ex. E), which was denied. Ex. F, *People v. Brown*, 968 N.E.2d 1067 (2012). Petitioner

did not file a writ of certiorari in the United States Supreme Court.

On March 15, 2013, Petitioner filed a postconviction petition pursuant to 725 ILCS 5/122-1 *et seq.* in the Champaign County Circuit Court, asserting prosecutorial misconduct. *See* Ex. J, *People v. Brown*, 2015 IL App (4th) 130412-U. Petitioner asserted his trial counsel was ineffective for failing to object and appellate counsel was ineffective for failing to raise the prosecutorial misconduct issue on direct appeal. *Id.*

On April 1, 2013, the trial court summarily denied the postconviction petition. The Appellate Court affirmed (Ex. J), and the Illinois Supreme Court denied Petitioner's petition for leave to appeal on September 30, 2015. Ex. L, *People v. Brown*, 39 N.E.2d 1005 (2015).

The Champaign County Circuit Clerk's website shows that Petitioner filed a successive postconviction petition in October 2016, which the state court denied in February 2017. Sangamon County Case No. 2008-CF-32 https://www.champaigncircuitclerk.org/public-court-records/ (last visited October 7, 2019). Respondent contends that Petitioner's postconviction pleadings did not raise any claims relevant to his federal petition.

III. LEGAL STANDARD

Petitioner seeks relief under 28 U.S.C. § 2254. Before a federal court may review a claim raised in the § 2254 Motion, Petitioner must exhaust his state court remedies. That is, Petitioner had to present each claim in the Petition to the Illinois appellate and Illinois

Supreme Courts (collectively the state courts) for a complete round of review on direct appeal or in post-conviction proceedings. *Malone v. Walls*, 538 F.3d 744, 753 (7th Cir. 2008). Petitioner had to present both the operative facts and controlling legal principles underlying each of the federal claims at issue. *Id.* (citing *Williams v. Washington*, 59 F.3d 673, 677 (7th Cir. 1995)). If Petitioner failed to properly present his federal claims to the state courts but there is no longer any corrective process available to him, he has procedurally defaulted that claim. *Perruquet v. Briley*, 390 F.3d 505, 513 (7th Cir. 2004) (a procedural default occurs when a petitioner failed to present the claim to the state court and that court would now hold the claim procedurally barred).

If Petitioner failed to adequately present any of his grounds for relief to the state courts, this Court may only review such ground if Petitioner demonstrates: (1) a cause for the failure and prejudice because of losing review on the merits or (2) that lack of review would result in a fundamental miscarriage of justice. *Smith v. McKee*, 598 F.3d 374, 382 (7th Cir. 2010). Cause means an objective factor, external to the defense, which prevented Petitioner from adequately presenting the claim to the state courts for discretionary review. *Id.* Prejudice means an error that so infected the trial that Petitioner's conviction violated due process. *Id.* A fundamental miscarriage of justice occurs only in the extraordinary case that includes evidence demonstrating innocence of the convicted petitioner. *See Sawyer v. Whitley*, 505 U.S. 333, 339 (1992).

Moreover, even if Petitioner adequately presented his claims to the state courts, the state court's "last reasoned opinion on the claim" receives substantial deference under the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996. *Woolley v. Rednour*, 702 F.3d 411, 421 (7th Cir. 2012) (noting that deference is applied to the "last reasoned opinion on the claim"). The AEDPA states that this Court may not grant habeas relief unless the state court's decision was (1) contrary to, or an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court; or (2) rested on an unreasonable factual determination in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d)(1), (2).

A state court's decision is contrary to clearly established federal law if the state court applies a legal standard inconsistent with United States Supreme Court precedent or contradicts the Supreme Court's treatment of a materially identical set of facts. *Bynum v. Lemmon*, 560 F.3d 678, 683 (7th Cir. 2009). A state court's decision is an unreasonable application of clearly established federal law if the state court identifies the correct legal rule but applies the legal rule in an objectively unreasonable way. *Id.*

Petitioner "bears the burden of rebutting the state's factual findings 'by clear and convincing evidence.'" *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (citing 28 U.S.C. § 2254(e)(1)). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion." *Burt*, 571

U.S. at 18 (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)).

Meeting the AEDPA standard for relief is difficult:

> Recognizing the duty and ability of our state-court colleagues to adjudicate claims of constitutional wrong, AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court. AEDPA requires "a state prisoner [to] show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error ... beyond any possibility for fairminded disagreement."

Burt, 571 U.S. at 19-20 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

IV. ANALYSIS

A. Petitioner is Not Entitled to Habeas Relief on His Claims That His Due Process Rights Were Violated by the State's Late Disclosure of a Mislabeling Error and the Denial of a Continuance or That Petitioner's Sixth Amendment Right to Effective Counsel Was Violated by the Denial of the Motion to Continue

Petitioner argues that the failure to bar Handy's testimony in its entirety—as opposed to only barring any testimony regarding Handy's identification of Petitioner or his brother from the photo arrays—or grant Petitioner's motion to continue to investigate and prepare violated Petitioner's fundamental right to due

process and his Sixth Amendment right to counsel. Petitioner asserts that his counsel prepared a defense, at least in part, on mistaken identity. On the first day of jury selection, the State disclosed a mistake in labeling the photo arrays and disclosed that the witness, Handy, "did not misidentify another as Petitioner." Am. Pet. at 4. Petitioner asserts that the State knew there was no misidentification two months prior to trial but failed to advise Petitioner until the first day of jury selection.

The Illinois Appellate Court considered Petitioner's claim that he was deprived of a fair trial by the State's failure to timely disclose the photo-array discrepancy, an error Petitioner claimed was compounded by the trial court's denial of his motion for a continuance. The Appellate Court found that the record refuted Petitioner's claims that all pre-jury voir dire discovery revealed that Handy had not identified Petitioner and that it was not until the day of trial that defense counsel learned that Handy identified Petitioner as the individual claiming to have a gun in his sock. Ex. D at 15.

The Appellate Court noted that, at a pretrial hearing in November 2008, one year before trial, defense counsel referred to his belief that only one individual—Milam—was shown a photo lineup. The Appellate Court found it apparent that, at that point, defense counsel believed Handy had not picked Petitioner's photograph from the array. *Id.* However, Detective Dale Radwin testified at that same hearing that, from his perusal of the reports and records in the case file, the witness seated at the bar (Handy) had identified defendant "through a photo spread." *Id.*

Moreover, the Appellate Court noted that Detective Shepard's December 31, 2007 interview of Handy shows incorrectly that Handy told Shepard that photo number four from photo array number two was the picture of the individual who made the gun-in-his-sock comment and photo number two from photo array number one was the picture of the man in the black fur coat. However, Detective Shepard's supplemental narrative report dated January 16, 2008—discussed further below—should have put Petitioner on notice that Handy had, in fact, picked defendant and his brother as the two suspects. Petitioner did not claim that he did not receive the 2008 report in discovery.

Detective Shepard's 2008 supplemental narrative report indicated that Handy identified Petitioner as the person in the argument and who made the comment about the pistol in his sock and identified Charnell Brown (Petitioner's brother) as the person wearing the black fur coat. The report also noted that Petitioner's photo was photo number four in photo array number one and Charnell Brown's photo was photo number two in photo array number two. The Appellate Court found the discrepancy in labeling the two photo lineups was apparent when comparing the transcript of the interview to the 2008 report. Ex. D at 16 (noting "it seemed clear that defendant's photo appeared in spot number four on photo array number one, not photo array number two, as it had been labeled at the time of her interview."). The Appellate Court noted that this evidence belied Petitioner's representation that he never knew Handy had identified Petitioner in the photo array until the day of trial. *Id.* The Appellate Court

concluded that, "[b]ecause this information was of record, the clarification or explanation of the information on the date of trial cannot be described as 'earth-shattering' as defendant claims in his brief." *Id.*

The Illinois Appellate Court agreed with the trial court that the State should have divulged the discrepancy when the State became aware of it but found that Petitioner did not suffer "sufficient prejudice." Ex. D at 16. Petitioner had the opportunity to notice the discrepancy and probe the State for an explanation. Therefore, the Appellate Court found the trial court properly denied Petitioner's motion to dismiss and his request for a continuance. The Appellate Court also found the trial court did not err in prohibiting the State from presenting testimony of Handy's identification of Petitioner in the photo array as a discovery sanction because the sanction was sufficient to cure the error and did not rise to the level of jeopardizing Petitioner's right to due process. *Id.* at 17.

In addition, the Appellate Court found that Petitioner was not denied his right to effective assistance of counsel based on the trial court's denial of his motion for continuance. Petitioner argued that the trial court deprived him of his right to the effective assistance of counsel by forcing counsel to proceed to trial arguably ill-prepared based on Petitioner's perceived ambush by the State. The Appellate Court found the argument without merit because Petitioner was not prejudiced by the State's late discovery, the court's denial of a continuance, or the court's denial of Petitioner's motion to dismiss. *Id.* at 18.

1. The Illinois Appellate Court's Decision on the Discovery Violation Was Not Contrary to or An Unreasonable Application of Clearly Established Federal Law as Determined by the United States Supreme Court and Did Not Rest on an Unreasonable Factual Determination

Petitioner argues that the trial court's failure to bar Handy's testimony in its entirety violated his fundamental right to due process of law. Petitioner cites various Supreme Court cases for broad recitations about due process rights and the right to a fair trial. Am. Pet. at 5-6.

Petitioner first argues that the Illinois Appellate Court's decision rested on an unreasonable factual determination. Petitioner asserts that the Appellate Court unreasonably found that the State disclosed the information related to the photo array significantly before trial when the trial court determined the disclosure was shortly before trial. Reply at 3 (d/e 23) (noting that the trial court determined the disclosure was shortly before trial, making the Illinois Court's determination that the State disclosed the information significantly before trial without merit). This Court does not read the Appellate Court's ruling as stating that the State disclosed the mislabeling significantly before trial. In fact, the Appellate Court specially found that the State should have divulged the discrepancy when the State became aware of it. Ex. D at 16.

Instead, the Appellate Court found that Petitioner's counsel had in his possession, well before trial,

information that put him on notice that Handy had identified Petitioner as the individual who made the comment about the gun and had picked him out of a photo lineup, thereby refuting Petitioner's claim he never knew Handy identified Petitioner in the photo array until the day of trial. *Id.* at 16. In addition, the Illinois Appellate Court pointed to evidence in the record that Petitioner had the opportunity to notice the discrepancy and inquire of the State before building a defense around a questionable issue. *Id.* at 17. Those factual determinations were not unreasonable in light of the evidence.

Petitioner also implicitly argues that the Illinois Appellate Court's application of clearly established federal law was objectively unreasonable. Petitioner argues that the trial court's failure to bar Handy's testimony in its entirety and the failure to grant a motion to continue violated his right to due process of law.

Generally, "[t]here is no constitutional right to discovery in non-capital criminal cases[.]" *United States v. Cruz-Velasco*, 224 F.3d 654, 665 (7th Cir. 2000) (citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)). Defendants do, however, have the right to receive material exculpatory or impeachment evidence from the prosecution for use at trial. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). Petitioner did not argue on direct appeal or in his Amended Petition that the State committed a *Brady* violation. In fact, Petitioner only referred to the *Brady* doctrine on direct appeal as an analogy to his argument that he was denied his right to counsel when the court denied his continuance. Ex. A at 30. Therefore, any

argument that a *Brady* violation occurred is procedurally defaulted. *See Perruquet*, 390 F.3d at 513 (a procedural default occurs when a petitioner failed to present the claim to the state court and that court would now hold the claim procedurally barred).[2]

In this case, the Illinois Appellate Court found that Petitioner did not suffer "sufficient prejudice" from the discovery violation because the evidence belied Petitioner's representation that he did not know Handy identified Petitioner in the photo array until the day of trial and because the Petitioner had the opportunity to notice the discrepancy in the documents. Ex. D at 16-17. The Appellate Court further found that the sanction for the late discovery disclosure—exclusion of the photo identification at trial—cured the error and did not rise to the level of jeopardizing Petitioner's right to due process.

This Court finds that the Illinois Appellate Court's was (1) not contrary to, nor an unreasonable application of, clearly established Supreme Court precedent; and (2) did not rest on an unreasonable factual determination in light of the evidence. As noted above, Petitioner had received discovery showing, well before trial, that Handy positively identified Defendant as the person that was in the argument with the victim and made the

---

[2] *Cf. United States v. Dixon*, 790 F.3d 758, 759 (7th Cir. 2015) (rejecting argument that prosecutor violated *Brady* because the "potentially exculpatory fact was disclosed in time to be used at trial"); *U.S. v. Grintjes*, 237 F.3d 876, 880 (7th Cir. 2001) (holding that "*Brady* does not apply to evidence that a defendant would have been able to discover himself through reasonable diligence")

comment that he had a pistol in his sock and identified Petitioner's brother as the person wearing the black fur coat. That information was contained in Detective Shepard's January 16, 2008 supplemental report. And, while Petitioner did not know of the mislabeling of the photo arrays until the first day of trial, the trial court barred the State from presenting testimony regarding Handy's identification of Petitioner and his brother in the photo arrays as a discovery sanction. Petitioner was, therefore, not prejudiced by the late disclosure of the mislabeling and was not denied his right to a fair trial.

2. The Illinois Appellate Court's Decision on the Sixth Amendment Claim Was Not Contrary to or An Unreasonable Application of Clearly Established Federal Law as Determined by the Supreme Court and Did Not Rest on an Unreasonable Factual Determination

Petitioner also argues that he was denied his Sixth Amendment right to counsel when the trial court failed to continue the trial due to the late disclosure of the mislabeling. The Sixth Amendment, applicable to the States under the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This right to counsel includes the right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984).

A defendant claiming that he was denied the effective assistance of counsel must generally show that counsel's performance was deficient and that the defendant was prejudiced by counsel's deficient

performance. *Strickland*, 466 U.S. at 687. The Supreme Court has recognized, however, that some circumstances are so egregious that a defendant is not required to show deficient performance or prejudice, such as when a defendant is completely denied counsel or counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 US. 648, 659 (1984). Such circumstances may also exist where, even though the defendant has counsel, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 559-60 (citing *Powell v. Alabama*, 287 U.S. 45 (1932) (wherein counsel was appointed on the day of trial)). The Seventh Circuit has noted that in some circumstances, denying a motion to continue can be "tantamount to the denial of counsel." *United States v. Rodgers*, 755 F.2d 533, 540 (7th Cir. 1985).

Petitioner argued on direct appeal that the trial court's failure to grant his counsel a continuance due to the late disclosure of the mislabeling was tantamount to the denial of counsel. On direct appeal, the Illinois Appellate Court rejected Petitioner's argument that the "trial court deprived him of his right to the effective assistance of counsel by forcing him to proceed to trial arguably ill-prepared based on [Petitioner's] perceived ambush by the State." Ex. D at 18. The Appellate Court found, as explained in the discussion regarding Petitioner's due process claim, that Petitioner was not prejudiced by the State's late disclosure, the denial of a

continuance, or the denial of Petitioner's motion to dismiss. *Id.*

The Illinois Appellate Court's decision was neither contrary to, nor an unreasonable application of, clearly established United States Supreme Court precedent or based on an unreasonable factual determination in light of the evidence. The Appellate Court found that Petitioner knew Handy identified him well before trial and had the opportunity to notice the discrepancy regarding the photo arrays. Moreover, the trial court excluded testimony regarding Handy's identifications of Petitioner and his brother in the photo arrays. The circumstances of this case are simply not so egregious to presume prejudice. *See Rodgers*, 755 F.2d at 540 (prejudice was not presumed where the trial court denied a continuance after the attorney was appointed to represent the defendant two days before jury selection began and four days before the actual trial commenced, noting that the circumstances were not "so horrendous as to raise a presumption of prejudice" because the case was not complicated and the case had already been prepared by previous counsel). Petitioner is not entitled to habeas relief based on the late disclosure of the mislabeling of the photo arrays and the denial of the motion to continue.

B. Petitioner is Not Entitled to Habeas Relief on his *Batson* Claim

Petitioner, who is African American, argues that the prosecution's use of a peremptory challenge to strike Devon Ware, one of two African Americans in the jury venire, violated Petitioner's right to a fundamentally fair

trial and right to have no juror struck for a discriminatory purpose.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held that the "Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." 476 U.S. at 89. In fact, the "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472, 478, (2008) (internal quotation marks omitted).

When analyzing a *Batson* claim, the court applies a three-step analysis applies. First, the defendant must make a prima facie showing that a preemptory challenge was exercised on the basis of race. *Rice v. Collins*, 546 U.S. 333, 338 (2006). The burden then shifts to the prosecution to present a race neutral explanation for the use of the peremptory challenge. *Id.* If the prosecution does so, the court must determine whether the defendant has proven purposeful discrimination. *Id.*

To make a prima facie showing, the defendant must show "the totality of the relevant facts give rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 94. The burden is light but is still an "essential part of the *Batson* framework." *Bennett v. Gaetz*, 592 F.3d 786, 791 (7th Cir. 2010) (noting that the trial court may "justifiably demand" that defendants meet this burden before requiring prosecutors to articulate their reasons for striking a juror). A defendant can make this showing by, for example, proof of systematic exclusion of African

Americans from the venire; proof that African Americans were substantially unrepresented on the venire from which his jury was drawn; a pattern of strikes against African Americans in the particular venire; and by showing that the prosecutor's questions and statements during voir dire and in exercising challenges support an inference of discrimination. *See Batson*, 476 U.S. at 95, 96-97; *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019). Other relevant factors include whether the victim and witnesses are African American; the percentage of preemptory challenges the prosecution used on African Americans; whether the prosecution exhausted its preemptory challenges to exclude all African Americans; and any disparity between the percentage of African Americans on the jury as compared to the venire. *See Franklin v. Sims*, 538 F.3d 661, 666 (7th Cir. 2008); *Bennett*, 592 F.3d at 791-92.

In this case, the trial court ruled that Petitioner failed to establish a prima facie case of discrimination under *Batson*. On direct appeal, the Illinois Appellate Court analyzed the issue under *Batson* and affirmed the trial court's finding that Petitioner failed to demonstrate a prima facie case of discrimination. Ex. D at 28. The Appellate Court noted the relevant factors for considering whether Petitioner made a prima facie showing, considered the record pertaining to the voir dire proceedings, and concluded the trial court correctly found that Petitioner failed to establish a prima facie case for a *Batson* violation. *Id*. 26-28. The court found no evidence of a pattern of striking African Americans from the jury and no evidence of a disproportionate number

of strikes used against African Americans. The Appellate Court further found the other factors "were unremarkable in the overall context of this case." *Id.* at 28. The Appellate Court noted that Ware's responses to the voir dire questions indicated significant and legitimate differences that distinguished him from other potential jurors. Therefore, the Appellate Court concluded that Petitioner failed to sustain his burden of demonstrating a prima facie case of racial discrimination in the jury selection process. *Id.*

The only arguments Petitioner makes to suggest that the Appellate Court's decision was an unreasonable application of Supreme Court precedent or resulted in a decision based on an unreasonable determination of the facts are that the prosecutor did not ask Ware any questions before excusing Ware; another juror, Ms. Chavarria, who had some knowledge of the location, was accepted as a juror but excluded later for a different reason; and there were only two African Americans in the venire, making the striking of Ware without asking any questions objectively unreasonable. Notably, the parties do not indicate, and the record does not reflect, whether the other African American was examined, struck, or made a part of the jury.

After reviewing the record, this Court concludes that Petitioner has not established that the Illinois Appellate court's decision was contrary to the holding in *Batson* or included an unreasonable determination of the facts in light of the record in this case. Here, the prosecutor struck one of two African American venirepersons. However, Petitioner must do more than point to the fact that the prosecutor exercised a peremptory strike on an

African American venireperson to establish a prima facie case. *Anderson v. Cowan*, 227 F.3d 893, 902 (7th Cir. 2000) (citing (*United States v. Cooke*, 110 F.3d 1288, 1301 (7th Cir. 1997)). He must also "show that the facts and 'any other relevant circumstances' raise an inference of discriminatory practice by the prosecutor." *Id.*

Petitioner does not identify any questions by the prosecutor at any time during voir dire that support an inference of racial discrimination. Mr. Ware answered a question asked of all of the venirepersons—whether he was familiar with the American Legion—in a manner different than the other venirepersons. Mr. Ware had been to the outside of the American Legion, and the shooting in question took place on the outside the American Legion. The other venireperson who indicated a familiarity with the American Legion was only familiar with the address and had never been there. Ex. D at 27; *see Henderson v. Briley*, 354 F.3d 907, 910 (7th Cir. 2004) (comparative evidence between struck jurors and empaneled jurors is relevant at the prima facie stage). Nothing about this question—and the failure of the prosecutor to ask Mr. Ware additional questions—supports an inference of racial discrimination. *See*, *e.g.*, *Bennett*, 592 F.3d 791-92 (finding the petitioner was not entitled to habeas relief where the only real evidence of discrimination the petitioner offered was that the prosecution used two of its four peremptory challenges against African Americans, who comprised just 5 of the 28 venire members, and three other African Americans were not excluded by the prosecution). Petitioner is, therefore, not entitled to habeas relief on his *Batson* claim.

C. Petitioner's Claim that the Trial Court Failed to Comply with Illinois Supreme Court Rule 431 is Not Cognizable Under § 2254

Petitioner claims that the trial court failed to comply with Illinois Supreme Court Rule 431(b) when the court asked venire members if they understood the presumption of innocence but failed to further ask if they accepted that principle. *See* Illinois Supreme Court Rule 431(b) (requiring the court ask each potential juror if he or she understands and accepts that the defendant is presumed innocent, the State must prove the defendant guilty beyond a reasonable doubt, the defendant is not required to offer evidence on his or her own behalf, and that a defendant's failure to testify cannot beheld against him or her).

Respondent argues that this claim is not cognizable because the claim only concerns a state-law issue. The Court agrees.

A state prisoner may obtain federal habeas relief "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A violation of Illinois Supreme Court Rule 431(b) does not implicate a fundamental right or constitutional protection and only involves a violation of the Illinois Supreme Court rules. *Rosario v. Akpore*, 967 F. Supp. 2d 1238, 1250 (N.D. Ill. 2013); *see also Harris v. Harrington*, No. 13-CV-2105, 2014 WL 1304995, at *4 (C.D. Ill. Apr. 1, 2014) ("There is no federal right to have potential jurors questioned in the manner set out in Illinois Supreme Court Rule 431(b), and Petitioner has relied solely on Rule 431(b) in

making his argument."). Therefore, this claim is not cognizable on habeas review.

D. Petitioner's Claim Regarding the Admission of Other-Crimes Evidence is Procedurally Defaulted

Petitioner last argues that the trial court's admission of other-crimes evidence denied Petitioner his right to due process and a fundamentally fair trial, when taken with the other violations herein, because the evidence had no probative value and served only to suggest Petitioner committed the offense charged.

Respondent argues that the claim is procedurally defaulted because the state court rejected the claim on an independent and adequate state law ground.

On direct appeal, Petitioner argued that the trial court erred in allowing Milam to introduce evidence of Petitioner's other crimes. Milam testified she told Petitioner, as she followed him to his vehicle after she watched him shoot Greer, that "he wouldn't get away with this one." *See* Ex. D at 28. Defense counsel objected, stating, "This is self-serving testimony. It's—it's going to try to bolster the credibility of whatever this witness may say—[.]" *Id.* The trial court overruled the objection. Petitioner also claims in his Amended Petition that the prosecutor reminded the jury of Milam's testimony by saying, "She tells him, you're not going to get away with this." *Id.*

The Illinois Appellate Court found that Petitioner forfeited the argument on appeal because counsel did not object on the basis that Milam's testimony constituted

other-crimes evidence. Ex. D at 29. Petitioner also did not raise the claim in his posttrial motion. *Id.*

Federal habeas review of a claim is foreclosed if the state court resolved the federal claim by relying on an independent and adequate state law ground. *Kaczmarek v. Rednour*, 627 F.3d 586, 591 (7th Cir. 2010). A state law ground is independent "when the court actually relied on the procedural bar as an independent basis for its disposition of the claim." *Id.* at 592. A state law ground is adequate "when it is a firmly established and regularly followed state practice at the time it is applied." *Id.*

Here, the Appellate Court actually relied on the procedural bar as an independent basis for its disposition of Petitioner's other-evidence claim. Moreover, the forfeiture rule requiring a defendant to object at trial and include the objection in a posttrial motion is an adequate state law ground. *Gray v. Pfister*, 6 F. Supp. 3d 871, 886 (C.D. Ill. 2013); *see also Miranda v. Liebach*, 394 F.3d 984, 997 (7th Cir. 2005) (finding the Illinois Appellate Court's disposition of the claim rested on an adequate and independent state ground—that the petitioner waived the claim when he failed to assert it in a posttrial motion for a new trial as required by Illinois law). Therefore, this claim is procedurally defaulted. *Johnson v. Loftus*, 518 F.3d 453, 455 (7th Cir. 2008) ("A procedural default also occurs when a state court disposes of a claim on an independent and adequate state ground.").

A petitioner can overcome a default by showing good cause for the default and resulting prejudice or by showing a fundamental miscarriage of justice would

result if the claim were not addressed on the merits. *Smith*, 598 F.3d at 382. Petitioner has made no effort to make such a showing on this claim. Therefore, Petitioner is not entitled to relief on his claim that the admission of other-crimes evidence denied him a fair trial because the claim is procedurally defaulted.

V. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing § 2254 Proceedings, this Court must "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." When a district court rejects the constitutional claims on the merits, a certificate of appealability may be issued if the petitioner shows "that reasonable jurors would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where a district court dismisses the petition based on procedural grounds, a certificate of appealability should issue only when the petitioner shows both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484; *see also Jimenez v. Quarterman*, 555 U.S. 113, 118 n.3 (2009). Applying these standards, the Court GRANTS a certificate of appealability on the *Batson* issue but declines to grant a certificate of appealability on the remaining issues.

VI. CONCLUSION

For the reasons stated, Petitioner's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Petition) (d/e 3) and Amended Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (d/e 18) are DENIED. The Court GRANTS a certificate of appealability on the *Batson* issue but declines to grant a certificate of appealability on the remaining issues. This case is closed.

ENTERED: October 7, 2019

FOR THE COURT:

s/ *Sue E. Myerscough*
SUE E. MYERSCOUGH
UNITED STATES
DISTRICT JUDGE

Appendix C

NO. 4-10-0409

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from Circuit Court of Champaign County
Plaintiff-Appellee,	)	No. 08CF32
v.	)	Honorable
CHARMELL D. BROWN,	)	Thomas J. Difanis, Judge Presiding.
Defendant-Appellant.	)	

JUSTICE APPLETON delivered the judgment of the court.
Justice McCullough concurred in the judgment.
Justice Pope specially concurred in the judgment.

ORDER

Held: 1. Where defendant failed to demonstrate that he was prejudiced by the State's late disclosure of certain discovery material, the trial court did not err in denying defendant's motion to continue the trial; nor was defendant denied the effective assistance of counsel based on counsel's lack of

adequate time to prepare for trial in light of the late disclosure.

2. The trial court erred in failing to fully comply with Supreme Court Rule 431(b) admonishments during *voir dire*; however, defendant forfeited review of the issue by failing to object. The issue was not reviewable under the plain-error doctrine because the evidence was not closely balanced and the error was not so serious that it denied defendant a substantial right.

3. Defendant failed to demonstrate a *prima facie* case of racial discrimination in the jury-selection process when the State excused an African-American male from service.

4. Defendant forfeited his claim that the trial court improperly allowed the introduction of evidence at trial tending to demonstrate defendant's involvement in other crimes.

5. Defendant failed to demonstrate that the prosecutor engaged in any misconduct during the trial-court proceedings.

In this direct appeal, from a jury's verdict, finding defendant, Charmell D. Brown, guilty of first-degree murder and aggravated battery with a firearm, he raises several contentions of reversible error. First, he claims the trial court erred in failing to allow his attorney time to adequately prepare for trial when the State, on the day of trial, revealed there had been a mix-up in the

paperwork related to a witness's identification of defendant from a photo array.

Second, he claims the trial court failed to fully comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) during *voir dire* by failing to ask each individual juror if he or she accepted the four principles set forth in that rule. Third, he challenges the State's use of one of its preemptory challenges during jury selection. The State asked that an African-American male be excused from service. Defendant objected on the basis that the State's decision was based solely on potential juror's race. The trial court overruled defendant's objection, finding defendant had failed to make a *prima facie* case of racial discrimination. Here, defendant challenges that decision.

Fourth, defendant claims that the trial court erred in allowing one of the States witnesses, the eyewitness to the shooting, make a comment on the witness stand that could reasonably be interpreted to imply that defendant had been involved in other crimes, including other murders. Defense counsel objected at the time, but not on the grounds that the testimony constituted other-crimes evidence. Because defendant did not challenge the testimony on the same grounds as he does in this appeal, we find he forfeited that issue for review.

Fifth, defendant claims that the prosecutor's (1) failure to reveal, until the day of trial, there was a mistake on the photo array, (2) failure to agree that defendant should be granted a continuance to adequately prepare for trial in light of the State's late disclosure, (3) intentional withholding of the information

until the day of trial, (4) failure to correct the trial court's admonitions to the jury of the four principles set forth in Rule 431(b), (5) request to remove an African-American male as a juror, (6) motive in eliciting other-crimes evidence from the State's pivotal witness and repeating that testimony to the jury during closing arguments, and (7) use of a photograph of the decedent during closing arguments, when taken together, constituted prosecutorial misconduct and served to undermine defendant's right to a fair trial. Because we disagree that any of the above-claimed errors jeopardized defendant's right to a fair trial, we affirm defendant's convictions.

I. BACKGROUND

In January 2008, defendant was indicted on three counts of first-degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2006)) and two counts of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006)) for shooting three people outside of the American Legion hall (also referred to as the club) in Champaign. One victim, Tyrone Greer, died and the other two victims, Eric Lucas and Johnny Valcourt, were injured. Prior to the start of defendant's trial, the State announced it was dismissing one count of aggravated battery with a firearm as it related to the shooting of Valcourt.

On December 7, 2009, the first day of defendant's trial, before jury selection, the parties presented the trial court with various preliminary matters. The State indicated there had been a typographical error on the two photo arrays shown to one of the State's witnesses. Apparently, defense counsel had not known there was an error and claimed the State had violated the rules of

discovery. The State insisted that defense counsel had been produced everything regarding the witness's identification of defendant as the shooter. Noting that the parties' explanations were "incredibly confusing," the trial court stated that it would allow the State to present an "offer of proof before the jury hears any of this testimony." Defense counsel requested a continuance. The court assured counsel that should the offer of proof indicate the State had committed a discovery violation, or what the court called "a violation of the *Brady* material" (referring to *Brady v. Maryland*, 373 U.S. 83 (1963)), it would impose sanctions, which could include barring the evidence, a mistrial, or "any number of things." However, "on the eve of trial," the court wanted to hear "what it is we're talking about." The State again insisted that counsel had "all the documents" and this was something the State had "figured out in trial preparation."

The trial court proceeded with the selection of the jury. The pertinent facts related to the court's *voir dire* as it relates to defendant's Rule 431(b) claim of error and the facts related to his *Batson* challenge are set forth in the respective section in which we analyze defendant's claims of error below.

The trial continued over the course of eight days with a total of 33 witnesses testifying. Defendant did not testify. As the testimony of a number of the witnesses is of little, consequence to our decision, we will summarize in detail only that which is either pertinent to the issues discussed below or necessary to an understanding of the circumstances surrounding the incident.

On December 29, 2007, Tyrone Greer, who lived in Springfield, had traveled with a group of friends to Champaign where Tamika Kirkwood lived. Kirkwood had planned a birthday celebration at the American Legion for her brother, LaWayne Johnson, Greer's friend, who also lived in Springfield. The group of friends met at Kirkwood's house and then arrived at the club at approximately 11 p.m. Apparently, the club was open to the public, as there were several other birthday celebrations occurring at the same time. By all accounts, it was fairly crowded by midnight. At approximately I a.m., the bouncers working security asked Greer, who was involved in some type of verbal altercation either (there were varying reports) with a female patron, defendant, or defendant's brother, Charnell Brown, who was wearing a black fur coat that evening, to leave the club. Johnson approached as one security employee was talking with Greer. Johnson assured the employee that Greer would leave without incident. In the meantime, Kirkwood and the rest of their group, including Tegan Milam, gathered each other and their belongings to leave with Greer. As Greer and Johnson were standing outside of the club at the front door and while other patrons were waiting in a line to enter, Greer was shot three times in the upper body. Two other people standing in line were shot in the leg. Greer stumbled into the club, collapsed on the floor, and died.

Before summarizing the specific testimony presented at trial, we will summarize the testimony presented as part of the State's offer of proof, which occurred in the middle of the trial. The State called Tawanda Handy, who testified that she was sitting at

the bar at the club when she heard an argument between two males, later identified as defendant and Greer. She said she did not pay much attention to them, as Greer walked away from the argument. However, she then heard defendant say to the man in the fur coat that security had not searched him at the door and he had a "'mf pistol'" in his sock. She said the comment alarmed her, so she retrieved her friend and started to leave.

A few days after the incident, detectives showed her a photo array, asking if any of those pictured were the men she saw at the American Legion that night. She recognized photo number four as the man who made the comment about the gun in his sock. From the second photo array, she recognized photo number two as the man with the black fur coat. She said she was not shown a list of names of the individuals that appeared in the photo arrays. She acknowledged signing the instruction sheets after she made her identifications. Those sheets and photo arrays were introduced into evidence.

Detective Donald Shepard testified that he and Detective Mary Bunyard showed Handy the photo arrays two days after the incident at her place of employment. The arrays were compiled by another detective, who used two because there were two suspects, defendant and his brother. The array identified as photo lineup number one contained defendant's photo in the number-four spot. Detective Shepard said Handy pointed to photo number four and identified him as the man who made the comment that he had a pistol in his sock. Photo lineup number two contained Charnell Brown's photo in the number-two spot. Handy pointed to Charnell's photo, identified him as the man in the fur

coat, and said she knew of him by his street name "Stretch." Shepard said Handy did not show any hesitancy in identifying either suspect. The photos and the corresponding names are correct. He watched Handy pick out the photos herself and she completed the forms correctly.

Detective Shepard explained that the instruction and answer sheets for each photo array got mixed up or mislabeled. The instruction or answer sheet which indicated that Handy had selected photo number four had "photo array number two" written on top, when it should have been labeled as "photo array number one." Detective Bunyard testified consistently with Detective Shepard's testimony, stating that Handy had selected the photos of defendant and his brother and the mistake occurred in the labeling of the corresponding instruction/answer sheets.

After considering this testimony, the trial court found that, based on the testimony presented, it was the instruction sheet that was in error and not the fact that Handy had identified people other than defendant and his brother. Defense counsel argued that the State acted in bad faith in not revealing the error until the day of trial. Counsel accused the State of intentionally preventing him from making an argument of misidentification and of violating the discovery rules. The court held that the State had not committed a *Brady* violation, as it did not want "to go that far," but it had committed a discovery violation. The court decided it would allow Handy to testify at trial for the State about what she saw that night, but bar any testimony-

regarding her identification of defendant or his brother from the photo arrays.

As for the evidence presented at trial, the State called Robert Sallee, manager at the American Legion, who described the general layout of the club for the jury. The interior was comprised of two separate areas separated by a fireplace. One side contained the bar and the other side, the dance floor. According to Sallee, sometime during the night, security personnel became aware of a problem between Greer and a female patron. They asked Greer to leave and he did so in a cooperative manner. Approximately 20 minutes later, Sallee said he was notified there had been a shooting outside. He saw Greer stumble into the club and collapse on the floor. He then saw a man, who was approximately 23 or 24, dark skinned, 170 to 180 pounds, 6 feet tall in a black fur coat standing over Greer. The man mumbled something and then left.

Vernon King, one of Greer's friends who had also traveled from Springfield for Johnson's party, testified that he saw Greer talking to security, while a friend was trying to get Greer to "calm down." Greer had said he "got into it with somebody" at the bar. He pointed to the man with a black fur coat. King saw the two stare at each other, but did not see any physical altercation. King said Greer and Johnson walked out of the club while he gathered everyone else to join them. As he was doing so, King heard gunshots and saw Greer stumble back into the club. King saw the man Greer "was in conflict with" come back inside the club, screaming "'that's what you get mother f***.'" The man, wearing the black fur coat, turned around and left. King rushed over to Greer and

saw blood coming from his mouth. King, another man, and a female began performing cardiopulmonary resuscitation (CPR) on Greer. When paramedics arrived, they took over assisting Greer, and everyone was told to leave the premises.

Alvin Mims, Johnson's and Kirkwood's brother who was also at the party, testified that Greer had mistakenly bumped into a female on the dance floor. They exchanged words. Greer left the dance floor and went to the bar. The female followed Greer and they exchanged more words. Security then asked Greer to leave the club. Mims said he started "rounding everybody up" to leave. Mims was standing by the door when he heard gunshots. He said he saw Greer run back inside the club after being shot. Mims said he could not describe "what the guy looked like[,] but some guy ran in behind him, in a black coat, stood over him and said a few words to him that was very disrespectful." Mims had seen the man in the coat earlier standing inside the club, but had not seen any altercation between him and Greer. After the man said the few words while standing over Greer, he "ran back out" and "jump[ed] in a white car with some rims on it, and drove off." On cross-examination, Mims admitted he had told the detectives during their investigation that the man in the black coat had something black in his hand when he came back into the club.

Kirkwood testified that at the time of the incident she was dating Greer. She had not seen any altercation between Greer and anyone at the party. She said the bouncer informed her that Greer needed to leave the club. She started "round[ing] up the crowd" to leave. She

handed her keys to Tegan Milam to warm up the car. As they were getting ready to go out the door, Greer "was running in the door." Kirkwood ran out the door, looking for Johnson. She saw Milam, who she described as "hysterical" and "yelling out a license plate number." Milam told Kirkwood that Greer had been shot. Milam repeated the license plate number over and over until the police arrived.

Johnson testified that he saw Greer talking to security. He approached them and discovered that security was "putting [Greer] out" of the club. He took Greer outside after telling Kirkwood to gather everyone else so they could leave. Johnson and Greer stopped outside the front door to wait for everyone else. Johnson asked Greer to explain what had happened inside. As he was doing so, Johnson heard gunshots: He saw two people, but did not see the person who had fired the gun. Greer was shot. Johnson at first ran away from the area, but he then went back inside the club to check on his friends. He saw Greer lying on the floor inside with a female and King performing CPR. On cross-examination, Johnson recalled that he had told the detectives that there were two people shooting.

Milam testified to the events fairly consistently with the other witnesses. She said once she learned Greer had been asked to leave, she got the car keys from Kirkwood. She walked out of the club toward the parking lot, walking past Johnson and Greer. She turned around to say something to Johnson when she saw defendant and the man in the fur coat exit the club from the side door. She saw defendant reach into his clothes, lift his right arm, and start shooting. She said the first shot hit Greer

in the shoulder. Defendant kept walking and shooting and eventually stood in front of Milam while firing. The man in the fur coat ran into the club. He came out and got into a white car that was parked in front of the building. Two other people standing outside were shot as well. Milam watched defendant, who she identified in court as the gunman, get into his car, a red or maroon newer model car. Milam yelled at him that "he wouldn't get away with this one." Defendant drove off. Milam memorized defendant's license plate number by repeating it over and over until the police arrived.

Milam testified that a few days after the incident, Detective Nathan Rath spoke with her and showed her a photo array. Milam chose number four as the photo of the person who had shot Greer. She did not recognize anyone from the second set of photographs.

Richard Carroll, a Champaign police officer, testified that he was patrolling near the American Legion. He heard an officer call for backup regarding the shooting. When he got to the club, Milam and Kirkwood approached. Milam was repeating what he learned was a license plate number of a suspect. Officer Carroll repeated the information over the police radio. Kirkwood described a white car. Milam corrected her, telling Kirkwood that the shooter got into a red or maroon car with the license plate number she had memorized. Officer Carroll described both vehicles over the radio.

Eric Lucas testified that he had arrived at the American Legion by himself at approximately 12 a.m. He was waiting in line to get in when he heard gun shots

but did not see who was shooting. He started running when he was shot in the leg. He was treated and released from Carle Hospital.

Detective Rath testified that he went to Carle Hospital immediately after the shooting to talk with Milam. The next day, he met with Milam to show her a photo array. Showing her the first photo array, Milam immediately pointed to defendant's photo (photo number four), stating "'oh, my God. That's him. Oh, my God." In the original photo array that Rath showed Milam immediately following the incident at the hospital, Milam was unable to identify a suspect. Rath said defendant's photo was not included in that array. Dr. John Scott Denton, a forensic pathologist, testified that he performed the autopsy on Greer, who had suffered three gunshot wounds. According to Dr. Denton, it appeared Greer had been shot from more than 18 to 24 inches away. He had one gunshot wound in his back where the bullet had traveled through his aorta, one on his shoulder, and one in his upper arm. According to Dr. Denton, Greer died from all three gunshot wounds.

Brian Long, a forensic scientist with the Illinois State Police, testified that he found no fingerprints on the four bullet casings that he had examined. Caroline Kersting, another forensic scientist, testified that the four bullets had been fired from the same weapon.

Detective Mary Bunyard testified that she was present when Charnell Brown was arrested in relation to this incident. At the time, she took into evidence a black fur coat and two T-shirts.

Finally, for the State, Twanda [sic] Handy testified that she was at the American Legion that night. As she was sitting at the bar, she heard two men arguing, but "didn't think anything of it." One was wearing a green jacket. The other, she identified in open court as defendant. A man in a black fur coat approached. Defendant made a statement to the man in the fur coat "that he had a pistol in his sock." She said his exact words were "'the mother*** didn't search me, I have a pistol in my sock.'" She said she immediately "got up and grabbed [her] girlfriend, and it was time to go." By the time she had found her girlfriend and proceeded to the front door, security was not allowing anyone to leave. She saw the man in the green jacket stagger into the club from the front door. When she was able, she proceeded to her vehicle. She said she did not see defendant or the man in the fur coat.

On cross-examination, defendant's counsel questioned Handy about how she could characterize the interchange between the two men as an argument when she was unable to hear the exact words exchanged and when the music was so loud. Handy responded that the two men were very loud and "it was apparent that they were arguing." Handy believed it was approximately 10 to 15 minutes before the man in the fur coat approached defendant.

Defendant presented the testimony of Stephen Campbell, who testified that he was working as security for the American Legion on the night of the incident. Campbell noticed a man (presumably Greer) continuously bumping into people on the dance floor. Campbell asked him to go sit down. He did, but not long

after, he was on the dance floor again "causing problems." Campbell led the man off the floor over to the bar area. The man told two girls that "he was going to slap them." Campbell said that was "the last time, he was going to have to leave." Campbell escorted him to the front door and asked him to wait until he could get someone else to "take him out." Campbell went to find a member of the man's party. He said by the time he got back, the man "ran back in" and "was on the floor." Someone told Campbell the man had walked outside on his own and had been shot.

Jamila Thomas testified that she was at the American Legion that night celebrating another birthday. As she was trying to leave the club, she was stopped "because there was a guy out of control." She was told to wait "until they get him out the door." She described the man as wearing a green vest (presumably Greer). She believed he "had got a little too tipsy in the club." When she was cleared to go, the man was standing outside. A man in a black fur coat was standing with the man in the green vest. "They were having words with each other." Thomas got in her car, but saw the man in the fur coat walk around the corner. He came back "without a coat on, and just opened fire towards the door where people were standing." When he came back, he was wearing a white T-shirt. After he fired his gun, he went back around the corner, got into a older-model Pontiac or Oldsmobile four-door car, and left.

Thomas testified that the detectives had shown her a photo array of 12 individuals, but she was unable to identify any of them as the shooter. Defendant's counsel asked Thomas if defendant was the shooter. She said:

"No (shakes head back and forth) I don't, no, no he's not even the right color. I didn't see his skin tone color. It was darker." However, on cross-examination, Thomas admitted that she could not pick the shooter out of the photo array because she did not see his face.

Jeffrey Palmer, a private investigator, testified that he investigated this case at defense counsel's request. In April 2008, Palmer had contacted Milam, the eyewitness to the shooting, and scheduled a time to meet with her. Shortly before the meeting time, Milam called Palmer and said she had spoken with someone who had informed her that Palmer was "working for the other side" and told her not to speak about the case. Milam refused to provide any details of the incident. However, she did say that, in her opinion, the police had not done a "complete job, that there should have been more people in custody relating to the incident."

After Palmer's testimony, the defense rested. The trial court asked defendant if he wished to testify and defendant said he did not. Defendant moved for a directed verdict, which the court denied. After closing arguments and instructions, the jury retired to deliberate. Four hours later, the jury returned guilty verdicts.

Defendant filed two posttrial motions, preserving the issues he raises in this appeal, except for the Rule 431(b) issue. The trial court denied defendant's motions and sentenced him to 60 years in prison for first-degree murder and 30 years in prison for aggravated battery with a firearm. The sentences were ordered to be served consecutively. This appeal followed.

II. ANALYSIS

In this appeal, defendant contends he is entitled to a new trial due to several trial errors. His claims center on his position that, despite the jury's verdicts, the State failed to prove beyond a reasonable doubt that he was the gunman. He claims that, due to these purported trial errors, the information submitted to the jury was misleading and prejudicial to defendant. We will address each contention of error in turn.

A. Police Officer's Error in Labeling Photo Arrays

First, defendant argues that, during his trial, "significant questions developed" as to the witness's identification of him as the "shooter." One such question arose after his counsel learned, on the day of trial, that there had been an error relating to the two photo arrays shown to Handy. Counsel claimed he was surprised at the prosecutor's announcement that the photo arrays had been incorrectly labeled.

In ruling on defense counsel's motion to continue, the trial court noted that it was clear from the testimony presented during the offer of proof that Handy had identified defendant and his brother in the photo arrays. It was equally clear, according to the court, that the mistake came when one of the two detectives labeled the answer sheet as those were being passed among them and Handy. However, defendant argues that it was possible that Handy had actually selected photos of two other men, not defendant nor his brother, and that the answer sheets were correctly labeled.

Defendant claims he was deprived of a fair trial by the State's failure to timely disclose the photo-array discrepancy, an error compounded by the trial court's denial of his motion for a continuance upon his discovery of the mix up. He accuses the State of "purposefully undermin[ing]" a fair trial by "intentionally avoiding" its duty to disclose.

We fail to recognize the gravity of the situation as described by defendant. For instance, in his brief, defendant makes the following representation: "All pre-jury *voir dire* discovery revealed [Handy] failed to identify defendant as the speaker." It was not until the day of trial, counsel claims, that he learned that Handy had, in fact, identified defendant as the man claiming he had a gun in his sock at the American Legion. The record indicates otherwise. At a pretrial hearing in November 2008, one year before trial, counsel informed the trial court "there's only one individual that *** has identified the defendant." Counsel was referring to Milam, not Handy. Thus, it is apparent he indeed believed, at that point, that Handy did not pick defendant's photograph from the array. The prosecutor did not correct him and, in fact, had just represented to the court that she "believe[d] so" that only one individual was shown a photo lineup. Though, at the same hearing, Detective Dale Radwin testified that, from his perusal of the various reports and records in the case file, he learned that the witness seated at the bar (Handy) had identified defendant "through a photo spread."

Further, in Detective Shepard's interview of Handy on December 31, 2007, at her place of employment, Handy told Shepard that photo number four from photo

array number two was a picture of the individual who had made the gun-in-his-sock comment. And, photo number two from photo array number one, was the man in the black fur coat who had approached as the two men argued. Although according to Handy's interview, it appears she did not identify defendant or his brother, Detective Shepard's supplemental narrative report dated January 16, 2008, should have put defendant on notice that Handy had, in fact, picked defendant and his brother as the two suspects. The report indicated the photo arrays had been mislabeled as number one and two.

In his supplemental report, Detective Shepard wrote:

> "I showed her [(Handy)] two photo line-ups. She positively identified Charnell Brown as the person with the black fur coat on. She positively identified Charmell Brown as the person that was in the argument and made the comment he had a pistol in his sock.
>
> I used the same six photo line-ups with several people I spoke to. I have entered them into evidence at CPD and attached a copy of them to this report. They are labeled 'Line-Up #1' and 'Line-Up #2.' Line-Up #1 has photo #4 as Charmell Brown and Line-Up #2 has photo #2 as Charnell Brown."

It is apparent there was a discrepancy in the labeling of the two photo lineups when comparing the transcript of Handy's interview to Detective Shepard's January 16,

2008, report. This discrepancy should have been sufficient to put counsel on notice that, at a minimum, the matter needed clarification. We agree with the State that it seemed clear that defendant's photo appeared in spot number four on photo array number one, not photo array number two, as it had been labeled at the time of her interview. Defendant does not claim that he did not receive in discovery Detective Shepard's January 16, 2008, supplementary police report, which contained the quotes set forth above. In sum, this evidence from the record belies defendant's representation that he never knew Handy had identified defendant in the photo array until the day of trial. Because this information was of record, the clarification or explanation of that information on the day of trial cannot be described as "earth-shattering," as defendant claims in his brief.

Although we agree with the trial court that the State should have divulged the discrepancy when it became aware of it, we conclude that defendant did not suffer sufficient prejudice as a result of the State's failure so as to justify reversal.

> "The failure to comply with discovery requirements does not in all instances necessitate a new trial. [Citation.] A new trial should only be granted if the defendant is prejudiced by the discovery violation and the trial court failed to eliminate the prejudice. [Citation.] Among the factors to be considered in determining whether a new trial is warranted are the strength of the undisclosed evidence, the likelihood that prior notice could have helped the defense discredit the evidence, and the

> willfulness of the State in failing to disclose. [Citation.]" *People v. Harris*, 123 Ill. 2d 113, 151-52 (1988).

Defendant had the opportunity to notice the discrepancy and probe the State for an explanation, rather than building his defense around a questionable issue. Given the information contained in the record, we find the trial court properly denied defendant's motion to dismiss and his request for a continuance. We further find that, because the State failed to timely disclose the discrepancy, regardless of how "obvious" the discrepancy was, the court did not err in prohibiting the State from presenting testimony regarding Handy's identification of defendant in the photo array as a discovery sanction. The imposition of the sanction was sufficient to cure the error, as it did not rise to the level of jeopardizing defendant's right to due process. See *People v. Lipscomb*, 215 Ill. App. 3d 413, 437-38 (1991) (trial court's admonition to the jury cured any prejudicial impact of the State's failure to tender one page missing from the police officer's report; the defendant's due-process rights were therefore not implicated).

Further, we conclude that defendant was not denied his right to the effective assistance of counsel based on the court's denial of his motion for a continuance. Contrary to the State's argument in response, defendant did not claim he was denied the effective assistance of counsel due to counsel's substandard performance—a claim which would trigger a *Strickland* analysis (see *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Rather, defendant claims the trial court deprived him of

his right to the effective assistance of counsel by forcing counsel to proceed to trial arguably ill-prepared based on defendant's perceived ambush by the State. This argument is without merit. As explained above, we conclude that defendant was not prejudiced by (1) the State's late disclosure, (2) the court's denial of a continuance, or (3) the court's denial of defendant's motion to dismiss. We find no reversible error.

B. Jury Selection

Next, defendant argues that the selection of the jury was improper for two reasons: (1) the trial court failed to comply with questioning pursuant to Supreme Court Rule 431(b) and (2) a juror was excused for no reason other than he was an African-American male.

1. *Rule 431(b)*

At the start of defendant's jury trial, in the presence of the entire venire, the trial court stated the following principles: (1) defendant is presumed innocent and that presumption remains with him throughout the trial; (2) the State has the burden of proof and must prove defendant guilty beyond a reasonable doubt; (3) defendant does not have to testify; and (4) defendant's decision not to testify cannot be held against him. On separate occasions, the court advised each panel of four prospective jurors and two alternates in substantially the same manner as follows:

> "As I've indicated to you, the defendant is presumed to be innocent of the charges against him. And that the defendant is not required to

> offer any evidence on his own behalf. But should the defendant offer evidence and decides to call witnesses or present evidence on his behalf, will you weigh this evidence just as you would the evidence presented by the State?"

All jurors answered yes. After the court and both counsel had the opportunity to question each panel of four and the two alternates, the following exchange (or an exchange substantially similar) occurred:

> "THE COURT: All right. For the four of you, the four of you understand that the defendant is presumed to be innocent of the charges against him. That before the defendant could be convicted, the State must prove him guilty beyond a reasonable doubt. That the defendant is not required to offer any evidence on his own behalf. And that if the defendant chooses not to testify, his failure to testify cannot be held against him in any way. The four of you understand those instructions. Is that correct?
>
> FOUR JURORS: (Indicating in the affirmative).
>
> THE COURT: And again, they answer in the affirmative.
>
> Now, if the four of you will please raise your right hands."

Each juror was impaneled and sworn in substantially the same way. Defendant's counsel did not object. Prior to

their deliberations, the jury was instructed on all of these principles as well.

In this appeal, defendant argues that the trial court failed to fully comply with Rule 431(b). Though the court asked each juror if he or she "underst[oo]d those instructions" (meaning the four principles set forth in Rule 431(b)), the court failed to give each juror the opportunity to state whether he or she *accepted* those principles--an error, defendant claims, justifying reversal.

Defendant concedes the contention of error was not preserved in the trial court proceedings, and therefore, in order for this court to review the error, we must do so under the plain-error doctrine. Specifically, defendant contends that plain-error review is appropriate in this case because the evidence of defendant's guilt was closely balanced. We review the issue of the trial court's compliance with a supreme court rule *de novo*. *People v. Garner*, 347 Ill. App. 3d 578, 583 (2004).

Rule 431(b) was adopted in 1997 to ensure compliance with *Zehr*. See *People v. Zehr*, 103 Ill. 2d 472, 477 (1984); Ill. S. Ct. R. 431(b), Committee Comments (eff. May 1, 1997). The *Zehr* court held that "essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify in his own behalf cannot be held against him." *Zehr*, 103 Ill. 2d at 477. As originally enacted, Rule 431(b) provided that the trial court was not obligated to ask potential jurors whether they

understood and accepted the *Zehr* principles absent a request from defense counsel. See *People v. Glasper*, 234 2d 173, 187 (2009).

Effective May 1, 2007, Rule 431(b) was amended to impose "a *sua sponte* duty on the trial court to question each potential juror as to whether he understands and accepts the *Zehr* principles." *People v. Gilbert*, 379 Ill. App. 3d 106, 110 (2008). That is, such questioning was no longer dependent upon a request by defense counsel. *Gilbert*, 379 Ill. App. 3d at 110. Rule 431(b) currently provides as follows:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and .accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

The committee comments provide as follows:

> "The new language is intended to ensure compliance with the requirements of *People v. Zehr*, 103 Ill. 2d 472 (1984). It seeks to end the practice where the judge makes a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law." Ill. S. Ct. R. 431(b), Committee Comments (eff. May 1, 1997).

In this case, the trial court advised each venireperson of all four *Zehr* principles, asking each if he or she understood them. However, the court never gave each juror the opportunity to state whether he or she accepted each principle. The rule specifically provides that the court *shall* ask whether each juror "understands and accepts" the principles. In carrying out this duty, the court is required to allow each juror an opportunity to respond. *People v. Chester*, No. 4-08-0841, slip op. at 7 (Ill. App. Apr. 11, 2011), ___ Ill. App. 3d, ___, ___. Because the court did not ask each juror whether he or she accepted each principle, nor gave them an opportunity to respond to such an inquiry, we find the court in this case did not follow the precise mandate of Rule 431(b), and this failure to comply was error.

Having found error, we next determine whether the error qualifies as one justifying, plain-error review. This court may review an error under the plain-error doctrine if (1) the evidence is closely balanced or (2) the error is "so substantial that it affected the fundamental fairness of the proceeding, and remedying the error is necessary to preserve the integrity of the judicial-

process." *People v. Hall*, 194 Ill. 2d 305, 335. (2000). Defendant seems to place a share of the burden of ensuring compliance with the rule upon the State. He insists that our review "should be pursuant to 'ordinary' error because to do otherwise would be rewarding the State for its reticence." Yet, defendant also suggests we review the error under the plain-error doctrine. In making that argument, he attempts to distinguish *People v. Thompson*, 238 Ill. 2d 598 (2010), a case which discusses only the second prong, while arguing only the merits of the first prong--that the evidence presented at trial was closely balanced.

We first note that the supreme court in *Thompson* held that a trial court's failure to comply with Rule 431(b) does not necessarily render a trial fundamentally unfair or unreliable and does not require automatic reversal. *Thompson*, 238 Ill. 2d at 614-15. Only upon the defendant's presentation of evidence that the jury was biased would his fundamental right to a fair trial be questioned. *Thompson*, 238 Ill. 2d at 614. The supreme court stated: "We cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning." *Thompson*, 238 Ill. 2d at 614. Thus, in analyzing the issue under a second-prong, plain-error analysis, the critical question is whether the defendant has shown that the trial court's Rule 431(b) error resulted in impaneling a biased jury. See *Thompson*, 238 Ill. 2d at 613.

As stated above, defendant in this case does not argue the trial court committed a substantial error and has offered no evidence of bias. Thus, without such evidence, defendant cannot demonstrate that the error

affected the fairness of his trial or challenged the integrity of the judicial process. See *Thompson*, 238 Ill. 2d at 615.

Defendant insists that his conviction be reversed and the matter remanded for a new trial due to the trial court's error based on the fact that the evidence was closely balanced. Defendant bears the burden of persuasion in attempting to convince this court that the evidence against him was not overwhelming, such that the error could have affected the jury's verdict. See *People v. Herron*, 215 Ill. 2d 167, 187 (2005) (defendant bears the burden of persuasion to demonstrate that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against the defendant). He fails to do so. Instead, he claims only that "because the evidence was closely balanced, the blended failures of the trial court, State and defense regarding 'understand and accept' should culminate in reversal and remand for trial anew." This conclusory statement is not sufficient to sustain his burden.

Rather, we find that, contrary to defendant's assertions, the evidence at trial clearly established defendant's guilt. One witness, Handy, identified defendant in open court as the man who was arguing with the victim and who subsequently made a comment to another man that he had a gun in his sock. Another witness, Milam, testified that she saw a man exit a side door of the club, walk around to the front, reach into his clothing, and shoot Greer. She watched him get into a red newer model car as she memorized his license plate. The next day, Milam selected defendant's picture from a

photo array as the suspect. She also identified him in open court as the shooter.

Based solely on these witnesses, we conclude that the evidence presented at defendant's trial overwhelmingly implicated him and established his guilt. He has failed to carry his burden of persuasion that the evidence against him was closely balanced. As a result, the trial court's Rule 431(b) error is not reversible under the first prong of the plain-error doctrine either. Thus, after our analysis of the facts of this case, we conclude that the trial court's failure to strictly comply with the requirements of Rule 431(b) did not rise to the level of plain error. Accordingly, defendant has forfeited his claim and we affirm defendant's convictions.

2. *Batson Challenge*

Next, defendant claims that a new trial is warranted because the State used its peremptory challenges to exclude an African-American male from the jury in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). During jury selection, the State used one of its preemptory challenges on potential juror Devon Ware, one of only two African-American males in the entire venire. Defendant objected to excusing Ware for apparently reasons related only to his race. In responding to defendant's objection, the trial court stated:

> "The issue on a *Batson* challenge, the first issue is, is there a *prima facie* case that a discriminatory practice is being conducted by the State. And we don't get to a race neutral

> explanation until the court has made a determination of a *prima facie* case. It's the court's opinion that there is not a *prima facie* case, and I am not going to require the State to provide a race neutral explanation. So the motion--the objection is overruled. And Mr. Ware is, I believe, properly excused."

A trial court's decision on a *Batson* claim will not be reversed unless it is clearly erroneous; this deferential standard is appropriate because of the court's pivotal role in the evaluation process. *People v. Davis*, 233 Ill. 2d 244, 261 (2009). Defendant has the burden of proving a *prima facie* case and preserving the record, and any ambiguities in the record will be construed against him. *Davis*, 233 Ill. 2d at 262.

In *Batson*, the United States Supreme Court held that the fourteenth amendment's equal-protection clause prohibits the State from using a peremptory challenge to exclude a prospective juror solely on the basis of race. *Batson*, 476 U.S. at 89, Under *Batson*, the equal-protection clause of the fourteenth amendment is violated where the facts show that the State excluded an African-American venireperson on the assumption that the person will be biased in favor of defendant simply because of their shared race. *Batson*, 476 U.S. at 97.

The Court provided a three-step analysis for evaluating claims of discrimination in jury selection. *Rice v. Collins*, 546 U.S. 333, 338 (2006). First, the moving party has the burden to show that the nonmoving party exercised its peremptory challenge on the basis of race. *Rice*, 546 U.S. at 338 (citing *Batson*, 476

U.S. at 96-97); *People v. Easley*, 192 Ill. 2d 307, 323 (2000). If a *prima facie* case is made, the process moves to the second step, where the burden of persuasion shifts to the nonmoving party to present a race-neutral reason for excusing the venireperson. *Rice*, 546 U.S. at 338 (citing *Batson*, 476 U.S. at 97-98); see also *Easley*, 192 Ill. 2d at 323-24. "Although the prosecutor must present a comprehensible reason, 'the second stop of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." *Rice*, 546 U.S. at 338 (quoting *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995)).

Once the nonmoving party presents its reason for excusing the venireperson in question, the process moves to the third step in the analysis. In that third step, the trial court must determine whether the moving party has sustained its burden of establishing purposeful discrimination. *Rice*, 546 U.S. at 338 (citing *Batson*, 476 U.S. at 98). "This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Rice*, 546 U.S. at 338 (quoting *Purkett*, 514 U.S. at 768).

First, we will discuss whether defendant established a *prima facie* case of racial discrimination. In making a *prima facie* case, the moving party must produce evidence sufficient to permit the trial court to draw an inference that discrimination has occurred. *People v. Hogan*, 389 Ill. App. 3d 91, 99 (2009). The court may conduct a "comparative juror analysis," as well as consider additional factors, such as: (1) the racial identity

between the defendant and the excluded venirepersons; (2) the pattern of strikes against African-American venirepersons; (3) the disproportionate use of peremptory challenges against African-American venirepersons; (4) the level of African-American representation in the venire as compared to the jury; (5) the prosecutor's questions and statements during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African-American venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim, and witnesses. *People v. Williams*, 173 Ill. 2d 48, 71 (1996).

Here, the trial court found that a *prima facie* case of discrimination under *Batson* was not established and, accordingly, the analysis did not proceed beyond the first step. After carefully reviewing the record pertaining to the *voir dire* proceedings, we conclude that the court correctly found that defendant failed to establish a *prima facie* case for a Batson violation.

Devon Ware was called by the clerk as a potential juror in the first panel of four. The trial court began questioning and asked Ware general questions regarding (1) whether he had heard anything about the case, (2) whether he knew anyone related to the case, (3) whether he knew anyone that was a police officer or an attorney, and (4) if there was any reason why he would not be fair and impartial. Ware answered "no" to each question.

The trial court noted that Ware had indicated on a questionnaire that he or a close family member had been

a victim of a crime. He denied the crime was one of violence and denied that it would affect his service as a juror. The court then asked a panel of four if anyone was familiar with the. American Legion. Ware said yes, while the other three indicated no. The court asked Ware if he "had occasion to visit the Legion on North Hickory?" Ware answered: "Been on the outside. Not inside." Ware denied that his familiarity with the American Legion would affect his service as a juror. The court tendered questioning to the prosecutor, who immediately requested that Ware be excused, and the court obliged.

In support of defendant's claim that the State excused Ware on the sole basis of race, he asserts that another prospective juror, Ms. Chavarria, noted that she was "familiar with the location of the American Legion Hall, but she was 'accepted' and sworn as a juror." However, Chavarria told the trial court that she knew the *address* of the American Legion only and that she had never been to the location and knew nothing about it. It is reasonable to expect the prosecution to seek to excuse any person who had a familiarity with the scene of the crime. A juror who had been to the scene before could possibly possess preconceived ideas related to the location and layout that the State would prefer to avoid, if possible. This is especially true when the shooting took place outside, the only part of the American Legion with which Ware was familiar.

There was no evidence of any pattern of striking African-Americans from the jury, nor was there any evidence of a disproportionate number of strikes used against African-Americans. The facts pertaining to the other factors were unremarkable in the overall context

of this case. The *voir dire* questions posed to Ware and his responses thereto indicated there were significant and legitimate differences that distinguished him from other potential jurors, making them a better choice for the State. Under the circumstances, we find defendant failed to sustain his burden of demonstrating a *prima facie* case of racial discrimination in the jury selection process, and the court's decision to overrule defendant's *Batson* objection was not clearly erroneous.

C. Other-Crimes Evidence

Defendant also argues the trial court erred in allowing Milam, "the State's pivotal witness," to introduce evidence of defendant's other crimes. The excerpted testimony to which defendant refers was as follows: Milam told defendant, as she followed him to his vehicle after she watched him shoot Greer, that "he wouldn't get away with this one." Defense counsel objected, stating: "Your Honor, we make an objection. This is self-serving testimony. It's--it's going to try to bolster the credibility of whatever this witness may say--[.]" The trial court overruled the objection. Defendant also claims the State's closing argument compounded the error when the prosecutor reminded the jury of Milam's testimony as follows: "She tells him, you're not going to get away with this." Defendant claims these "united" errors prejudiced him to the extent they justify reversal.

The State asserts that defendant forfeited this argument on appeal and we agree. Though defense counsel asserted a contemporaneous objection to Milam's testimony at trial, the basis for his objection was that the testimony was bolstering her own credibility.

Counsel did not object on the basis that her testimony constituted other-crimes evidence. Nor did defendant raise the issue in his posttrial motion.

"When, as here, a defendant fails to object to an error at trial and include the error in a posttrial motion, he forfeits ordinary appellate review of that error." *People v. Johnson*, 238 Ill. 2d 478, 484 (2010), citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The underlying purpose of the rule of forfeiture is to afford the trial court the opportunity to correct its own errors and determine whether a new trial is warranted (*Herron*, 215 Ill. 2d at 175), which, in turn, affords the reviewing court the benefit of the trial court's judgment and observations (*People v. Pickett*, 54 Ill. 2d 280, 284 (1973)). Because defendant did not allow the trial court to consider his contention of error, we will not now consider it on review.

D. Prosecutorial Misconduct

Defendant pools each of his individual contentions of error raised above into his final argument that, when taken together, those instances constitute improper conduct on the part of the prosecutor. Defendant complains of the following acts:

> "(1) failing to disclose critical identification flaws in pretrial discovery provided defendant; (2) withholding that critical information until immediately before jury selection; (3) remaining silent (or opposing) defendant's continuance where defendant was understandably seeking additional time to investigate, prepare, and for

> additional discovery; (4) purposefully declining telling the trial court and defendant that they had learned of the critical identification information at least two months before trial after seeking the assistance of the lead detective for clarification in connection with identification photo spread 'mix-up(s)'; (5) refusing to correct the trial court's failure to provide complete Rule 431(b) principles; (6) striking the only African-American juror; (7) presumptively inviting the pivotal identification witness to recite for the jury that [defendant] wouldn't get away with '*this one*'; (8) during summations reminding the jury about '[defendant] not getting away with it,' but resting assured that the jury would clearly recall '*this one*'; and (9) while sitting directly in front of the jury during defense summation, propping up the decedent's photograph."

With the exception of the final complaint regarding the decedent's photograph, we have addressed each claim individually and concluded there existed no impropriety. As to the decedent's photograph, our review of the record indicated defense counsel made no objection regarding the use of a photograph during the State's closing argument. In fact, he began his argument presumably with the photo displayed. It was not until halfway through his argument that he apparently noticed the photo and stated: "I'm sorry, Judge, counsel has the live photo of Mr. --[.]" The court instructed: "Put it down. Thank you."

Not only did defense counsel proceed with his closing argument with the photograph displayed and without

objection, but defendant fails to sufficiently present his claim of error in this appeal. He cites no authority and provides no argument as to how the display of the decedent's photograph during the State's closing argument prejudiced him or constituted prosecutorial misconduct. For these reasons, we reject defendant's contention of error. See *People v. Morales*, 343 Ill. App. 3d 987, 991 (2003) ("Arguments not supported by citation to authority do not comply with the requisites of Supreme Court Rule 341(e)(7) and do not merit our consideration on appeal.").

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

Affirmed.

JUSTICE POPE, specially concurring:

I agree the trial court's judgment should be affirmed. I write separately because I do not believe the trial court erred during *voir dire* and therefore any plain-error analysis is unnecessary. In this case, after reviewing the Rule 431(b) principles with the potential jurors, the trial court stated "[Y]ou understand those instructions. Is that correct?" After each juror affirmatively indicated his or her understanding, the trial court stated "and *** you will follow those instructions. Is that correct?" Thus, in my opinion, the court asked the potential jurors whether they understood and would follow the *Zehr* principles. This complied with Rule '431(b) and, consequently, the court committed no error.

Appendix D

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 17, 2020

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

No. 19-3172	Appeal from the United States District Court for the Central District of Illinois.
CHARMELL BROWN, *Petitioner-Appellant*,	
v.	No. 17-2212
ALEX JONES, Acting Warden, *Respondent-Appellee.*	Sue E. Meyerscough, *Judge*.

ORDER

It is ORDERED that the opinion in this case issued October 21, 2020, is amended as follows:

In the first line of the first sentence of the first paragraph under "I. BACKGROUND" on page two, strike "three counts" and replace that phrase with "one count".

Further, on consideration of the petition for rehearing and rehearing *en banc*, no judge in active service has requested a vote on the petition for rehearing *en banc* and all members of the original panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing *en banc* are **DENIED**.

Appendix E

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS**

PEOPLE of the STATE OF ILLNOIS,	)	
v.	)	NO. 2008-CF-32
CHARMELL D. BROWN,	)	
Defendant.	)	

JURY TRIAL - DAY 1

REPORT OF PROCEEDINGS had in the above-entitled cause on the 7TH DAY OF DECEMBER, 2009, before the HONORABLE THOMAS J. DIFANIS, Circuit Judge.

THE COURT: This is 08-CF-32. The Defendant is present personally, with Mr. Cross. We have Ms. Carlson and Ms. Clark here on behalf of the People. This matter is set today for trial. Mr. Cross, I have a statement of the nature of the case. Any objection to the statement of the nature the case?

MR. CROSS: Judge, I have spoken with my client about that. We have no objection to the statement of the nature of the case.

****

(PROSPECTIVE JURORS SWORN).

THE COURT: Thank you. Now, Ms. Campbell's going to call the number and names of twelve jurors. We're going to start by filling the front row first. So the first juror called will go into the front row, all the way towards the back, and we'll fill the six chairs up towards the front, leaving the one chair on the end empty. The seventh jury will go into the second row, again, all the way towards the back, filling the six chairs up towards the front, leaving the one chair on the end empty.

MADAM CLERK: Juror number 8, Bridget Owen. Juror number 42, Gregory Tresslar. Juror number 7, James Baltz. Juror number 45, Loubna Aichach. Juror number 54, Devon Ware. Juror number 53, Brian Robertson. Juror number 29, Steven Brown.

THE COURT: Mr. Brown, second row, please.

MADAM CLERK: Juror number 20, Christopher Craig. Juror number 33, Sandra Hockman. Juror number 59, Nathaniel Manzano. Juror number 72, Robert Weatherford. Juror number 36, Ken Gunji.

THE COURT: Mr. Robertson, have you heard anything about this case?

JUROR ROBERTSON: No.

THE COURT: Do you know anyone who's seated at counsel table?

JUROR ROBERTSON: No, I do not.

THE COURT: Do you know anyone in the State's Attorney's Office?

JUROR ROBERTSON: No.

THE COURT: Did you recognize any of those names that I read?

JUROR ROBERTSON: No.

THE COURT: You have had jury service in the past. Is that correct?

JUROR ROBERTSON: Yep.

THE COURT: When you were called for jury duty, did you sit on any trials?

JUROR ROBERTSON: I sat on two trials.

THE COURT: Anything about that jury experience that will make it difficult for you to be fair and impartial in this case?

JUROR ROBERTSON: No.

THE COURT: Do you have any family members or close friends that are police officers?

JUROR ROBERTSON: No, I do not.

THE COURT: What about family members or close friends that are attorneys?

JUROR ROBERTSON: No.

THE COURT: As you sit there now, can you think of any reason why you could not be fair and impartial?

JUROR ROBERTSON: No, I can't.

THE COURT: Thank you. Mr. Ware, have you heard anything about this case?

JUROR WARE: No.

THE COURT: Do, you know anyone seated at counsel table?

JUROR WARE: No.

THE COURT: Did you recognize any of those names that I read?

JUROR WARE: (Shakes head in the negative).

THE COURT: Do you know anyone in the State's Attorney's Office?

JUROR WARE: No.

THE COURT: Have you had jury service in the past?

JUROR WARE: No, sir.

THE COURT: Do you have any family members or close friends that are police officers?

JUROR WARE: Not that I can think of.

THE COURT: Do you have any family members or close friends that are attorneys?

JUROR WARE: No.

THE COURT: You've indicated that you or a close family member had been the victim of a crime. Did that have anything to do with a crime of violence, like we're dealing with here?

JUROR WARE: That -- it was just DUI's and stuff.

THE COURT: Okay. There's nothing about that situation that would make it difficult for you to be fair and impartial in this case. Is that correct?

JUROR WARE: No.

THE COURT: And as you sit there now, can you think of any reason why you could not be fair and impartial?

JUROR WARE: No, I can't.

THE COURT: Thank you. Ms. Aichach's, have you heard anything about this case?

JUROR AICHACH: No.

THE COURT: Do you know anyone seated at counsel table?

JUROR AICHACH: No.

THE COURT: Do you know anyone in the State's Attorney's Office?

JUROR AICHACH: No.

THE COURT: And did you recognize any of those names that I read?

JUROR AICHACH: No.

THE COURT: Have you had jury service in the past?

JUROR AICHACH: No.

THE COURT: Do you have any family members or close friends that are police officers?

JUROR AICHACH: No.

THE COURT: What about family members or close friends that are attorneys?

JUROR AICHACH: No.

THE COURT: As you sit there now, can you think of any reason why you could not be fair and impartial?

JUROR AICHACH: No.

THE COURT: Thank you. And Mr. Baltz, have you heard anything about this case?

JUROR BALTZ: No.

THE COURT: Do you know anyone seated at counsel table?

JUROR BALTZ: No.

THE COURT: Do you know anyone in the State's Attorney's Office?

JUROR BALTZ: No.

THE COURT: Did you recognize any of the names that I read?

JUROR BALTZ: No.

THE COURT: Have you had jury service in the past?

JUROR BALTZ: No.

THE COURT: Do you have any family members or close friends that are police officers?

JUROR BALTZ: No.

THE COURT: What about family members or close friends that are attorneys?

JUROR BALTZ: No.

THE COURT: As you sit there now, can you think of any reason why you could not be fair and impartial?

JUROR BALTZ: No.

THE COURT: Now, I'm going to ask the following questions of the four jurors, and your response can be -- it will be all at the same time. Do any of you have opinions about bars, taverns, nightclubs or establishments that sell alcohol, that are so positive or so negative that you could not be a fair and impartial juror in a case that takes place in such an establishment?

FOUR JURORS: (Indicating in the negative).

THE COURT: And the answer is no. Do any of you have any opinions about people who attend establishments that sell alcohol, that are so positive or negative that you could not be a fair and impartial juror if a witness was such an attendee? Again, any problem with that?

FOUR JURORS: (Indicating in the negative).

THE COURT: Again, they answer no. Do you have any strong opinions, one way or the other, about alcohol consumption?

FOUR JURORS: (Indicating in the negative).

THE COURT: Again, the answers are no. Have you or any member of your family, had a negative experience with a law enforcement official that would cause you to be biased when evaluating the testimony of a witness who is so employed?

FOUR JURORS: The answers are no. And will you follow the instructions that you get at the conclusion of the case, even if it turns out that the law is different than what you think. Will you follow the Court's instructions?

FOUR JURORS: (Indicating in the positive).

THE COURT: And again, they answer yes. One offense alleged in this case is first degree murder. Do any of you feel that the nature if the offense, being murder, would make it difficult for you to render a fair and impartial verdict in this case just because of the nature of the offense? Is that going to pose a problem for any of you?

FOUR JURORS: (Indicating in the negative).

THE COURT: The answer is no. The-Defendant is charged with two different charges in multiple counts. Does the mere fact that he is facing multiple allegations lead you to believe that he is probably guilty of some or all of the charges? Yes or no?

FOUR JURORS: (Indicating in the negative).

THE COURT: And the answer, again, is no. The offense is alleged to have occurred at the American Legion post on Hickory. Street. Are any of you familiar with that location?

JUROR WARE: Yes.

THREE JURORS: (Indicating in the negative).

THE COURT: Mr. Ware, you are?

JUROR WARE: Yes.

THE COURT: And have you had occasion to visit the Legion on North Hickory?

JUROR WARE: Been on the outside. Not inside.

THE COURT: Is there anything about what you know from that limited contact, that's going to make it difficult for you to be fair and impartial in this case?

JUROR WARE: No.

THE COURT: The fact that testimony is going to be presented that this offense occurred at the Legion, will you base your decision only on what you see and hear in this courtroom and not be affected by the fact that you've seen the outside of the place and you're familiar with where it is. You'll base your decision on what you see and hear in the courtroom. Is that correct?

JUROR WARE: Yes, sir.

THE COURT: As I've indicated to you, the Defendant is presumed to be innocent of the charges against him. And that the Defendant is not required to offer any evidence on his own behalf. But should the Defendant offer evidence and decides to call witnesses or present evidence on his behalf, will you weigh this evidence just as you would the evidence presented by the State?

FOUR JURORS: (Indicating in the affirmative).

THE COURT: And the answer is yes. Do the four of you believe -- do any of you believe, that because the Defendant is charged with a crime and is on trial, that he must be guilty of something?

FOUR JURORS: (Indicating in the negative).

THE COURT: And they answer is no. Ms. Carlson, I'll let you supplement.

MS. CARLSON: Thank you, your Honor. At this time, we would thank but excuse Mr. Ware.

THE COURT: Mr. Ware, I'm going to excuse you from this trial and ask -- well, you're excused for the rest of the term. This was a limited summons so this excuses you. Thank you, sir. The next person called will take the seat that was occupied by Mr. Ware.

MADAM CLERK: Juror number 25, Susan Chavarria.

THE COURT: Ms. Chavarria, have you heard anything about this case?

JUROR CHAVARRIA: (Shakes head in the negative).

THE COURT: No?

JUROR CHAVARRIA: No.

THE COURT: Do you know anyone who's seated at counsel table?

JUROR CHAVARRIA: No.

THE COURT: Do you know anyone in the State's Attorney's Office?

JUROR CHAVARRIA: No.

THE COURT: Did you recognize any of those names that I read?

JUROR CHAVARRIA: No.

THE COURT: Have you had jury service in the past?

JUROR CHAVARRIA: No.

THE COURT: Do have you any family members or close friends that are police officers?

JUROR CHAVARRIA: No.

THE COURT: Do you have any family members or close friends that are attorneys?

JUROR CHAVARRIA: No.

THE COURT: As you sit there now, can you think of any reason why you could not be fair and impartial?

JUROR CHAVARRIA: No.

THE COURT: Again, I'm going to ask you some of the same questions that I asked the other four jurors. Do you have any opinion about bars, taverns, nightclubs or establishments that sell alcohol, that are so positive or

so negative that you could not be a fair and impartial juror in a case that takes place in such an establishment?

JUROR CHAVARRIA: No.

THE COURT: Do you have any opinions about people who attend establishments that sell alcohol, that are so positive or negative that you could not be a fair and impartial juror if a witness was such an attendee?

JUROR CHAVARRIA: No.

THE COURT: Do you have any strong opinions about the consumption of alcohol?

JUROR CHAVARRIA: No

THE COURT: Have you or any member of your family had a negative experience with a law enforcement official that would cause you to be biased when evaluating the testimony of a witness so employed?

JUROR CHAVARRIA: No.

THE COURT: And will you follow the instructions that you get at the conclusion of the case, even if it turns out the law is different than you thought it would be?

JUROR CHAVARRIA: Yes.

THE COURT: One of the alleged -- one of the charges against the Defendant is first degree murder. Do you feel that the nature of the offense, first degree murder, would make it difficult for you to render a fair and impartial verdict in this case?

JUROR CHAVARRIA: No.

THE COURT: The Defendant is charged with two different charges, multiple counts. Does the mere fact that he is facing multiple allegations lead you to believe that he's probably guilty of some or all the charges?

JUROR CHAVARRIA: No.

THE COURT: The indicted offenses are alleged to have occurred at the American Legion post on Hickory Street. Are you familiar with that location?

JUROR CHAVARRIA: With the address. Yes.

THE COURT: But have you been to the location?

JUROR CHAVARRIA: No, I have not.

THE COURT: Other than knowing the address, that's about all you know about it?

JUROR CHAVARRIA: That's it.

THE COURT: Is there anything about that fact that's going to make it difficult for you to be fair and impartial in this case?

JUROR CHAVARRIA: No.

THE COURT: Again, as I indicated, the Defendant is not required to offer any evidence on his own behalf. But if the Defendant decides to call witnesses or present evidence on his behalf, will you weigh this evidence just as you would the evidence presented by the State?

JUROR CHAVARRIA: (Shakes head in the affirmative).

THE COURT: Do you believe that because the Defendant is charged with a crime and is on trial, that he must be guilty?

JUROR CHAVARRIA: No.

THE COURT: Ms. Carlson.

MS. CARLSON: Thank you, your Honor. Good afternoon, ladies and gentlemen. Mr. Robertson.

JUROR ROBERTSON: Yes.

MS. CARLSON: Are you still employed at the Urbana Free Library?

JUROR ROBERTSON: Yes, I am.

MS. CARLSON: Could you tell me a little bit about what it is you do for a living.

JUROR ROBERTSON: I work at the acquisitions department. Do processing of audio -- audio, visual materials.

MS. CARLSON: okay. Great. And you had a chance to have prior jury service?

JUROR ROBERTSON: Yes.

MS. CARLSON: Were you the foreperson of any your juries?

JUROR ROBERTSON: No.

MS. CARLSON: And did all of your juries reach a verdict?

JUROR ROBERTSON: No. Just one. One was dismissed.

MS. CARLSON: Is there anything about your prior experience as a juror that you think would be difficult for you to be fair and impartial in this case, setting aside your prior experiences?

JUROR ROBERTSON: No.

MS. CARLSON: And do you know any of the other jurors seated up here with you now, from outside of your experience as a juror?

JUROR ROBERTSON: Just one, from working at the library.

MS. CARLSON: Okay. Is this person your supervisor?

JUROR ROBERTSON: No.

MS. CARLSON: Do you supervise them?

JUROR ROBERTSON: No.

MS. CARLSON: Would you feel you needed to have to agree or disagree with that person?

JUROR ROBERTSON: No.

MS. CARLSON: And you wouldn't be worried about anything happening to your job if it turned out you served together?

JUROR ROBERTSON: No.

MS. CARLSON: Okay. Thank you very much. And good afternoon, Ms. Chavarria.

JUROR CHAVARRIA: Good afternoon.

MS. CARLSON: Did I pronounce that correctly?

JUROR CHAVARRIA: That's fine.

MS. CARLSON: Okay. And are you still with the Regional Planning Commission?

JUROR CHAVARRIA: Yes.

MS. CARLSON: Could you tell me a little bit about what you do.

JUROR CHAVARRIA: I'm a regional planning manager for a six county area. Do planning services.

MS. CARLSON: Okay. Do you know any of the other jurors who are-seated with you now?

JUROR CHAVARRIA: No.

MS. CARLSON: And there's no one that you're employed with who's also serving, perhaps, out here?

JUROR CHAVARRIA: No.

MS. CARLSON: Okay. Thank you very much. I'm going to try this one. Ms. Aichach.

JUROR AICHACH: Yeah.

MS. CARLSON: Okay. What do you do at Carle Hospital?

JUROR AICHACH: I go on deliveries to the equipment to the patients and the nurses on the floors.

MS. CARLSON: Does any part of your work take you into the emergency department?

JUROR AICHACH: I'm sorry? What was it?

MS. CARLSON: Does -- do any of your professional responsibilities have you interact with people from the ER?

JUROR AICHACH: No.

MS. CARLSON: Okay. If you heard testimony in this case from a surgeon who happens to be employed by Carle, would you still be able to be fair and impartial?

JUROR AICHACH: Yes.

MS. CARLSON: And no aspect of your employment would necessarily affect your ability to be a juror?

JUROR AICHACH: Right.

MS. CARLSON: Correct?

JUROR AICHACH: Yeah.

MS. CARLSON: Okay. Seated with you now, do you know any of the other twelve jurors?

JUROR AICHACH: No.

MS. CARLSON: What about out here in the venire?

JUROR AICHACH: No.

MS. CARLSON: Thank you very much.

JUROR AICHACH: You're welcome.

MS. CARLSON: And good afternoon, Mr. Baltz. You're with the University?

JUROR BALTZ: Correct.

MS. CARLSON: And in the department of --

JUROR BALTZ: Animal science.

MS. CARLSON: Okay. Could you tell, me a little bit about what you do.

JUROR BALTZ: I develop on-going classes.

MS. CARLSON: Okay. Will you be able to listen to evidence in this case and just judge it based on what you see here on the stand?

JUROR BALTZ: Yes.

MS, CARLSON: And do you know anyone seated with you on the jury?

JUROR BALTZ: No.

MS. CARLSON: What about out here in the venire?

JUROR BALTZ: No.

MS. CARLSON: Your Honor, may I have one moment?

THE COURT: Yes.

MS. CARLSON: Thank you, your Honor. We accept this panel.

THE COURT: Mr. Cross.

MR. CROSS: One minute, Judge.

THE COURT: Sure.

MR. CROSS: Judge, we accept the panel.

THE COURT: All right. For the four of you, the four of you understand that the Defendant is presumed to be innocent of the charges against him. That before the Defendant could be convicted, the State must prove him guilty beyond a reasonable doubt. That the Defendant is not required to offer any evidence on his own behalf. And that if the Defendant chooses not to testify, his failure to testify cannot be held against him in any way. The four of you understand those instructions. Is that correct?

FOUR JURORS: (Indicating in the affirmative).

THE COURT: And they answer in the affirmative. And the four of you will follow those instructions. Is that correct?

FOUR JURORS: (Indicating in the affirmative).

THE COURT: And again, they answer in the affirmative. Now, if the four of you will please raise your right hands.

(FIRST PANEL OF FOUR SWORN IN).

****

THE COURT: Ms. Carlson, as to Ms. Heinrichs and Mr. Gomez.

MS. CARLSON: Thank you. Good afternoon, Mr. Gomez. Did I hear you correctly, you work at the Mental Health Center?

JUROR GOMEZ: Yes.

MS. CARLSON: And prior to that, were you a student in social work at the University?

JUROR GOMEZ: Yes, I was.

MS. CARLSON: How many years of social work education do you have?

JUROR GOMEZ: Social work education, about two years.

MS. CARLSON: Is that graduate work, undergraduate --

JUROR GOMEZ: That's graduate work.

MS. CARLSON: What was your undergraduate major?

JUROR GOMEZ: Sociology and arrow engineering.

MS. CARLSON: Did you also complete that education here at the University of Illinois?

JUROR GOMEZ: Yes.

MS. CARLSON: Has there been, a focus or specific area of interest that you've had in social work?

JUROR GOMEZ: Yes. Social justice and law.

MS. CARLSON: okay.

JUROR GOMEZ: And -- well, medical social work is my specialization. But my sociology and social work also involve social justice and law.

MS. CARLSON: And has any aspect of the research that you've done to get your degrees, and of course, your interest in social justice, given you the opportunity to ride along with police officers or anything like that?

JUROR GOMEZ: I have ridden along with police officers once. And that was in my process for applying for the Urbana Police Department --

MS. CARLSON: Okay.

JUROR GOMEZ: -- to become a police officer.

MS. CARLSON: So you tried to become employed as a police officer?

JUROR GOMEZ: Yes.

MS. CARLSON: Are you still on the hiring list over there?

JUROR GOMEZ: No. I was -- I was one of the final candidates for being interviewed by the Police Chief, and that's about it, so.

MS. CARLSON: Okay. Did you ever undergo any training at the Police Training Institute?

JUROR GOMEZ: No.

MS. CARLSON: But you really just got to the interview stage?

JUROR GOMEZ: Yes.

MS. CARLSON: Did you have any contact with the Champaign Police Department?

JUROR GOMEZ: No.

MS. CARLSON: And did you ever apply for any other agencies?

JUROR GOMEZ: No.

MS. CARLSON: In your academic background, have you had the opportunity to publish any papers?

JUROR GOMEZ: No. Not officially. No.

MS. CARLSON: Okay. Did you write any papers about your interest in social justice?

JUROR GOMEZ: Yeah. It involved course work. Yes.

MS. CARLSON: Okay. Is any aspect of your studies about any factors on discrimination within law enforcement work?

JUROR GOMEZ: Yes. I did write a paper doing research for the summer, in terms of discretion among security personnel and police officers, and wanting to press charges for -- in the instance of shoplifting.

MS. CARLSON: Okay. When you say discretion, if -- could you just tell me what you mean by discretion in that instance.

JUROR GOMEZ: When -- when store owners decide whether to press charges on the sole basis of appearances and other social factors.

MS. CARLSON: In doing this research and writing the paper, did you draw any conclusions that you think would impact upon your ability to be a fair and impartial juror in any criminal cause?

JUROR GOMEZ: No.

MS. CARLSON: And have you also had the opportunity to need the services of the Urbana Police Department over the years?

JUROR GOMEZ: No.

MS. CARLSON: Okay. Thank you, Mr. Gomez. And Ms. Heinrichs?

JUROR HEINRICHS: Yes.

MS. CARLSON: Okay. Sometimes I can't even read my own handwriting. Obviously, as a person employed by the University, there's a good chance that you might know some other folks who are on the jury. Anybody you know out here?

JUROR HEINRICHS: Not that I can recognize. No.

MS. CARLSON: What about out here in the venire?

JUROR HEINRICHS: No.

MS. CARLSON: Okay. If it did turn out that you ended up deliberating on this case with somebody else who happens to have the same employer as you, do you think you would be able to do so with a free spirit of debate?

JUROR HEINRICHS: Yes.

MS. CARLSON: You wouldn't feel like you just had to agree with them just because you know them or because you work together?

JUROR HEINRICHS: No.

MS. CARLSON: Thank you. In your capacity as an employee within the Athletic Department, do you have anything to do with any type of nutrition or anything that the athlete' s would consume?

JUROR HEINRICHS: I don't give it to them, but I council them on diet and alcohol consumption. Yes.

MS. CARLSON: Okay. And how long have you been in that position with the teams?

JUROR HEINRICHS: I've been there since November of 2006, but I was not full-time until last September.

MS. CARLSON: Okay. Is there particular sport that you focus on?

JUROR HEINRICHS: Not one sport. I work with several. I work with men's and women's track and field, and cross country. Women's swimming and diving. Women's tennis. Women's golf.

MS. CARLSON: What about men's basketball?

JUROR HEINRICHS: I do not work with men's basketball, but I have been -- an occasion over in their training room when the athletes are there.

MS. CARLSON: What about men's football?

JUROR HEINRICHS: Not with -- well, I've been in their training room also, but I don't have contact with any of the ball players.

MS. CARLSON: Okay. Your Honor, may I have one moment?

THE COURT: You may.

MS. CARLSON: Your Honor, we would accept and tender.

THE COURT: All right. For the four you, Mr. Gomez, Ms. Owen, Ms. Hartman, Ms. Heinrichs, the four of you understand that the Defendant is presumed to be innocent of the charges against him. That before the Defendant could be convicted, the State must prove him guilty beyond a reasonable doubt. That the Defendant is not required to offer any evidence on his own behalf. And that if the Defendant chooses not to testify, his failure to testify cannot be held against him in any way. The four of you understand those instructions. Is that correct?

FOUR JURORS: (Indicating in the affirmative).

THE COURT: And they answer in the affirmative. And the four of you will follow those instructions. Is that correct?

FOUR JURORS: (Indicating in the affirmative).

THE COURT: Again, they answer in the affirmative. Now, if the four of you will raise your right hands, please.

(SECOND PANEL OF FOUR SWORN IN).

THE COURT: Thank you. Now, we'll have you go with the officer. She'll show you where our jury room is. I'll need you back there by 1:30 tomorrow afternoon. Please don't discuss this case among yourselves or with anyone else. Back in the jury room by 1:30 tomorrow afternoon.

(SECOND PANEL OF FOUR EXCUSED).

THE COURT: Counsel, you want to approach.

(BENCH CONFERENCE BETWEEN COURT AND COUNSEL).

THE COURT: For the rest of the prospective jurors in the courtroom, and for the four of you seated in the jury box, it's about a quarter after 4:00. Rather than go well past 4:30, close to 5:00 o'clock, we have some other matters we need to take up outside of your presence. So everyone in the courtroom, including the four of you that are seated in the jury box, I'll need you to come back tomorrow afternoon, in the jury assembly room on the first floor. As soon as we're ready, we'll bring you back up, we'll get the four of you reseated, and we will conclude jury selection. So I'll need everyone back tomorrow afternoon at 1:30, down in the jury assembly room on the first floor. Thank you.

(PROSPECTIVE JURORS EXCUSED).

THE COURT: We are still on 08-CF-32. This is outside the presence of the jury. The Defendant is present with Mr. Cross. Ms. Carlson, Ms. Clark. Mr. Cross, I believe after Mr. Ware was excused on a

peremptory challenge by the State, you indicated an objection after the panel had been sworn and we were dealing with the second panel. As to your objection, sir.

MR. CROSS: Well Judge, Devon Ware is an African American male. The Defendant is an African American male. There are only two African Americans, both young African American males, of which the Defendant is a young African American male, in the entire venire. Devon Ware was excused without any questions being asked of him by the State. Devon Ware, under questioning by the Court, indicated that he understood the Court's statements to the panel, that he could follow the instructions of the Court regarding issues that might be before the jury. He was asked one question by the Court, actually a series of questions by the Court regarding the American Legion. Devon Ware appeared to respond appropriately to all the questions that were put to him by the Court, regarding his knowledge of the American Legion, the location, indicating that he had some knowledge of it and had experience about being there on occasion.

Judge, there was nothing of a race neutral indication that Devon Ware should have been excused by the State. Particularly, where the panel that is before the Court only has two young African American males, which the Defendant is. Because we don't see any race neutral reason for excluding Devon Ware, particularly where the State did not ask him any questions before excusing him.

THE COURT: The issue on a *Batson* challenge, the first issue is, is there a *prima facie* case that a

discriminatory practice is being conducted by the State. And we don't get to a race neutral explanation until the Court has made a determination of a *prima facie* case. It's the Court's opinion that there is not a *prima facie* case, and I am not going to require the State to provide a race neutral explanation. So the motion -- the objection is overruled. And Mr. Ware is, I believe, properly excused.

Counsel, tomorrow morning I have my pretrial, which is going to last all morning. Let's gather before 1:30 and sort out any other issues we need to take up before we get this last panel chosen. I will also do two alternate jurors. Thank you counsel.

WHICH WERE THE PROCEEDINGS HAD IN THE ABOVE ENTITLED CAUSE ON SAID DATE.

****

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

PEOPLE of the STATE OF ILLINOIS,	)	
v.	)	NO. 2008-CF-32
CHARMELL D. BROWN,	)	
Defendant.	)	

JURY TRIAL - DAY 2

REPORT OF PROCEEDINGS had in the above-entitled cause on the 8TH DAY OF DECEMBER, 2009, before the HONORABLE THOMAS J. DIFANIS, Circuit Judge.

****

THE COURT: Ms. Carlson.

MS. CARLSON: Thank you, Judge. Good afternoon, Mrs. Young.

JUROR YOUNG: Good afternoon.

MS. CARLSON: You're with the University?

JUROR YOUNG: Yes, I am.

MS. CARLSON: What department?

JUROR YOUNG: Sponsored research.

MS. CARLSON: And you're a director of research?

JUROR YOUNG: Yes, I am.

MS. CARLSON: Could you tell me what that means.

JUROR YOUNG: I supervise about 28 people who review requests for funding that the faculty submit. And then we negotiate the terms and the conditions of the resulting contracts.

MS. CARLSON: Okay. Are these employment contracts?

JUROR YOUNG: No. They're funding contracts, to provide funds for the faculty to conduct the research. So we get money from the National Cancer Institute to explore ways to cure cancer, that sort of thing.

MS. CARLSON: Okay. There have been some people already seated on this jury who are employed by the University. Do you know any of them?

JUROR YOUNG: Not the gentleman. Bridgette Owen, I've met once in assisting her with a contract resolution, which was probably a few months ago.

MS. CARLSON: Given that you have had contact with Ms. Owen before, do you feel that you necessarily have to agree or disagree with her because you already know her?

JUROR YOUNG: No.

MS. CARLSON: Do either of you supervise each other at work?

JUROR YOUNG: No.

MS. CARLSON: In her capacity with the University, does she have to come to you to ask for money?

JUROR YOUNG: Not to ask for money, but to assist with putting the money in place, to negotiate the terms and conditions of the awards that she over-sees.

MS. CARLSON: Okay. Is there anything about that relationship then, where you're sort of, like giving her permission or ability to do parts of her job, that would make you feel as though you couldn't have a frank, open discussion with her?

JUROR YOUNG: No. There's no power or authority in that relationship.

MS. CARLSON: Okay. Great. And is there anyone else out here in the venire who you might know from, or seated with you now, from any other out of court experiences?

JUROR YOUNG: There's a few people that I know throughout the group that I've had contact with in the past, from a professional perspective.

MS. CARLSON: In light of that, is there anyone here who supervises you?

JUROR YOUNG: No.

MS. CARLSON: Is there anyone who you supervise?

JUROR YOUNG: No.

MS. CARLSON: Is there anyone here, as a prospective juror, who you'd feel you had to agree with just because you already know them?

JUROR YOUNG: No.

MS. CARLSON: Would you feel you had to disagree with them just because you already know them?

JUROR YOUNG: No.

MS. CARLSON: Your Honor, may I have one moment?

THE COURT: Yes.

MS. CARLSON: Thank you, your Honor. We would accept this juror.

THE COURT: Mr. Cross.

MR. CROSS: Judge, we also accept that juror.

****

MADAM CLERK: Juror number 24, Ralph Rossman.

MR. CROSS: Judge, I'm sorry, the last name again?

THE COURT: Rossman. R-o-s-s-m-a-n.

MR. CROSS: Thank you, Judge.

THE COURT: Mr. Rossman, have you heard anything about this case?

JUROR ROSSMAN: No.

THE COURT: Do you know anyone who's seated at counsel table?

JUROR ROSSMAN: No.

THE COURT: Do you know anyone in the State's Attorney's Office?

JUROR ROSSMAN: No.

THE COURT: And did you recognize any of those names that I read?

JUROR ROSSMAN: No.

THE COURT: How many times do you think you've been called for jury duty?

JUROR ROSSMAN: This may be seven. Six or seven. I don't know.

THE COURT: And during -- in all of the prior times you were called for jury duty, did you sit on some trials?

JUROR ROSSMAN: Oh, yeah.

THE COURT: Besides your jury service coming too frequently, is there anything about your jury experience that's going to make it difficult for you to be fair and impartial in this case?

JUROR ROSSMAN: I -- I really can't answer that. I don't know for sure. There were a number different cases that I was on.

THE COURT: Were any of them murder cases?

JUROR ROSSMAN: No.

THE COURT: So it may very well be that during the course of the trial, if you're selected as a juror, something might come up that you recall an issue in one your other trials, you'll be able to base your decision only by what you see and hear in this courtroom. Is that correct.

JUROR ROSSMAN: I would think so (shakes head in the affirmative).

THE COURT: Do you have any family members or close friends that are police officers?

JUROR ROSSMAN: No.

THE COURT: What about family members or close friends that are attorneys?

JUROR ROSSMAN: I don't believe so (shakes head in the negative).

THE COURT: You've indicated you or a close family member had been convicted of an offense. Did that have anything to do with what we're dealing with here, something like murder or a crime of violence?

JUROR ROSSMAN: No.

THE COURT: You've also indicated that you or a close family member has been the victim of a crime. Again, anything like what we're dealing with here?

JUROR ROSSMAN: I don't think so.

THE COURT: Again, anything about those two situations that would make it difficult for you to be fair and impartial in this case?

JUROR ROSSMAN: No.

THE COURT: As you sit there now, can you think of any reason why you could not be fair and impartial?

JUROR ROSSMAN: No.

THE COURT: Thank you. Ms. Hockman, have you heard anything about this case?

MS. HOCKMAN: No, sir.

THE COURT: Do you know anyone seated at counsel table?

MS. HOCKMAN: No, sir.

THE. COURT: Do you know anyone in the State's Attorney's Office?

MS. HOCKMAN: No, sir.

THE COURT: Did you recognize any of the names that I read?

MS. HOCKMAN: No.

THE COURT: Have you had jury service in the past?

MS. HOCKMAN: No.

THE COURT: Do you have any family members or close friends that are police officers?

MS. HOCKMAN: Yes.

THE COURT: And where do they work?

MS. HOCKMAN: Mahomet.

THE COURT: Are you employed by the Village of Mahomet?

MS. HOCKMAN: I am. As a consultant.

THE COURT: And as such, you have an occasion to work with some of the -- do you have occasion to work with the Police Department in Mahomet?

MS. HOCKMAN: No.

THE COURT: But you know some of the officers?

MS. HOCKMAN: Only one.

THE COURT: Is there anything about that fact that's going to make it difficult for you to be fair and impartial in this case?

MS. HOCKMAN: I don't believe.

THE COURT: Do you have any family members or close friends that are attorneys?

MS. HOCKMAN: Yes. My step-brother.

THE COURT: And where does he practice?

JUROR BROWN: Louisiana.

THE COURT: And anything about that relationship that will make it difficult for you to be fair and impartial?

MS. HOCKMAN: No, sir.

THE COURT: You've indicated that you or a close family member has been the victim a crime. Did that have anything do with what we're dealing with here, murder, or a crime of violence?

MS. HOCKMAN: No, sir.

THE COURT: Is there anything about that situation that would make it difficult for you to be fair and impartial?

MS. HOCKMAN: About this case?

THE COURT: Right.

MS. HOCKMAN: Can you ask me the question again.

THE COURT: All right. The box says, have you or a close family member been the victim of a crime. You checked yes.

MS. HOCKMAN: Yes. It was me.

THE COURT: Is there anything about the fact that you've been the victim of an offense that would make it difficult for you to be fair and impartial in this case?

MS. HOCKMAN: Not in this case.

THE COURT: Can you think of any reason why you could not be fair and impartial?

MS. HOCKMAN: Yes.

THE COURT: And is that because of the nature of the offense?

MS. HOCKMAN: Yes, sir.

THE COURT: You think it would be difficult to sit on a trial such as this and render a verdict to the best of your ability that's fair and impartial?

MS. HOCKMAN: I do.

THE COURT: All right. I'm going to excuse you from this trial, ma'am, and that will excuse you for the term. Thank you. All right. The next juror called will take the seat that was occupied by Ms. Hockman.

MADAM CLERK: Juror number 69, Kristine Young.

THE COURT: Ms. Young, have you heard anything about this case?

JUROR YOUNG: No.

THE COURT: Do you know anyone who's seated at counsel table?

JUROR YOUNG: No.

THE COURT: Do you know anyone in the State's Attorney's Office?

JUROR YOUNG: No.

THE COURT: And did you recognize any of those names that I read?

JUROR YOUNG: No.

THE COURT: Have you had jury service in the past?

JUROR YOUNG: Yes.

THE COURT: About how long ago?

JUROR YOUNG: Three years ago.

THE COURT: And was that here in this county?

JUROR YOUNG: Yes.

THE COURT: Did you sit on any trials?

JUROR YOUNG: No.

THE ‘COURT: Do you have any family members or close friends that are police officers?

JUROR YOUNG: No.

THE COURT: What about family members or close friends that are attorneys?

JUROR YOUNG: No.

THE COURT: As you sit there now, can you think of any reason why you could not be fair and impartial?

JUROR YOUNG: No.

THE COURT: Thank you. Mr. Craig, have you heard anything about this case?

JUROR CRAIG: No.

THE COURT: Do you know anyone seated at counsel table?

JUROR CRAIG: No, I don’t.

THE COURT: Do you know anyone in the State’s Attorney’s Office?

JUROR CRAIG: No, I don’t.

THE COURT: Did you recognize any of the names that I read?

JUROR CRAIG: Yes, I did.

THE COURT: And which names were those?

JUROR CRAIG: I believe Brandon Thomas and Rob Morris.

THE COURT: And how is that you know those officers?

JUROR CRAIG: Brandon I and served on a Volunteer Fire Department together several years ago. And Rob Morris, I just -- I work in the construction industry. I just know him when he used to build houses. I don't know him. I knew of him.

THE COURT: And that was in his construction business not in his police business?

JUROR CRAIG: Right.

THE COURT: Anything about the fact that you know these two police officers that's going to make it difficult for you to be fair and impartial in this case?

JUROR CRAIG: No.

THE COURT: If they come into court to testify, will you be able to judge their testimony only by what you see and hear in this courtroom?

JUROR CRAIG: Yes.

THE COURT: Do you know anyone in the State's Attorney's Office?

JUROR CRAIG: No, I don't.

THE COURT: Do you have any family members or close friends that are police officers?

JUROR CRAIG: I don't -- I wouldn't call them close friends. I just -- I know some police officers.

THE COURT: Again, there's nothing about that relationship that puts one side to an advantage over the over side?

JUROR CRAIG: No, sir.

THE COURT: What about family members or close friends that are attorneys?

JUROR CRAIG: No.

THE COURT: As you sit there now, can you think any reason why you could not be fair and impartial?

JUROR CRAIG: No.

THE COURT: Thank you. Mr. Brown, have you heard anything about this case?

JUROR BROWN: I may have read about it or heard about it, but I don't have any recollection of it.

THE COURT: Do you know anyone who's seated at counsel table?

JUROR BROWN: No.

THE COURT: Do you know anyone in the State's Attorney's Office?

JUROR BROWN: No.

THE COURT: And did you recognize any of those names that I read?

JUROR BROWN: No.

THE COURT: Have you had jury service in the past?

JUROR BROWN: No, sir.

THE COURT: Do you have any family members or close friends that are police officers?

JUROR BROWN: No.

THE COURT: What about family members or close friends that are attorneys?

JUROR BROWN: I have a sister-in-law who is an attorney in San Francisco. And a cousin who is an attorney and a Circuit Court Judge in Washanau (sic) County, Michigan.

THE COURT; The attorney from San Francisco, does she do prosecution work?

JUROR BROWN: No.

THE COURT: Anything about the fact that you know some people involved in the practice of law, that

would make it difficult for you to be fair and impartial in this case?

JUROR BROWN: No.

THE COURT: As you sit there now, can you think of any reason why you could not be fair and impartial?

JUROR BROWN: No, sir.

THE COURT: Okay. Now, I'm going to ask these questions of the four of you and you can answer at the same time, if you wish. Do any of you have opinions about bars, taverns, nightclubs or establishments that sell alcohol that are so positive or so negative that you could not be a fair and impartial juror in a case that takes place at such an establishment? Is that going to be a problem for any of you?

FOUR JURORS: (Indicating in the negative).

THE COURT: They answer no. Do you have any opinions about people who attend establishments that sell alcohol that are so positive or so negative that you could not be a fair and impartial juror if a witness was such an attendee? Any problem with that?

FOUR JURORS: (Indicating in the negative).

THE COURT: Again, the answers are no. Do any of you have any strong opinions about alcohol consumption?

FOUR JURORS: (Indicating in the negative).

THE COURT: And again, the answers are no. Have you, or any member your immediate family, had a negative experience with a law enforcement official that would cause you to be biased when evaluating the testimony of a witness who is so employed?

FOUR JURORS: (Indicating in the negative).

THE COURT: And the answer is no. And will you follow the instructions that you get at the conclusion of the case, even if it turns out the law is different than what you thought it would be? Will you follow the instructions?

FOUR JURORS: (Indicating in the affirmative).

THE COURT: And the answer is yes. The offenses that the -- one of the offenses charged in this case is murder. Do you feel that the nature of the offense, being murder, would make it difficult for you to render a fair and impartial verdict in this case?

FOUR JURORS: (Indicating in the negative).

THE COURT: The answer is no. The Defendant is charged with two different charges, in multiple counts. Does the mere fact that he's facing multiple allegations lead you to believe that he's probably guilty of some or all the charges?

FOUR JURORS: (Indicating in the negative).

THE COURT: Again, the answer is no. The offense is alleged to have occurred at the American Legion post on Hickory Street. Are you familiar with that location?

FOUR JURORS: (Indicating in the negative).

THE COURT: Again, the answer is no. And again, as I've said over and over again, the Defendant is not required to offer any evidence on his own behalf. But if the Defendant decides to call witnesses or present evidence, in his behalf, will you weigh this evidence just as you would the evidence presented by the State?

FOUR JURORS: (Indicating in the affirmative).

THE COURT: The answer is yes. Do you believe that because the Defendant is charged with a crime and is on trial, that he must be guilty?

FOUR JURORS: (Indicating in the negative).

THE COURT: The answer is no. Ms. Carlson.

MS. CARLSON: Thank you, your Honor. Good afternoon. Ms. Young, you're the Vice President of academic services and that's for Parkland.

JUROR YOUNG: Yes.

MS. CARLSON: Okay. How long have you been there?

JUROR YOUNG: Eleven and a half years.

MS. CARLSON: Does any part of your work have any direct interaction with the Parkland Police Department?

JUROR YOUNG: Occasionally (shakes head in the affirmative). Yes.

MS. CARLSON: Is there anything about having that direct contact that'll make it difficult for you to be fair and impartial in listening to police testimony?

JUROR YOUNG: No.

MS. CARLSON: Okay. Obviously, Parkland does have a lot of employees. Is there already seated on this jury, or seated with you now, who you know from outside of being a juror?

JUROR YOUNG: Yes.

MS. CARLSON: Okay. Is it someone you work with?

JUROR YOUNG: No.

MS. CARLSON: Is it a social friend?

JUROR YOUNG: No. People I'm -- social, sure, yes, but not close social.

MS. CARLSON: Okay. Are these people that you feel that you could serve as an impartial juror with?

JUROR YOUNG: Yes.

MS. CARLSON: Would you feel you necessarily had to agree or disagree with them just because you already know them?

JUROR YOUNG: No.

MS. CARLSON: Is there anything about your relationship with those jurors that would make you feel as though you had to do what they said?

JUROR YOUNG: No.

MS. CARLSON: Is there anything about the relationship that you have with them that you think might make them feel they had to do what you said?

JUROR YOUNG: No.

MS. CARLSON: So you think you would be able to discuss things freely and openly?

JUROR YOUNG: Yes.

MS. CARLSON: And you had service about three years ago, you say?

JUROR YOUNG: Um, hm (yes).

MS. CARLSON: Do you remember if that was a criminal case?

JUROR YOUNG: I was -- I made it to that part of the room but never up here.

MS. CARLSON: Okay. So you made selection but you didn't make it on to -- as far as you've gotten to this point?

JUROR YOUNG: Correct.

MS. CARLSON: And you've never served on a jury that deliberated?

JUROR YOUNG: Correct.

MS. CARLSON: Okay. Thank you very much. And good afternoon, Mr. Rossman.

JUROR ROSSMAN: Good afternoon.

MS. CARLSON: You've certainly put in some time in jury service.

JUROR ROSSMAN: Yes.

MS. CARLSON: Over the past six or seven times that you've served, were you ever the foreperson of your jury?

JUROR ROSSMAN: Was I ever what?

MS. CARLSON: Were you ever the foreman of your jury?

JUROR ROSSMAN: I can't remember being foreman.

MS. CARLSON: Okay. Were your jury's all able to reach verdicts?

JUROR ROSSMAN: Where they what?

MS. CARLSON: Were the jury's you sat on able to reach a decision?

JUROR ROSSMAN: Most of them (shakes head in the affirmative).

MS. CARLSON: Okay. Of the ones that didn't reach a decision, were any of those criminal cases?

JUROR ROSSMAN: I don't think so.

MS. CARLSON: Okay. After so many years of jury service, have you formed any opinions about the criminal justice system that would make it difficult for you to be fair and impartial as a juror yet again?

JUROR ROSSMAN: No.

MS. CARLSON: Is there anybody already selected for this jury or seated with you now, who you know?

JUROR ROSSMAN: No.

MS. CARLSON: Is there anything out here in the venire that you know?

JUROR ROSSMAN: I've got a neighbor that's in jury selection.

MS. CARLSON: If you were -- found, yourself to be serving on jury duty with your neighbor, would you be able to have a free and healthy discussion of the issues with the case with your neighbor?

JUROR ROSSMAN: No.

MS. CARLSON: You wouldn't be able to talk with them?

JUROR ROSSMAN: My neighbor?

MS. CARLSON: Right.

JUROR ROSSMAN: About the -- the trial?

MS. CARLSON: Well, let me ask it a different way. If you were both jurors, would you feel that you had --

JUROR ROSSMAN: Oh, I understand. Yes. Yeah.

MS. CARLSON: Okay. So you'd be able to serve with this person?

JUROR ROSSMAN: Yeah.

MS. CARLSON: And you wouldn't worry about somebody cutting your flowers at home or anything?

JUROR ROSSMAN: No.

MS. CARLSON: Okay. And what department are you retired from at the University?

JUROR ROSSMAN: The University of Operation Maintenance Division.

MS. CARLSON: And are you employed in another capacity now or just enjoying your retirement?

JUROR ROSSMAN: No. I'm retired.

MS. CARLSON: Okay. Thank you very much. And Mr. Craig.

JUROR BROWN [1]: Hi.

MS CARLSON: Hi. Now, you're in the construction industry?

JUROR BROWN: Yeah. I have a -- I'm a fencing and landscape contractor. I have may own company.

MS. CARLSON: Okay. In that capacity, is there anything that you can think of about the work that you do, that you feel has brought you into greater contact with law enforcement than the average citizen?

JUROR BROWN: Not yet.

MS. CARLSON: Okay. Is there anybody already seated on the juror with you right now, who you know from outside of your experience as being a juror?

JUROR BROWN: Not anymore. She just left.

MS. CARLSON: Okay. I think that takes you off the hot seat, Mr. Craig. Thank you. And Mr. Brown, good afternoon.

JUROR BROWN: Hello.

MS. CARLSON: Hi. You're with the -- you're a geologist?

---

[1] Petitioner note: So in original. From context, the first four Juror Brown entries appear to have been with Juror Craig, not Juror Brown.]

JUROR BROWN: I am.

MS. CARLSON: And you're in a position where your agency contracts with the University?

JUROR BROWN: Yes.

MS. CARLSON: Okay. Does that make you a University employee directly?

JUROR BROWN: I am a University employee.

MS. CARLSON: Okay. Now, you've had a chance to hear from another couple of jurors who are also employed by the University of Illinois. Do you know any of them?

JUROR BROWN: I do not.

MS. CARLSON: Do you know anyone that's already been selected for the jury or seated with you now?

JUROR BROWN: I do not.

MS. CARLSON: What about out here in the venire?

JUROR BROWN: I do not.

MS. CARLSON: Okay. When -- let's see, I had another question for you and I lost it. As a geologist, can you tell me a little bit about your academic background.

JUROR BROWN: Yes. I have a -- a masters of geology from the University of Wisconsin. I worked for Indiana University for sixteen years, Indiana geological

survey. Now I'm the head of a section of about eleven scientific and technical staff at the Illinois State Geological Survey, which is a part of the Institute of Natural Resource Sustainability at the University.

MS. CARLSON: Have you -- have you ever been in the position of having to testify about your area of expertise?

JUROR BROWN: No, I have not.

MS. CARLSON: Does anyone in your department ever do that?

JUROR BROWN: Yes, they do.

MS. CARLSON: And do you supervise any of those people?

JUROR BROWN: I am a supervisor. I don't recall any of the people that I supervise, which I've been in this business for three and a half years, I don't recall that any of them have ever testified.

MS. CARLSON: Okay. If you were to hear testimony from expert witnesses in this case in areas such as forensic pathology, or fingerprint evidence, would you be able to listen to that evidence with a clear, open mind, not keeping in mind what some your colleagues do?

JUROR BROWN: Yes.

MS. CARLSON: Okay. Your Honor, may I have a moment?

THE COURT: Yes.

MS. CARLSON: Your Honor, with our thanks, the People would excuse Mr. Rossman.

THE COURT: All right. Mr. Rossman, I'm going to excuse you from this trial and that also excuses you for the term. Thank you, sir. I'd ask the next juror called to take the seat next to Ms. Young.

MADAM CLERK: Juror number 18, Derrick Peters.

****

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

PEOPLE of the STATE OF ILLINOIS,	)	
v.	)	NO. 2008-CF-32
CHARMELL D. BROWN,	)	
Defendant.	)	

JURY TRIAL - DAY 3

REPORT OF PROCEEDINGS had in the above-entitled cause on the 9TH DAY OF DECEMBER, 2009, before the HONORABLE THOMAS J. DIFANIS, Circuit Judge.

****

MR. CROSS: Now, the evidence will also show that the person that can be identified as doing the shooting does not match the physical description of Mr. Charmell Brown. Besides there being a different vehicle that the shooter was seen leaving in. From what you'll hear from the prosecution witness, Tegan Milam, this individual that was seen doing the shooting does not resemble Mr. Brown in some very characteristic ways. There are no African Americans on the jury, but African American

people identify readily with skin color. I'm fifty-five years old. Since the time I was a little boy, there was always talk about light skinned blacks, cocoa, caramel color …, and dark skinned blacks. May not mean much if you're not an African American, but this is one of the ways that African American people use to identify other African Americans. The person that was seen in the white t-shirt, that fired the four shots from the gun and that left the scene in the white vehicle, does not match the complexion of Charmell Brown.

Now, there's going to be instructions from Judge Difanis involving identification. Judge Difanis will likely instruct you that the law that applies regarding circumstances of identification, has included in it a list of at least five items which you should consider when you make a decision as to whether or not identification has been made to your satisfaction.

You'll also get an instruction that you and only you, are the judges of the facts in this case. The identification evidence and the instruction that you get will be important. One of the things that Defense witness will establish in this case, is that the only eye witness to this shooting that the prosecution can call or will call, is Tegan Milam. …

****

IN THE CIRCUIT COURT FOR
THE SIXTH JUDICIAL CIRCUIT OF ILLINOIS
URBANA, ILLLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	No. 2008 CF 32
Plaintiff,	)	
	)	Post-Trial Motion
VS.	)	
	)	
CHARMELL BROWN,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED AND CERTIFIED, that on, to-wit: The 8th day of February, 2010, the following proceedings were had in the aforesaid cause before the Honorable THOMAS J. DIFANIS, Judge Presiding.

****

MR. CROSS: Judge, we argue the issue of the African-American prospective juror, Devon Ware, there is a request to have the State present some justification for exercising a peremptory challenge against Mr. Ware, who was a young African-American male, where the defendant on trial was a young African-American male, and the entire panel of jurors, which consisted of about

60 jurors, included only one other young African-American male, or one other African-American, period. We cite the case of *People vs. Andrews*, which is a 1992 Illinois Supreme Court case at 146 Ill. 2d 413. I believe 426 talks about where there is no heterogeneous issues, victims of the shooting and the witnesses were … all African-Americans, it -- for the State to exercise their challenge against Mr. Ware, without asking Mr. Ware a single question, we feel that that was an intentional, raced based exclusion of Mr. Ware. Your Honor will recall that when general questions were asked of Mr. Ware, he indicated he was only familiar with the American Legion facility. He had never been on the inside of it. He had been by it, or the outside of it one time. There was no indication or nothing that was state by Mr. Ware that indicated that his experience in being outside of the Legion on an occasion, we don't even know how many occasions, or it was just the one. But there was no indication from him that that experience on being on the outside of the Legion would affect his ability to sit in this case as a juror, listen to the facts and the evidence, and to do his duty under oath as a juror.

There was, as we say, there was absolutely no questions from the State. Your Honor ruled that we had not made out a prima facie case of discrimination. Mr. Ware did come early on in terms of being a prospective juror during the voir dire. However, Judge, we pointed out that there were only two other African-American males. That no other person that we were aware of that had been questioned prior to Mr. Ware had indicated in any way any differently than Mr. Ware about being able to listen to the evidence in this case, nor that a person

that was selected or was not objected to by the State had indicated in any way that they were not able to listen to the evidence and give a verdict based upon the facts and the evidence that was presented.

****

THE COURT: The voir dire questions, the court asked counsel to submit questions, the court asked several of the questions that were submitted by both counsel. The court again allowed counsel to supplement the voir dire with voir dire of their own. ...

Another issue was basically a *Batson* challenge. We had an African-American juror who, unlike every other juror that was questioned, not only knew where the Legion was, but had been there. Now I'm not sure he had been inside, but had spent time either in the parking lot, which seemed a bit odd, but all of the other -- all of the other jurors either didn't know where the Legion was, or at least knew where it was and that was their only connection to the Legion. I don't believe that a *prima facie* case was made concerning discrimination, and that is why the court denied the *Batson* challenge.

****