No. _____

In the Supreme Court of the United States

ROBERTO LOPEZ-ORTIZ,
Petitioner,
v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

Petition for Writ of Certiorari
to the Appeals Court of the Commonwealth of Massachusetts

Appendix to Petition

DAVID NATHANSON
Counsel of Record
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DATED: DECEMBER 22, 2025

Index to the Appendix

Gmail **Mark Shea <markwshea@gmail.com>**

Mr. Lopez-Ortiz sentencing

5 messages

July Perham <[redacted]> Sat, Mar 18, 2017 at 3:12 PM
To: markwshea@gmail.com

Dear Mr. Shea,

As a juror on the trial of Mr. Lopez-Ortiz, I believe based on the evidence in the case and the charges we had to consider, Mr. Lopez-Ortiz should receive the minimum number of years in prison before the possibility of parole. Please inform the Judge that I believe that 15 years in prison before parole is the right outcome in this case.

Thank you,
Julia Perham, Juror # 3

Mark Shea <markwshea@gmail.com> Sat, Mar 18, 2017 at 4:49 PM
To: July Perham [redacted]>

Dear Ms Perham,
Thank you for your correspondence. I will be sure to share your view with the Judge. I appreciate the opportunity to speak with you yesterday and your thoughtful efforts as a deliberating juror.
Mark Shea

Sent from my iPhone
[Quoted text hidden]

Gmail

Mark Shea <markwshea@gmail.com>

Regarding the Trial of Mr. Lopez-Ortiz

4 messages

Alexander Miller <[redacted]> Tue, Mar 21, 2017 at 10:31 AM
To: markwshea@gmail.com

Dear Mr. Shea,

I served as a juror on the trial of Mr. Lopez-Ortiz, I believe based on the evidence presented in the case and the charges we were asked to consider, Mr. Lopez-Ortiz should receive the minimum sentence possible. Please pass along my request to the Honorable Judge Tuttman.

Respectfully,

Alexander Miller, Juror # 16

Mark Shea <markwshea@gmail.com> Tue, Mar 21, 2017 at 10:58 AM
To: Alexander Miller [redacted]>

Dear Mr Miller,
Thank you for sharing your opinion on sentencing. I will be sure to pass your sentiments on to the Judge. My client and I appreciate your thoughtful service. Please feel free to call me Mark should we cross paths again. All the best
Mark Shea

Sent from my iPhone
[Quoted text hidden]

Gmail **Mark Shea <markwshea@gmail.com>**

Roberto Lopez-Ortiz

18 messages

Caroline Malcolm <[redacted]> Mon, Mar 20, 2017 at 10:20 AM
To: markwshea@gmail.com

Dear Mr. Shea,

Thanks for taking the time to talk to a few of the jurors on Friday evening after the verdicts were read. I'm sure it was a trying few weeks, but I appreciated speaking with you, and hearing from Judge Tutteman before the jurors were excused.

While I was an alternate juror on the trial of Mr. Lopez-Ortiz, and, thus, was unable to deliberate, I believe that, based on the evidence and testimony presented during the trial and the charges brought against Mr. Lopez-Ortiz, he should receive the minimum sentence for felony murder in the second degree, before becoming eligible for parole. If you are able to present these opinions before the sentencing hearing, that would be appreciated.

All the best to you,

Caroline Malcolm
Juror #10 (alternate)

Mark Shea <markwshea@gmail.com> Mon, Mar 20, 2017 at 1:18 PM
To: Caroline Malcolm <[redacted]>

Dear Ms Malcolm,
Thank you for sharing some of your insights on Friday and ,of course, thank you for your jury service. I noted how engaged you were throughout the trial and I was disappointed when you were chosen as an alternate.
I appreciate your thoughts on sentencing and I will share them with the Judge. If we ever cross paths again please call me Mark. No matter how old I get Mr Shea will always be either my father or some other older guy.
All the best
Mark Shea

Sent from my iPhone
[Quoted text hidden]

Caroline Malcolm [redacted]> Mon, Mar 20, 2017 at 2:05 PM
To: Mark Shea <markwshea@gmail.com>

Thanks, Mark! I was also disappointed to be an alternate, but glad to have participated nonetheless. It is a unique and important opportunity to serve on a jury, and is an eye-opener to the justice system. The process made me wish I ended up going to law school! But, I'm settling for "The Night Of" - thanks for mentioning it at some point in the courtroom. It's excellent.

Good luck with the next steps.
[Quoted text hidden]

Gmail **Mark Shea <markwshea@gmail.com>**

Letters in support of minimum sentencing

4 messages

David Kluchman <[redacted]> Mon, Mar 20, 2017 at 1:50 PM
To: Mark Shea <markwshea@gmail.com>
Cc: Caroline Malcolm <[redacted]>, July Perham <[redacted]>, [redacted]

Mark, I (as juror #6), endorse the letter you received from July supporting the minimum sentence of 15 years before probation for Roberto Lopez Ortiz. I know others do too and am hoping Marilyn, Caroline and July can help assemble a complete list as Iam pretty flat out until Wednesday morning. I believe Alex, Alex, Vee, Laura, Paul, Megan, David may each have said things sympathetic to this idea. If it is permitted and helpful to have someone read a letter out loud in court at the sentencing, I would feel privileged to do so.

Mark Shea <markwshea@gmail.com> Mon, Mar 20, 2017 at 2:05 PM
To: David Kluchman <[redacted]>

Thank you David. I will consider having someone read a letter but I may just present it to the Judge. Mr Diaz Arias family will be addressing the Court and I don't want to undercut their moment to grieve.
[Quoted text hidden]
--
Mark W. Shea
Shea and LaRocque Law Offices
929 Massachusetts Avenue
Suite 200
Cambridge MA 02139
617.577.8722 tel
www.shearock.com

David Kluchman <[redacted]> Mon, Mar 20, 2017 at 2:08 PM
To: Mark Shea <markwshea@gmail.com>

Of course I will do whatever you and the family think best.

David Kluchman
[redacted]
[Quoted text hidden]

David Kluchman <[redacted]> Wed, Mar 22, 2017 at 1:22 PM
To: Mark Shea <markwshea@gmail.com>

FYI I am here at court today. I thought the sentencing hearing was at 1, but now understand it is at 2 pm. I will return to the court room shortly before that unless you wish to speak with me for some reason (you can call or text me at the number below). I remain ready to read any or all of the letters in support of the minimum 15 years of prison before probation but will assume you are simply going to submit them in writing unless you tell me otherwise. Best wishes to you and Roberto today.

David Kluchman
[redacted]

On Mar 20, 2017 2:05 PM, "Mark Shea" <markwshea@gmail.com> wrote:
[Quoted text hidden]

Gmail

Mark Shea <markwshea@gmail.com>

Fwd: Roberto Lopez-Ortiz

4 messages

[redacted] [redacted] Wed, Mar 22, 2017 at 8:28 AM
To: markwshea@gmail.com

Dear Mr. Shea,

Please add me (#15) to the list of jurors in Ms. Howard's statement below. I also agree that Mr. Lopez-Ortiz should be given the minimum sentence, based on the evidence and the guidelines we were given for the charges we had to consider.

Sincerely,

David Cherenson
Deliberating Juror #15

Sent from my iPhone

Begin forwarded message:

From: Mark Shea <markwshea@gmail.com>
Date: March 21, 2017 at 9:01:00 AM EDT
To: MARILYN HOWARD <[redacted]>
Subject: Re: Roberto Lopez-Ortiz

Dear Ms Howard and other deliberating and alternate jurors,
Thank you for sharing your sentiments regarding sentencing. I will share this information with the Judge.
Mark Shea

Sent from my iPhone

On Mar 21, 2017, at 8:19 AM, MARILYN HOWARD <[redacted]> wrote:

> Dear Mr. Shea,
>
> We, the following jurors, believe that given the evidence in the case and the guidelines for the charges we had to consider, that Mr. Roberto Lopez-Ortiz should receive the minimum sentence possible (15 years before the chance of parole?). Please pass along our request to the Honorable Judge Tuttman.
>
> Respectfully,
>
> Deliberating jurors #2,4,5,11,12
>
> Alternate juror #10

Mark Shea <markwshea@gmail.com> Wed, Mar 22, 2017 at 9:20 AM
To: [redacted]

Dear Mr Cherenson,
Thank you for sharing your sentiments. I will be sure to inform the Judge. Your thoughtful service is appreciated. If we happen to cross paths again please call me Mark.
All the best
Mark Shea

Sent from my iPhone
[Quoted text hidden]

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 1481CR00430

COMMONWEALTH

vs.

ROBERTO LOPEZ-ORTIZ

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S RENEWED MOTION TO REDUCE THE VERDICT OR FOR A NEW TRIAL

The defendant, Roberto Lopez-Ortiz, was convicted after a jury trial, held before the undersigned, of second-degree felony murder based on the predicate felony of assault with intent to rob in connection with the death of Cristiano Dias-Arias in Lowell on December 18, 2013. Because the crime of second-degree felony murder has been abrogated in Massachusetts, Commonwealth v. Brown, 477 Mass. 805 (2017), the defendant now moves to reduce the verdict to the predicate offense of assault with intent to rob, or alternatively, for a new trial. After a non-evidentiary hearing,[1] for the reasons that follow, the defendant's motion is DENIED.

Background

The defendant was indicted for first-degree murder, armed home invasion and armed assault with intent to rob. On March 17, 2017, a jury found him guilty of the lesser-included

[1] The issues raised in the defendant's motion did not require, and the defendant did not request, an evidentiary hearing.

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offenses of second-degree felony murder and assault with intent to rob (the predicate felony). He was sentenced to the then-mandatory term of life in state prison with the possibility of parole in fifteen years. At trial, the defendant repeatedly objected to the application of the felony murder doctrine and to the court's instructions to the jury pursuant to that doctrine. Following his conviction, the defendant moved under Mass. R. Crim. P. 25(b)(1) and 25(b)(2) to reduce the verdict or for a new trial. This court denied that motion on May 4, 2017. On September 20, 2017, the Supreme Judicial Court decided Brown. The defendant filed a timely notice of appeal from his conviction but the record has not yet been assembled and the appeal has not been docketed.

Evidence at Trial

The evidence at the trial established that, on December 18, 2013, the defendant, together with four other men, Donte Okowuga, Tarrane Tillis, Jonathan Rivera and Kent Grays, attempted to rob Cristiano Dias-Arias, a drug dealer known to both Tillis and Grays, who went by the name, "Pedro." During the incident, Pedro was shot and killed. The Commonwealth's theory was that the defendant was the shooter. Rivera and Okowuga both testified pursuant to cooperation agreements.

The Commonwealth presented evidence that Tillis, Rivera, and the defendant traveled from Rivera's apartment in Nashua, New Hampshire to Lowell on the date of the incident. Once in Lowell, they met up with Grays and then with Okowuga, and eventually gathered at Grays' residence. Okowuga had two guns in a bag in his car. After discussing and abandoning an initial

plan to rob a drug dealer in Boston, the men decided to rob Pedro. During the discussion, Okowuga stated that he had guns for the robbery.

At about 8:00 p.m., the five men traveled in two vehicles to Pedro's residence at 49 Second Street in Lowell. Grays went first, alone, and the others followed in Okowuga's car. After arriving on Second Street, Rivera and Okowuga entered and cased the building while the defendant and Tillis went into a nearby convenience store. Tillis kept in phone contact with Grays. The defendant, Tillis, Okowuga and Rivera then returned to Okowuga's car and discussed their plan. They agreed that Rivera and Okowuga would carry the guns, and that once they entered Pedro's apartment, Tillis would tie Pedro up; Rivera and Okowuga would train their guns on Pedro to make sure he would not resist; and the defendant would search Pedro's apartment for drugs and money. Based on information Tillis received from Grays, however, the men decided to forgo their plan and began to drive back to New Hampshire. Subsequently, after they heard from Grays that the coast was clear, they returned to Lowell to commit the robbery.

Okowuga parked his car around the corner from Pedro's apartment. He pulled out the two guns, passed one to Rivera, and pocketed the other. Okowuga, Tillis, Rivera and the defendant then headed towards Pedro's residence on foot. Before they entered the building, Rivera gave the gun he was carrying to the defendant.

The four men entered the home and encountered Pedro in the second floor hallway, in the doorway to his apartment. Pedro tried to shut the door, but Okowuga shoved it, breaking it off its hinges. The men entered Pedro's apartment and Tillis, Rivera and the defendant attacked

Pedro, beating him with fists and objects, while Okowuga held a gun on him.[2] Some of Pedro's neighbors observed the altercation. Pedro struggled and repeatedly yelled, "Call the cops!" in Spanish. He managed to extricate himself and ran out of the apartment. Three of the assalants, identified by witnesses as Tillis, Okowuga and Rivera, began to flee. Pedro grabbed one of them and struggled with him briefly, and then chased the three down the stairs and out of the building. Pedro, who was bleeding from the forehead, then returned to the residence and started up the stairs. The fourth assailant, identified as the defendant, who had stayed behind to search Pedro's apartment for drugs, came out of the apartment and pointed a gun at Edwin Vega, a neighbor who was in the hallway. Pedro reached the top of the stairs and charged at the man with the gun. The man fired three shots, striking Pedro once in the chest and once in the head, killing him. Vega then began to fight with the shooter and tried, unsuccessfully, to throw him down the stairs. During the struggle, the shooter accidentally shot himself in the hand. The shooter then ran down the stairs and fled from the building.

Meanwhile, Tillis, Okowuga and Rivera got into Okowuga's car and began to pull away when they saw the defendant come out of the building. They picked him up, and the defendant stated that he had shot Pedro and had also shot himself and needed to go to the hospital. Okowuga refused to take the defendant to the hospital but offered to drive the men back to New Hampshire. The defendant pulled out the gun he had used to shoot Pedro, and gave it either to Tillis or to Okowuga.

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[2] Okoguwa denied this in his trial testimony.

When they got to Nashua, Okowuga gave the men cleaning supplies, and they cleaned up the blood from the defendant's wound that was in the car. Okowuga threatened the men not to say anything about the shooting to anyone. Rivera would not allow the defendant to come inside his apartment, so the defendant went upstairs to the apartment of Vanessa Cruz. He showed Cruz a bullet hole in his left hand and told her that he thought he had killed someone, and that he got shot while fighting with that person. Rivera came to Cruz's apartment and the defendant told him how the shooting had occurred. The defendant said that when he came out of Pedro's apartment, other residents surrounded him. He drew the gun and cocked it and told the people to back away, but they did not comply. Pedro then came up the stairs and lunged at him, at which point the defendant fired several shots, striking Pedro in the chest and chin. He said that he thought he had killed Pedro.

Rivera then drove the defendant to Manchester, where the defendant's cousin picked him up and took him to Elliott hospital where he was treated for a gunshot wound in the early morning of December 19, 2013. The defendant told the treating physician that he had shot himself in his left hand. The defendant told a police officer who responded to the hospital that he had injured himself when he struck a bullet with a hammer.

Investigators later recovered blood from a doorframe across the hall from Pedro's apartment, and from the stairwell where Vega fought with the shooter. Forensic analysis showed that the defendant was the major source of the DNA in the blood samples.

The defendant testified at trial. He admitted to participating in planning the robbery and participating in the attempt to carry it out by assaulting Pedro, but denied knowing that any of his

co-venturers were armed until he saw Okowuga pull a gun out and hit Pedro in the head with it during the incident. He explained that during an initial meeting the day before the robbery attempt, he told the others that he would not participate if guns were involved. He stated that Okowuga had shown a gun at that meeting, and he knew that Okowuga wanted to use a gun, so he decided not to participate in the plan. The following day, when he met up with Rivera and Tillis, the three agreed to go ahead with the robbery, but without any guns. He said that even after he learned that Okoguwa was indeed going to participate, Tillis assured him that guns would not be used. He explained that his blood was at the scene because Tillis cut him on the hand with a knife accidentally after Okowuga hit Pedro with the gun. He explained that after he got cut, he left the building, along with Tillis and Rivera, and he heard some shots being fired. He said that Okowuga stayed inside the building a few second longer than the others. He implied that Okowuga shot and killed Pedro. He said that Okowuga shot him in the hand during a roadside argument on the trip back to New Hampshire. The defendant also stated that his physical appearance and his clothing differed from descriptions that witnesses gave of the shooter.

Discussion

In Brown, 477 Mass. at 807-808, the Supreme Judicial Court announced a new common-law rule abrogating felony murder as an independent theory of liability. Consequently, "criminal liability for murder in the first or second degree [is now] predicated on proof that the defendant acted with malice or shared the intent of a joint venturer who acted with malice. The sole remaining function of felony-murder [is] to elevate what would otherwise be murder in the

second degree to murder in the first degree where the killing occurs during the commission of a life felony." Id. at 832. The concept of felony murder in the second degree is now "entirely eliminate[d]." Id. at n. Gants-4. The defendant argues that because he objected at trial to the application of the felony murder doctrine, and because the Supreme Judicial Court has now abolished second-degree felony murder as a theory of liability for homicide, he is entitled to the benefit of that rule where his case is pending on direct appeal. Consequently, he argues, this court should reduce his conviction for second-degree felony murder to the lesser-included predicate offense of assault with intent to rob pursuant to G.L. c. 265, § 20, or should grant him a new trial.

The Supreme Judicial Court expressly made the Brown rule prospective, stating, "[t]he abolition of felony murder liability from our common law of murder [will apply] *only to cases where trial begins after our adoption of the change. It will have no effect on cases already tried.*" 477 Mass. at 834 (emphasis added). Also see Commonwealth v. Bin, 480 Mass. 665, 681 (2018) (noting that Brown narrowed the felony murder rule prospectively and declining to abolish the rule entirely); Commonwealth v. Phap Buth, 480 Mass. 113, 120, cert. denied, 139 S. Ct. 607 (2018) (declining to apply Brown rule retroactively); Commonwealth v. Martin, 484 Mass. 634, 644 (2020) (same, citing Bin and Phap Buth).

Nevertheless, the defendant argues that the new rule should apply to him because he preserved the issue by objecting at trial and because the change in the law would have affected the verdict in his case. In support of his position, the defendant points to the case of Commonwealth v. Pring-Wilson, 448 Mass. 718, 737 (2007). There, the Supreme Judicial Court

affirmed the trial judge's grant of a new trial, giving the defendant the benefit of a new, prospective common-law rule announced in Commonwealth v. Adjutant, 443 Mass. 649 (2005). That rule permits the trial judge, in a self-defense case, to admit evidence of prior acts of violence committed by the alleged victim, even if unknown to the defendant, on the issue of the first aggressor's identity. Adjutant was decided after the defendant in Pring-Wilson was convicted and sentenced but before his appeal, and at trial, he had argued unsuccessfully for the admission of first aggressor evidence. The defendant contends that he is situated similarly because he raised the validity of the felony murder rule at trial and repeatedly objected to its application. But in deciding Pring-Wilson, the Court relied not only on the grounds that the defendant had objected at trial and that his case was pending on appeal when Adjutant was decided, but also on the fact that, unlike the defendant in Brown, the defendant in Adjutant had herself received the benefit of the new rule. Pring-Wilson, 448 Mass. at 736 ("Although we said in Adjutant that the new rule announced there applies prospectively, we applied it to Adjutant herself, noting that the identity of the first aggressor was paramount in her case; that she had sought at trial to introduce evidence of the victim's prior violent acts to address the first aggressor question; and that she had pressed the matter on appeal. We reasoned that, '[g]iven the probative value of the excluded evidence, it may have been enough to create reasonable doubt of the defendant's guilt.' [Adjutant, 443 Mass.] at 666. Those factors led us for the first time to apply a new rule of criminal law, not constitutionally mandated, to the defendant before us, even though we said in the decision that the new rule would apply prospectively.") (first alteration in original).

The Supreme Judicial Court has rarely applied a new, prospective common-law rule retroactively. Commonwealth v. Dagley, 442 Mass. 713, 720-721 (2004), and cases cited. As the Court explained in Commonwealth v. Clemente, 452 Mass. 295, 305 (2009), its decision to do so in Adjutant "was a most unusual step" and "an exception to our normal practice of prospective application." Indeed, as noted, the defendant in Brown did not receive the benefit of the new rule of felony murder. For this reason, the defendant here is not situated similarly to the defendant in Pring-Wilson, and is not entitled to retroactive application of the abolition of second-degree felony murder.

To the extent the defendant argues that the verdict in his case should be reduced in the interests of justice, that argument is similarly unpersuasive. This is not a situation where the defendant's participation was limited to the "remote outer fringes" of the criminal enterprise. Cf. Brown, 477 Mass. at 824, quoting from Commonwealth v. Rolon, 438 Mass. 808, 824 (2003) (Court exercised its discretion to reduce the defendant's conviction from first to second-degree felony murder under G.L. c. 233, § 33E where the defendant, who supplied his co-venturers with a firearm and clothing used in the commission of the crime, "was involved in the 'remote outer fringes' of the attempted armed robbery and armed home invasion."). Even by his own admission at trial, the defendant actively participated in planning and carrying out the home invasion and attempted robbery. It is true, as the defendant points out, that the jury rejected significant aspects of the Commonwealth's evidence. Most importantly, the jury concluded that the Commonwealth failed to prove either the defendant's identity as the shooter, or the defendant's knowledge that a co-venturer was armed, beyond a reasonable doubt. But the jury's assessment of the evidence was reflected in their verdict of second-degree, rather than first-

degree, felony murder. This court views that verdict as consonant with justice. For that reason, the court declines to reduce the verdict or to grant a new trial.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendant's renewed motion to reduce the verdict or for a new trial is **DENIED**.

Dated: June 23, 2020

/s/ Kathe M. Tuttman
Kathe M. Tuttman
Justice of the Superior Court

105 Mass.App.Ct. 265
Appeals Court of Massachusetts,
Middlesex.

COMMONWEALTH

v.

Roberto **LOPEZ**-**ORTIZ**.

No. 23-P-295
|
Argued March 28, 2024
|
Decided February 12, 2025

Synopsis
Background: Defendant was convicted in the Superior Court Department, Middlesex County, Kathe M. Tuttman, J., of felony-murder in the second degree. Defendant appealed.

Holdings: The Appeals Court, Englander, J., held that:

trial court acted within its discretion in finding that prosecutor's proffered explanation for peremptory challenge of prospective juror was adequate;

trial court acted within its discretion in finding that prosecutor's proffered explanation for peremptory challenge was genuine;

prosecutor's proffered explanation for peremptory challenge of prospective juror, who was Hispanic-American, was race-neutral, and

prosecutor included specific examples of how prospective juror responded to particular questions in proffered explanation for peremptory challenge.

Affirmed.

D'Angelo, J., filed concurring opinion.

Rubin, J., filed dissenting opinion.

See also 105 Mass.App.Ct. 265.

Procedural Posture(s): Appellate Review; Jury Selection Challenge or Motion.

****1071** Constitutional Law, Jury. Jury and Jurors. Practice, Criminal, Jury and jurors, Challenge to jurors.

Commonwealth v. Lopez-Ortiz, 105 Mass.App.Ct. 265 (2025)
252 N.E.3d 1068

Indictments found and returned in the Superior Court Department on April 3, 2014.

The cases were tried before Kathe M. Tuttman, J.,

Attorneys and Law Firms

David J. Nathanson, Boston, (Mark W. Shea also present) for the defendant.

Jamie Michael Charles, Assistant District Attorney, for the Commonwealth.

Lori J. Shyavitz, Leah R. McCoy, & Oren Sellstrom, Boston, for Lawyers for Civil Rights & others, amici curiae, submitted a brief.

Present: Rubin, Englander, & D'Angelo, JJ.

Opinion

ENGLANDER, J.

***265** In 2017, the defendant was convicted of felony-murder in the second degree, with the predicate felony being unarmed assault with intent to rob. The murder occurred after the defendant and several accomplices attempted to rob the victim at the victim's apartment in Lowell. On appeal the defendant raises several issues, all but one of which we dispose of this day in an unpublished memorandum and order pursuant to our Rule 23.0.

This opinion addresses the final issue the defendant raises, as to which the panel is not unanimous. The defendant argues that the ***266** prosecutor improperly utilized a peremptory challenge to strike a prospective juror (designated juror no. 3) because of the juror's Hispanic ethnicity, and that the judge erred in allowing that strike over the defendant's objection. The prosecutor provided a lengthy explanation for the strike during jury selection, and the defendant contends that the reasons given were "not race neutral," citing in particular that the prosecutor, in explaining the strike, referenced statements by the juror regarding the apparent lack of Hispanic people in the jury venire. The dissenting judge in this court also claims that the prosecutor's reasons were not race neutral, citing the prosecutor's references to both the jury pool comments, as well as the juror's objection to a question on the juror questionnaire.[1] We perceive no error in the ****1072** judge's decision to allow the peremptory strike. As discussed below the prosecutor's reasons were based not on race, but upon the juror's answers and observed demeanor, which reasons the judge specifically found were both "genuine" and "adequate." As we discern no error, the judgment is affirmed.

Background. 1. The crime. The evidence at trial showed that on December 18, 2013, the defendant, Roberto **Lopez-Ortiz**, and three others, including Jonathan Rivera and Donte Okowuga, decided to commit a robbery. Okowuga had two guns, one of which he gave to Rivera prior to the attempted robbery. Testimony differed on whether Rivera thereafter gave the gun to the defendant.

The four men drove to the victim's building and entered it, encountering the victim in the entrance to his apartment. The men entered the apartment, at which time Okowuga pointed a gun at the victim while the other men, including the defendant, attacked him. The victim managed to get away and ran out of the apartment.

Three of the men thereafter left the building. The victim returned to the building, where the fourth man, who had remained just outside the apartment, shot and killed the victim. The defendant testified that Okowuga was the assailant who stayed behind at the victim's apartment, whereas Rivera and Okowuga testified that the defendant had remained behind.[2]

2. The jury selection process. The trial took place in February ***267** and March of 2017. During the second day of jury empanelment the trial judge directed questions to the venire as a whole, including whether there was "anything about the nature of this case as I've described it to you that would affect your ability to be a fair and impartial juror." Juror no. 3 raised his hand to this question.

The trial judge then questioned juror no. 3 individually, beginning by asking why the juror indicated that the nature of the case might affect his ability to be fair and impartial. Juror no. 3 replied:

> "Because I looked at the jury pool and I don't feel that [the defendant] has his peers out there. I don't see any Spanish people out there or anything like that and I feel that he should be, if he's going to be, life and death like that there should be some of his people out there."[3]

The trial judge clarified that her question was whether there was "anything about the nature of the case as I described it that would affect [juror no. 3's] ability to be a fair and impartial juror," to which juror no. 3 responded, "Oh, no, no, not at all."

The trial judge also inquired about juror no. 3's answer to question 18 on the juror questionnaire, which asked, "Do you believe that Dominicans or Puerto Ricans are more likely to [sic] than other members of ethnic groups to commit crimes?" Juror no. 3 had written: "No. I do not approve of this question." Juror no. 3 replied, "I don't like those questions, I never did, I don't think they're proper at all." The trial judge then explained that the purpose of the question was to determine whether the venirepersons were biased or prejudiced and asked, "Does that help you understand the reason for the question?" Juror no. 3 responded, "Sure."

****1073** The judge asked about a driving under the influence case that the juror disclosed on his confidential juror questionnaire, and asked when it had occurred. Juror no. 3 said, "I had gone to Florida, that was maybe four years ago and one in Maine around '13." The judge asked him, "[H]ow were you treated by the police and the prosecutors who were involved in handling your matters?" The juror replied, "Down in Florida very disgusting." The judge then asked, "And how about in Maine?" to which the juror ***268** responded, "Very nice." The judge asked, "Would your experiences with either of those cases affect your ability to be fair to both sides in this case?" The juror said, "Not at all because I'm in Massachusetts."

The judge then allowed follow-up questioning by the parties, and the prosecutor asked, "If you were seated on the jury and you felt that the rest of the panel did not adequately make up a jury of the defendant's peers; would that affect your ability to be fair and impartial as a juror in this case?" The juror said, "No, not at all, I'd put that aside." The prosecutor then asked, "So, you would be able to put aside any beliefs that you had?" The juror replied, "Yes, I would, correct."

The trial judge found juror no. 3 to stand indifferent, but the prosecutor subsequently challenged the juror for cause. In doing so, the prosecutor stated several reasons:

> "The fact that, I think he gave a number of answers that were troubling. The fact that he had what he described as a disgusting experience when he had an incident in Miami, as well as his initial reaction to the make-up of the jury pool.
>
> "While he did answer a question saying that he could put that aside, he had to think about it for a while. That gives the Commonwealth pause about whether he really can be fair and impartial to both sides in this case given what he came in with. Clearly some dis[d]ain about even the question that is on the questionnaire. And even when you explained to him the reason for the question, I believe it was No. 18, his response was just, 'Sure,' it didn't seem to the Commonwealth that he was satisfied with the reasons why that question was there."

The trial judge declined to excuse juror no. 3 for cause, but concluded her ruling by stating, "If you want to exercise a peremptory you may do so."

The prosecutor then exercised a peremptory challenge. The defendant objected and raised a "Soares" challenge, arguing that the peremptory was based in part on juror no. 3's Hispanic ethnicity. See Commonwealth v. Soares, 377 Mass. 461, 488-489, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979), overruled in part by Commonwealth v. Sanchez, 485 Mass. 491, 151 N.E.3d 404 (2020). The trial judge stated that she did not find a pattern, and additionally stated that the reasons provided by the Commonwealth for the for-cause challenge ***269** were an adequate and genuine explanation for the peremptory. Out of "an abundance of caution," however, the trial judge asked the prosecutor to state her reasons for the peremptory.

The prosecutor stated:

> "Your Honor, as previously stated, the reason for the Commonwealth's objection and use of the peremptory, is that the Commonwealth does not believe that this juror can be fair to the Commonwealth. It has nothing to do with this juror's race particular to him, it is based on the answers to the questions that he came in here and stated and indicated his issues that he had with police previously, his beliefs that he feels that the defendant cannot get a fair trial.
>
> "And while he said that he could put that aside, the Commonwealth does not ****1074** believe that he is in a position to give the Commonwealth a fair trial based on his beliefs. Again, going back to the questionnaire where he was, he seemed upset or offended in some way about the particular question, No. 18, 'Do you believe that Dominicans or Puerto Ricans are more likely than members of other ethnic groups to commit crimes?' And even upon your explanation, it is the Commonwealth's opinion that he did not seem satisfied by saying very flippantly, 'Sure.' And that his attitude coming into this trial, again, having nothing to do with his race, gives the Commonwealth concern and pause and that is why the Commonwealth has exercised a peremptory."

The trial judge then explicitly found that the above rationale was both "adequate" and "genuine."

Discussion. On appeal, the defendant argues that the trial judge erred in allowing the Commonwealth to strike juror no. 3. The State and Federal Constitutions forbid a party from exercising a peremptory challenge on the basis of a juror's race. See Soares, 377 Mass. at 486, 488-489, 387 N.E.2d 499. See also Batson v. Kentucky, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The court in Soares held that there was "a legitimate and significant role for the peremptory challenge," but that the use of peremptory challenges to exclude members of discrete groups on the basis of that affiliation violated art. 12 of the Massachusetts Declaration of Rights. Soares, supra at 485-486, 488, 387 N.E.2d 499.

The law of peremptory challenges has evolved some since Soares, and can be summarized as follows. If a peremptory ***270** challenge is objected to, the trial judge must apply a burden-shifting analysis. "We generally presume that peremptory challenges are made and used properly during jury selection." Commonwealth v. Kalila, 103 Mass. App. Ct. 582, 587, 223 N.E.3d 1220 (2023), quoting Commonwealth v. Mason, 485 Mass. 520, 529, 151 N.E.3d 385 (2020). A party who challenges a peremptory strike must overcome the presumption of propriety by showing that "the totality of the relevant facts gives rise to an inference of discriminatory purpose." Sanchez, 485 Mass. at 511, 151 N.E.3d 404, quoting Johnson v. California, 545 U.S. 162, 168, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005).

If the judge finds that the challenging party has met his burden in showing an inference of discrimination, the burden shifts to the party seeking to exercise the peremptory challenge to proffer a "bona fide" nondiscriminatory justification for the peremptory. Kalila, 103 Mass. App. Ct. at 587-588, 223 N.E.3d 1220. A bona fide explanation is one that is both "genuine" and "adequate." Commonwealth v. Maldonado, 439 Mass. 460, 464, 788 N.E.2d 968 (2003). The Supreme Judicial Court explained the standard as follows:

> "An explanation is adequate if it is 'clear and reasonably specific,' 'personal to the juror and not based on the juror's group affyliation' (in this case race), and related to the particular case being tried. Challenges based on subjective data such as a

> juror's looks or gestures, or a party's 'gut' feeling should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination. An explanation is genuine if it is in fact the reason for the exercise of the challenge.... An explanation that is perfectly reasonable in the abstract must be rejected if the judge does not believe that it reflects the challenging party's actual thinking." (Emphasis added; citations omitted.)

Id. at 464-465, 788 N.E.2d 968.

We review a judge's decision to allow a peremptory challenge for abuse of discretion (or other error of law). See **1075 Mason, 485 Masonss. at 530, 151 N.E.3d 385. An abuse of discretion occurs when the trial judge made "a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27, 20 N.E.3d 930 (2014). In doing so we give great deference to the findings of the trial judge, who saw, heard, and participated in the exchange with the prospective juror. *271 See Kalila, 103 Mass. App. Ct. at 590, 223 N.E.3d 1220, and cases cited ("We of course give deference to the fact finding of trial judges, who see and hear the witnesses and the counsel in real time in the court room").

In this case, the trial judge found that the justification provided by the Commonwealth for its peremptory challenge was both adequate and genuine.[4] As noted, the prosecutor began her explanation by stating that "the Commonwealth does not believe that this juror can be fair to the Commonwealth." It bears emphasis that in response to the judge's question to the venire, "Is there anything about the nature of this case as I've described it to you that would affect your ability to be a fair and impartial juror?" the juror himself raised his hand. When asked why, the juror stated:

> "Because I looked at the jury pool and I don't feel that [the defendant] has his peers out there. I don't see any Spanish people out there ... and I feel that he should be, if he's going to be, life and death like that there should be some of his people out there."

The prosecutor cited this answer both times that she provided an explanation for her concerns about the prospective juror, and she cited other answers the juror gave as well. As set forth above, the prosecutor also cited an experience the juror had with police in Florida that the juror described as "disgusting." Further, the prosecutor cited concerns about the manner in which the juror answered questions, which would not be apparent from the cold transcript that we review on appeal. The prosecutor noted that while the juror subsequently stated that he could put aside his concerns about the makeup of the jury pool, the juror "had to think about it for a while." The prosecutor also cited the way the juror responded to questions and statements from the judge, which the prosecutor described as "flippant[ ]."

It was not an abuse of discretion for the judge to find that the above reasons were "adequate" — that is, "clear and reasonably specific, personal to the juror and not based on the juror's group affiliation, ... and related to the particular case being tried" *272 (quotation omitted). Maldonado, 439 Mass. at 464-465, 788 N.E.2d 968. Indeed, a fact-based concern that a juror cannot be fair and impartial is the sine qua non of the pretrial juror evaluation process. Many years ago in Soares, the Supreme Judicial Court reaffirmed the legitimacy of peremptory challenges as a means of "assuring the parties 'that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.' " Soares, 377 Mass. at 485, 387 N.E.2d 499, quoting Swain v. Alabama, 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). In light of the above answers, the prosecutor may well have been concerned that juror no. 3 **1076 would view the case, not through the lens of the facts presented and the law provided, but through the lens of the race of the defendant and perceived unfairness of the system. The judge could certainly find that such concerns about the impartiality of a prospective juror were not based on race, and are an adequate basis for exercising a peremptory challenge.

The Supreme Judicial Court's opinion in Commonwealth v. Williams, 481 Mass. 443, 116 N.E.3d 609 (2019), supports this conclusion. In Williams, a prospective juror was excused for cause after saying that she believed "the system is rigged against young African American males." Id. at 444, 116 N.E.3d 609. The court held that the judge's assessment of the juror's impartiality was "incomplete," because the judge's questioning had failed to recognize that the juror's general belief about the system would

not necessarily render her incapable of being impartial in the case at bar — more questioning was required. Id. at 446-447, 116 N.E.3d 609. However — and importantly for this case—the court held that the defendant was not prejudiced by the exclusion of the juror for cause, because the Commonwealth had a peremptory challenge available for use at the end of jury selection, which challenge could have been used for the prospective juror. Id. at 453-454, 116 N.E.3d 609. In so holding, the court implicitly recognized that although the juror's expressed belief that the criminal justice system is rigged against a racial group was insufficient to excuse a juror for cause, such an expressed belief would be an adequate basis to exercise a peremptory challenge. See id.[5]

***273** In short, the trial judge did not abuse her discretion, or commit an error of law, in finding and ruling that the prosecutor's reasons were adequate.[6]

The defendant argues that the prosecutor's concern as to juror no. 3's impartiality derived from the fact that juror no. 3 and the defendant were both Hispanic, and thus that the prosecutor's concern was "not race neutral," because "the prosecutor's argument assumed that the juror's shared race would cause him to be biased." The defendant's argument, however, misstates what the prosecutor said and what the judge found. The prosecutor stated that her concerns arose from juror no. 3's statements regarding the makeup of the venire and thus the possible unfairness of the trial, the juror's prior experiences with the police, and also the manner in which the juror answered questions. ****1077** These concerns arose out of facts personal to the juror, and the judge found them adequate and genuine. See Maldonado, 439 Mass. at 464, 788 N.E.2d 968. The record does not show that the prosecutor's concern as to impartiality was based upon juror no. 3's race.[7]

The dissent goes all out in criticizing the result we reach, but the dissent suffers from several basic flaws. Most importantly, the ***274** dissent ignores the findings of the trial judge, treating them as irrelevant. But we are not engaged in de novo review. The question of counsel's "genuineness" is a question of fact. See Maldonado, 439 Mass. at 465, 788 N.E.2d 968 ("An explanation is genuine if it is in fact the reason for the exercise of the challenge"). The question of "adequacy" is more of a mixed question of law and fact, but there can be no denying that the adequacy determination has a significant factual component; in making an adequacy determination a trial judge must determine and evaluate what reasons are actually being advanced, based on a colloquy with counsel (and often, the juror) that is unstructured and often shifting. Most important, the ultimate question for the judge is whether the party's strike was "motivated ... by," or "based on" the prospective juror's race (here, ethnicity). See Flowers v. Mississippi, 588 U.S. 284, 303, 139 S.Ct. 2228, 204 L.Ed.2d 638 (2019), quoting Foster v. Chatman, 578 U.S. 488, 513, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016) ("The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent' "); Commonwealth v. Burnett, 418 Mass. 769, 771, 642 N.E.2d 294 (1994). The question of motivation is fundamentally a question of fact, and the trial judge is far better positioned to make that determination than we are on appellate review.[8] See Burnett, supra ("the judge must ... decide whether the challenges ****1078** were exercised improperly because ***275** they were based on the juror's membership in a discrete group. Once the judge decides that an adequate reason exists for exercising the challenge, an appellate court will accord substantial deference to the decision if it is supported by the record").[9]

Unconstrained by the judge's findings, the dissent conducts its own de novo review of what the prosecutor said. For example, the dissent states that "in this Commonwealth where a Latino man is struck for expressing concern about an all-white[10] jury hearing a Latino's murder trial, that strike is 'based on race.' " Post at 291, 252 N.E.3d at 1089 (Rubin, J., dissenting). But this statement is erroneous on two fronts. First, the dissent's characterization is not a fair summary of what the prosecutor actually said. As discussed above, the prosecutor was concerned about the substance and manner of the juror's answers to several questions, writ large. The prosecutor specifically cited, for example, the juror's demeanor when he was asked if he could "put ... aside" the make-up of the jury pool. Picking through paragraphs of reasons to isolate two of the prosecutor's statements takes them out of their larger context and recasts the thrust of the prosecutor's expressed concerns. And second, the dissent is wrong when it suggests that its proposition must be accepted as a matter of law. Rather, under our cases the prosecutor's statements

must be evaluated for whether the strike is motivated by race, and we as an appellate court do not do our own fact finding. The trial judge found that the reasons given were genuine and adequate, and on this record that was neither an ***276** abuse of discretion nor an error of law.[11]

****1079** In sum, the trial judge did not err in allowing the Commonwealth's peremptory challenge of juror no. 3. The judgment and the order denying the renewed motion for a new trial are affirmed.

So ordered.

D'ANGELO, J. (concurring)

Because we grant great deference to the trial judge's findings on whether a permissible ground for a peremptory challenge has been shown, I feel constrained to concur in the majority's decision. See Commonwealth v. Kalila, 103 Mass. App. Ct. 582, 590, 223 N.E.3d 1220 (2023) ("We of course give deference to the fact finding of trial judges, who see and hear the witnesses and the counsel in real time in the court room"). I, like Justice Lowy in his concurring opinion in Commonwealth v. Sanchez, write separately to urge the Supreme Judicial Court to reevaluate the three-step analysis established in Commonwealth v. Soares, 377 Mass. 461, 492, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979), overruled in part by Sanchez, 485 Mass. 491, 151 N.E.3d 404 (2020), and eliminate the first step requiring a prima facie showing that a challenge is based on race or other protected status. See Sanchez, supra at 517, 151 N.E.3d 404 (Lowy, J. concurring). Additionally, I wish to emphasize the need for clear and concise findings in matters related to alleged race-based challenges during jury selection.

Discussion. 1. Batson-Soares challenges. Article 12 of the Massachusetts Declaration of Rights, and the Sixth and Fourteenth Amendments to the United States Constitution, guarantee a criminal defendant "the right to a trial by an impartial jury." Commonwealth v. Susi, 394 Mass. 784, 786, 477 N.E.2d 995 (1985). See ***277** Soares, 377 Mass. at 492, 387 N.E.2d 499. Pursuant to these same protections, the Commonwealth may not exercise a peremptory challenge on the basis of race or other protected classes. See Sanchez, 485 Mass. at 493, 151 N.E.3d 404.[1]

"A challenge to a peremptory strike, whether framed under State or Federal law, is evaluated using a [three-step] burden-shifting analysis" (quotation and citation omitted). Commonwealth v. Ortega, 480 Mass. 603, 606, 106 N.E.3d 675 (2018). "First, the burden is on the objecting party to establish a 'prima facie showing of impropriety' sufficient to 'overcome[ ] the presumption of regularity afforded to peremptory challenges.' " Commonwealth v. Henderson, 486 Mass. 296, 311, 157 N.E.3d 1277 (2020), quoting Commonwealth v. Robertson, 480 Mass. 383, 390-391, 105 N.E.3d 253 (2018). If the judge finds that a prima facie case has been established, "the burden shifts to the party attempting to strike the prospective juror to provide a group-neutral reason for doing so." Commonwealth v. Jones, 477 Mass. 307, 319, 77 N.E.3d 278 (2017). Finally, the judge must "evaluate[ ] whether the proffered reason is adequate and genuine" (quotation and citation omitted). Robertson, supra at 391, 105 N.E.3d 253.

Trial judges have extraordinary tasks during jury trials. Selecting a jury can be time consuming and arduous depending on the circumstances. Currently, in determining whether a prima facie case of discriminatory impropriety has been established, a judge must consider all relevant circumstances, including all of the excluded jurors and the similarities in their race, differences compared to the challenged juror, and the composition of the jurors already seated. See ****1080** Batson v. Kentucky, 476 U.S. 79, 96-97, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). This can prove a herculean task — especially if jury selection spans numerous days. Much of our appellate analysis over the years has been spent deciding whether a judge abused their discretion in finding that a prima facie showing has been made.[2]

***278** Additionally, the first step in the analysis forces judges to find "that the challenging attorney may have engaged in discriminatory conduct." Sanchez, 485 Mass. at 517, 151 N.E.3d 404 (Lowy, J., concurring). Such a task "often requires the

judge to make a finding of discriminatory intent concerning an attorney whose ability and integrity the judge respects based on years of the judge's experience." Id. "One can understand a judge's reticence to do so, and perhaps even a fellow attorney's as well, in the face of what appears to be minimal evidence of discriminatory purpose." Id.

Recently, the Supreme Judicial Court described the first step of the analysis in greater detail:

> "As to the first step of the Batson-Soares inquiry, the presumption of propriety is rebutted when the totality of the relevant facts gives rise to an inference of discriminatory purpose. Specifically, the inquiry is merely a burden of production, not persuasion. Because establishing a prima facie case of impropriety is not an onerous task, we have long cautioned that judges should think long and hard before they decide to require no explanation from the prosecutor for the challenge and make no findings of fact." (Quotations and citations omitted.)

Commonwealth v. Carter, 488 Mass. 191, 196, 172 N.E.3d 367 (2021).

Notably, however, the court has "persistently urged, if not beseeched" judges to elicit group-neutral explanations regardless of whether the first prong of the inquiry has been satisfied. Sanchez, 485 Mass. at 515, 151 N.E.3d 404 (Lowy, J., concurring).

Judges, like the one in this case, should not spend time determining whether the burden of persuasion of step one has been met. It is often a time consuming, clumsy, and difficult endeavor. Therefore, it is time for the first step of this analysis to be eliminated.[3] Once an attorney objects to a ****1081** peremptory challenge ***279** arguing that it is race based, the burden should immediately shift to the challenging party. If the challenge is not race based, the attorney who seeks to have the juror excluded should immediately provide the reason. This should not be difficult because there should not be any discriminatory intent involved. The judge should carefully observe what happens next, because

> "[t]he [attorney's] own demeanor — the furtiveness of a glance, the hesitation in giving a response, or the frantic reading of the juror questionnaire before proffering an explanation may provide valuable clues as to whether even a sound reason for the challenge is genuine or merely a post hoc justification for an impermissibly motivated challenge."

Commonwealth v. Maldonado, 439 Mass. 460, 466, 788 N.E.2d 968 (2003).

In this case, the trial judge went to great lengths to decide whether a prima facie showing was made and reiterated this fact repeatedly. The judge emphasized that she did not find a pattern in the challenges. Under this suggested approach to eliminate the first inquiry following the invocation of a peremptory challenge, the judge would turn to the challenging party to provide the reason(s) for the challenge immediately. Such an approach would spare the judge from the complicated and difficult inquiry into the objecting party's prima facie showing. Instead, it would place the burden on the challenging party to immediately give an answer as to why they challenged the juror.

2. Findings. Ultimately, the trial judge has the difficult task of making factual and credibility determinations of an attorney's explanation for a peremptory challenge. See Commonwealth v. Prunty, 462 Mass. 295, 313, 968 N.E.2d 361 (2012) (judge's decision on ultimate question of discriminatory intent represents finding of fact). The Supreme Judicial Court has explained that

> "[t]he determination whether an explanation is bona fide entails a critical evaluation of both the soundness of the proffered explanation and whether the explanation (no matter how sound it might appear) is the actual motivating force behind the challenging party's decision. In other words, the judge must decide whether the explanation is both adequate and genuine.
>
> ***280** "An explanation is adequate if it is clear and reasonably specific, personal to the juror and not based on the juror's group affiliation ... and related to the particular case being tried. Challenges based on subjective data such as a juror's looks or gestures, or a party's gut feeling should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination. An explanation is genuine if it is in fact the reason for the exercise of the challenge. The mere denial of an

improper motive is inadequate to establish the genuineness of the explanation. An explanation that is perfectly reasonable in the abstract must be rejected if the judge does not believe that it reflects the challenging party's actual thinking." (Quotations and citations omitted.)

Maldonado, 439 Mass. at 464-465, 788 N.E.2d 968.

Therefore, a judge is "obligated to make a specific determination or specific findings, in some form" regarding the adequacy and genuineness of an attorney's proffered reasons for a peremptory challenge. Commonwealth v. Benoit, 452 Mass. 212, 221, 892 N.E.2d 314 (2008).

In this case, the trial judge requested that the prosecutor provide a race-neutral reason for exercising a peremptory challenge as to juror no. 3. The Commonwealth responded:

**1082 "Your Honor, as previously stated, the reason for the Commonwealth's objection and use of the peremptory, is that the Commonwealth does not believe that this juror can be fair to the Commonwealth. It has nothing to do with this juror's race particular to him, it is based on the answers to the questions that he came in here and stated and indicated his issues that he had with police previously, his beliefs that he feels that the defendant cannot get a fair trial.

"And while he said that he could put that aside, the Commonwealth does not believe that he is in a position to give the Commonwealth a fair trial based on his beliefs. Again, going back to the questionnaire where he was, he seemed upset or offended in some way about the particular question, No. 18, 'Do you believe that Dominicans or Puerto Ricans are more likely than members of other ethnic groups to commit crimes?' And even upon your explanation, it is the Commonwealth's opinion that he did not seem satisfied by saying very flippantly, 'Sure.' And that his attitude coming into this *281 trial, again, having nothing to do with his race, gives the Commonwealth concern and pause and that is why the Commonwealth has exercised a peremptory."

The majority writes that, "[i]n this case, the trial judge found that the justification provided by the Commonwealth for its peremptory challenge was both adequate and genuine." Ante at 271, 252 N.E.3d at 1075. Although the judge did use that phraseology, it was primarily in conjunction with the judge's initial finding that there had not been a showing of prima facie pattern. Specifically, the judge stated:

"That said, I will state that in the Court's view based on what [the prosecutor] already said about her reasons for requesting an excuse for cause of this juror, although I didn't find it sufficient for a basis for cause I do find it sufficient if I were to find a pattern I would find there was an adequate and genuine rationale that has nothing to do with the ethnicity of this juror because of the reasons [the prosecutor] put on the record previously. So, that is my ruling, I am not finding a pattern.

"...

"Okay, but, [defense counsel], remember I have not asked the Commonwealth to justify their exercise of a peremptory because I have not found that a pattern has been established, so that's where we are in terms of this exercise. What I did state was, if we got to that point I was persuaded that there was an adequate and genuine reason. We haven't even gotten to that point because on the record that is before me based on my observations of this juror and the entire course of this empanelment, I am not persuaded that there is a pattern."

I agree that it was not an abuse of discretion for the judge to find that the above reasons were "adequate." However, the judge should have made more clear and concise findings regarding the prosecutor's reasoning regarding the challenge. The judge simply concluded that "the Commonwealth [was] entitled to make a decision on the basis of body language and other observable characteristics of a potential juror." The judge went on: "[T]he Commonwealth ... may exercise a peremptory on the basis of information that they legitimately believe would make that person a juror who could not be fair to both sides."

***282** When an attorney challenges a juror — even partially — based on their answers being "flippant[ ]" or on their attitude, the judge should make specific and clear findings. Demeanor-based reasons "should rarely be accepted as adequate because such explanations can easily be used as ****1083** pretexts for discrimination." Maldonado, 439 Mass. at 465-466, 788 N.E.2d 968. Based on a transcript alone, an appellate court cannot ascertain the veracity of the attorney's perceptions. Thus, we need the benefit of substantial judicial findings regarding observations made of the jurors and attorney alike.

RUBIN, J. (dissenting).

As the court majority correctly indicates, a peremptory challenge based even in part on race or ethnicity violates the State and Federal constitutional rights of the defendant.[1] Race- or ethnicity-based challenges (what courts refer to collectively as race-based challenges) are so serious a matter, that "a Batson-Soares error constitutes structural error" requiring in every case vacatur of the conviction and a new trial. Commonwealth v. Jones, 477 Mass. 307, 325-326, 77 N.E.3d 278 (2017).[2]

In this case, at least some of the prosecutor's given reasons for her peremptory challenge were race based, not race neutral. That should be the end of the inquiry. Other arguably race-neutral reasons, whether legitimate or not, put forward by the prosecutor do not protect the peremptory strike from invalidation, or disentitle the defendant to a new trial with a jury selection process not tainted by a peremptory challenge in part motivated by race.

To reach the contrary result, the court majority abdicates our well-settled responsibility to determine which proffered reasons ***283** are race or other protected group-based. Contrary to the teaching of the Supreme Judicial Court, the majority explicitly renders the protection in this Commonwealth against racial discrimination in jury selection weaker, eliminating decades of antidiscrimination law by freeing a party from the need to articulate a race or other group-neutral explanation for its peremptory strike after a judge has found a prima facie case of discrimination. See ante at note 8. It thus critically weakens the protections against discrimination set out by the Supreme Judicial Court in Commonwealth v. Soares, as broadened in Commonwealth v. Sanchez, and these cases' progeny. See Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979), overruled in part by Commonwealth v. Sanchez, 485 Mass. 491, 511, 151 N.E.3d 404 (2020). Given this court's unfortunate and unwarranted action, it will be up to the Supreme Judicial Court to restore Massachusetts antidiscrimination law to what it was before today's decision.

****1084** Background. To begin with, the facts of the crime of which the defendant was convicted are described in part in the body of the majority opinion in a way that may cast him in a false light. To the extent that any the facts are relevant, the jury in this case concluded that the defendant was not armed and was not the shooter. He was acquitted of murder in the first degree, armed home invasion, and armed assault with intent to rob. He was convicted, rather, of unarmed assault with intent to rob, and, with that as the predicate crime, felony-murder in the second degree, a judge-made crime "of questionable origin" that "eroded the relation between criminal liability and moral culpability," and that ceased to exist in this Commonwealth 187 days after the defendant's conviction, but for which he was sentenced to, and is now serving a sentence of, life imprisonment (quotations and citations omitted). Commonwealth v. Brown, 477 Mass. 805, 825, 826, 832, 81 N.E.3d 1173 (2017).

1. Facts about jury selection. During the general voir dire portion of jury empanelment, juror no. 3 raised his hand in response to a question whether anything about the nature of the case would affect his ability to be fair and impartial. When asked by the judge at individual voir dire why he raised his hand, the juror said,

> "Because I looked at the jury pool and I don't feel that [the defendant] has his peers out there. I don't see any Spanish people out there or anything like that and I feel that he should ***284** be, if he's going to be, life and death like that there should be some of his people out there."

When the judge pointed out, "The question though was there anything about the nature of the case as I described it that would affect your ability to be a fair and impartial juror," the juror said, "Oh, no, no, not at all."

The judge asked the juror to explain the extent of his contact with persons of Hispanic descent. The juror said,

> "Well, I'm 100 percent Puerto Rican and I try, you know, it's, I grew up here as a young kid so I'm kind of, how would you say, not pro this or pro that because now I don't appear to be Hispanic, but I've gone through my life having to deal with something like that so."

The judge clarified that the question was what sources of contact the juror had had with persons of Hispanic descent, and he said, "Oh, family, friends, music, everything, I try to stay into the community still."

The judge said, "Question 18 asks, 'Do you believe that Dominicans or Puerto Ricans are more likely ... than other members of ethnic groups to commit crimes?' You checked, 'No. I do not approve of this question.' " The juror replied, "Yeah, I don't like those questions, I never did, I don't think they're proper at all." The judge explained the need for the question was to ensure that no one had a personal bias or prejudice that might make them unqualified to serve. She then asked, "Does that help you understand the reason for the question?" The juror responded, "Sure."

The judge asked the juror about a driving under the influence case that was mentioned on the confidential juror questionnaire, and asked when it occurred. The juror said, "I had gone to Florida, that was maybe four years ago and one in Maine around '13." The judge asked him, "[H]ow were you treated by the police and the prosecutors who were involved in handling your matters?" The juror replied, "Down in Florida very disgusting." The judge then asked, "And how about in Maine?" to which the juror responded, "Very nice." The judge asked, "Would your experiences with either of those cases affect your ability ****1085** to be fair to both sides in this case?" And the juror said, "Not at all because I'm in Massachusetts."

The judge then allowed follow-up questioning by the parties, and the prosecutor asked, "If you were seated on the jury and you ***285** felt that the rest of the panel did not adequately make up a jury of the defendant's peers; would that affect your ability to be fair and impartial as a juror in this case?" The juror said, "No, not at all, I'd put that aside." The Commonwealth then asked, "So, you would be able to put aside any beliefs that you had?" The juror replied, "Yes, I would, correct." The judge found that the juror could be fair and impartial and that he stood indifferent.

The Commonwealth moved to strike the juror for cause on the ground "that he had what he described as a disgusting experience when he had an incident in Miami, as well as his initial reaction to the make-up of the jury pool." The judge found the juror fair and impartial and that he stood indifferent, and she denied the motion. The prosecutor then exercised a peremptory challenge.

The defendant objected on Batson-Soares grounds. See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Soares, 377 Mass. at 486, 387 N.E.2d 499. The judge said she found no "pattern" of discrimination, also stating, "I do recognize a pattern can be demonstrated with a single challenge." The defendant requested that the judge ask the Commonwealth its race-neutral reason for the challenge. The judge said, "I'm not persuaded there is a pattern but in abundance of caution I will ask the Commonwealth to state its reasons for the record." The prosecutor then responded:

> "Your Honor, as previously stated, the reason for the Commonwealth's objection and use of the peremptory, is that the Commonwealth does not believe that this juror can be fair to the Commonwealth. It has nothing to do with this juror's race particular to him, it is based on the answers to the questions that he came in here and stated and indicated his issues that he had with police previously, his beliefs that he feels that the defendant cannot get a fair trial.
>
> "And while he said that he could put that aside, the Commonwealth does not believe that he is in a position to give the Commonwealth a fair trial based on his beliefs. Again, going back to the questionnaire where he was, he seemed upset or

> offended in some way about the particular question, No. 18, 'Do you believe that Dominicans or Puerto Ricans are more likely than members of other ethnic groups to commit crimes?' And even upon your explanation, it is the Commonwealth's opinion that he did not seem satisfied by saying very flippantly, 'Sure.' And that his attitude coming into this trial, again, having nothing to do with his race, gives the ***286** Commonwealth concern and pause and that is why the Commonwealth has exercised a peremptory." (Emphases added.)

Without any further questioning and without any specific factual findings, the judge said, "I find that the Commonwealth has identified, for the same reasons they previously identified, a rationale for the exercise of this peremptory that is both adequate and genuine."

Discussion. The procedure for addressing a Batson-Soares challenge to a peremptory strike is well known. "A challenge to the peremptory strike of a potential juror is subject to a three-step burden-shifting analysis. See Batson, 476 U.S. at 94-95 [, 106 S.Ct. 1712] ; Soares, 377 Mass. at 489-491 [, 387 N.E.2d 499] ." Commonwealth v. Jackson, 486 Mass. 763, 768, 162 N.E.3d 48 (2021). In the usual case, "[f]irst, to rebut the presumption that the ****1086** strike was proper, the challenger must make out a prima facie case that it was impermissibly based on race or other protected status by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose" (quotation and citations omitted). Id. Second, if the challenger makes that showing, the burden shifts to the party exercising the challenge to provide a "race-neutral" (or other-protected "group-neutral") explanation for it. Id. See Commonwealth v. Carter, 488 Mass. 191, 192, 172 N.E.3d 367 (2021). "Third and finally, the judge must then determine whether the explanation is both 'adequate' and 'genuine' " (quotation and citation omitted). Jackson, supra at 768, 162 N.E.3d 48.

Trial judges are "strongly encouraged to ask for an explanation as questions are raised regarding the appropriateness of the challenges. A judge has the broad discretion to do so without having to make the determination that a pattern of improper exclusion exists" (quotation and citations omitted). Commonwealth v. Lopes, 478 Mass. 593, 598, 91 N.E.3d 1126 (2018). Where, as in this case, the Commonwealth has given a purportedly race-neutral explanation for a challenged peremptory strike, and the trial judge has ruled on whether the strike was motivated by race, "the preliminary issue of whether the defendant had made a prima facie showing" — on appeal what is ordinarily required at the first step of the analysis — "becomes moot." Commonwealth v. Carleton, 36 Mass. App. Ct. 137, 141-142, 629 N.E.2d 321, S.C., 418 Mass. 773, 641 N.E.2d 1057 (1994), quoting Hernandez v. New York, 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion of Kennedy, J., in which Rehnquist, C.J., and White and Souter, JJ., joined).

The initial question we face therefore is the second-step one, whether the reasons put forward by the Commonwealth for the ***287** strike are race neutral. As described above, see supra at 276-277 & n.1, 252 N.E.3d at 1078-1080 & n.1, a strike motivated even in part by race is impermissible. We "make our own [de novo] determination whether the Commonwealth's reasons for the challenge were race-neutral" (citation omitted). Commonwealth v. Rodriguez, 457 Mass. 461, 473, 931 N.E.2d 20 (2010). See Paulino v. Harrison, 542 F.3d 692, 699 (9th Cir. 2008) ("At Batson's second step, the question of whether the state has offered a 'race-neutral' reason is a question of law that we review de novo"); United States v. Mulero-Algarin, 535 F.3d 34, 39 (1st Cir. 2008) ("A district court's determination of the facial adequacy of the government's proffered explanation for withholding a substantial assistance motion presents a question of law that, logically, engenders de novo review"); United States v. Smith, 534 F.3d 1211, 1226 (10th Cir.), cert. denied, 555 U.S. 1058, 129 S.Ct. 654, 172 L.Ed.2d 631 (2008) ("When considering a Batson claim, we review de novo whether the proffered explanations were race-neutral").

The majority's first error, and one that substantially weakens the protection of defendants and jurors against race-based peremptory strikes, is its rewriting of the law articulated in innumerable cases over several decades to eliminate the requirement that in the face of a prima facie case of discrimination, or on request of the judge, the party seeking to strike the juror state a race or other group-neutral explanation for the strike. See Commonwealth v. Grier, 490 Mass. 455, 458, 191 N.E.3d 1003 (2022) (party defending challenge must provide "group-neutral explanation"); Commonwealth v. Kozubal, 488 Mass. 575, 581, 174 N.E.3d 1169 (2021), cert. denied, —— U.S. ——, 142 S. Ct. 2723, 212 L.Ed.2d 787 (2022) (same); Commonwealth v.

Carter, 488 Mass. 191, 196, 172 N.E.3d 367 (2021) (same); **1087 Commonwealth v. Sanchez, 485 Mass. 491, 493, 151 N.E.3d 404 (2020) (same); Commonwealth v. Long, 419 Mass. 798, 807, 647 N.E.2d 1162 (1995) ("group-neutral reason"). This requirement has been part of antidiscrimination law for decades. See, e.g., Trevino v. Texas, 503 U.S. 562, 565, 112 S.Ct. 1547, 118 L.Ed.2d 193 (1992) (Batson "announced the now familiar rule that when a defendant makes a prima facie showing that the State has exercised its peremptory challenges to exclude members of the defendant's racial group, the State bears the burden of coming forward with a race neutral justification"). Yet the court eliminates the requirement that at the second step of analysis the party defending the strike articulate a race-or group-neutral justification for it. See ante at 271-272, 252 N.E.3d at 1075-1076. The court majority writes instead that "[i]f the judge finds that the challenging party has met his burden in showing an inference of discrimination, the burden shifts to the party seeking to exercise *288 the peremptory challenge to proffer a 'bona fide' nondiscriminatory justification for the peremptory challenge. Kalila, 103 Mass. App. Ct. at 587-588, 223 N.E.3d 1220. A bona fide explanation is one that is both 'genuine' and 'adequate.' Commonwealth v. Maldonado, 439 Mass. 460, 464, 788 N.E.2d 968 (2003)." Ante at 270, 252 N.E.3d at 1074. The court's entire analysis then purports to relate only to genuineness and adequacy.

As myriad cases, including those quoted above, hold, in order for the party defending the strike to meet its step-two burden under Soares, and for there even to be a need to proceed to step three of the analysis, its articulated justification must be race or other group neutral. See Sanchez, 485 Mass. at 493, 151 N.E.3d 404 (under both State and Federal law, proffered reason must be "group neutral"—if it is, judge must determine whether it is adequate and genuine). The majority never considers whether the proffered reasons given by the prosecutor were "race neutral" or "group neutral," in its entire analysis. In a final footnote the majority states, again contrary to law, that the phrase "race neutral" refers not to the proffered justification, but to the judge's ultimate conclusion about whether there was discriminatory intent. Indeed, the majority suggests that applying step two of the Batson-Soares analysis as it has been articulated for decades to require a race-neutral justification for the peremptory strike before proceeding to the questions of genuineness and adequacy, would be to implement "a new and different standard." Ante at 271 n.11, 252 N.E.3d at 1078 n.11. The majority's suggestion of unfamiliarity with step two of the Batson-Soares analysis is, to say the least, difficult to understand.

In response to this dissent, the majority does drop a footnote where it states that the "second step review is quite limited - an appellate court reviews counsel's stated reasons only for whether those reasons are racially discriminatory (that is, not 'race neutral') on their face. Ante at 274 n.8, 252 N.E.3d at 1077 n.8. This incorrect assertion, however, that at the second step we look at the proffered reasons only "on their face" is just another elliptical way of eliminating the careful, de novo review of those reasons at the second step required under the law of this Commonwealth to prevent racial discrimination in jury selection. See, e.g., Commonwealth v. Prunty, 462 Mass. 295, 313, 968 N.E.2d 361 (2012) ("An explanation that is 'race neutral' on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice" [citation omitted]). Indeed, even the Supreme Court plurality that the majority cites for its supposed statement of law recognized that some facially race-neutral proffered justifications will not meet the requirement of *289 step two because they must "be treated as a surrogate for race." Hernandez, 500 U.S. at 371, 111 S.Ct. 1859 (plurality opinion).

**1088 The court further insists that we are not engaged in de novo review because the race neutrality of a given proffered reason is not a question of law to be reviewed de novo, but one of fact, requiring deference to the trial judge's conclusion. See ante at 274 n.8, 252 N.E.3d at 1077 n.8. This is a serious error. It amounts to an abdication of our long-settled role in protecting against discrimination by engaging in de novo appellate review of the race-neutrality of proffered justifications for a peremptory challenge when a prima facie case has been made out that it is racially discriminatory.

This is, indeed, a particularly inapt case in which to announce incorrectly that we must defer to the trial judge's finding of race neutrality because it is a question of fact, since the judge here did not, in fact, find each of the Commonwealth's reasons race neutral. The entire finding of the trial judge given after the Commonwealth proffered its justifications for the strike is quoted above: "I find that the Commonwealth has identified, for the same reasons they previously identified, a rationale for the exercise

of this peremptory that is both adequate and genuine." A close reading of the majority opinion reveals that it is these findings of adequacy and genuineness to which the court defers — not a finding, that it ultimately does not claim was made, that each reason was race neutral.

Having skipped the critical question of reviewing whether the reasons given were as a matter of law race-neutral — indeed having stripped the question from the legal analysis — the court majority focuses as described only on what it calls the "factual findings" of the trial judge with respect to the genuineness and adequacy of the prosecutor's proffered reasons for the strike. Ante at ——, 252 N.E.3d at ——.

But these are questions that may not properly be reached if the party exercising the strike has not, at the previous step of analysis, met its burden by proffering race-neutral reasons for the strike. See ante at ——, 252 N.E.3d at —— (quoting description of proper procedure in Jackson, 486 Mass. at 768, 162 N.E.3d 48). Of course this makes sense. If a race-based (rather than race-neutral) reason is "genuine," which is indeed a question of fact, it is not a permissible basis for a peremptory strike. As for adequacy, the court majority concedes that it contains subsidiary questions of law. But one of them, in fact, is whether the proffered reason is race neutral. Maldonado, 439 Mass. at 464-465, 788 N.E.2d 968 ("An explanation is adequate if it is 'clear ***290** and reasonably specific,' 'personal to the juror and not based on the juror's group affiliation' [in this case race] ... and related to the particular case being tried").

I turn therefore to the proper initial step-two question whether, as a matter of law, any of the reasons put forward by the Commonwealth was based on race. And of course, contrary to the assertion of the court majority, I engage in no fact finding. Ante at ——, 252 N.E.3d at ——.

Before us, the Commonwealth defends only one of the reasons given by the prosecutor at trial, the prosecutor's asserted concern about the juror's interactions with police, particularly the one in Florida he described as "disgusting."[3] But accepting that reason as race neutral does not resolve the case, because even if the challenge was motivated only in part by race, it would be impermissible. The Commonwealth ****1089** does not mention the alleged "demeanor" or "flippancy" of the juror — reasons that "should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination," Maldonado, 439 Mass. at 465-466, 788 N.E.2d 968 — although the court majority does. Nonetheless, even if these reasons were before us and adequate to support a peremptory strike, because the strike was at least in part motivated by race, the analysis would be the same.

The Commonwealth does not attempt to defend as race neutral the prosecutor's assertion that the juror could not be "fair" to the Commonwealth because of his "beliefs that he feels that the defendant cannot get a fair trial." Although that argument is thus waived, because the court majority upholds the strike, I must address it.

First, juror no. 3 did not even say what the prosecutor said he did. He said that if a Latino person was going to be tried for murder, his jury should include some Latino people, and indeed the reason the prosecutor gave explicitly for her for-cause challenge was precisely the juror's reaction to the all-white jury venire present that day.[4] The prosecutor also said that she was striking the juror because he "seemed upset or offended in some ***291** way" that jurors in this criminal case were being asked if members of the juror's specific ethnicity — not merely Latino, but Puerto Rican — are, as a well-known racist stereotype asserts, prone to criminality.

Neither of these reasons is race neutral. A person of Puerto Rican or Dominican descent is the person most likely to be upset about seeing what appears to be an all-white jury about to try a Puerto Rican or Dominican-American defendant for murder. And a person of Puerto Rican or Dominican descent is likely to be the most offended by a question in a government court room asking, "Do you believe that Dominicans or Puerto Ricans are more likely than members of other ethnic groups to commit

crimes?" Indeed, if you asked all people of Puerto Rican descent whether they shared the juror's offense at the stereotype, you would likely find overwhelming, maybe unanimous, agreement with it.

Under art. 12 of the Declaration of Rights as construed in Soares and its progeny, in this Commonwealth where a Latino man is struck for expressing concern about an all-white jury hearing a Latino's murder trial, that strike is "based on race." See, e.g., Prunty, 462 Mass. at 313, 968 N.E.2d 361. In Prunty the Supreme Judicial Court stated:

> "In this case, defense counsel based his challenge on an assumption that an individual who had suffered racism would feel subtle biases against an alleged racist. This assumption, however, is undoubtedly 'based' on race, and therefore provides an illegitimate basis for a peremptory challenge. See Georgia v. McCollum, [505 U.S. 42,] 59 [112 S.Ct. 2348, 120 L.Ed.2d 33 (1992)]. It would require a measure of 'willful intellectual blindness,' Love v. Yates, 586 F. Supp. 2d 1155, 1180 (N.D. Cal. 2008), for us to conclude that Juror 16's experience of racism (particularly the race-specific examples described by the judge in his questioning) does not correlate almost perfectly with his race and therefore serve as a 'surrogate for race.' Hernandez v. New York, [500 U.S. 352,] 371 [111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)]."

Prunty, supra. The same is true where a Puerto Rican man is offended by a question ****1090** asking jurors if they agree that Puerto Ricans are prone to criminality, or expresses concern about an all-white jury venire in a trial of a Latino defendant.

That some white people may share these concerns does not make the strike race-neutral. A Black person's residence in a ***292** primarily Black neighborhood, for example, has been held to be a proxy for race, despite some white people living there, too. See, e.g., United States v. Bishop, 959 F.2d 820, 822 (9th Cir. 1992) (impermissible to strike Black juror because he lived in Compton). As amici Lawyers for Civil Rights, and others, put it in their brief, a "critical evaluation of the[se] ... justifications ... shows that they were based on Juror No. 3's [race] ... and thus were not race-neutral."

We may not ignore as judges what we know as people: A person of color who shares a murder defendant's race is far more likely to express concern about an all-white jury venire than anyone else. Likewise such a person is far more likely to take and express offense at a vicious stereotype about his own people. Thus, although the prosecutor said that the juror "seemed upset or offended in some way about the particular question, No. 18, 'Do you believe that Dominicans or Puerto Ricans are more likely than members of other ethnic groups to commit crimes?' " we know why the juror was upset. This is a racist stereotype that has led to violence against and injustice toward Puerto Ricans in the United States, and the juror was Puerto Rican.

> "The growing Hispanic and Latino population ... has encountered varied sources of discrimination. See, e.g., Commonwealth v. Buckley, 478 Mass. 861, 878 [, 90 N.E.3d 767] (2018) (Budd, J., concurring) (Hispanic drivers are stopped more often by police than Caucasian drivers); Bradley v. Lynn, 443 F. Supp. 2d 145, 148, 149 (D. Mass. 2006) (finding disparate and adverse impact on Hispanic candidates for entry-level firefighter positions); Kane v. Winn, 319 F. Supp. 2d 162, 179 (D. Mass. 2004) (citing statistics that Latinos are overrepresented in country's prison population, and 'Latino youths are incarcerated at twice the rate of [Caucasian] American youths')."

Commonwealth v. Colon, 482 Mass. 162, 179-80, 121 N.E.3d 1157 (2019). The Commonwealth's objections were thus not race neutral.

Oddly, the Commonwealth does not even discuss, much less defend, these proffered reasons, relying instead entirely on Commonwealth v. Williams, 481 Mass. 443, 116 N.E.3d 609 (2019). But that is not a Batson-Soares case at all and says nothing about strikes of jurors of color on grounds that are race-based. In fact, nothing in that case or its record indicates that the juror who stated her opinion ***293** that the "system is rigged against young African American males" was a person of color. Williams, at 449, 116 N.E.3d 609. Putting aside that juror no. 3 did not say what the juror in Williams said, the actual holding of Williams is that the judge erroneously struck the juror for her "inability to disregard [her] life experiences and resulting beliefs." Id. at 452, 116 N.E.3d 609. She said those beliefs were formed when "[she] worked with ... low income youth in a school setting. [She] worked a lot with ... teenagers who were convicted of drug crimes." Id. at 444, 116 N.E.3d 609. In dictum, the court did

say that the juror might nonetheless have been struck peremptorily by the Commonwealth. Id. at 453-454, 116 N.E.3d 609. But it certainly did not opine on whether that peremptory strike would survive a possible Soares claim if the juror were a person of color.[5] **1091 There was in fact no claim made in the trial court or the Supreme Judicial Court that the juror was struck by the judge on the basis of her race, which, again, was not even indicated in the record. Indeed, the Supreme Judicial Court said that "[i]n contrast [to Soares], here, the prospective juror was not struck due to being a member of a discrete group." Id. at 456, 116 N.E.3d 609. Williams thus does not "indicate that striking a juror based on the juror's expressed belief that the criminal justice system is rigged is not racially discriminatory on its face." Ante at 272 n.5, 252 N.E.3d at 1076 n.5. It could not, because we do not even know the race of the juror. Williams is thus literally irrelevant to this case.

As to the court majority, although it purports to recognize that a strike motivated even in part by race is impermissible, rather than addressing whether the two reasons described above are as a matter of law race neutral, it says my assessment of them takes them "out of their larger context," and thus misses the "thrust" of the prosecutor's concerns, which were about the juror's responses throughout voir dire "writ large." Ante at 275, 252 N.E.3d at 1078. This unjustified, newly-minted approach for assessing reasons articulated by the prosecutor amounts to little more than an obfuscatory way of saying the court majority without warrant will ignore some of the actual, specific justifications for the strike explicitly articulated by the prosecutor.

The actual "context" in which these justifications were given was that the prosecutor was asked to justify on a race-neutral basis her peremptory strike of a Puerto Rican juror. The prosecutor articulated, as required, her reasons for the strike. Two were *294 race based.

That the majority concludes that the peremptory strike was nonetheless permissible, first by eliminating from our analysis the foundational requirement that the prosecutor's justifications be race neutral, and then by the use of verbal formulae that amount to asserting without any legal or factual basis that the prosecutor really did not mean what she said, is disappointing. It seems to me like less than should be expected of our court.

The court majority repeatedly states that the juror was struck because of the Commonwealth's "concern that [the] juror [could not] be fair and impartial." Ante at 272, 252 N.E.3d at 1075. Of course the judge, who herself found the juror impartial, did not say that in her finding. But in any event every race-based strike is borne of what might be characterized a "concern about" the juror's partiality. The party exercising the strike thinks the juror will vote in favor of the other side because of the juror's race. See, e.g., Thompson v. United States, 469 U.S. 1024, 1026, 105 S.Ct. 443, 83 L.Ed.2d 369 (1984) (Brennan, J., dissenting) (before it was overruled by Batson, Swain v. Alabama, 380 U.S. 202, 221, 85 S.Ct. 824, 13 L.Ed.2d 759 [1965], had "h[eld] that the State may presume in exercising peremptory challenges that only white jurors will be sufficiently impartial to try a Negro defendant fairly"). The court majority says that "[i]n light of the [juror's] answers, the prosecutor may well have been concerned that juror no. 3 would view the case, not through the lens of the facts presented and the law provided, but through the lens of the race of the defendant and perceived unfairness of the system." Ante at 272, 252 N.E.3d at 1075–76. If concern about an all-white jury venire trying a Latino person, or taking offense at a poisonous stereotype of Puerto Rican **1092 people, means one cannot be fair in a trial of a Latino defendant, then all jurors of Puerto Rican discent will be subject to peremptory strikes.

Under art. 12, the trial judge erred in allowing the Commonwealth's peremptory challenge of juror no. 3. Therefore, the defendant's conviction should be vacated and the case remanded for a new trial. With respect, I dissent.

All Citations

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Footnotes

1 We acknowledge the amici brief submitted by Lawyers for Civil Rights, the Massachusetts Association of Hispanic Attorneys, the Jewish Alliance for Law and Social Action, and Citizens for Juvenile Justice.

2 As indicated, the jury convicted the defendant of felony-murder in the second degree, with the predicate felony being unarmed assault with intent to rob. They acquitted the defendant of murder in the first degree, armed home invasion, and armed assault with intent to rob.

3 The defendant was Hispanic and juror no. 3 also identified as Hispanic, as he made clear during his voir dire.

4 As the trial judge ruled on the ultimate question whether the Commonwealth's peremptory challenge was discriminatory, her findings whether the defendant showed a prima facie case of discrimination are "no longer of consequence." See Commonwealth v. Carleton, 36 Mass. App. Ct. 137, 141, 629 N.E.2d 321, S.C., 418 Mass. 773, 641 N.E.2d 1057 (1994).

5 The dissent contends that our citation to Williams is inapt because Williams is not a Soares case, and does not discuss the race of the prospective juror. The dissent states that the Williams court "certainly did not opine on whether that peremptory strike would survive a possible Soares claim if the juror were a person of color." Post at 293, 252 N.E.3d at 1090 (Rubin, J., dissenting). But Williams does indicate that striking a juror based on the juror's expressed belief that the criminal justice system is rigged is not racially discriminatory on its face (i.e., is race neutral); the relevance of Williams is that the court's opinion indicates that the reason given would have been an adequate basis for a peremptory challenge—regardless of the race of the prospective juror.

6 There also was no error in the judge's finding that the prosecutor's reasons were genuine. The trial judge is uniquely positioned to make a determination as to genuineness, while the appellate courts are not. See Maldonado, 439 Mass. at 466, 788 N.E.2d 968 ("while appellate courts may be equipped to some extent to assess the adequacy of an explanation, they are particularly ill-equipped to assess its genuineness"). Here the defendant urges us to conclude on appeal that the prosecutor acted from discriminatory intent, and that the intent was shown by alleged misstatements of the record and differential questioning of juror no. 3. Based on our review of the prosecutor's statements, we perceive no clear error in the trial judge's finding that the prosecutor's justifications were genuine.

7 The prosecutor's comments appear to be directed in part at the juror's demeanor throughout questioning, and the prosecutor referenced specific examples of the juror's demeanor several times in the reasons she stated to the judge. As noted, the judge found these reasons genuine. The judge correctly noted that the Commonwealth may "make a decision on the basis of body language and other observable characteristics of a potential juror, that they may interpret differently from the [c]ourt." See Commonwealth v. Caldwell, 418 Mass. 777, 779, 641 N.E.2d 1054 (1994) ("A juror's demeanor and reactions during the voir dire may constitute a sufficient basis for peremptory removal .... However, the prosecutor must have articulated, on the record, an explanation for the challenge that was not vague and general"). See also Williams, 481 Mass. at 453, 116 N.E.3d 609 ("Judges are expected to, and indeed must, use their discretion and judgment to determine whether a prospective juror will be fair and impartial based on verbal and nonverbal cues" [emphasis added]).

Here, the prosecutor's references to demeanor were not vague and general, but involved specific examples of how the juror responded to particular questions. These details allowed the judge to evaluate the genuineness of the reasons given.

8 The dissent nevertheless claims that the question whether a proffered justification is "race neutral" is reviewed de novo, citing primarily Federal cases dealing with the second "step" of the Federal Batson analysis. But under the Federal analysis that second step review is quite limited — an appellate court reviews counsel's stated reasons only for whether those reasons are racially discriminatory (that is, not "race neutral") on their face. The United States Supreme Court has stated the test thusly:

> "A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." (Emphasis added.)

Hernandez v. New York, 500 U.S. 352, 360, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion). See Purkett v. Elem, 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (quoting with approval the Hernandez plurality opinion and stating "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible"). No case suggests a more searching de novo review under Massachusetts law.

While the dissent appears to be arguing, at least in part, that it considers the prosecutor's stated reasons to be discriminatory on their face, that position cannot be squared with the tests, or the holdings, of Hernandez and Purkett. The prosecutor's stated reasons here addressed juror no. 3's impartiality as evidenced by his answers and demeanor; the prosecutor's statements cannot be said to demonstrate discriminatory intent on their face.

9 The dissent's reliance on Commonwealth v. Prunty, 462 Mass. 295, 968 N.E.2d 361 (2012), is misplaced for precisely this reason. Prunty is a case where the trial judge declined the defendant's peremptory challenge of a juror, finding that defense counsel's reasons were in fact based on race. Id. at 302, 968 N.E.2d 361. In affirming, the Supreme Judicial Court emphasized the need to defer to the trial judge's findings — as we do here. See id. at 309-314, 968 N.E.2d 361.

10 As is reflected in the transcript, the jury venire was not "all-white," and it appears the petit jury was not either, although the record as to the race of the jurors is by no means complete.

11 There are places where the dissent seems to be suggesting that the prosecutor's reasons were not "race neutral" for the simple reason that the prosecutor referenced answers by the juror that discussed race (ethnicity). The dissent's reasoning in this regard is faulty. If, as here, a juror (or a questionnaire) raises issues of race or ethnicity, the prosecutor is not precluded from addressing the juror's statements, as they might bear on the juror's ability to be impartial. As indicated, the actual question for the judge is whether the strike was motivated by, or "based on," race. See Flowers, 588 U.S. at 303, 139 S.Ct. 2228; Burnett, 418 Mass. at 771, 642 N.E.2d 294. The fact that a party references issues of race raised by a juror during the colloquy of course does not ipso facto render the party's reasons discriminatory, or not "race neutral." As discussed in note 8, supra, "race neutral" simply means an explanation that is not based on (motivated by) the race of the juror; it is not some new and different standard for determining whether a peremptory strike is appropriate.

1 See Batson v. Kentucky, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) ("the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race").

2 See Robertson, 480 Mass. at 390, 105 N.E.3d 253 (reviewing "judge's finding that there was no prima facie showing of a discriminatory pattern for an abuse of discretion"); Jones, 477 Mass. at 325, 77 N.E.3d 278 (determining judge abused her discretion in finding that defendant made necessary prima facie showing of discrimination); Commonwealth v. Issa, 466 Mass. 1, 11, 992 N.E.2d 336 (2013) (concluding "judge did not abuse his discretion in finding that the defendant had fallen short of making a prima facie case of bias"); Commonwealth v. Lugo, 104 Mass. App. Ct. 309, 313, 237 N.E.3d 1206 (2024) (reviewing "judge's decision relative to a peremptory challenge for an abuse of discretion"); Commonwealth v. Carvalho, 88 Mass. App. Ct. 840, 843, 43 N.E.3d 340 (2016) (determining judge did not abuse his discretion in finding that "a prima facie showing of impropriety was made").

3 Other States have eliminated step one of the analysis in order to combat race-based peremptory challenges. Some have gone further and created presumptively invalid reasons for a peremptory challenge. This concurrence merely suggests eliminating step one. It does not attempt to go further as other States have done.

Washington adopted a court rule listing presumptively invalid reasons for a peremptory challenge. See Wash. Rule of General Application 37(h) (2018). Subsequently, California passed legislation with the same sentiment: to provide a list of reasons "presumed to be invalid" for a peremptory challenge. See Cal. Civ. Pro. Code § 231.7(e) (effective 2020). In 2022, the New Jersey Supreme Court amended its rules of court to include a list of "reasons [that] are presumptively invalid" as a justification for a peremptory challenge. N.J. R. 1:8-3A (2022 comment).

1 See Foster v. Chatman, 578 U.S. 488, 513 n.6, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016) (noting that Supreme Court had "not previously allowed the prosecution to [prevent invalidation of a strike by] show[ing] that 'a discriminatory intent [that] was a substantial or motivating factor' behind a strike was nevertheless not 'determinative' to the prosecution's decision to exercise the strike" [citation

omitted]); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (equal protection clause, which prohibits intentional racial discrimination, "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes"); Commonwealth v. Long, 485 Mass. 711, 726, 152 N.E.3d 725 (2020) (where traffic stop is "motivated at least in part by race" it "violate[s] the equal protection principles of arts. 1 and 10" of Massachusetts Declaration of Rights); id. at 736, 152 N.E.3d 725 (Gants, C.J., concurring) ("it is the unanimous view of this court that ... judges should suppress evidence where a motor vehicle stop is motivated, even in part, by the race of the driver or passenger").

2 The Supreme Judicial Court has abandoned any distinction between discrimination on the basis of race and discrimination on the basis of ethnicity. See Commonwealth v. Colon, 482 Mass. 162, 179, 121 N.E.3d 1157 (2019).

3 Without specifying what they were, the Commonwealth does also say in its brief conclusorily that the prosecutor "articulated several justifiable, non-race-based reasons for Juror No. 3 to be excused. The trial judge properly exercised her discretion in accepting these proffered justifications and allowing the peremptory challenge."

4 The transcript indicates that, although two Latino jurors were among the venire on the first day of jury selection, on the second day, when juror no. 3 was present, he was the only Latino person in the venire.

5 It thus did not "indicate[ ] that the reason given would have been an adequate basis for a peremptory challenge — regardless of the race of the prospective juror," ante at 293 n.5, 252 N.E.3d at 1076 n.5, if the peremptory strike was challenged under Soares.

Commonwealth v. Lopez-Ortiz, 105 Mass.App.Ct. 1114 (2025)
253 N.E.3d 608

105 Mass.App.Ct. 1114
Unpublished Disposition

Appeals Court of Massachusetts.

COMMONWEALTH

v.

Roberto **LOPEZ**-**ORTIZ**.

23-P-295
|
Entered: February 12, 2025

By the Court (Rubin, Englander & D'Angelo, JJ.[1])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** The defendant appeals from his conviction of felony-murder in the second degree and from an order denying his renewed motion for a new trial.[2] In a separate published decision issued today, we address the defendant's claim concerning the peremptory strike of juror no. 3 by the Commonwealth, and, by a divided vote, affirm his conviction. In this memorandum and order we address his other claims, with respect to all of which we are unanimous. The facts of the case are addressed in both the majority and dissenting opinions in our published decision, and we will not repeat them here.

1. Sufficiency. The defendant argues that the evidence was insufficient to support a conclusion beyond a reasonable doubt that the death occurred during the commission of the underlying felony.

The defendant was found not guilty of armed home invasion, and of armed assault with intent to rob. He was found guilty of the lesser included offense of assault with intent to rob. (This conviction was dismissed as duplicative of his felony-murder in the second degree conviction.) The Commonwealth contends that in assessing this claim, we must view the evidence in the light most favorable to the Commonwealth, regardless of the various verdicts reached by the jurors. The defendant counters that we must view the evidence in the light most favorable to the verdict, so that, for example, despite the evidence that the defendant was armed, we must take the jury's decision to acquit him of armed assault with intent to rob, in favor of the lesser included offense of unarmed assault with intent to rob, along with his acquittal of armed home invasion, to mean that the jury found that he was not armed.

We need not resolve the issue because, even assuming the defendant's own testimony is true regarding the events surrounding the murder, under that testimony the defendant was, at the time of the killing, outside the building but was not yet in the car.

The jury were not required to believe his testimony that he had attempted to stop the crime once he realized a member of his group was armed, nor that he had stopped being a participant. Without concluding anything at variance with their verdict, the jury could have found that the defendant was attempting to escape the scene of the crime when the shooting occurred, and this was sufficient for the jury to convict him. See Commonwealth v. Hanright, 466 Mass. 303, 308-309 (2013).

2. Jury reinstruction. The defendant contends that the judge's response to a jury question during deliberation was erroneous, and that such error could have led to his conviction on unlawful grounds.

The jury submitted a question to the judge, asking, "There are four co-venturer's [sic] in an assault with an intent to rob, three exit the building, one remains in the building where the felony took place. Are the subsequent acts by the co-venturer automatically part of the under-lying [sic] felony, i.e., is the under-lying [sic] felony still going on?" Defense counsel requested that the judge instruct the jury that "subsequent acts of the co-venturers are not automatically part of the under-lying [sic] felony." The judge declined, instead repeating essentially the instruction on withdrawal that she had previously given and adding the sentence, "This is a fact question for you the jury to resolve based on the evidence presented at the trial and my instructions to you considered as a whole."[3] The defendant argues that reversal of his conviction is required, as the judge's reinstruction did not explain to the jury that finding the defendant "automatically" guilty under the circumstances described would be impermissible.

***2** The judge's instruction was a correct statement of the law. We see no abuse of discretion or other error of law in the supplemental instruction.

3. Voir dire question. Finally, defense counsel sought to question jurors about who they voted for in the 2016 presidential election, arguing that Donald Trump's campaign used racist rhetoric -- in particular, calling people of Hispanic origin criminals -- so the jurors' voting history was relevant to discovering bias. The judge declined to allow that line of questioning, saying it would be inappropriate. The defendant now argues that the judge's decision was erroneous. Given both the secrecy of the ballot, see, e.g., proposed but unenacted Fed. R. Evid. 507, 3 Weinstein's Federal Evidence § 507.01 (2d ed. 2024) ("Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally"), and the fact that tens of millions of people for a wide range of reasons vote for each candidate in a presidential election, we see no abuse of discretion or other error of law in not allowing the defendant, at voir dire, to use voting for Donald Trump for President in 2016 as a proxy for racism against Latinos.

4. Application of Brown. Finally, the defendant argues that he is entitled to the benefit of the common law rule announced in Commonwealth v. Brown, 477 Mass 805, 825 (2017) (Gants, C.J.). The Supreme Judicial Court, in Brown, made its substantive change in the law prospective only. Id. 834. It stated that the rule would not apply to cases like this one where trial was held before the date of the Supreme Judicial Court decision. Id.

As described in our published decision, the judgment and order denying the renewed motion for a new trial are affirmed.

So ordered.

Affirmed

All Citations

105 Mass.App.Ct. 1114, 253 N.E.3d 608 (Table), 2025 WL 470738

Footnotes

1 The panelists are listed in order of seniority.

2 The defendant makes no separate arguments concerning his renewed motion for a new trial.

3 The judge said: "To prove felony murder in the 1st or 2nd degree the Commonwealth must prove beyond a reasonable doubt that the act that caused Christiano Diaz-Arias' death occurred during the commission of the under-lying [sic] felony at substantially the same place and time. A killing may be found to occur during the commission of the felony if the killing occurred as part of the defendant's effort to escape responsibility for the felony. This is a fact question for you the jury to resolve based on the evidence presented at the trial and my instructions to you considered as a whole."

496 Mass. 1103
(This disposition is referenced in the North Eastern Reporter.)
Supreme Judicial Court of Massachusetts.

COMMONWEALTH

v.

Roberto LOPEZ-ORTIZ

June 6, 2025

Reported below: 105 Mass. App. Ct. 265 (2025).

Opinion
Appellate review denied.

All Citations

496 Mass. 1103, 262 N.E.3d 932 (Table)

End of Document

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

COMMONWEALTH vs. ROBERTO LOPEZ-ORTIZ
FAR-30230

CASE HEADER

Case Status	FAR denied	**Status Date**	06/06/2025
Nature	Murder2	**Entry Date**	02/28/2025
Appeals Ct Number	2023-P-0295	**Response Date**	05/23/2025
Appellant	Defendant	**Applicant**	Defendant
Citation	496 Mass. 1103	**Case Type**	Criminal
Full Ct Number		**TC Number**	
Lower Court	Middlesex Superior Court	**Lower Ct Judge**	Kathe M. Tuttman, J.

ADDITIONAL INFORMATION

Volume number for second order in case: Volume number for second opinion in case: 105
Page number for second order in case: Page number for second opinion in case: 1114

INVOLVED PARTY	ATTORNEY APPEARANCE
Commonwealth Plaintiff/Appellee	Thomas D. Ralph, A.D.A. Jamie Michael Charles, A.D.A.
Roberto Lopez-Ortiz Defendant/Appellant	David J. Nathanson, Esquire Melissa Ramos, Esquire Mark W. Shea, Esquire
Lawyers for Civil Rights Amicus (defendant)	Lori Jane Shyavitz, Esquire Leah Rachel McCoy, Esquire
Criminal Justice Institute at Harvard Law School Amicus	Katharine Naples-Mitchell, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
02/28/2025		Docket opened.
02/28/2025	#1	MOTION to file FAR application late filed for Roberto Lopez-Ortiz by Attorney David James Nathanson. (Allowed).
05/02/2025	#2	MOTION to file FAR application late filed for Roberto Lopez-Ortiz by Attorney David James Nathanson. (5/6/2025: Allowed).
05/09/2025	#3	FAR APPLICATION filed for Roberto Lopez-Ortiz by Attorney David James Nathanson and Attorney Melissa Ramos.
05/09/2025	#4	MOTION to exceed page limits filed for Roberto Lopez-Ortiz by Attorney David James Nathanson. (5/16/2025: The motion is allowed).
05/13/2025	#5	Supplemental Citation filed for Roberto Lopez-Ortiz by Attorney David James Nathanson.
06/06/2025	#6	DENIAL of FAR application.
06/20/2025	#7	MOTION to reconsider denial of FAR application filed for Roberto Lopez-Ortiz by Attorney David James Nathanson. (7/25/2025: The motion is denied).
06/23/2025	#8	Amicus statement in support of motion to reconsider denial of FAR application filed for Criminal Justice Institute at Harvard Law School by Attorney Katharine Naples-Mitchell.

As of 07/25/2025 1:20pm