No. 20-5685

IN THE

SUPREME COURT OF THE UNITED STATES

RUBEN SANCHEZ — PETITIONER
(Your Name)

vs.

STEVEN SILVA — RESPONDENT(S)

ORIGINAL

FILED
SEP 02 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RUBEN SANCHEZ (PRO-SE)
(Your Name)

MCI-NORFOLK, POB 43, 2 CLARK ST
(Address)

NORFOLK, MA 02056
(City, State, Zip Code)

NA
(Phone Number)

QUESTIONS PRESENTED

(1) Whether, in an analysis under Batson v Kentucky, 476 U.S. 79 (1986), the prosecutor's peremptory challenge of Hispanic prospective jurors was justified where (a) the racially-neutral justification was the young age, maturity and/or education of the prospective juror(s), and (b) other non-Hispanic jurors of similar age and of equal or lesser academic accomplishments were not challenged; and whether these facts rendered the prosecutor's justification to be likely false, inconsistent and pretextual, thereby violating clearly established Federal law as articulated by the Supreme Court of the United States.

(2) Whether the trial judge erred when upholding the prosecutor's exclusion of these Hispanic prospective jurors by mistaking the prosecutor's "arbitrary" use of age as permissible because he relied on misplaced guidance from "Contra-Batson" dissenters rather than on the mandate of the U.S. Supreme Court as decided under Batson itself.

(3) Whether the Massachusetts Appeals Court characterization of the trial judge's ruling as "harmless error" violated the dictates of Batson by failing to require that the trial judge "consider all the relevant circumstances" when evaluating a prosecutor's permptory challenge.

(4) Whether the prosecutor's peremptory challenges of Hispanic prospective jurors caused at least one such juror to be stricken in violation of the Equal Protection Clause of the Fourteenth Amendment.

LIST OF PARTIES

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

RELATED CASES

Commonwealth v Sanchez [listed as Commonwealth v Brea], 87 Mass. App. Ct. 1130 (2015). FAR denied, Supreme Judicial Court, No. FAR-23562A. Certiorari denied.

Sanchez v Silva, U.S. District Court for Massachusetts, No. 17-11811-LTS. Judgement entered on November 15, 2018.

Sanchez v Silva, U.S. Court of Appeals for the First Circuit. No. 18-2159. Judgement entered June 8, 2020.

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IN THE SUPREME COURT OF THE UNITED STATES

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V

STEVEN SILVA, SUPERINTENDENT OF MCI-NORFOLK
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI
OF RUBEN SANCHEZ TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Ruben Sanchez ["Sanchez"] petitions for a writ of certiorari for the United States Court of Appeals for the First Circuit to review a final judgement in a habeas corpus case.

OPINION BELOW

On June 8, 2020, the United States Court of Appeals for the First Circuit entered judgement denying a Certificate of Appealability as to the United States District Court's order denying Sanchez's petition for a writ of habeas corpus under 28 U.S.S §2254.

BASIS OF JURISDICTION

The judgement of the United States Court of Appeals for the First Circuit was entered on June 8, 2020. This petition is filed within 90 days after the judgement. This Court has jurisdiction to review final judgements of the courts of appeals pursuant to 28 U.S.C. §1254(1).

Denial of a Certificate of Appealability is reviewable by this Court. Ayestas v Davis, 138 S.Ct. 1080,1088,n1 (2018). See also Miller-El v Cockrell, 537 U.S. 322, 326-7 (2003)("When the lower courts deny a COA and we conclude that their reason for doing so was flawed, we may reverse and remand so that the correct legal standard may be applied. See Slack v McDaniel, 529 U.S. 473, 485-6, 489-90 (2000)").

CONSTITUTIONAL PROVISIONS INVOLVED

> The trial judge violated the petitioner's right of Equal Protection of the laws under the Equal Protection Clause of the 14th Amendment, by permitting the prosecutor's peremptory challenge of one or more qualified Hispanic prospective jurors based on their Hispanic ethnicity, while crediting the prosecutor's pretextual assertions that these Hispanic prospective jurors, who were intelligent and academically successful, could not handle a trial with "extensive witnesses as well as scientific evidence" because of their age, while admitting non-Hispanic prospective jurors of same age and with equal or lesser academic achievements.
>
> The relevant portion of the Fourteenth Amendment reads: Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Ruben Sanchez ["Sanchez] is presently serving a life sentence for a conviction of second degree murder (#001); a sentence of 4 years and 364 days to 5 years for illegal possession of a firearm, concurrent with #001; and a sentence of 5 years of probation from and after #001 for carrying a loaded firearm. Sanchez was found guilty on July 1, 2011 and sentenced

on July 6,2011. Sanchez's conviction was affirmed by the Massachusetts Court of Appeals in Commonwealth v Sanchez [listed as Memorandum of Decision and Order Pursuant to Rule 1:28, "Commonwealth v Brea"], 87 Mass. App. Ct. 1130 entered June 17, 2015. The petitioner filed an Application for Further Appellate Review which was denied by the Supreme Judicial Court October 30, 2015 (See SJC No. FAR-23562A, Commonwealth v Sanchez [listed as "Commonwealth v Brea"]. A pro-se petition for writ of certiorari in the Supreme Court of the United States was denied on February 21, 2017. The petitioner filed a timely Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 on September 21, 2017. The District Court denied the Petition on November 15, 2018, and denied COA. Petitioner sought a Certificate of Appealability (COA) in the U.S. Court of Appeals for the First Circuit. On June 8, 2020 the First Circuit entered judgement denying the COA and terminating Sanchez's appeal.

STATEMENT OF RELEVANT FACTS

I. TRIAL PROCEEDINGS IN THE STATE COURT

Sanchez was tried together with two co-defendants, Andre Brea and Miguel Vasquez.[1] All three co-defendants were 19 at the time of the offense and are Hispanic[2] (see Tr.Vol I/8-10). Jury

1. At trial, Ruben Sanchez was represented by Attorneys Michael J. Doolin and William J. Keefe, Andre Brea was represented by Attorney Leftheris Travayakis, and Miguel Vasquez was represeanted by Attorney Daniel Solomon. (Tr. Vol I/1)

2. Hispanic ethnicity is a protected racial status for the purposes of determining whether an Equal Protection violation, under Batson v Kentucky, 476 U.S. 79 (1986), has occurred during jury selection. Hernandez v New York, 500 U.S. 352 (1991); Casteneda v Partida, 430 U.S. 482, 292-95 (1977); Commonwealth v Povez, 84 Mass. App. Ct. 660, 665 (2013).

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selection in this case occurred on June 9, 2011 (see Tr Vol I/44-263) and June 10, 2011 (see Tr. Vol II/3-293). Early during jury selection a pattern appeared to be emerging in the prosecutor's peremptory challenges, which seemed to target young Hispanics and possibly young minorities.

Facts Pertaining to Jury Selection

Prospective Juror No.2, Mr. Solomon

Prosepective Juror No. 2 (seated in Seat 1), Mr. Solomon, was 25 years old, a temporary worker employed by a staffing agency; he worked in the "accounting area" at Harvard (Tr Vol I/68-9, 72-3, 150). Mr. Solomon did not see the blank on the juror questionnaire about education so the trial judge asked: "Could you tell me a little bit about that please?" to clarify his education status. Mr. Solomon stated: "I graduated from the University of Maine in '08." When asked by the trial judge "And have you been doing generally accounting finance?" Mr. Solomon relied, "As an associate." When the trial judge suggested that Mr. Solomon "went up to school in Maine" Mr. Solomon responded, "I was in the--program, went to school out in Lexington." "graduated from the University of Maine in '08." (Tr Vol I/70). Thus the extent and location of Mr. Solomon's college education was unclear.

Prospective Juror No. 16, Mr. Flynn

Prospective Juror No. 16, Mr. Flynn (seated in Seat 2) worked as a supervisor of a valet service with responsibility for parking vehicles at the main entrance of a hospital. Flynn had attended high school but did not graduate from high school; he had earned a GED (general equivalency diploma). Flynn had been

arrested for possession of marijuana and had been placed on probation. Flynn told the trial judge that the amount of marijuana was "a joint". (Tr. Vol I/110-2).

Prospective Juror No. 26, Mr. Salazar

The trial judge assumed that the prospective juror No. 26, Mr. Salazar, was Hispanic. (Tr Vol I/147-8). The Commonwealth did not contradict the statement of the defendant's trial counsel, Mr. Doolin, that prospective juror Mr. Salazar "presents as a Hispanic male." See Tr Vol I/147, 147-51). Mr. Salazar indicated he would be fair as a juror. Mr. Salazar was nineteen, a college student; he had just finished his freshman year at Brandeis University and was undecided as to his major. He also worked at "the family firm" but was willing to interrupt that work to participate as a juror for the approximate two weeks that the case would run. (Tr Vol I/144-46). The prosecutor made a peremptory challenge to which the petitioner objected. The exchange went as follows:

> MS. HICKMAN: The Commonwealth would use a peremptory, Your Honor.
>
> MR. DOOLIN: I object under Commonwealth versus Soares[3].
>
> THE COURT: Seeing what pattern, Mr. Doolin?
>
> MR. DOOLIN: So far, the Commonwealth has used three challenges. This gentleman, Mr. Salazar, presents as a

3. An objection to discrimination in jury selection under Commonwealth v Soares, 377 Mass. 461, cert. denied. 444 U.S. 881 (1979), includes and preserves an objection under the Equal Protection Clause as stated in Batson v Kentucky, 476 U.S. 79 (1986). See Commonwealth v Prunty, 462 Mass. 295, 305 (2012)(citing J.E.B. v Alabama ex rel. T.B., 511 U.S. 127, 146 (1994); Batson v Kentucky, 476 U.S. 79 (1986); Prunty, supra, 462 Mass. at 305 n.14 (quoting Commonwealth v Young, 401 Mass. 390, 402 n.11 (1987).

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Hispanic male. He's nineteen years old. The government's first challenge was to a young black male, nineteen years old, also from the minority community, and there was a white juror that was challenged as well.

As I look through the questionnaires as to what's coming up, I see one other Hispanic male in the fifty jurors that we have. And I would suggest that at this point even though we're early on in the proceedings that I object under Commonwealth versus Soares.

THE COURT: Well, first, I do not know whether the juror before the court at the moment is or is not of Hispanic heritage. I certainly am unable to tell. I don't know how one can tell that, but assuming that he is, and I do recall the challenge of the younger black male by Ms. Hickman, two can certainly make a pattern. And so let me ask you, Ms. Hickman, as to give me a neutral reason as to why you exercised this challenge?

MS. HICKMAN: Well, why a pattern, then?

THE COURT: I am.

MS. HICKMAN: Because of age, Your Honor, he's only finished his first year of college. In dealing with a murder case I have extensive witnesses as well as scientific evidence. So the Commonwealth use of the peremptory would be based on the age of nineteen year old and he's only through one year of college.

THE COURT: Okay. Do you wish to be heard on [any] further, gentlemen?

MR. DOOLIIN: Respectfully, I would suggest he's obviously an intelligent individual, he's going to one of the finest colleges in America, Brandeis University, so he certainly has an intellectual ability to serve as a juror. He appears to be mature, also putting himself seemingly through college. Respectfully, I would ask the court to seat Mr. Salazar...

MR. TRAVAYAKIS; Right. Juror No. 16 however, I believe had no education. [Mr. Flynn had no HS diploma but did have a GED].

THE COURT: Is this the first juror?

MR. TRAVAYAKIS: He was a valet supervisor if you recall, Mr. Flynn...Juror No. 16, right. So, I mean, just based on those other two previous jurors that were sat, I don't see much of a distinction between Mr. Salazar and Number 2.

THE COURT: Well, there may not be much of a distinction and certainly that parallel is a factor under the Soares jurisprudence, I'm well aware of that.

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But we are in the zone of peremptory challenges, which by definition, if they are not used for a purpose grounded solely in an illegal basis such as sex, gender, or religion or ethnic origin, can be exercised peremptorily. So, my own personal sense is that people ought not to be challenged [o]n the basis of age. But, I, obviously am not in a position to make the laws.

So, I'm comfortable that the reasons asserted are both adequate and genuine and so I'm going to permit the challenge. So, I'll be mindful of this point.

MR. DOOLIN: On behalf of Mr. Sanchez, I object.

THE COURT: Yes

MR. TRAVAYAKIS: Mr. Brea as well.

(Tr Vol I/144-151)

The prosecutor did not contest Mr. Doolin's description of Mr. Salazar as "obviously an intelligent individual, he's going to one of the finest colleges in America, Brandeis University, so he certainly has an intellectual ability to serve as a juror. He appears to be mature, also putting himself seemingly through college." (See Tr Vol I/144-51). The prosecutor offered no explanation to justify why she was challenging Mr. Salazar on intellectual ability grounds when the facts identified above seemed to clearly contradict that argument. The trial judge apparently concurred, acknowledging that "there may not be much of a distinction" between Mr. Salazar and Juror No. 2. See Tr Vol 1/150.

Prospective Juror No. 50, Ms. Ortiz

Juror No. 50, Ms. Ortiz, was admitted to be a student at UMass Lowell starting in the fall. She had just finished high school and was going to be working at Childrens Hospital (a hospital perennially ranked as the #1 children's hospital in the

U.S.) as an intern in the summer. Ms. Ortiz had attended Boston Latin Academy (a high-ranking Boston Exam school). She did not know the specific duties of the internship at Childrens Hospital but she said she would do whatever they asked of her.

Ms. Ortiz and her family lived in South Boston; she had resided in South Boston for ten years. Ms. Ortiz had two older brothers, one attending UMass Amherst who would be finishing in December. Ms. Ortiz would be at UMass Lowell at the same time. The other brother was 32 years old. (Tr Vol I/243-46)

The trial judge asked Ms. Ortiz the following:

> THE COURT: ...Well, Ms. Ortiz, I wonder once you graduate on Friday, if we get you to help us with this trial which will pick up Monday. It's going to take us about two weeks. I know that will water up the beginning of your summer and perhaps even your internship and I understand that, but we could really use your help, do you think you can give that to us?
>
> THE JUROR: Sure, if you want to.
>
> THE COURT: Okay. It's nice of you to be willing, [Ms.] Ortiz, and it's nice to meet you. Give me just a sec and I'll be right back with you.
>
> THE JUROR: Okay
>
> THE COURT: Okay, so, we're on the Seat Number five.
>
> MR. CLERK: Correct? Commonwealth?
>
> MS. HICKMAN: Your Honor, the Commonwealth would be using a peremptory. And this would be the same circumstances as Juror No. 26, Stephen Salazar which a Soares challenge was found by the court in which the Commonwealth had mentioned the fact that as a nineteen year old and had only finished one year of college, we're dealing right here with an eighteen year old who's just graduating from high school tomorrow and not starting college until this fall, so I'd be using a peremptory on that.
>
> MR. SOLOMAN: If I may, Your Honor, Mozart wrote some things when he was twelve and I know plenty of seventy year olds who are idiots, so that's my comment on the age aspect of the challenge.

MR. DOOLIN: On behalf of Mr. Sanchez, I object under Soares[4]. Again, this is a young woman who is graduating high school. She's intelligent, she was respectful. She's going to college. She's obviously an intelligent person. She's Hispanic. Again, her name is Otilia Ortiz is her name, which I would suggest is a Hispanic surname.

THE COURT: It would appear to be...

MR. DOOLIN: Can I just make one other point respectfully...

THE COURT: Sure.

MR. DOOLIN: --just to try to persuade the court and I respect the court's decision.

But at this point in time this is the Commonwealth's fourth challenge. Three out of four have been members of, I'm sorry, this is the government's fifth challenge. I would suggest by my records, and I'd be corrected if I'm wrong, that this has been the second Hispanic individual and the third person in the minority community.

THE COURT: Can I see the data? This is the government's challenges?

MR. DOOLIN: So I would suggest that it's 60 percent of the challenges so far, three out of five have been to members of the minority community.

THE COURT: If this one is sustained?

MR. DOOLIN: Yes, Your Honor.

THE COURT: Yes. Although, we do have as a seated juror, Where are the seated jurors, Dave?

THE CLERK: I have it right here, Your Honor.

MS. HICKMAN: We have an African-American juror, we have...

THE COURT: And do we have a breakdown of age and race or gender?

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4. As noted above, an objection to discrimination in jury selection under Commonwealth v Soares, 377 Mass. 461, cert. denied. 444 U.S. 881 (1979), includes and preserves an objection under the Equal Protection Clause as stated in Batson v Kentucky, 476 U.S. 79 (1986). See Commonwealth v Prunty, 462 Mass. 295, 305 (2012)(citing J.E.B. v Alabama ex rel. T.B., 511 U.S. 127, 146 (1994); Batson v Kentucky, 476 U.S. 79 (1986); Prunty, supra, 462 Mass. at 305 n.14 (quoting Commonwealth v Young, 401 Mass. 390, 402 n.11 (1987).

MS. HICKMAN: I can do that for you, Your Honor.

THE COURT: I know Juror Number 1 was a black male.

MR. DOOLIN: Nineteen years old.

THE COURT: Juror Number 2 is a white male, I remember. Juror Number 3 is a female. Juror Number 3 is a female with a surname of Acevedo, which would appear to be, possibly, at least, Hispanic. Juror Number 4, Martin Hollick, I think, was a white male. And I think that's as far as we've gotten.? Is Mr. Ortega seated?

MR. CLERK: He is in seat Number 8, Your Honor.

THE COURT: Mr. Ortega is what would appear to be an Hispanic male. So, the government has not, I don't think there's been any demonstration and I do not make any finding. Quite the contrary, I do not make any finding that there has been a pattern of challenging Hispanic persons or minority persons. The pattern, insofar as it exists, is challenging young people.

Again, I will say it's concerning to me, but I don't think my concerns are the governor here because it's not unlawful the exercise of a peremptory challenge, to the best of my knowledge, on the basis of age. I'd like to see that changed, quite frankly, but I don't believe it's unlawful. [emphasis added]

So, I'm going to sustain the challenge...

(Tr VolI/246-51).

Prospective Juror No. 52, Ms. Abdelaal

MR. CLERK: Juror Number 52.

THE JUROR: Here.

THE COURT: Hi, Ma'am, how are you?

THE JUROR: Fine.

THE COURT: Is it Ms. Abdelaal?

THE JUROR: The last name is, Abdelaal.

THE COURT: Sorry?

THE JUROR: Abdelaal, first name is Asmaa.

THE COURT: Abdelaal is the last name?

THE JUROR: Um hmm.

THE COURT: Ms. Abdelaal, how are you today?

THE JUROR: Good.

THE COURT: Good, Ms. Abdelaal, did you raise your hand on any of the questions I asked earlier?

THE JUROR: No.

THE COURT: Okay. You do remember that one or more of the defendants is charged with possession of weapon and murder?

THE JUROR: Yup

THE COURT: Whether you have any feelings about those kinds of charges that would make it hard for you as a juror to be fair to all parties?

THE JUROR: No.

THE COURT: In other words, you would be a fair juror?

THE JUROR: Um hmm.

THE COURT: Okay. Ms. Abdelaal, I want to mention to you that one or more of the defendants, some of our witnesses and the alleged victim of the homicide are all people of Hispanic origin, whether you have any feelings about race or ethnic origin that would make it hard for you to be fair to everybody?

THE JUROR: No.

THE COURT: Okay. Ms. Abdelaal, you are currently working, is that correct?

THE JUROR: Yes

THE COURT: And how long have you been at this T-Mobile?

THE JUROR: I just got that job.

THE COURT: You just got it.

THE JUROR: But, I had a job before that.

THE COURT: And what was that?

THE JUROR: I was at UPS for a while.

THE COURT: Okay. What did you do at UPS?

THE JUROR: I was a mail clerk.

THE COURT: Okay. How do you like this job?

THE JUROR: It's better.

THE COURT: Better, good.

THE JUROR: It fits my field more.

THE COURT: And where did you go to high school, Ms. Abdelaal?

THE JUROR: East Boston High.

THE COURT: Okay. And how long have you lived in East Boston?

THE JUROR: My whole life, for about fourteen years.

THE COURT: Okay. Good. And your family lives with you there in East Boston?

THE JUROR: Um hmm.

THE COURT: Do you have older brothers and sisters?

THE JUROR: I have a twin sister and a younger brother.

THE COURT: You have a what?

THE JUROR: A twin sister and,---

THE COURT: A twin sister, okay, good. What does she do?

THE JUROR: She works at the same company with me.

THE COURT: At T-Mobile?

THE JUROR: Um hmm.

THE COURT: Oh, good did she help you get that job?

THE JUROR: No, I got it.

THE COURT: Okay. All right, that's great Ms. [Abdelaal]. I wonder if we could take you away from that work for a while. We have a trial that's going to resume here Monday and will last for about two weeks. I know that will interrupt your work, but we could very much use your help on this case, do you think you're able to give that to us?

THE JUROR: I would have [to] contact my job, but I don't think they would have a problem with that.

THE COURT: Yeah. The way it works, ma'am, is [your] employer has to permit you to work, I mean, to come as a juror and they have to pay you for the first three days.

A big company like T-Mobile will probably pay you throughout. The government pays you starting [on] the fourth [day] of your service, but only fifty dollars a day.

But you could check out that to be sure you get your paycheck because I'm sure that's important to you.

THE JUROR: Um hmm.

THE COURT: And you could let them know if you're seated that of course you're required to be here and I'm sure they deal with this all the time.

THE JUROR: Yeah.

THE COURT: Okay, so we're still on that Seat Number 5, Dave?

MR. CLERK: We are.

MS. HICKMAN: The Commonwealth is content with her.

MR. CLERK: Do you need a moment?

MR. DOOLIN: If I could.

THE COURT: Gentlemen?

MR. CLERK: Mr. Doolin?

MR. DOOLIN: Mr. Sanchez is content.

MR. CLERK: Mr. Solomon?

MR. SOLOMON: Mr. Vasquez is content.

MR CLERK: Mr. Travayakis?

MR. TRAVAYAKIS: Mr. Brea is content, but I would, you know, Your Honor, with regard to this juror and the [previous] Commonwealth challenges again we have a young woman, high school diploma, nineteen years old, you know, this is the typical juror that the Commonwealth has challenged based on age. And so in retrospect [with] those previous Soares challenges it would appear that the Commonwealth would challenge this juror as well,--

THE COURT: Yup.

MR. TRAVAYAKIS: --if age was that factor, I just want to point out that for the record.

THE COURT: I understand that and to just briefly rehearse what is well known to all of us, we have these strictures on peremptory challenges from the SJC and the Appeals Court, to a lesser extent, from the U.S. Supreme Court, and they're

difficult to manage and administer.

The fundamental problem is the dissenting opinion in the Supreme Court case that followed Soares and the Wheeler case in California[5] is that the very nature of a peremptory challenge is arbitrary. And of course [there] are some including current and former members of the SJC and other judges who believe that we have way too many peremptories in our cases. And they are troublesome.

But I don't believe that one has to behave arbitrarily and consistently in order to exercise peremptories lawfully, in fact, I'm quite sure you do not.

So, I'm going to seat this juror. Come on up, ma'am, please. Ms. Abdelaal, I'm glad to have you serve. You'll be juror Number 5...

(Tr Vol I/252-58)

II. MASSACHUSETTS APPEALS COURT RULING ON JURY SELECTION ISSUES

On jury selection issues the Appeals Court ruled as follows:

3. Peremptory challenges. Sanchez next contends that the judge erred in permitting one or more of the Commonwealth's peremptory challenges based on the potential jurors' Hispanic ethnicity.[n.5] ...

In the present case, although he did not find a pattern of discriminatory intent, the judge inquired into the prosecutor's rationale for challenging the first of the prospective jurors in question, and the prosecutor independently offered an explanation for the second. Following this second challenge, the judge concluded that the prosecutor's race-neutral reasons--age and ability to digest information--were genuine and adequate.

---

5. The judge was referring to Batson v Kentucky, 476 U.S. 79 (1986) where the U.S Supreme Court stated that it was reversing a decision of the Supreme Court of Kentucky in which that court "declined the petitioner's invitation to adopt the reasoning of People v Wheeler, [22 Cal.3d 258 (1978)]...and Commonwealth v Soares, supra". Batson 476 U.S. at 84. Clearly the trial judge understood that he was being asked and was required to apply Batson and its progeny. Further, as noted above, an objection to discrimination in jury selection under Commonwealth v Soares, 377 Mass. 461, cert. denied. 444 U.S. 881 (1979), includes and preserves an objection under the Equal Protection Clause as stated in Batson v Kentucky, 476 U.S. 79 (1986). See Commonwealth v Prunty, 462 Mass. 295, 305 (2012)(citing J.E.B. v Alabama ex rel. T.B., 511 U.S. 127, 146 (1994); Batson v Kentucky, 476 U.S. 79 (1986); Prunty, supra, 462 Mass. at 305 n.14 (quoting Commonwealth v Young, 401 Mass. 390, 402 n.11 (1987).

The judge's colloquy with counsel was sufficient to evaluate meaningfully the prosecutor's proffered reasons for the challenges, and we see no reason to disturb his rulings, which are supported by the record.[n.6] Contrast Commonwealth v Benoit, 452 Mass. 212, 222...(2008). Furthermore, at the time of the second challenge in question, at least five had been seated, including two who appeared to be of Hispanic ethnicity. The judge noted that the final jury appeared to be comprised of four persons who were African-American, three who were Hispanic, seven who were Caucasian, and one who was Egyptian. Cf. Commonwealth v LeClair, 429 Mass. 313, 321 (1999).

...

Footnotes

...

5. He appears to take issue with the peremptory challenges of prospective jurors 26 and 50.

6. For the same reasons, we also discern no merit in Sanchez's claim that the judge applied an incorrect standard in assessing the validity of the prosecutor's reasons for exercising the challenges. Even if the judge made a reference to an incorrect standard, the error was harmless because the record demonstrates that he applied the correct standard in conducting an independent evaluation of the adequacy and genuineness of the prosecutor's proffered reasons.

See Memorandum of Decision and Order Pursuant to Rule 1:28, Commonwealth v Sanchez, No. 13-P-562, 87 Mass. App. Ct. 1130...(June 17, 2015).

REASONS FOR GRANTING THE PETITION

I. THE PROSECUTOR'S STATED REASONS FOR PEREMPTORY CHALLENGES OF HISPANIC JURORS WERE FALSE, INCONSISTENT AND PRETEXTUAL AND THE TRIAL JUDGE VIOLATED CLEARLY ESTABLISHED FEDERAL LAW BY UPHOLDING THESE CHALLENGES.

A. THE BATSON STANDARD

In Batson v Kentucky, 476 U.S. 79 (1986), the United States Supreme Court "outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause" [of the 14th Amendment]. Hernandez v New York, 500 U.S. 352, 358 (1991)(citing Batson, 476 U.S. at 96-98):

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. [Batson] at 96-97. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Id. at 97-98. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. Id. at 98.

Hernandez v New York, supra, 500 U.S. at 358-359.

> Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot.

Hernandez v New York, supra, 500 U.S at 359. At that point, "the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination." Id. (quoting Batson, 476 U.S. at 98).

> [T]he credibility of reasons given can be measured by "how reasonable, or how improbable, the explanations are; and by whether the proffered reationale has some basis in accepted trial strategy[.]"

Miller-El v Dretke, 545 U.S. 231, 247 (2005)(citing and quoting Miller-El v Cockrell, 537 U.S. 322, 339 (2003)).

> A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Miller-El v Dretke, supra,545 U.S at 252.

> More powerful than...bare statistics...are side by side comparisons of some [protected minority] venire panelists who were struck and white [or other] panelists allowed to serve. If a prosecutor's proffered reason for striking a [protected minority] panelist applies just as well to an otherwise-similar [non-protected minority] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step.

Miller-El v Dretke, supra, 545 U.S. at 241.

"Racial identity between the defendant and the excused person...may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred" Powers v Ohio, 499 U.S. 400, 416 (1991).

B. APPLICATION OF BATSON STANDARD TO FACTS

Here the excused prospective jurors at issue (No. 26, Salazar and No. 50, Ortiz) and all the defendants were Hispanic, making this "one of the easier cases to establish...a conclusive showing that wrongful discrimination has occurred." Id. Prospective juror No. 26, Mr. Salazar, indicated that he would be a fair juror. Mr. Salazar was a college student; he had finished his freshman year at Brandeis University and worked at "the family firm". He was willing to interrupt that work to participate in this case as a juror for the approximately two

weeks that the judge indicated would be required. (Tr Vol I/144-146). The prosecutor exercised a peremptory challenge to Mr. Salazar and the petitioner objected "under Commonwealth v Soares[6].

At that point, the Commonwealth had challenged three prospective jurors: a young (19 year old) black male, a white juror, and Mr. Salazar, a nineteen year old Hispanic male. There was only one other Hispanic male remaining among the 50 prospective jurors still available. (Tr Vol I/1, 146-147). The judge found a pattern of possible discrimination and required the prosecutor to give a neutral explanation. The prosecutor gave the following reason:

> Because of age, Your Honor, he's only finished his first year in college. In dealing with a murder case I have extensive witnesses as well as scientific evidence. So the Commonwealth use of the peremptory would be based on the age of nineteen year old and he's only through one year of college.

(Tr Vol 1/148).

It was undisputed that Salazar was "obviously an intelligent individual" and that he "was going to one of the finest colleges in America, Brandeis University," and that he "certainly has an intellectual ability to serve as a juror". He appeared "to be mature, also putting himself seemingly through college." The

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6. As noted above, an objection to discrimination in jury selection under Commonwealth v Soares, 377 Mass. 461, cert. denied. 444 U.S. 881 (1979), includes and preserves an objection under the Equal Protection Clause as stated in Batson v Kentucky, 476 U.S. 79 (1986). See Commonwealth v Prunty, 462 Mass. 295, 305 (2012)(citing J.E.B. v Alabama ex rel. T.B., 511 U.S. 127, 146 (1994); Batson v Kentucky, 476 U.S. 79 (1986); Prunty, supra, 462 Mass. at 305 n.14 (quoting Commonwealth v Young, 401 Mass. 390, 402 n.11 (1987).

petitioner asked the court to seat Mr. Salazar (Tr Vol I/148). The Judge stated:

> THE COURT: ...But we are in the zone of peremptory challenges, which by definition, if they are not used for a purpose grounded solely in an illegal basis such as sex, gender, or religion or ethnic origin, can be exercised peremptorily. So, my own personal sense is that people ought not to be challenged [o]n the basis of age. But, I, obviously am not in a position to make the laws.
>
> So, I'm comfortable that the reasons asserted are both adequate and genuine and so I'm going to permit the challenge. So, I'll be mindful of this point...
>
> I think the reasons advanced by Ms. Hickman are certainly genuine. And although it's troublesome because grounded in age, the reasons appear to be adequate. She does really point to the age and experience of the juror. Age is not one of the equal rights amendment bases that the Soares and the follow-on decisions are grounded in...
>
> **Age is one of the areas in which one can be arbitrary, I think** under our case law, I know of no case law that grounds as Soares type ruling based on age... [emphasis added]

(Tr Vol I/148-149).

With Salazar, the Commonwealth had used three challenges, two on nineteen year old minority prospective jurors and one on a white juror. The Commonwealth had not challenged two previous non-minority jurors, Juror No. 16, Mr. Flynn, and Juror No. 2, Mr. Solomon, who appeared similar but less qualified than Salazar to handle "extensive witnesses as well as scientific evidence". (Tr Vol 1/148, 149-150). The judge conceeded that "there may not be much of a distinction" between Salazar and Juror No. 2, but nevertheless ruled that "the reasons asserted are both adequate and genuine", upholding the challenge to Salazar. (Tr Vol I/150-51).

It appears that the Judge misinterpreted the applicable standard. The question was **NOT** whether age (and intellectual

capacity) is an unprotected class whose application may be arbitrary. The proper issue is whether the third step assessment mandated by Batson and Miller-El holds up. See Miller-El v Dretke, supra, at 252 ("If the stated reason does not hold up, its pretextual significance does not fade..."). And, looking ahead to prospective jurors No. 50 and No. 52, it becomes apparent that the Judge's initial concern about the prosecutor's use of age as a pretext was properly justified. With these latter prospective jurors, the prosecutor's explanations are expoosed as false, inconsistent and pretextual, rendering them impermissible.

Prospective Juror No. 50, Ms. Ortiz, was graduating from high school "tomorrow" (June 10, 2011) and was admitted to the University of Massachusetts at Lowell for the fall. She was accepted by Childrens Hospital (a nationally pre-eminent institution) for a summer internship. She indicated that she would be a fair juror (Tr Vol I/243-44). The prosecutor made a peremptory challenge, stating:

> ...this would be the same circumstance as Juror Number 26, Stephen Salazar which a Soares challenge was found by the Court in which the Commonwealth had mentioned the fact that as a nineteen year old and had only finished one year of college, we're dealing right here with an eighteen year old who's just graduating from high school tomorrow and not starting college until this fall, so I'd be using a peremptory on that.

(Tr Vol I/247-48). All three defendants objected to the Commonwealth's challenge of Ms. Ortiz:

> Mr. DOOLIN: On behalf of Mr. Sanchez, I object under Soares. Again, this is a young woman who is graduating high school. She's intelligent, she was respectful. She's going to a college. She's obviously an intelligent person. She's Hispanic. Again, her name is Otilia Ortiz, which I would suggest is a Hispanic surname.

> THE COURT: It would appear to be.
> MR. DOOLIN: And respectfully, on behalf of Mr. Sanchez and I cite Commonwealth versus Soares.[7]
> THE COURT: Well, **everything that Mr. Doolin just said and joined in by both of the other defense lawyers here, everything he said is perfectly true**... [emphasis added] ...I have no doubt that Ms. Hickman's stated reason is the genuine reason that she puts forward. I don't see any pretext on account of the ethnic origin of the prospective juror, for example. She says it's age and I find that she is speaking genuinely.
>
> **Adequacy really becomes a non-issue because she's perfectly entitled to be utterly arbitrary on a zone that is not a forbidden zone**, such as religion, gender, race and the like. So, I'm troubled but I will sustain the challenge. And, **of course, all of your rights are saved**. [emphasis added]

(Tr Vol I/247-249).

Petitioner Ruben Sanchez's counsel Mr. Doolin noted that the challenge of Ms. Ortiz was the Commonwealth's fifth challenge and that "this has been the second Hispanic individual and the third person in the minority community...So...60 percent of the challenges so far...have been to members of the minority community." (Tr Vol I/249). The trial judge found that because two of the chosen jurors were Hispanic, there was no pattern of challenging Hispanic or minority persons. (Tr Vol I/250-251). The judge found that the pattern, insofar as it existed, was "challenging young people" (Tr Vol I/251), and sustained the

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7. As noted above, an objection to discrimination in jury selection under Commonwealth v Soares, 377 Mass. 461, cert. denied. 444 U.S. 881 (1979), includes and preserves an objection under the Equal Protection Clause as stated in Batson v Kentucky, 476 U.S. 79 (1986). See Commonwealth v Prunty, 462 Mass. 295, 305 (2012)(citing J.E.B. v Alabama ex rel. T.B., 511 U.S. 127, 146 (1994); Batson v Kentucky, 476 U.S. 79 (1986); Prunty, supra, 462 Mass. at 305 n.14 (quoting Commonwealth v Young, 401 Mass. 390, 402 n.11 (1987).

peremptory challenge of Ms. Ortiz. (Id.)

That this pattern was not the true cause of the prosecutor's challenges became crystal clear only two prospective jurors later, with Prospective Juror No. 52, Ms. Abdelaal. Ms. Abdelaal was 19 years old, with only a high school diploma, virtually identical in age and likely less qualified than either Mr. Salazar or Ms. Ortiz to deal with "multiple witnesses and scientific evidence". However, she was also not Hispanic. And, when co-defendant Andre Brea's counsel brought this to the attention of the trial judge, implying that the prosecutor's stated reasons for challenging Salazar and Ortiz had been a pretextual sham, the judge attempted to explain:

> ...we have these strictures on peremptory challenges from the SJC and the Appeals Court, to a lesser extent, from the U.S. Supreme Court, and they're difficult to manage and to adminster. ...The fundamental problem is the **DISSENTING** opinions in the Supreme Court cases that followed the Soares and Wheeler case in California is that **the very nature of a peremptory challenge is arbitrary**.[8] [emphasis added]. (Tr Vol I/257-258).

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8. The judge was referring to Batson v Kentucky, 476 U.S. 79 (1986) where the U.S Supreme Court stated that it was reversing a decision of the Supreme Court of Kentucky in which that court "declined the petitioner's invitation to adopt the reasoning of People v Wheeler, [22 Cal.3d 258 (1978)]...and Commonwealth v Soares, supra". Batson 476 U.S. at 84. Although the trial judge must have understood that he was required to apply Batson and its progeny, he seems to have erroneously fixated on the dissenting opinions rather than the reasoning clearly laid out in Miller-El v Dretke, 545 U.S. 231 (2005). See also infra, "III. THE MASSACHUSETTS APPEALS COURT RULING THAT THE TRIAL JUDGE'S MISAPPLICATION OF BATSON WAS HARMLESS WAS ITSELF ERRONEOUS. Further, as noted above, an objection to discrimination in jury selection under Commonwealth v Soares, 377 Mass. 461, cert. denied. 444 U.S. 881 (1979), includes and preserves an objection under the Equal Protection Clause as stated in Batson v Kentucky, 476 U.S. 79 (1986). See Commonwealth v Prunty, 462 Mass. 295, 305 (2012)(citing J.E.B. v Alabama ex rel. T.B., 511 U.S. 127, 146 (1994); Batson v Kentucky, 476 U.S. 79 (1986); Prunty, supra, 462 Mass. at 305 n.14 (quoting Commonwealth v Young, 401 Mass. 390, 402 n.11 (1987).

The trial judge deserves no deference, having employed an incorrect standard of review, and having failed to acknowledge the significance of the inherently self-contradictory nature of the prosecutor's jury selection conduct. See Miller-El v Dretke, supra, 545 U.S. at 247 ("the credibility of reasons given can be measured by 'how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy'" (quoting Miller-El v Cockrell, supra, 537 U.S. at 339)). The prosecutor's assertion that Salazar and Ortiz lacked the capacity to handle a trial with "extensive witnesses as well as scientific evidence"
because of their age and experience was contrary to the evidence and belied by the prosecutor's repeated acceptance of jurors of similar age and with lesser academic and intellectual qualifications. The prosecutor did not contradict any of defense counsel's assertions that Salazar was "obviously an intelligent individual" or that he was "going to one of the finest colleges in America, Brandeis University", that "he certainly has an intellectual ability to serve as a juror" and that he appeared "to be mature, also putting himself seemingly through college". (Tr Vol I/148-150). Similarly, Ms. Ortiz was graduating from an elite Boston Exam school, had been accepted for an internship at Childrens Hospital [one of the finest hospitals in the world], and was accepted for admission to University of Massachusetts, Lowell, for the fall semester. The prosecutor did not contradict Mr. Doolin's assertions that "She's intelligent, she was

respectful...She's obviously an intelligent person."

The failure to contradict is relevant. See Batson v Kentucky, supra, 476 U.S. at 93 ("In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available'" (quoting Arlington Heights v Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977)); Commonwealth v Vann Long, 419 Mass. 798, 806 n.8 (1995)(unchallenged factual assertions in jury selection "'will be deemed established'" (quoting Mejia v State, 328 Md. 522, 535 (1992))).

Indicative that the reasons given by the prosecutor for challenging these two highly qualified prospective jurors were false, inconsistent and pretextual, is that the prosecutor failed to exercise a peremptory challenge of Prospective Juror No. 52, Ms. Abdelaal, who was not Hispanic. She was the same age and with lesser academic accomplishments, yet was not challenged. Co-defendant Brea's counsel, Mr. Travayakis, explicitely brought this disparity to the judge's attention, but to no avail. (Tr Vol I/257).

The fact that the two intelligent, well-qualified and academically accomplished and, indeed, exceptional prospective jurors, Mr. Salazar and Ms. Ortiz, who were challenged by the prosecutor for purportedly lacking these qualities, were also Hispanic prospective jurors is proof that illegal discrimination occurred in jury selection in this case. See Batson v Kentucky, supra, 476 U.S. at 93 ("Circumstantial evidence of invidious

intent may include proof of disproportionate impact."); Powers v Ohio, supra, 499 U.S. at 416 ("Racial identity between the defendant and the excused person...may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred.")

In conclusion, the trial judge's resort to abjectly incorrect law in determining otherwise, involving the trial judge following the dissent in controlling United States Supreme Court cases, makes it abundantly clear that a constitutional violation has resulted and that the defendant's petition for writ of certiorari should be granted.

II. THE MASSACHUSETTS APPEALS COURT RULING THAT THE TRIAL JUDGE'S MISAPPLICATION OF BATSON WAS HARMLESS WAS ITSELF ERRONEOUS

The Massachusetts Appeals Court erroneously applied a "harmless error" standard to the trial judge's fundamental misunderstanding of the procedure outlined in Batson for determining whether a prosecutor has engaged in illegal unconstitutional discrimination in jury selection, in violation of the Fourteenth Amendment's Equal Protection Clause. In this regard, the Appeals Court stated:

> Even if the judge made a reference to an incorrect standard, the error was harmless because the record demonstrates that he applied the correct standard in conducting an independent evaluation of the adequacy and genuineness of the prosecutor's proffered reasons.

Memorandum of Decision and Order Pursuant to Rule 1:28, Commonwealth v Sanchez, 87 Mass. App. Ct. 1130 (2015), WL 3755894, at *3 n.6.

The Appeals Court's "reference to an incorrect standard"

made by the trial judge implicates his repeated erroneous reference to age as an area where the prosecutor has full license to be arbitrary. This occurred with respect to the decisions for both Salazar and Ortiz. With respect to Salazar, the trial judge stated:

> Age is not one of the equal rights amendment bases that the Soares [Batson] and the follow-on decisions are grounded in...Age is one of the areas in which one can be arbitrary, I think under our case law, I know of no case law that grounds as Soares type ruling based on age... (Tr Vol I/149)

And with respect to Ms. Ortiz the judge said:

> Adequacy really becomes a non issue because she's perfectly entitled to be utterly arbitrary on a zone that is not a forbidden zone, such as religion, gender, race and the like. So, I am troubled but I will sustain the challenge... (Tr Vol I/248-249)

This, however, is not what the U.S. Supreme Court requires. That Court is unmistakably clear in its directions to trial judges with respect to the determination of illegal discrimination that violates the Equal Protection Clause. "The Batson framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process... 'What matters is the real reason [the prospective jurors at issue] were stricken'". Johnson v California, 545 U.S. 162, 172 (2005)(quoting Paulino v Castro, 371 F.3d 1083, 1090 (9th Cir. 2004)).

> When circumstances suggest the need, the trial court must undertake a "factual inquiry" that "takes into account all possible explanatory factors" in the particular case. Alexander v Louisiana, [405 U.S. 625,] 630 [(1972)].

(Batson v Kentucky, supra, 476 U.S. at 95).

The trial judge's failure to follow the unmistakable directives of the United States Supreme Court to investigate and question with an open mind whether the prosecutor's peremptory challenges of Salazar and Ortiz, two well-qualified prospective jurors, reflected unconstitutional discrimination. Instead, the trial judge indicated that he had no authority to investigate the real reasons for challenging Mr. Salazar and Ms. Ortiz because that reason, age, was not subject to the heightened scrutiny required for protected classes. And, he explicitly articulated that he did so because he felt he was obligated to follow the "strictures" of "the **dissenting** opinions in the Supreme Court cases that followed Soares and the Wheeler case in California...that the very nature of a peremptory challenge is arbitrary". (Tr Vol I/257-58) See also note 8, supra. The dissenting view referred to by the trial judge appears in Batson itself and in J.E.B. v Alabama ex rel T.B., supra. The dissenters rejected the rules of law required by Batson, that a prosecutor may not be permitted to rebut a defendant's prima facie showing of impropriety "merely by denying that he had a discriminatory motive or '[affirming his] good faith in making individual selections'", Batson, supra, 476 U.S. at 97-98 (quoting Alexander v Louisana, 405 U.S. [625] at 632 [(1972)]. Additionally, "[t]he prosecutor...must articulate a neutral explanation related to the particular case to be tried". Batson, supra, 476 U.S. at 98, and that to rebut a prima facie showing of impropriety, "the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the

challenge"; Batson, supra, 476 U.S. at 98 n. 20 (quoting Texas Dept. of Community Affairs v Burdine, 450 U.S. 248, 258 (1981)). To understand what this trial judge has erroneously done, one must read the dissenting views that he referenced, which contradict Batson's requirements: Contra Batson, supra, 476 U.S. at 127-28 (Burger, C.J., joined by Rehnquist, J., disssenting)(complaining that "A 'clear and reasonably specific' explanation of 'legitimate reasons' for exercising the challenge will be difficult to distinguish from a challenge for cause. Anything short of a challenge for cause may well be seen as an 'arbitrary and capricious' challenge, to use Blackstone's characterization of the peremptory". (quoting 4 W. Blackstone, Commentaries *353); J.E.B. v Alabama ex rel T.B., supra, 511 U.S. at 161 (Scalia, J. joined by Rehnquist, C.J., and Thomas, J., dissenting)("Even if the line of our later cases guaranteed by today's decision limits the theoretically boundless Batson principle to race, sex and perhaps other classifications subject to heightened scrutiny (which presumably would include religious belief, see Larson v Valente, 456 U.S. 228, 244-246...(1982)), much damage has been done. It has been done, first and foremost, to the peremptory challenge system, which loses its character when (in order to defend against 'impermissible stereotyping' claims) 'reasons' for strikes must be given. The right of peremptory challenge "'is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose'". Lewis v United States, 146 U.S. 370, 378...(1892), quoting Lamb v State, 36 Wis. 424, 427

(1874)"). Thus, in this instant case, the trial judge's reference to peremptories being appropriately exercised arbitrarily is an **erroneous rejection** of the trial judge's duty to engage in a meaningful inquiry into the prosecutor's reasons for exercising a peremptory challenge as required by Batson. Consequently, the trial judge's determinations as to the validity of the prosecutor's reasons for challenging prospective jurors Salazar and Ortiz should be accorded no deference. See Miller-El v Dretke, supra, 545 U.S. at 247 ("the credibility of reasons given can be measured by 'how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy'" (citing and quoting Miller-El v Cockrell, supra, 537 U.S. at 339).

Thus, contrary to the Appeals Court's view that the trial judge's misunderstanding of the law was "harmless error", that misunderstanding was, in fact, a deliberate rejection of the essence of Batson, under which peremptory challenges can no longer be considered a matter in which the prosecutor has any right to be arbitrary. Batson, 476 U.S. at 89 ("Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried, 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 to impartially consider the State's case against a black defendant." (citations and internal quotations omitted)); Batson, supra, 476

U.S. at 93 ("Circumstantial evidence of invidious intent may include proof of disproportionate impact."). The absence of legitimate and credible explanation by the prosecutor requires reversal. This practice and the ruling by the Massachusetts Appeals Court violates the Equal Protection Clause of the Fourteenth Amendment and should not be permitted to continue. See e.g. Miller-El v Dretke, supra, 545 U.S. at 265-266. See also id. at 235-266. Reversal and remand to the First Circuit should be provided.

III. THE MASSACHUSETTS APPEALS COURT VIOLATED THE CLEARLY ESTABLISHED RULE THAT THE EXCLUSION OF EVEN ONE JUROR FOR IMPERMISSIBLE REASONS VIOLATES THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE

> "A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions." [Arlington Heights v Metropolitan Housing Development Corp.,] 429 U.S. [252,] 266 n.14 [(1977)]. For evidentiary requirements to dictate that "several must suffer discrimination" before one could object, McCray v New York, 461 U.S. [961,] 965 [(1983)](Marshall, J., dissenting from denial of certiorari), would be inconsistent with the promise of equal protection to all.

Batson v Kentucky, 476 U.S. 79, 95-96 (1986)(footnote omitted). The Appeals Court's decision violated the rule of law under the Fourteenth Amendment's Equal Protection Clause, "[t]he exclusion of **even one juror** for impermissible reasons harms that juror and undermines public confidence in the fairness of the system [emphasis added]." J.E.B. v Alabama ex rel T.B., 511 U.S. 127, 142 (1994); accord, Snyder v Louisiana, 552 U.S. 472, 478 (2008). Compare Memorandum of Decision and Order Pursuant to Rule 1:28, supra, Commonwealth v Sancheez, 87 Mass. App. Ct. 1130 (2015), WL

3755894, at *2 (stating, as support for its rejection of Ruben Sanchez's Equal Protection claims, "Furthermore, at the time of the second challenge in question, at least five jurors had been seated, including two who appeared to be of Hispanic ethnicity. The judge noted that the final jury appeared to be comprised of four persons who were African-American, three who were Hispanic, seven who were Caucasian, and one who was Egyptian.").

Contrary to the trial judge's erroneous method for determining whether the prosecutor had engaged in illegal discrimination in jury selection on the basis of Hispanic ethnicity in violation of the Equal Protection Clause of the Fourteenth Amendment, which was to rely on the presence of Hispanic or minority jurors on the selected jury as proof no such discrimination had occurred, Batson requires a trial judge to "**consider all relevant circumstances**" [emphasis added], Batson, 476 U.S. at 96-97. The United Supreme Court also has made it clear that "[t]he exclusion of **even one juror** for impermissible reasons harms that juror and undermines public confidence in the fairness of the system" [emphasis added]. J.E.B. v Alabama ex rel T.B., 511 U.S. 127, 142 (1994); accord. Snyder v Louisiana, 552 U.S. 472, 478 (2008).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Petitioner presented "a substantial showing of a denial of a constitutional right," entitling him to