Utah Supreme Court
Rules of Criminal Procedure Committee

Meeting Agenda

Doug Thomspon, Chair

Location: WebEx Meeting:
https://meet214.webex.com/meet214-en/j.php?MTID=mec2068259c2a7c00e4b69529c8e35beb

Date: July 19, 2022

Time: 12:00 p.m. – 2:00 p.m. MST

Action: Welcome and approve May 18, 2022 minutes	Tab 1	Doug Thompson
Discussion: Rules from the pretrial committee update (Rules 6, 7, 7A, 7.5, 9)	Tab 2	David Ferguson
Discussion: Upcoming Rules • Rule 21 – Inconsistent Verdicts • Rule 17.5 – Future of Webex • Rule 14 – Appeals from 14(b) • Probation consolidation (Ryan Peters) *State v. Aziakanou* (*Batson*)	Tab 3	Doug Thompson
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https://www.utcourts.gov/rules/urcrp.php

Meeting Schedule:
September 20, 2022
November 15, 2022

Rule Status:

Rule 8 – Approved for Public Comment by SC

Rule 42 – Approved for Expedited Adoption and Public Comment by SC

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF CRIMINAL PROCEDURE

MEETING MINUTES
May 17th, 2022
12:00 – 2:00 p.m.
Via Webex

MEMBERS PRESENT	MEMBERS EXCUSED	GUESTS	STAFF
Doug Thompson Janet Reese Meredith Mannebach William Carlson David Ferguson Elizabeth Hruby-Mills Ryan Peters Ryan Stack Denise Porter Matthew Tokson	Craig Johnson Kelly Schaeffer-Bullock	Neal Hamilton	Bryson King

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1. WELCOME, INTRODUCTION OF NEW STAFF, AND APPROVAL OF MINUTES:

Doug Thompson welcomed the members to the Committee meeting and introduced Bryson King, new staff for the Committee, who is replacing Stacy Haacke. The minutes from the prior meeting were approved by unanimous vote of the attending members.

2. Rule 8: Ready for Public Comment

Guest, Mr. Neal Hamilton, addressed the committee and reviewed amendments to Rule 8. Mr. Ryan Peters stated his agreement with the changes proposed in subsection (b)(1) and Doug Thompson proposed changes to subsections (b)(2) and (d)(1) for clarity. Janice Porter moved to adopt the Committee's amendments proposed to subsections (c) and (d). Ryan Peters seconds and no objection is heard. The motion carries.

Doug Thompson reviews subsections (a) and (b) with the Committee and there is discussion about whether the amendments permit a judge's subjective discomfort with an individual's education, training, and background when requesting self-representation or whether these considerations are merely relevant to an objective finding of knowing and voluntary waiver. Doug Thompson clarifies it is the latter. William Carlson proposes an amendment to subsection

(b)(2) and then moves to approve all of the Committee's amendments to Rule 8. Ryan Slack seconds and there is no objection. The motion carries. Rule 8 will be sent to the Supreme Court to approve for public comment.

3. Rule 42: Ready for Public Comment

Doug Thompson addresses Rule 42 and reviews its progress in subcommittee and in the Committee. He directs his attention, specifically, to subsection (b)(3)(B). William Carlson indicates concern with the current e-filing procedure and asks how the AOC will process objections from prosecutors to individual cases on the automatic expungement-eligible list. Bryson King clarifies that once a list is created, a prosecutor may file an objection to a case being included on that list, so long as the objection is e-filed in the case and is filed under the category "Automatic Expungement Objection." CORIS will flag the objection and will make the case ineligible. The AOC will then manually remove the case from the list. Doug Thompson says he will take some time to review this process with the AOC and match it with the Rule's language. There is discussion to also review the AOC's process in subsection (b)(2)(A) to ensure consistency with the Rule.

Doug Thompson invites the Committee to discuss subsection (c)(2) amendments. William Carlson indicates his approval of the language because it directs notice to prosecuting agencies and not individual prosecutors who may or may not be employed with those agencies anymore. Janet Reese also clarifies that in (c)(3), certificates will be filed into the court's docket by uploading them into CORIS. She also states that when a criminal case does not exist (for example, because an arrest never led to charges), an expungement case will be created, otherwise a petition for expungement will be filed in an existing criminal case and procedures for processing the expungement will occur in the existing criminal case. The word "case" is replaced with "action" to account for the distinction between the two scenarios.

William Carlson proposes removing language in (c)(4)(B) that requires prosecutors to send notice to victims of an expungement petition using Judicial Council-approved forms. Mr. Carlson moves for the amendment, David Ferguson seconds, and there is no objection. The motion carries and the language is removed.

Doug Thompson directs the Committees attention to subsection (c)(4)(C) and the Committee agrees to replace "serve" with "provide notice" (or variations thereof) in the subsection. Discussion over subsection (c)(4)(D) clarifies that any court findings will occur in the expungement order issued by the Court. There is further discussion from William Carlson about the number of days provided in subsection (c)(5) and whether it should be 35 or 60 and Doug Thompson references the statute to confirm 35 is the correct number.

William Carlson moves to adopt all of the Committee's amendments to Rule 42. Ryan Stack seconds the motion, no objection is heard. The motion carries and the Rule will be sent to the Supreme Court to approve for public comment. Ryan Peters asks that we clarify the AOC's process for subsection (b)(2)(A) and Doug Thompson indicates he will follow up with the

Committee though email and invite a motion if any changes to the language are needed.

4. Rule 12.5: Back from subcommittee and ready for public comment

Doug Thompson then addresses amendments to Rule 12.5 and there is discussion about amending subsection (c) to clarify whether the district court has absolute discretion to review and modify rulings made by the justice court after a DV case transfer. The Committee agrees to remove the list of decisions subject to review to improve readability and further agrees to add language clarifying that the district court may, in its discretion, grant a motion to address rulings from the justice court after the transfer.

David Ferguson suggests the Committee clarify in subsection (a) that a notice cannot be filed in a case not set for trial. The Committee agrees and adopts the changes. Ryan Peters then asks to clean up language in the Rule and change "notice to" to "notice of" and make capitalizations consistent. Those changes are made. Changes to the language for timing of notices in cases set for trial, in subsection (g) is made after discussion among the Committee.

Upon Ryan Slack's excusal from the meeting, an insufficient number of votes remain in the Committee to approve a motion. Ryan Peters moves to adopt the amendments to Rule 12.5, William Carlson seconds, no objection is heard, and Doug indicates he will finalize the motion via email to secure all necessary votes for the motion's approval.

Adjourn:
After these discussions, Doug indicates any remaining items of business will be discussed through email. The meeting is adjourned.

Rule 6. Warrant of arrest or summons.

(a) Upon the filing of an indictment, or upon the acceptance of an information by a judge, the court must set the case for an initial appearance or arraignment, as appropriate. The court must then issue a summons directing the defendant to appear for that hearing, except as described in subsection (c).

(b) The summons must inform the defendant of the date, time and courthouse location for the initial appearance or arraignment. The summons may include a temporary pretrial status order permitting the defendant to appear on their own recognizance or imposing reasonably available and necessary conditions of release. A summons may be mailed to the defendant's last known residential or email address, or served by anyone authorized to serve a summons in a civil action.

(c) If the defendant is not a corporation, a judge may issue a warrant of arrest instead of a summons if the court finds from the information and any supporting statements or affidavits that:

(c)(1) The defendant's address is unknown or the defendant will not otherwise appear on a summons; or

(c)(2) there is substantial danger of a breach of the peace, injury to persons or property, or danger to the community.

(d) A judge may issue a warrant of arrest in cases where the defendant has failed to appear in response to a summons.

(e) Prior to issuing a warrant the judge must review the information for sufficiency. If the judge determines from the information, or from any supporting statements or affidavits, that there is probable cause to believe the offenses have been committed and that the accused committed them, and that the circumstances of (c)(1) or (c)(2) are met, the judge may issue the warrant. If the judge determines there is not probable cause the judge must notify the prosecutor. If the prosecutor does not file a sufficient information within 28 days, the judge must dismiss the case.

(e)(1) When a warrant of arrest is issued, if the judge determines the defendant must appear in court, the judge must include on the warrant the name of the law enforcement agency in the county or municipality with jurisdiction over the offense charged.

(e)(2) The judge must ~~state~~ include on the warrant a temporary pretrial status order that indicates:

(e)(2)(A) Whether the defendant is denied pretrial release ~~under the authority of Utah Code § 77-20-1,~~ pending a pretrial status order issued in accordance with Rule 7, and the alleged facts supporting the judge's decision; or

(e)(2)(B) The terms and conditions of pretrial release pending a pretrial status order issued in accordance with Rule 7.~~the court requires of the defendant in accordance with Utah Code section 77-20-1~~The court may only impose terms and conditions that are reasonably available and necessary to reasonably ensure the defendant's appearance, the safety of any witnesses or victims, the safety and welfare of the public, and non-obstruction of the criminal justice process.

(e)(2)(C) ~~As required by Utah Code section 77-20-1, if~~ If the court determines monetary bail is necessary, the judge must either issue an unsecured bond or consider the individual's ability to pay and set the lowest amount reasonably calculated to ensure the defendant's appearance at court.

(e)(2)(D) ~~The court must state~~ Whether the defendant's personal appearance is required or whether the defendant may remit ~~monetary bail~~ a fine to satisfy any obligation to the court pursuant to Utah Code § 77-7-21.

~~(e)(1)(E) The geographic area from which the issuing court will guarantee transport pursuant to Utah Code § 77-7-5.~~

(f) The clerk of the court must enter the warrant into the court information management system.

(g) **Service, Execution and return of the warrant.**

(g)(1) The warrant must be served by a peace officer. The officer may execute the warrant at any place within the state.

(g)(2) The warrant must be executed by the arrest of the defendant. The officer need not possess the warrant at the time of the arrest. Upon request, the officer must show the warrant to the defendant as soon as practicable. If the officer does not have the warrant in possession at the time of the arrest, the officer must inform the defendant of the offense charged and of the fact that the warrant has been issued.

(g)(3) The person executing a warrant or serving a summons must make return thereof to the magistrate as soon as practicable.

(h) The court may periodically review unexecuted warrants to determine whether they should be recalled.

Rule 7. Initial proceedings for class A misdemeanors and felonies.

(a) **First appearance.** At the defendant's first appearance, the court must inform the defendant:

(a)(1) of the charge in the information or indictment and furnish a copy;

(a)(2) of any affidavit or recorded testimony given in support of the information and how to obtain them;

(a)(3) of the right to retain counsel or have counsel appointed by the court without expense if unable to obtain counsel;

(a)(4) of rights concerning pretrial release; ~~and~~

(a)(5) that the defendant is not required to make any statement, and that any statement the defendant makes may be used against the defendant in a court of law~~.~~; and

(a)(6) that a defendant who is charged and not a United States citizen may request that an attorney for the government or a law enforcement official notify a consulate officer from the defendant's country of nationality that the defendant has been arrested, and that even without the defendant's request that the consular may be notified.

(b) **Right to counsel.** If the defendant is present at the initial appearance without counsel, the court must determine if the defendant is capable of retaining the services of an attorney within a reasonable time. If the court determines the defendant has such resources, the court must allow the defendant a reasonable time and opportunity to retain and consult with counsel. If the court determines the defendant is indigent, the court must appoint counsel pursuant to Rule 8, unless the defendant knowingly and intelligently waives the right to counsel.

(c) ~~**Release conditions**~~**Pretrial status order.** ~~(c)(1)~~ Except as provided in paragraph (c)(1), the court must issue a pretrial status order ~~pursuant to Utah Code section 77-20-1~~at an initial appearance. Parties should be prepared to address this issue, including complying with victim notice requirements ~~under Utah Code section 77-37-3 and Utah Code section 77-38-3~~.

(c)(1) At a first appearance the court must extend the temporary pretrial status order issued under rule 6 and delay issuing a pretrial status order if:

(c)(1)(A) a pretrial detention hearing is scheduled in accordance with Rule 7.5 after a prosecutor moves for pretrial detention;

(c)(1)(B) either party requests a delay; or

(c)(1)(C) the court finds good cause to delay issuing a pretrial status order.

(c)(2) The pretrial status order must:

(c)(2)(A) release the defendant on the defendant's own recognizance until the case is adjudicated;

(c)(2)(B) designate one or more conditions of the defendant's release until the case is adjudicated; or

(c)(2)(C) order the defendant be detained until the case is adjudicated.

(c)(3) The court issuing a pretrial status order may not give any deference to the findings, conclusions, and order of a temporary pretrial status order.

(c)(4) A motion to modify the pretrial status order ~~issued at initial appearance~~ may be made by either party at any time upon notice to the opposing party sufficient to permit the opposing party to prepare for the hearing and to permit each alleged victim to be notified and be present.

(c)(4)(A)~~3) Subsequent~~ motions to modify a pretrial status order may be made only upon a showing that there has been a material change in circumstances.

(c)(4)(B)~~4)~~ A hearing on a motion to modify a pretrial status order may be held in conjunction with a preliminary hearing or any other pretrial hearing.

(d) **Release conditions.**

(d)(1) When imposing conditions of a defendant's release, a court must impose only conditions that are reasonably available and necessary to reasonably ensure the defendant's appearance, the safety of any witnesses or victims, the safety and welfare of the public, and non-obstruction of the criminal justice process.

(d)(2) A court determining what conditions of release to impose must consider any identified services offered by a local government's pretrial services program and may not require the local government to provide services that are not currently available. Many conditions of release will not require resources from local governments and a court may impose any such condition subject to the limitations of (d)(1).

(d)(3) If the court determines that a financial condition, other than an unsecured bond, is necessary to impose as a condition of release, the court shall a set single amount for each case and shall consider the defendant's ability to pay when determining the amount of the financial condition. If a bail commissioner or temporary pretrial status order previously fixed a financial condition for the defendant, the court may not give any deference to that action or the amount of the financial condition.

(d)(3)(A) Notwithstanding this subsection, when a court imposes a financial condition for a case in which a bail commissioner or temporary pretrial status order previously fixed a financial condition and

the defendant has not secured release by the time the court issues a pretrial status order, the court must consider whether the amount exceeded the defendant's ability to pay.

(~~d~~e) **Continuances.** Upon application of either party and a showing of good cause, the court may allow up to a seven day continuance of the hearing to allow for preparation, including notification to any victims. The court may allow more than seven days with the consent of the defendant.

(~~e~~f) **Right to preliminary examination.**

(~~e~~g)(1) The court must inform the defendant of the right to a preliminary examination and the times for holding the hearing. If the defendant waives the right to a preliminary examination, and the prosecuting attorney consents, the court must order the defendant bound over for trial.

(~~e~~g)(2) If the defendant does not waive a preliminary examination, the court must schedule the preliminary examination upon request. The examination must be held within a reasonable time, but not later than 14 days if the defendant is in custody for the offense charged and not later than 28 days if the defendant is not in custody. These time periods may be extended by the magistrate for good cause shown. Upon consent of the parties, the court may schedule the case for other proceedings before scheduling a preliminary hearing.

(~~e~~g)(3) A preliminary examination may not be held if the defendant is indicted.

Rule 7A. Procedures for arraignment on class B or C misdemeanors, or infractions.

(a) **Initial appearance.** At the defendant's initial appearance, the court must inform the defendant:

(a)(1) of the charge in the information, indictment, or citation and furnish a copy;

(a)(2) of any affidavit or recorded testimony given in support of the information and how to obtain them;

(a)(3) of the right to retain counsel or have counsel appointed by the court without expense if unable to obtain counsel;

(a)(4) of rights concerning pretrial release; and

(a)(5) that the defendant is not required to make any statement, and that any statement the defendant makes may be used against the defendant in a court of law.

(a)(6) that a defendant who is charged and not a United States citizen may request that an attorney for the government or a law enforcement official notify a consulate officer from the defendant's country of nationality that the defendant has been arrested, and that even without the defendant's request that the consular may be notified.

(b) **Right to counsel.** If the defendant is present at the initial appearance without counsel, the court must determine if the defendant is capable of retaining the services of an attorney within a reasonable time. If the court determines the defendant has such resources, the court must allow the defendant a reasonable time and opportunity to retain and consult with counsel. If the court determines defendant is indigent, the court must appoint counsel pursuant to rule 8, unless the defendant knowingly and intelligently waives such appointment.

(c) (c) **~~Release conditions~~Pretrial status order.** ~~(c)(1)~~ Except as provided in paragraph (c)(1), the court must issue a pretrial status order ~~pursuant to Utah Code section 77-20-1~~at an initial appearance. Parties should be prepared to address this issue, including complying with victim notice requirements ~~under Utah Code section 77-37-3 and Utah Code section 77-38-3~~.

(c)(1) At a first appearance the court must extend the temporary pretrial status order issued under rule 6 and delay issuing a pretrial status order if:

(c)(1)(A) a pretrial detention hearing is scheduled in accordance with Rule 7.5 after a prosecutor moves for pretrial detention;

(c)(1)(B) either party requests a delay; or

(c)(1)(C) the court finds good cause to delay issuing a pretrial status order.

(c)(2) The pretrial status order must:

(c)(2)(A) release the defendant on the defendant's own recognizance until the case is adjudicated;

(c)(2)(B) designate one or more conditions of the defendant's release until the case is adjudicated; or

(c)(2)(C) order the defendant be detained until the case is adjudicated.

(c)(3) The court issuing a pretrial status order may not give any deference to the findings, conclusions, and order of a temporary pretrial status order.

(c)(4) A motion to modify the pretrial status order ~~issued at initial appearance~~ may be made by either party at any time upon notice to the opposing party sufficient to permit the opposing party to prepare for the hearing and to permit each alleged victim to be notified and be present.

(c)(4)(A)~~3) Subsequent~~ motions to modify a pretrial status order may be made only upon a showing that there has been a material change in circumstances.

(c)(4)(B)~~4)~~ A hearing on a motion to modify a pretrial status order may be held in conjunction with a preliminary hearing or any other pretrial hearing.

(d) **Release conditions.**

(d)(1) When imposing conditions of a defendant's release, a court must impose only conditions that are reasonably available and necessary to reasonably ensure the defendant's appearance, the safety of any witnesses or victims, the safety and welfare of the public, and non-obstruction of the criminal justice process.

(d)(2) A court determining what conditions of release to impose must consider any identified services offered by a local government's pretrial services program and may not require the local government to provide services that are not currently available. Many conditions of release will not require resources from local governments and a court may impose any such condition subject to the limitations of (d)(1).

(d)(3) If the court determines that a financial condition, other than an unsecured bond, is necessary to impose as a condition of release, the court shall a set single amount for each case and shall consider the defendant's ability to pay when determining the amount of the financial condition. If a bail commissioner or temporary pretrial status order previously fixed a financial condition for the defendant, the court may not give any deference to that action or the amount of the financial condition.

(d)(3)(A) Notwithstanding this subsection, when a court imposes a financial condition for a case in which a bail commissioner or temporary pretrial status order previously fixed a financial condition and

the defendant has not secured release by the time the court issues a pretrial status order, the court must consider whether the amount exceeded the defendant's ability to pay.

(~~d~~e) **Continuances.** Upon application of either party and a showing of good cause, the court may allow up to a seven day continuance of the hearing to allow for preparation, including notification to any victims. The court may allow more than seven days with the consent of the defendant.

(~~e~~f) **Entering a plea.**

(~~e~~f)(1) If defendant is prepared with counsel, or if defendant waives the right to be represented by counsel, the court must call upon the defendant to enter a plea.

(~~e~~f)(2) If the plea is guilty, the court must sentence the defendant as provided by law.

(~~e~~f)(3) If the plea is not guilty, the court must set the matter for trial or a pretrial conference within a reasonable time. Such time should be no longer than 30 days if defendant is in custody.

(~~e~~f)(4) The court may administratively enter a not guilty plea for the defendant. If the court has appointed counsel, the defendant does not desire to enter a plea, or for other good cause, the court must then schedule a pretrial conference.

Rule 7.5. Pretrial Detention Hearings

(a) Applicability. A prosecutor may file a motion for pretrial detention:

(a)(1) if the defendant has been charged with one or more offenses eligible for detention under Utah Constitution, Article I, Section 8; or

(a)(2) for a crime that is not eligible for pretrial detention the court makes written findings of the following:

(a)(2)(i) ~~if~~ the defendant violated a material condition of release that is reasonably necessary to ensure the defendant's appearance, the safety of any witnesses or victims, the safety and welfare of the public, ~~and~~ or non-obstruction of the criminal justice process.

(a)(2)(ii) no other condition of release can be imposed to reasonably secure the defendant's appearance

(a)(2)(iii) the defendant is held in custody on another case or

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(b) Timing. Upon receipt of a motion for pretrial detention, the court shall set a pretrial detention hearing to be held at either the initial appearance or between seven and fourteen days after the defendant's arrest. A defendant has the right to be represented by counsel at the pretrial detention hearing and if indigent, has the right to court-appointed counsel.

(c) Burden of Proof. At the detention hearing the prosecutor has the burden of proof and proceeds first. The prosecutor must show that there is substantial evidence to support the offense eligible for detention, and for a non-capital offense one or more of the following:

(c)(1) for a motion to detain based on a felony committed while on parole, probation, or free while awaiting a previous felony charge, the prosecutor must show substantial evidence of the previous felony;

(c)(2) for a motion to detain based on a felony, the prosecutor must show clear and convincing evidence that:

(c)(2)(A) the defendant constitutes a substantial danger to any other individual or the community;

(c)(2)(B) the defendant is likely to flee if released; or

(c)(2)(C) the defendant violated a material condition of release while released on a previous case.

(c)(3) for a motion to detain based on a domestic violence offense, the prosecutor must show clear and convincing evidence that the defendant would constitute a substantial danger to the victim if released.

(c)(4) for a motion to detain based on driving under the influence or driving with a measurable controlled substance:

(c)(4)(A) the prosecutor must show substantial evidence the offense resulted in death or serious bodily injury to an individual; and

(c)(4)(B) the prosecutor must show clear and convincing evidence that the person would constitute a substantial danger to the community if released.

(c)(5) for a motion to detain based on violation of a pretrial status order, the prosecutor must show clear and convincing evidence that the defendant violated the terms and conditions of release and that no other conditions can reasonably ensure defendant's appearance, the safety of any witnesses or victims, the safety and welfare of the public, and non-obstruction of the criminal justice process.

(d) **Procedure.** Both parties have the opportunity to make arguments and present relevant evidence or information. The court may rely on any reliable record or source, including proffered evidence. The court must allow a victim to be heard at the hearing if the victim wishes to address pretrial detention.

(e) Subpoenas. Either party may subpoena witnesses to testify. At the end of a detention hearing a defendant may ask the court for leave to issue a subpoena compelling the victim to testify, continuing the evidentiary hearing until the conclusion of that testimony. The court may only grant the defendant's request to compel victim testimony if the court finds that the testimony sought:

(e)(1) is material to whether the burdens of proof described in paragraph (c) have been met in light of all information which has been presented to the court; and

(e)(2) would not unnecessarily intrude on the victim's rights or place an undue burden on the victim.

(f) **Written Findings**. If the court grants the motion for pretrial detention, the court must execute a pretrial status order denying pretrial release and ordering that the defendant be detained while the defendant awaits trial or other resolution of criminal charges. The court must include any written findings in the case record.

(g) **Appeal De Novo from the Justice Court.** If a defendant is denied bail or release in justice court after a pretrial detention hearing, the defendant may appeal the denial as a hearing de novo to the district court by notifying the justice court of the intent to appeal. The district court must schedule the detention hearing promptly, and no later than 14 days after receipt of the notice of appeal. The justice court's order will remain in effect until the hearing de novo. At the conclusion of the hearing, the

case will be remanded to the justice court for further proceedings unless the parties and the district court agree to have the district court retain jurisdiction.

Commented [DF1]: This language comes from 78A-7-118 for the hearings de novo that are recognized by statute.

Rule 9. Proceedings for persons arrested without a warrant on suspicion of a crime.

(a) **Probable cause determination**.

(a)(1) A person arrested ~~and delivered to a correctional facility~~ without a warrant for an offense must be presented without unnecessary delay before a magistrate for the determination of probable cause and eligibility for ~~pretrial release pursuant to Utah Code § 77-20-1~~a temporary pretrial status order.

(a)(2) The arresting officer, custodial authority, or prosecutor with authority over the most serious offense for which defendant was arrested must, as soon as reasonably feasible but in no event longer than 24 hours after the arrest, present to a magistrate a sworn statement that contains the facts known to support probable cause to believe the defendant has committed a crime. The statement must contain any reasonably available facts known to the affiant that are relevant to ~~determining the appropriateness of precharge release and the conditions thereof~~a temporary pretrial status order, including:

(a)(2)(A) identification information for the defendant;

(a)(2)(B) the defendant's residential address;

(a)(2)(C) any pending charges or warrants for the defendant;

(a)(2)(D) the defendant's probation or parole supervision status;

(a)(2)(E) whether the defendant was on pretrial release for another offense prior to the arrest for the current offense

(a)(2)(F) the defendant's financial circumstances; and

(a)(2)(G) any ties the defendant has to the community.

(a)(3) If available, the magistrate should also be presented the results of a validated pretrial risk assessment tool and any other reliable information that may aid in its determination under (a)(4).

(a)(4) The magistrate must review the information provided and determine if probable cause exists to believe the defendant committed the offense or offenses described. If the magistrate finds there is probable cause, the magistrate must ~~determine if the person is eligible for pretrial release pursuant to Utah Code § 77-20-1. The magistrate will impose the least restrictive reasonably available conditions of release reasonably necessary to~~issue a temporary pretrial status order that releases the defendant on their own recognizance, designates one or more conditions to be imposed upon the defendant's release, or orders the defendant to be detained. In making a determination about pretrial release, a magistrate shall impose only conditions of release that are reasonably available and necessary to reasonably ensure:

(a)(4)(A) ~~ensure~~ the individual's appearance ~~at future court proceedings~~in court when required;

(a)(4)(B) ~~ensure~~ that the individual will not obstruct or attempt to obstruct the criminal justice process;

(a)(4)(C) ~~ensure~~ the safety of any witnesses or victims of the offense allegedly committed by the individual; and

(a)(4)(D) ~~ensure~~ the safety and welfare of the public ~~and the community~~.

(a)(5) If the magistrate finds the statement does not support probable cause to detain the defendant on the submitted charges ~~support the charges filed~~, the magistrate may determine what if any charges are supported, and proceed under paragraph (a)(4).

(a)(6) If probable cause is not articulated for any charge, the magistrate must return the statement to the submitting authority indicating such.

(a)(7) A statement that is verbally communicated by telephone must be reduced to a sworn written statement prior to presentment to the magistrate. The statement must be retained by the submitting authority and as soon as practicable, a copy shall be delivered to the magistrate who made the determination.

(a)(8) The arrestee need not be present at the probable cause determination.

(b) **Monetary bail.** If the magistrate determines that a financial condition, other than an unsecured bond, is necessary to impose as a condition of release, the magistrate shall set a single amount for each case and shall consider the defendant's ability to pay when determining the amount of the financial condition. If a bail commissioner previously fixed a financial condition for the defendant, the magistrate may not give any deference to the bail commissioner's action or the amount of the financial condition.

(b)(1) Notwithstanding this subsection, when imposing a financial condition in a case that a bail commissioner previously fixed a financial condition and the defendant has not secured release by the time the magistrate issues a temporary pretrial status order, the magistrate must consider whether the amount exceeded the defendant's ability to pay.

(~~b~~c) **Magistrate availability.**

(~~b~~c)(1) The information required in paragraph (a) may be presented to any magistrate, although if the judicial district has adopted a magistrate rotation, the presentment should be in accord with that schedule or rotation. If the arrestee is charged with a capital offense, the magistrate may not be a justice court judge.

(~~b~~c)(2) If a person is arrested in a county other than where the offense was alleged to have been committed, the arresting authority may present the person to a magistrate in the location arrested, or in the county where the crime was committed.

(~~c~~d) **Time for review.**

(~~c~~d)(1) Unless the time is extended at 24 hours after booking, if no probable cause determination and temporary pretrial status order have been received by the custodial authority, the defendant must be released on the arrested charges on recognizance.

(~~c~~d)(2) During the 24 hours after arrest, for good cause shown an arresting officer, custodial authority, or prosecutor with authority over the most serious offense for which defendant was arrested may request an additional 24 hours to hold a defendant and prepare the probable cause statement or request for release conditions.

(~~c~~d)(3) If after 24 hours, the suspect remains in custody, an information must be filed without delay charging the suspect with offenses from the incident leading to the arrest.

(~~c~~d)(4)(A) If no information has been filed by 3:00pm on the fourth calendar day after the defendant was booked, the release conditions set under subsection (a)(4) shall revert to recognizance release.

(~~c~~d)(4)(B) The four day period in this subsection may be extended upon application of the prosecutor for ~~a~~ periods of three more days, for good cause shown. Any prosecutor request beyond an initial three day extension must identify the number of previous extensions received.

(~~c~~d)(4)(C) If the time periods in this subsection (c)(4)(A) and (c)(4)(B) expire on a weekend or legal holiday, the period expires at 3:00pm on the next business day.

(~~d~~e) **Other processes.** Nothing in this rule is intended to preclude the accomplishment of other procedural processes at the time of the probable cause determination.

(a)~~(1)~~ **Verdict options**.

(1) ~~For crimes committed on or after May 6, 2002, t~~The verdict of the jury shall be either "guilty" or "not guilty," "not guilty by reason of insanity," "guilty and mentally ill at the time of the offense," or "not guilty of the crime charged but guilty of a lesser included offense," or "not guilty of the crime charged but guilty of a lesser included offense and mentally ill at the time of the offense," provided that when the defense of mental illness has been asserted and the defendant is acquitted on the ground that the defendant was insane at the time of the commission of the offense charged, the verdict shall be "not guilty by reason of insanity."

~~(a)~~(2) For crimes committed before May 6, 2002, the defendant may also elect to proceed under subsection (a)(1) or under (a)(3).

~~(a)~~(3) For crimes committed before May 6, 2002, unless the defendant elects to proceed under subsection (a)(1), the verdict of the jury shall be either "guilty," "not guilty," "not guilty by reason of insanity," "guilty and mentally ill," "not guilty of the crime charged but guilty of a lesser included offense," or "not guilty of the crime charged but guilty of a lesser included offense and mentally ill" provided that when the defense of mental illness has been asserted and the defendant is acquitted on the ground that the defendant was insane at the time of the commission of the offense charged, the verdict shall be "not guilty by reason of insanity."

(b) **Unanimity.** The verdict shall be unanimous. It shall be returned by the jury to the judge in open court and in the presence of the defendant and counsel. If the defendant is voluntarily absent, the verdict may be received in the defendant's absence.

(c) **Multiple defendants.** If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to any defendant as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(d) **Multiple offenses.** When the defendant may be convicted of more than one offense charged, each offense of which the defendant is convicted shall be stated separately in the verdict.

(e) **Offenses included in charged offense.** The jury may return a verdict of guilty to the offense charged or to any offense necessarily included in the offense charged or an attempt to commit either the offense charged or an offense necessarily included therein.

(f) **Polling the jury.** When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or may be polled at the court's own instance. If, upon the poll, there is no unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged. If the verdict is unanimous, it shall be recorded.

(g) ~~**Acquittal.**~~ **Custody.** If judgment of acquittal is given on a verdict or the case is dismissed and the defendant is not detained for any other legal cause, the defendant shall be discharged as soon as the judgment is given. If a verdict of guilty is returned, the court

may order the defendant to be taken into custody to await judgment on the verdict or may permit the defendant to remain on bail.

(h) **Inconsistent verdicts.** The court must, upon its own motion or upon the motion of any party, enter an acquittal for a legally impossible guilty verdict.

(1) Legally impossible verdicts include conviction for a compound offense and acquittal for a predicate offense. A compound offense is an offense composed of one or more separate offenses. A predicate offense is a crime that is composed of some, but not all, of the elements of the compound offense and that is necessarily committed in carrying out the compound offense. After considering the elements of the crimes, the jury verdicts, and the jury instructions, if the court finds that the conviction for the compound offense is impossible in the face of an acquittal for a predicate offense the verdict is impossible and must be vacated.

Utah Courts

URCRP Rule 17.5 (Rules of Criminal Procedure)

Rule 17.5. Hearings with contemporaneous transmission from a different location.

Rule printed on July 13, 2022 at 2:47 pm. Go to https://www.utcourts.gov/rules *for current rules.*

Effective: 11/1/2016

(a) The court, in its discretion, may conduct the arraignment, bail hearing, and/or initial appearance with a defendant attending by contemporaneous transmission from a different location without the agreement of the parties or waiver of the defendant's attendance in person.

(b) For any other type of hearing, the court may conduct the hearing with a defendant attending by contemporaneous transmission from a different location only if the parties agree and the defendant knowingly and voluntarily waives attendance in person.

(c) For good cause and with appropriate safeguards the court may permit testimony in open court by contemporaneous transmission from a different location if the party not calling the witness waives the right to confront the witness in person.

(d) Nothing in this rule precludes or affects the procedures in rule 15.5.

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IN THE UTAH SUPREME COURT and UTAH JUDICIAL COUNCIL

Administrative Order for Court Operations During Pandemic

ADMINISTRATIVE ORDER June 24, 2022

Beginning on March 13, 2020 the Chief Justice, on behalf of the Judicial Council and the Supreme Court, issued a series of Administrative Orders for Court Operations During the Pandemic (Administrative Order) to respond to the recommendations of the Centers for Disease Control (CDC), the Utah Department of Health, and local health experts for avoiding the spread of COVID-19 and its variants. The Judiciary continues to be in the unique position of having authority to compel individuals to attend court proceedings in person. Throughout the pandemic the judiciary has consistently focused on the safety of patrons and court personnel. The Judiciary will continue that focus while also recognizing the benefits associated with vaccination and the continuing modifications to the CDC recommendations.

Each Administrative Order has superseded the previous Administrative Order. The last Administrative Order dated April 11, 2022 suspended the September 17, 2021 Administrative Order for courts located in a county designated by the CDC COVID Data Tracker as a low or medium community level county, but required courts located in a county designated as a high community level county to follow the September 17, 2021 Administrative Order and operate under the Yellow Phase of the Risk Phase Response Plan.

This Order supersedes all previous Orders, including the Risk Phase Response Plan and operations under the Green, Yellow or Red Phase of operations, and clarifies that the Judiciary will continue to follow the CDC guidelines for communities that are designated as low, medium or high community level counties by the CDC data tracker.

To the extent any provision of this Administrative Order conflicts with the Utah Code of Judicial Administration or with a rule of procedure or evidence, the provision in this Administrative Order will govern. The provisions of this Administrative Order are therefore subject to the same types of challenges that could be raised against a rule of administration, procedure, or evidence. Rules 2-205 and 11-105(5)(B) of the Utah Rules of Judicial Administration are suspended to the extent they require a rule amendment that has been adopted on an expedited basis to be immediately published for comment and to be published for 45 days. Rule amendments will be published for public comment as directed by the body that adopts the rule, including reducing the time for public comment.

IT IS HEREBY ORDERED:

General Orders and Orders Applicable to All Courts

1. Presiding judges, trial court executives, clerks of court, guardian ad litem managing attorneys, and chief probation officers should implement the changes to court operations as a result of this order in coordination with community partners, such as sheriffs, jails, prosecutors, and defense attorneys. Each judicial district shall designate a person to weekly check the CDC COVID Data Tracker to determine the county community level and adjust the court's operations accordingly. The designated person shall also check the CDC Quarantine and Isolation Calculator and inform their bench of any changes to the quarantine or isolation standards. For purposes of this Administrative Order:

   The CDC COVID Data Tracker can be found at:
   https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=all_states&list_select_county=all_counties&data-type=CommunityLevels&null=CommunityLevels

   The CDC Quarantine and Isolation Calculator can be found at:
   https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html#

2. Except as provided in paragraph 3 or this order, Courts in the state are authorized to continue in person proceedings, including jury trials, and must follow the CDC recommendations for the county community level. Those recommendations and an explanation of how they apply to the Courts are found in the document titled *Management Committee's COVID-19 Community Level Instructions.*
3. Courts in Community Level High may not hold law and motion calendars with more than 10 cases set at the same time or convene a large gathering for purposes of selecting a jury, unless approved in advance by the Management Committee.
4. Presiding judges may issue whatever orders are necessary to facilitate remote transmission of court hearings and to implement all other provisions of this Administrative Order. Orders issued by presiding judges or individual judges before the effective date of this Administrative Order that are consistent with this Administrative Order remain in effect. Orders may be issued hereafter by presiding judges or individual judges provided they are consistent with this Administrative Order.

Judicial Council Temporary Rule Modifications

The Utah Judicial Council continues the following temporary rule modifications.

5. The calculation of time for determining juror terms of availability under rule 4- 404(2)(B) of the Utah Rules of Judicial Administration is suspended. The suspension will be lifted for a particular court when jury trials resume in that court.
6. Rule 4-404(6)(C)(i) is amended as follows: The summons may be by first class mail delivered to the address provided on the juror qualification form, by email to the email address provided on the juror qualification form, or by telephone.

Supreme Court Order for Temporary Rule Modifications

The Utah Supreme Court continues the following temporary rule modifications.

Orders Applicable to All Courts

7. Rule 17(a) of the Utah Rules of Criminal Procedure is amended to include the following: In all cases tried to the bench, a defendant may waive the right to appear in person at trial and consent to appear through video conferencing if the defendant has an effective opportunity to participate, which includes the ability to view trial participants and to meaningfully interact with counsel of record in real time. "Trial participants" is defined to include the judge and testifying witnesses. The defendant's waiver and consent must be on the record and the court must make findings that the waiver and consent are voluntary.

Orders Applicable to District Courts

Criminal Cases

8. Rule 17.5(b) of the Utah Rules of Criminal Procedure is suspended in infraction cases and to the extent it requires the prosecution's consent in other cases. The parties' consent is not required for a bench trial by remote transmission in an infraction case and a defendant may consent to a bench trial in other cases. Bench trials will be conducted as scheduled unless the court determines it is not reasonably practical to do so in a particular case, given the issues and anticipated evidence.

Civil Cases

9. Rule 26.3 of the Utah Rules of Civil Procedure is temporarily amended. In unlawful detainer cases under Title 78B, Chapter 6, Part 8, Forcible Entry and Detainer, the plaintiff shall include a completed form declaration, disclosing information relevant to federal, state, and local COVID relief law. Such declaration shall be provided with the

required Rule 26.3(b)(1) disclosures. Rule 55 of the Utah Rules of Civil Procedure is also temporarily amended. The court may not enter default judgment in unlawful detainer cases under Title 78B, Chapter 6, Part 8, Forcible Entry and Detainer, unless the plaintiff has submitted to the court a completed form declaration showing compliance with federal, state, and local COVID relief law. A sample form declaration will be available on the Utah State Courts website after review by the Judicial Council

Orders Applicable to Juvenile Courts

10. Any child welfare, delinquency, or protective order timeline may be extended by the court.

11. With respect to any court hearings or reports, any persons who provide information to the court shall obtain that information in a manner that is consistent with federal, state, and local law or directives and the policies and procedures of their agency or organization. In the event sufficient information cannot be safely obtained in this manner, the court shall continue that hearing until the information can be safely obtained.

Orders Applicable to Justice Courts

13. Rule 17.5(b) of the Utah Rules of Criminal Procedure is suspended in infraction cases and to the extent it requires the prosecution's consent in other cases. The parties' consent is not required for a bench trial by remote transmission in an infraction case or for a small claims hearing, and a defendant may consent to a bench trial in other cases. Bench trials and small claims hearings will proceed as scheduled unless the court determines it is not reasonably practical to do so in a particular case, given the issues and anticipated evidence.

Order Subject to Amendment

15. This Order may be amended at any time to respond to changed conditions.

DATED this 24th Day of June, 2022

MATTHEW B. DURRANT
Presiding Officer, Utah Judicial Council

DATED this 24th Day of June, 2022

MATTHEW B. DURRANT
Chief Justice, Utah Supreme Court

Utah Courts

URCRP Rule 14 (Rules of Criminal Procedure)

Rule 14. Subpoenas

Rule printed on July 14, 2022 at 12:06 pm. Go to https://www.utcourts.gov/rules *for current rules.*

Effective: 1/1/2020

(a) **Subpoenas requiring the attendance of a witness or interpreter and production or inspection of records, papers, or other objects.**

(a)(1) A subpoena to require the attendance of a witness or interpreter before a court, magistrate or grand jury in connection with a criminal investigation or prosecution may be issued by the magistrate with whom an information is filed, the prosecuting attorney on his or her own initiative or upon the direction of the grand jury, or the court in which an information or indictment is to be tried. The clerk of the court in which a case is pending must issue in blank to the defendant, without charge, as many signed subpoenas as the defendant may require. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court.

(a)(2) A subpoena may command the person to whom it is directed to appear and testify or to produce in court or to allow inspection of records, papers or other objects, other than those records pertaining to a victim covered by Subsection (b). The court may quash or modify the subpoena if compliance would be unreasonable.

(a)(3) A subpoena may be served by any person over the age of 18 years who is not a party. Service must be made by delivering a copy of the subpoena to the witness or interpreter personally and notifying the witness or interpreter of the contents. A peace officer must serve any subpoena delivered for service in the peace officer's county.

(a)(4) Written return of service of a subpoena must be made promptly to the court and to the person requesting that the subpoena be served, stating the time and place of service and by whom service was made.

(a)(5) A subpoena may compel the attendance of a witness from anywhere in the state.

(a)(6) When a person required as a witness is in custody within the state, the court may order the officer having custody of the witness to bring the witness before the court.

(a)(7) Failure to obey a subpoena without reasonable excuse may be deemed a contempt of the court responsible for its issuance.

(a)(8) If a party has reason to believe a material witness is about to leave the state, will be too ill or infirm to attend a trial or hearing, or will not appear and testify pursuant to a subpoena, the party may, upon notice to the other, apply to the court for an order that the witness be examined conditionally by deposition. The party must file an affidavit providing

facts to support the party's request. Attendance of the witness at the deposition may be compelled by subpoena. The defendant shall be present at the deposition and the court will make whatever order is necessary to effect such attendance.A deposition may be used as substantive evidence at the trial or hearing to the extent it would otherwise be admissible under the Rules of Evidence if the witness is too ill or infirm to attend, the party offering the deposition has been unable to obtain the attendance of the witness by subpoena, or the witness refuses to testify despite a court order to do so.

(b) **Subpoenas for the production of records of victim.**

(b)(1) No subpoena or court order compelling the production of medical, mental health, school, or other privileged records pertaining to a victim shall be issued by or at the request of any party unless the court finds after a hearing, upon notice as provided below, that the records are material and the party is entitled to production of the records sought under applicable rules of privilege, and state and federal law.

(b)(2) The request for the subpoena or court order shall identify the records sought with particularity and be reasonably limited as to subject matter.

(b)(3) The request for the subpoena or court order shall be filed with the court as soon as practicable, but no later than 28 days before trial, or by such other time as permitted by the court. The request and notice of any hearing shall be served on counsel for the victim or victim's representative and on the opposing party. Service on an unrepresented victim must be facilitated through the prosecutor. The prosecutor must make reasonable efforts to provide a copy of the request for the subpoena to the victim or victim's representative within 14 days of receiving it.

(b)(4) If the court makes the required findings under subsection (b)(1), it must issue a subpoena or order requiring the production of the records to the court. The court will then conduct an in camera review of the records and disclose to the defense and prosecution only those portions that the requesting party has demonstrated a right to inspect.

(b)(5) Any party issuing a subpoena for non-privileged records, papers or other objects pertaining to a victim must serve a copy of the subpoena upon the victim or victim's representative. Service on an unrepresented victim must be facilitated through the prosecutor. The prosecutor must make reasonable efforts to provide a copy of the subpoena to the victim within 14 days of receiving it. The subpoena may not require compliance in less than 14 days after service on the prosecutor or victim's representative.

(b)(6) The court may, in its discretion or upon motion of either party or the victim or the victim's representative, issue any reasonable order to protect the privacy of the victim or to limit dissemination of disclosed records.

(b)(7) For purposes of this rule, "victim" and "victim's representative" are used as defined in Utah Code § 77-38-2.

(b)(8) Nothing in this rule alters or supersedes other rules, privileges, statutes or caselaw pertaining to the release or admissibility of an individual's medical, psychological, school or other records.

(c) **Applicability of Rule 45, Utah Rules of Civil Procedure.** The provisions of Rule 45, Utah Rules of Civil Procedure, will govern the content, issuance, objections to, and service of subpoenas to the extent those provisions are consistent with the Utah Rules of Criminal Procedure.

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498 P.3d 391
Supreme Court of Utah.

STATE of Utah, Appellee,
v.
Ayayai AZIAKANOU, Appellant.

No. 20180284
|
Heard October 9, 2020
|
Filed September 30, 2021

Synopsis

Background: Defendant was convicted in the Third District Court, Salt Lake, Paul B. Parker, J., of distribution of or arranging to distribute a controlled substance. Defendant appealed.

Holdings: The Supreme Court, Petersen, J., held that:

[1] prosecutor's concern that juror could not be impartial to law enforcement witnesses due to his negative view of police was a facially race-neutral reason for peremptory strike;

[2] race-neutral reason for strike was not a pretext for discrimination; and

[3] circumstantial evidence was sufficient to support conviction.

Affirmed.

Lee, Associate C.J., filed concurring opinion.

Himonas, J., filed concurring opinion in which Durrant, C.J., and Pearce and Petersen, JJ., joined.

Procedural Posture(s): Appellate Review; Jury Selection Challenge or Motion; Trial or Guilt Phase Motion or Objection.

West Headnotes (42)

[1] **Criminal Law** Summoning, impaneling, or selection of jury
Jury Peremptory challenges

A *Batson* challenge involves a three-step inquiry, each with a different standard of review.

[2] **Jury** Peremptory challenges

At first step of *Batson* analysis, the defendant, as the opponent of a peremptory strike, must make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.

[3] **Criminal Law** Selection and impaneling

A trial court's determination at first step of a *Batson* challenge, of whether the defendant as the opponent of a peremptory strike has made out a prima facie case of purposeful discrimination, is reviewed under an abuse of discretion standard.

[4] **Jury** Peremptory challenges

At second step of a *Batson* challenge, the burden shifts to the State to come forward with a neutral explanation for a peremptory strike.

[5] **Criminal Law** Summoning, impaneling, or selection of jury

A trial court's determination at second step of a *Batson* challenge, of whether the State has come forward with a neutral explanation for a peremptory strike, is reviewed for correctness.

[6] **Jury** Peremptory challenges

At third step of a *Batson* challenge, the trial court must determine if the defendant, as the opponent of a peremptory strike, has established purposeful discrimination.

[7] **Criminal Law** Jury selection

A trial court's decision at third step of a *Batson*, on the ultimate question of discriminatory intent in a peremptory strike, represents a finding of fact of the sort accorded great deference on appeal.

[8] **Criminal Law** Jury selection

Supreme Court will not reverse a trial court's finding on the issue of discriminatory intent in a peremptory strike unless the Court is convinced that the trial court's determination was clearly erroneous.

[9] **Criminal Law** Nature of Decision Appealed from as Affecting Scope of Review

Supreme Court reviews a trial court's ruling on a motion for directed verdict for correctness.

[10] **Jury** Peremptory Challenges

Peremptory strikes traditionally may be used to remove any potential juror for any reason with no questions asked.

[11] **Jury** Peremptory challenges

The mere fact that the subject of the peremptory strike is a minority member does not establish a prima facie case under *Batson*.

[12] **Jury** Peremptory challenges

A defendant, as the opponent of a peremptory strike, need not prove purposeful discrimination at first step of *Batson* analysis; initial burden is satisfied by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

[13] **Jury** Peremptory challenges

Trial court's step-one determination under *Batson* analysis was rendered moot, where court proceeded to second step of *Batson* inquiry and asked prosecutor to provide a race-neutral explanation for peremptory strike.

[14] **Jury** Peremptory challenges

A "facially race-neutral reason" for a peremptory strike is an explanation based on something other than the race of the prospective juror.

[15] **Jury** Peremptory challenges

Unless a discriminatory intent is inherent in a prosecutor's explanation for peremptory strike, the reason offered will be deemed facially race neutral at step two of a *Batson* challenge.

[16] **Jury** Peremptory challenges

Step two of *Batson* analysis, in which the proponent of a peremptory strike must provide a facially race-neutral reason for strike, does not demand an explanation that is persuasive, or even plausible.

[17] **Jury** Peremptory challenges

A facially race-neutral reason for a peremptory strike, as required at step two of a *Batson* challenge, need not rise to the level justifying a challenge for cause.

[18] **Jury** Peremptory challenges

Mere denial of a discriminatory motive or a mere affirmation of good faith in exercising a peremptory strike is not a sufficient race-neutral

reason for strike for second step of *Batson* analysis.

[19] **Jury** Peremptory challenges

Prosecutor's concern that prospective juror could not be impartial to State's law enforcement witnesses due to his negative view of the police was a facially race-neutral reason for peremptory strike, where prosecutor gave a number of reasons for concern including juror's shaking head or making faces during some voir dire questions and juror's prior negative interactions with police due to alleged racial profiling.

[20] **Jury** Peremptory challenges

The facially race-neutral reason for a peremptory strike under step two of a *Batson* challenge can be absurd, silly, superstitious, frivolous, or utterly nonsensical.

[21] **Jury** Peremptory challenges

Questions about the believability or persuasiveness of the State's explanation for a peremptory strike are not relevant in the second step of *Batson* analysis, in which the State must provide a facially race-neutral reason for strike.

[22] **Jury** Peremptory challenges

At step three of *Batson* inquiry, the burden shifts back to the party challenging a peremptory strike to convince the trial court that, despite the proponent's race-neutral explanation, the proponent struck the potential juror with discriminatory intent.

[23] **Jury** Peremptory challenges

At third step of a *Batson* challenge, the trial court must consider the prosecutor's race-neutral reasons for a peremptory strike in light of all relevant facts and circumstances, and in light of the parties' arguments, and then determine whether the proffered reasons are the actual reasons or whether the proffered reasons are pretextual and the prosecutor instead exercised the strike on the basis of race.

[24] **Jury** Peremptory challenges

A party raising a *Batson* challenge may rely on a variety of evidence to show that a peremptory strike was made with discriminatory intent including statistical evidence about prosecutor's use of peremptory strikes against Black prospective jurors as compared to white prospective jurors in case; evidence of a prosecutor's disparate questioning and investigation of Black and white prospective jurors in case; side-by-side comparisons of Black prospective jurors who were struck and white prospective jurors who were not struck in case; a prosecutor's misrepresentations of the record when defending the strikes during *Batson* hearing; relevant history of State's peremptory strikes in past cases; or other relevant circumstances that bear upon the issue of racial discrimination.

[25] **Jury** Peremptory challenges

If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination.

[26] **Jury** Peremptory challenges

Prosecutor's facially race-neutral reason for peremptory strike, that prosecutor was concerned about prospective juror's ability to be impartial to State's law enforcement witnesses due to his negative view of the police, was not a pretext for discrimination in drug case, where juror apparently had repeat prior encounters with law enforcement involving alleged racial profiling,

juror shook head and made faces during some voir dire questions, and case involved an issue about reasons for police stopping defendant, all of which caused prosecutor to worry that juror would not credit law enforcement witnesses at trial.

[27] **Jury** Peremptory challenges

A party bringing a *Batson* challenge need not offer proof of systematic efforts of racial discrimination in the use of a peremptory strike.

[28] **Jury** Making and sufficiency

A proponent of a peremptory strike is not required to ask specific questions of potential jurors that the proponent suspects might harbor bias against its case or witnesses.

[29] **Jury** Peremptory challenges

Party raising a *Batson* challenge carries the burden of persuasion.

[30] **Criminal Law** Summoning and impaneling jury

Defendant failed to preserve for appeal his argument, relating to *Batson* issue, that prosecutor did not voir dire a white potential juror who stated he was a victim of the justice system's treatment of drug crimes, where defendant did not make argument to trial court, thereby depriving court of opportunity to consider that factual assertion when assessing prosecutor's explanation for peremptory strike of a prospective juror who had alleged experience being racially profiled.

[31] **Criminal Law** Sufficiency to support conviction in general

A conviction not based on substantial reliable evidence cannot stand.

[32] **Criminal Law** Construction of Evidence

Criminal Law Inferences or deductions from evidence

On appeal, the Supreme Court views the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the jury verdict.

[33] **Criminal Law** Reasonable doubt

Supreme Court will reverse a jury verdict based on insufficiency of evidence only if the evidence is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted.

[34] **Criminal Law** Circumstantial Evidence

A conviction can be based on sufficient circumstantial evidence.

[35] **Criminal Law** Circumstantial evidence

When a conviction is based on circumstantial evidence, the Supreme Court must determine (1) whether there is any evidence that supports each and every element of the crime charged, and (2) whether the inferences that can be drawn from that evidence have a basis in logic and reasonable human experience sufficient to prove each legal element of the offense beyond a reasonable doubt.

[36] **Criminal Law** Inferences from evidence

A guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt.

[37] **Controlled Substances** Sale, distribution, delivery, transfer or trafficking

Evidence was sufficient to support conviction for distribution of or arranging to distribute a

controlled substance, even though State did not offer direct evidence of statements that defendant made during observed drug transactions; police officers testified that they observed defendant approach passersby on three separate occasions and lead them to his companion and that defendant watched each transaction that then took place. Utah Code Ann. § 58-37-8(1)(a)(ii).

[38] **Criminal Law** Circumstantial Evidence

Direct evidence is not required to sustain a conviction.

[39] **Criminal Law** Inferences from evidence

Jury may rely on all reasonable inferences that can be drawn from the evidence at trial.

1 Cases that cite this headnote

[40] **Jury** Peremptory challenges

A trial court has the power, if not the duty, to raise a *Batson* challenge sua sponte. (Per concurring opinion of Himonas, J., for a majority of the court.)

[41] **Jury** Representation of community, in general

Jury Competence for Trial of Cause

A defendant has the right to be tried before an impartial jury drawn from a fair cross section of the community. (Per concurring opinion of Himonas, J., for a majority of the court.) U.S. Const. Amends. 6, 14.

[42] **Jury** Constitution and Selection of Jury

Potential jurors enjoy a right to be free from purposeful discrimination in jury selection. (Per concurring opinion of Himonas, J., for a majority of the court.)

***394** Third District, Salt Lake, The Honorable Paul B. Parker, No. 171911262

Attorneys and Law Firms

Sean D. Reyes, Att'y Gen., Jeffrey S. Gray, Asst. Solic. Gen., Paul S. Fuller, Salt Lake City, for appellee

Debra M. Nelson, McCaye Christenson, David P.S. Mack, Salt Lake City, for appellant

Justice Petersen authored the opinion of the Court, in which Chief Justice Durrant, Associate Chief Justice Lee, Justice Himonas, and Justice Pearce joined.

Justice Petersen, opinion of the Court:

INTRODUCTION

¶1 A jury convicted Ayayai Aziakanou of distribution of or arranging to distribute a controlled substance. Aziakanou, who is African American, alleges that the State violated his right to equal protection under the law during jury selection when it used a peremptory strike to remove the only person of color from the jury pool. Aziakanou challenged the strike under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), which prohibits purposeful discrimination during jury selection. But his challenge was denied by the trial court. He now appeals, reiterating his *Batson* challenge and arguing that the evidence supporting his conviction was insufficient. We affirm.

BACKGROUND [1]

¶2 Two law enforcement officers set up surveillance near Pioneer Park in Salt Lake City. The officers observed "a group of individuals in the park ... smoking spice." [2] Aziakanou and another man left the group and set up a lawn chair in the park.

¶3 The officers watched as Aziakanou approached a person on the sidewalk and, after a brief discussion, led the person over to his companion on the lawn chair. The person gave the companion money in exchange for a ***395** "clear canister[ ] filled with a green, leafy substance." After the exchange,

the person left. The officers did not stop the person who purchased the canister.

¶4 The officers continued to observe Aziakanou and his companion for thirty to forty-five minutes. During that time, the officers observed two more transactions. After the third transaction, "it looked like [the companion] and Aziakanou were gathering their things, as if they were leaving the area." The officers stopped the third buyer and retrieved two canisters, an empty one and the one purchased from Aziakanou's companion containing the leafy green substance.

¶5 The officers returned to the park and arrested Aziakanou and his companion. They retrieved another empty canister at the park. Both canisters were sent for forensic analysis, which confirmed the leafy substance was spice. The State charged Aziakanou with distribution of or arranging to distribute a controlled substance, a third-degree felony.

¶6 The case was set for a one-day jury trial. During jury selection, the court asked the jury pool if any of them had been "victims of drug cases." Juror 13 raised his hand and said, "Yeah. I'm not sure what you mean by a victim of a drug case. ... I haven't been—I have been stopped illegally on occasion. ... For suspicion with the profiling, but other than that ... no."

¶7 Another question posed by the court during *voir dire*[3] was whether any of the potential jurors would "give a witness who is a law enforcement officer more or less credibility just because they are a police officer." No one indicated that would be a problem. The court then asked whether anyone had "any feelings about your interaction with law enforcement officers that would impact your ability to sit in this case where law officers are witnesses." No one indicated it would affect their ability to serve.

¶8 After the initial questions, only one juror, Juror 23, was struck for cause because he expressed "hate for substance." The court, addressing counsel, inquired about Juror 13, because he "had an addiction, he talked about being profiled."[4] The prosecutor answered, "I thought he'd be one to talk to." Defense counsel agreed, "That's what I was thinking, too. We may want to follow up."

¶9 The court called up Juror 13 for an individual *voir dire*. It first asked Juror 13 to explain his prior reference to "experiences that you've had, and that you felt like you were being profiled." Juror 13 said, "I would say it's—it's happened more than once. I would have to say at least five times in my lifetime, just being pulled over for—for no reason." When asked where these events occurred, he answered, "It happened a few times here. ... And then elsewhere, too." The court asked, "[W]hen you say no reason ...—did they tell you a reason, or did you feel like there was no reason?" Juror 13 responded, "I felt like it was no—there was no reason." He further explained:

> I could tell you one specific time when I was a minor. ... I was—me and my friends, we were at a party, many of us were at a party at a park, and all of our cars were lined up in the parking lot. As we were leaving the party, everyone got in their cars to leave, as did I, except I was the only person ... [w]ho got boxed in by the patrol car, so I got chosen, the only Brown person out of everyone else to be singled out ... and blocked and Breathalyzed for drinking, but I—I mean, I wasn't drinking or doing anything.

Juror 13 then said that was "one experience, and then there's been others, too." In response, the court asked:

> In this case where police are going to testify, where it concerns drug behavior, and undoubtedly at least some kind of interaction between police and a person, and it's obvious that the defendant here is not Caucasian, would that—your experiences ***396** impact your ability to sit in this case as a fair and impartial judge?

And Juror 13 responded:

> I don't think so. I think that ... the presentation from the lawyers would give us the facts, and if the person is

> guilty, then we will see that they're guilty. If they're innocent, we'll be—we'll see that they're innocent. So I would wait to see what presentation I see before making any decision.

¶10 After concluding the individual *voir dire*, neither party moved the court to remove Juror 13 for cause. Once the jury pool was recongregated in the courtroom, the court inquired, "If you were a party, either as the plaintiff, the prosecutor, or as the defendant, would you be fully satisfied to have your case tried by a person of your present attitude and frame of mind toward this case?" No one raised their hand. The court followed up by asking whether anyone had "any personal considerations or concerns that may interfere with your ability to objectively sit and hear the evidence to be presented, or to fairly and impartially consider the evidence, deliberate, and render a verdict in this case." Again, no one in the pool raised their hand.

¶11 The court then gave the parties the opportunity to use their peremptory challenges and, during a sidebar, the State struck Juror 13. The court then excused the jury pool briefly and defense counsel raised a challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), arguing the State's strike of Juror 13 was motivated by discriminatory intent. Defense counsel argued that Juror 13

> explained himself well that there—that, despite those experiences, that he would be able to let the facts stand or fall as they may, and that he would judge what happened or didn't happen based on what he hears in this court. But I think the effect of his removal, and he's, I would note, the only person of color even—well, on the entire panel, but of—that even had a chance of sitting on this jury. I think it's a common experience for people of color to have had such experiences where they feel like they have been singled out without justification, and I think the effect of his removal means that, at least in this case, people of color aren't allowed to sit.
>
> But there may be some other explanation for the state's decision on that, but it seems that, based on his answers, all of his answers in *voir dire*, that he indicated a willingness to be fair, to listen fairly and impartially, and there were no other responses, I don't think, to any of the questions the Court put to him that would've seemed to have impacted his ability to sit as a juror in this case.

¶12 The court asked defense counsel to elaborate on his argument "as far as the initial showing of some kind of an intent to exclude a particular class of folks." Defense counsel asserted that "our client obviously is ... African American. He's a person of color. ... [And] the only person of color potentially to be seated on this jury was excused." Defense counsel noted that while he did not know the reason Juror 13 was excused, he did not "have to supply that reason" to the court. But then defense counsel observed that it seemed as though Juror 13 "was removed because ... he had encounters with the police that ... he considered to be profiling, and he was a person of color."

¶13 The court concluded that defense counsel made "an insufficient showing that is required for the answer." Then the court stated:

> I show that [Juror 13]—and I—no one asked about his nationality, and I can't even tell it from the name, whether he is Hispanic or Middle Eastern. I don't know. But he is darker complected, and clearly of another—not just a Caucasian race. He is the only person, as far as I could tell on the panel, that really seems to be of any other nationality other than Caucasian.

¶14 Although it had determined defense counsel made an insufficient showing to continue the *Batson* inquiry, the court nevertheless asked the State to explain why it struck Juror 13. The prosecutor responded:

> When questioned, I felt like he answered those correctly, so I agree with defense counsel, that's why after initially considering to move for cause, his answers I didn't ***397** think—I didn't think had enough to move for cause. But ... I didn't feel he could be impartial based on some of these things. He stood for when he thought he'd been victimized, he wanted more clarification. He also did

> refer to profiling. There were some issues where I doubted his ability to try the case and be fair and impartial during the process. He answered the questions correctly. I didn't strike him for cause because I didn't think so. But I can make, based on my observations of him, the way he's interacting, the way he's shaking his head, or nodding, making faces during some of the questions, I didn't—I didn't feel comfortable with him as being a juror.

Defense counsel responded:

> I watched him, too .... [I]f there's something specific about his gestures or his face making, or something like that, I didn't notice that .... But I think that it's—I don't know that it's a race neutral reason to strike someone who says they think they've been the victim of racial profiling when they're ... as he indicated, the only Brown person stopped during that incident he described in the park with his friends as a juvenile, and other times that he's been stopped. ... I think that's the problem that *Batson* tries to address.
>
> If there's more than that, if he was, like, making sounds, or acting like he generally disagreed, or something like that, ... I didn't see any of that. I didn't get that at all. But those would've been reasons for cause, I think, if that was the case, but I don't think there's anything demonstrable that he did other than indicate ... his ability to be fair in this case, and set those things aside, and judge it based on the evidence that's presented.

¶15 The court observed that "the issue rises or falls on this idea of him saying that he felt like he had been stopped in some kind of profiling, and whether or not that amounts to a race neutral explanation." Defense counsel concurred with that statement. The court then asked the prosecutor, "[I]sn't the real thing ... the statement that [Juror 13] made that he felt like he had been ... stopped repeatedly, I believe he said about five times for profiling .... Was that part of the reasons .... [f]or your striking him?"

¶16 The prosecutor answered,

> [A]ll my witnesses are law enforcement witnesses. And reading between the lines .... I think he has an issue with law enforcement. It's not *Batson*.... This is not about his race. This is about his—me believing that he's not going to give law enforcement testimony the same credibility as if Mr. Aziakanou testifies. It's the same thing we do with all jurors, figuring out, you know, we read between the lines.

¶17 Defense counsel countered that it appeared "that the reason being given is the reason that is common to many people of color" and that Juror 13's answers "indicated that he would not hold that against anyone."

¶18 The court then decided:

> I am going to overrule the *Batson* challenge, not only because I don't show any evidence of any systemic efforts to exclude any particular set of persons from the panel, but also the explanation I think is race neutral. Not including what his nationality is or not, the idea that his explanation that he has been repeatedly stopped by the police, and that he feels that that is profiling, I think is sufficient for the state to have been concerned in a case that we have where the police are again going to be ... an issue.

¶19 Juror 13 was dismissed and the jury was seated. At trial, the State presented as witnesses the two officers involved in the surveillance and arrest of Aziakanou. The officers described the events they observed, including Aziakanou approaching three individuals and leading them to his companion, from whom they purchased spice.

¶20 After the State rested its case, Aziakanou moved for a directed verdict, arguing the State presented insufficient evidence that he intended a drug transaction to occur. The trial court denied the motion, concluding there was enough evidence presented to sustain a conviction. The court explained that "it really is a question of whether or not the jury and reasonable minds could find the defendant guilty of the crime" and that the State presented "specific enough evidence ***398** that there was a pattern where the defendant would go out and approach people on the sidewalk, bring them over, they would at least walk together over, and then a drug transaction occurred." The court also noted the "spice found on at least one of the people that were stopped, and some spice containers found in the area where the defendant and his companion were located," supported its denial of the motion. Aziakanou rested without presenting a defense and the jury found him guilty.

¶21 Aziakanou appealed, arguing the trial court erred in denying his *Batson* challenge and his motion for a directed verdict, and the case was poured over to the court of appeals. After briefing and oral argument before the court of appeals, the court certified the case to us.

¶22 We exercise jurisdiction under Utah Code section 78A-3-102(3)(b).

STANDARDS OF REVIEW

[1] **[2]** **[3]** ¶23 On appeal, Aziakanou argues the trial court erroneously overruled his *Batson* challenge. A *Batson* challenge involves a three-step inquiry, each with a different standard of review. *Batson v. Kentucky*, 476 U.S. 79, 96–98, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (articulating the three-step inquiry). First, the defendant must "make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id.* at 93–94, 106 S.Ct. 1712. A trial court's determination on this point is reviewed under an abuse of discretion standard. *State v. Alvarez*, 872 P.2d 450, 456 (Utah 1994).

[4] **[5]** ¶24 At the second step of a *Batson* challenge, "the burden shifts to the State to come forward with a neutral explanation for challenging [the] jurors." *Batson*, 476 U.S. at 97, 106 S.Ct. 1712. This step is reviewed for correctness. *See* *Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion) (explaining that this determination is "a matter of law").

[6] **[7]** **[8]** ¶25 Finally, the trial court must "determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98, 106 S.Ct. 1712. "[T]he trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal" because this "finding 'largely will turn on [an] evaluation of credibility.' " *Hernandez*, 500 U.S. at 364–65, 111 S.Ct. 1859 (citation omitted). Thus, we will not reverse the "trial court's finding on the issue of discriminatory intent unless [we are] convinced that its determination was clearly erroneous." *Id.* at 369, 111 S.Ct. 1859.

[9] ¶26 Aziakanou also alleges the trial court erred in denying his motion for a directed verdict based on insufficient evidence. "We review a trial court's ruling on a motion for directed verdict for correctness." *State v. Gonzalez*, 2015 UT 10, ¶ 21, 345 P.3d 1168.

ANALYSIS

I. *BATSON* CHALLENGE

¶27 We first address Aziakanou's contention that the trial court erred when it denied his *Batson* challenge. To put Aziakanou's *Batson* argument in context, we draw upon a helpful description of the jury selection process from the United States Supreme Court.

> *First*, a group of citizens in the community is randomly summoned to the courthouse on a particular day for potential jury service. *Second*, a subgroup of those prospective jurors is called into a particular courtroom for a specific case. The prospective jurors are often questioned by the judge, as well as by the prosecutor and defense attorney. During that second phase, the judge may excuse certain prospective jurors based on their answers. *Third*,

> the prosecutor and defense attorney may challenge certain prospective jurors. The attorneys may challenge prospective jurors for cause, which usually stems from a potential juror's conflicts of interest or inability to be impartial. In addition to challenges for cause, each side is typically afforded a set number of peremptory challenges or strikes.

Flowers v. Mississippi, —— U.S. ——, 139 S. Ct. 2228, 2238, 204 L.Ed.2d 638 (2019).

***399** **[10]** ¶28 Peremptory strikes "traditionally may be used to remove any potential juror for any reason—no questions asked." *Id.* They have long been used in the United States and date back to the common law. *Id.* But for much of our country's history, "the freedom to exercise peremptory strikes for any reason meant that 'the problem of racial exclusion from jury service' remained 'widespread' and 'deeply entrenched.' " *Id.* at 2239 (citation omitted).

¶29 So in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court made clear that the use of a peremptory strike based on the race of the potential juror is a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The Court established a three-part inquiry to determine whether a peremptory strike was used in a discriminatory manner.[5] *Id.* at 96–98, 106 S.Ct. 1712. First, the person challenging the peremptory strike must establish a prima facie case of discrimination. *Id.* at 96, 106 S.Ct. 1712. If the challenger meets the prima facie threshold, the burden shifts to the proponent of the strike to provide a facially race-neutral reason for removing the juror. *Id.* at 97, 106 S.Ct. 1712. The trial court then must determine whether the challenger of the strike established that it was exercised with a discriminatory purpose. *Id.* at 98, 106 S.Ct. 1712. "[T]he burden is, of course, on the defendant who alleges discriminatory selection of the venire[6] to prove the existence of purposeful discrimination" *Id.* at 92, 106 S.Ct. 1712. (citation omitted) (internal quotation marks omitted); *see also State v. Valdez*, 2006 UT 39, ¶ 15 n.10, 140 P.3d 1219 ("[T]he ultimate burden of persuasion in a *Batson* challenge rests with the opponent of the peremptory challenges.").

¶30 Aziakanou's argument focuses almost entirely on step two of the analysis: the requirement that the prosecutor provide a facially race-neutral explanation for the challenged peremptory strike. He asserts that the prosecutor struck Juror 13 because Juror 13 had been racially profiled. And Aziakanou argues that as a matter of law, a potential juror's experience with racial profiling does not qualify as a race-neutral reason for a peremptory strike. He argues that the State therefore violated his right to equal protection under the Fourteenth Amendment. Although Aziakanou focuses on step two, we must address each step of the *Batson* analysis.

A. Step One

[11] **[12]** ¶31 A defendant seeking to challenge a peremptory strike based on alleged discrimination must first make a prima facie showing of "purposeful discrimination in selection of the petit jury." *Batson*, 476 U.S. at 96, 106 S.Ct. 1712. "The mere fact that the subject of the peremptory strike is a minority member does not establish a prima facie case." *State v. Colwell*, 2000 UT 8, ¶ 18, 994 P.2d 177. But the opponent of a peremptory strike need not prove purposeful discrimination at this point. This initial burden is satisfied by producing "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005).

¶32 After the State used a peremptory strike to remove Juror 13, Aziakanou raised a *Batson* challenge. To make a prima facie showing of discrimination, defense counsel asserted that, "[I]t seem[ed] ... [Juror 13] was removed because—because he had encounters with the police that maybe were—that he considered to be profiling, and he was a person of color." Counsel emphasized that Juror 13's responses in *voir dire* demonstrated, "despite those experiences [with racial profiling], that he would be able to let the facts stand or fall as they may, and that he ***400** would judge what happened or didn't happen based on what he hears in this court." He elaborated that "our client obviously is ... a person of color" and "the only person of color potentially to be seated on this jury was excused."

¶33 The trial court acknowledged that Juror 13 appeared to be the only person of color among the jury pool but determined defense counsel made "an insufficient showing that is required for the answer." Nevertheless, the court then asked the prosecutor for "an explanation."

[13] ¶34 Both parties agree that, although the trial court said Aziakanou failed to satisfy step one of *Batson*, the court's step-one determination is rendered moot because the court proceeded to the second step of the inquiry and asked the prosecutor to provide a race-neutral explanation for the strike. *Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion) ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.").

¶35 Accordingly, we do not assess whether the court abused its discretion in determining that Aziakanou failed to make a prima facie showing of discrimination sufficient to satisfy step one. However, we emphasize that a defendant need not prove purposeful discrimination at this stage of a *Batson* challenge. It is sufficient to show that the "totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 94, 106 S.Ct. 1712.

B. Step Two

¶36 The core of Aziakanou's argument on appeal is that the trial court erred at step two of the *Batson* analysis because a potential juror's experience with racial profiling is, as a matter of law, not a race-neutral explanation for a peremptory strike.[7] However, we disagree with Aziakanou's characterization of the prosecutor's explanation of his peremptory strike. And we agree with the trial court that the prosecutor's proffered reasons were facially race neutral.

[14] **[15]** ¶37 Once the party challenging a peremptory strike makes a prima facie case of discrimination, the proponent of the strike must provide a facially race-neutral reason for the strike. *Hernandez*, 500 U.S. at 358–59, 111 S.Ct. 1859. This is "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." *Id.* at 360, 111 S.Ct. 1859.

[16] **[17]** **[18]** ¶38 Step two "does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam) (explaining that the proponent's reason may be even "silly or superstitious" at step two, but if it is facially race-neutral, the ***401** step-two requirement has been met). And "[t]he explanation given 'need not rise to the level justifying exercise of a challenge for cause.' " *Colwell*, 2000 UT 8, ¶ 22, 994 P.2d 177 (quoting *Batson*, 476 U.S. at 97, 106 S.Ct. 1712). But it is insufficient for the proponent to "merely deny[ ] that he had a discriminatory motive or ... merely affirm[ ] his [or her] good faith." *Purkett*, 514 U.S. at 769, 115 S.Ct. 1769.

¶39 In *Hernandez v. New York*, the State struck two Latinos[8] who spoke Spanish from the jury pool. 500 U.S. at 356, 111 S.Ct. 1859. Upon a *Batson* challenge, the prosecutor explained that he "fe[lt] very uncertain that they would be able to listen and follow the interpreter" because both "looked away from [him] and said with some hesitancy that they would try, not that they could" accept the court "interpreter as the final arbiter of what was said by each of the [Spanish-speaking] witnesses." *Id.* The Supreme Court accepted this as a race-neutral reason sufficient to satisfy *Batson* step two. *Id.* at 361, 111 S.Ct. 1859.

¶40 In accepting this explanation, the Supreme Court explained that "[i]n evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." *Id.* at 359, 111 S.Ct. 1859. The Court explained that "[t]he prosecutor's articulated basis for these challenges divided potential jurors into two classes: those whose conduct during *voir dire* would persuade him they might have difficulty in accepting the translator's rendition of Spanish-language testimony and those potential jurors who gave no such reason for doubt." *Id.* at 361, 111 S.Ct.

1859. The Court concluded that each class could include both Latinos and non-Latinos. *Id.*

¶41 In *Purkett v. Elem*, the Supreme Court upheld as facially race-neutral the strike of two Black potential jurors because one "had long hair hanging down shoulder length, curly, unkempt hair" and "a mustache and a goatee type beard" and the other also had "a mustache and goatee type beard," which the prosecutor described as "suspicious." 514 U.S. at 766, 115 S.Ct. 1769. The Court explained that *Batson*'s "second step ... does not demand an explanation that is persuasive, or even plausible." *Id.* at 768, 115 S.Ct. 1769. It found that the Eighth Circuit "erred by combining *Batson*'s second and third steps into one, requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive" because "[i]t is not until the *third* step that the persuasiveness of the justification becomes relevant." *Id.*

[19] ¶42 Aziakanou asserts that the State struck Juror 13 because Juror 13 had been racially profiled. And his primary argument on appeal is that this is not a race-neutral explanation "because racial profiling only applies to people of color." However, Aziakanou does not accurately characterize the State's reason for the strike. The prosecutor did not state that he was striking Juror 13 *because* he had been racially profiled. Rather, the prosecutor explained that he struck Juror 13 because he "didn't feel [Juror 13] could be impartial" to the State's law enforcement witnesses. The State gave a number of reasons for this concern, including because Juror 13 had "stood for when he thought he'd been victimized, he wanted more clarification"; he "refer[red] to profiling"; and "the way he's interacting, the way he's shaking his head, or nodding, making faces during some of the questions."

¶43 The trial court then directly asked the prosecutor if he was striking Juror 13 because he had experienced racial profiling. The court asked,

> [I]sn't the real thing ... the statement that [Juror 13] made that he felt like he had been ... stopped repeatedly, I believe he said about five times for profiling .... Was that part of the reasons .... [f]or your striking him?

***402** In response, the prosecutor did not accept the court's characterization, instead answering,

> [A]ll my witnesses are law enforcement witnesses. And reading between the lines .... I think he has an issue with law enforcement. It's not *Batson*.... This is not about his race. This is about his—me believing that he's not going to give law enforcement testimony the same credibility as if Mr. Aziakanou testifies.

¶44 Thus, the prosecutor's explanation was not that he struck Juror 13 *because* he had experienced racial profiling, but because these prior negative experiences with law enforcement, in combination with Juror 13's demeanor during *voir dire*, caused the prosecutor to believe that Juror 13 had a negative view of the police and may not credit the testimony of the State's law enforcement witnesses. As in *Hernandez*, the prosecutor's explanation divided the jury pool into two groups: those whose answers and demeanor during *voir dire* caused the prosecutor to believe they had a negative view of law enforcement and would not credit his witnesses' testimony, and those whose answers and demeanor suggested they would be impartial toward (or possibly favor) the State's law enforcement witnesses. *See* *Hernandez*, 500 U.S. at 361, 111 S.Ct. 1859. On its face, this explanation is not based on the race of a prospective juror but on the particular juror's prior experience with and views toward law enforcement. *See* *id.* at 361, 111 S.Ct. 1859. Accordingly, we reject Aziakanou's characterization of the explanation given by the State and his argument that the explanation was not race-neutral as a matter of law.

¶45 To be clear, this is not the end of the *Batson* inquiry. This explanation satisfies step two because on its face, it is "something other than ... race." *Id.* at 360, 111 S.Ct. 1859. However, as we will discuss, if Aziakanou were to show at step three that there were similarly situated white jurors

whom the State treated differently—for example, white jurors who described prior negative interactions with the police or indicated a dim view of law enforcement in some way, but were not stricken by the State—that could provide evidence of purposeful discrimination.

[20] ¶46 Aziakanou argues that the State did not satisfy step two for two additional reasons. First, he argues that the prosecutor's explanation was not clear, reasonably specific, or legitimate [9] because the prosecutor did not give specific details about Juror 13's body language, defense counsel did not see Juror 13 making faces or gesturing, and the prosecutor did not move to strike Juror 13 for cause. But the Supreme Court has made clear that the explanation given at step two "need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97, 106 S.Ct. 1712.

[21] ¶47 And questions about the believability or persuasiveness of the State's explanation are not relevant in step two of the *Batson* analysis. The Supreme Court has instructed that when evaluating whether an explanation is race-neutral, a court "assum[es] the proffered reasons for the peremptory challenges are true" and analyzes whether those reasons "violate the Equal ***403** Protection Clause as a matter of law." *Hernandez*, 500 U.S. at 359, 111 S.Ct. 1859. The Court has explained that "[i]t is not until the *third* step that the persuasiveness of the justification becomes relevant." *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769. Accordingly, at step two, we assume the truth of the prosecutor's explanation that he struck Juror 13 because he believed Juror 13 would not be impartial toward the State's witnesses—not because of Juror 13's race, but because of his past negative experiences with law enforcement and demeanor during jury selection.

¶48 Finally, Aziakanou argues that it is "a common experience" for people of color to be subject to racial profiling, and therefore peremptory strikes on this basis disproportionately impact racial minorities. Again, we clarify that we are not holding that it is race-neutral to strike potential jurors *because they have been racially profiled*. We hold only that the explanation given by the State here was race neutral. *See supra* ¶¶ 36–44.

¶49 However, we understand Aziakanou's point more broadly to be that striking jurors for reasons associated with past negative experiences with the police disproportionately impacts racial minorities. For purposes of step two of *Batson*, the Supreme Court has held that disparate impact is not determinative. In *Hernandez*, the Court recognized that striking Spanish-speaking jurors "might well result in the disproportionate removal of prospective Latino jurors." 500 U.S. at 361, 111 S.Ct. 1859. But the Court held that was insufficient to make it a "*per se* violation of the Equal Protection Clause." *Id.* And it explained that while disparate impact should be given "appropriate weight" in assessing discriminatory intent in step three, "it will not be conclusive in the preliminary race-neutrality step of the *Batson* inquiry." *Id.* at 362, 111 S.Ct. 1859. The Court has made clear that

> "[d]iscriminatory purpose" ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected ... a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Id. at 360, 111 S.Ct. 1859 (second, third, and fourth alterations in original) (citation omitted). [10]

¶50 Accordingly, we agree with the trial court that the State provided a race-neutral explanation for its peremptory strike of Juror 13. This does not end the *Batson* inquiry. The analysis now proceeds to step three.

C. Step Three

¶51 Aziakanou next claims that the trial court clearly erred in its determination that he did not prove purposeful discrimination. We disagree.

[22] **[23]** ¶52 At step three of the *Batson* inquiry, the burden shifts back to the party challenging the strike to convince the trial court that, despite the proponent's race-neutral explanation, the proponent struck the potential juror with discriminatory intent. *Batson*, 476 U.S. at 98, 106

S.Ct. 1712. At this stage, "[t]he trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties" and then "determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Flowers*, 139 S. Ct. at 2243–44. The trial court is afforded great deference in this determination because it is "a pure issue of fact" and "largely will turn on [an] evaluation of credibility." *Hernandez*, 500 U.S. at 364–65, 111 S.Ct. 1859 (citation omitted).

[24] **[25]** ¶53 At this step, the court may consider any relevant facts. The Supreme Court recently identified examples of evidence a party raising a *Batson* challenge may rely on:

***404** • statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;

• evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;

• side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;

• a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;

• relevant history of the State's peremptory strikes in past cases; or

• other relevant circumstances that bear upon the issue of racial discrimination.

Flowers, 139 S. Ct. at 2243. These enumerated factors are not exhaustive, nor are they required in every case. We also note that even though disparate impact is not dispositive at step two, it is relevant to the trial court's decision at step three. *Hernandez*, 500 U.S. at 363, 111 S.Ct. 1859. "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another." *Id.* (alterations in original) (citation omitted). So "[i]f a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination." *Id.*

[26] ¶54 Here, the trial court did not explicitly state that it was moving to step three of the analysis—likely because Aziakanou's arguments to the trial court focused entirely on step two. However, the court provided the following reasons for its final decision to overrule Aziakanou's *Batson* objection: (1) there was no evidence of systematic efforts to exclude people of color from the venire, (2) the prosecutor's reasoning was race-neutral, and (3) the prosecutor was justified in being concerned about whether Juror 13 would impartially consider his witnesses' testimony. [11]

[27] ¶55 Regarding the first point, we agree with Aziakanou that the trial court erroneously concluded that evidence of a systematic effort to exclude persons of color from the jury pool was necessary. The Supreme Court explicitly rejected this assertion in *Batson*. 476 U.S. at 92–93, 106 S.Ct. 1712. A party bringing a *Batson* challenge need not offer proof of systematic efforts of racial discrimination in the use of a peremptory strike. *Id.* at 93–96, 106 S.Ct. 1712. They may rely on the facts and circumstances present in the instant case. *Id.* at 95, 106 S.Ct. 1712. Accordingly, we do not defer to the trial court's reasoning on this point.

¶56 And the trial court's second reason relates back to step two. Once the prosecutor offered his race-neutral reason for the strike, the analysis should have then focused on whether that facially race-neutral reason was pretextual. However, Aziakanou did not make any such arguments to the trial court or put forth any new facts relevant to the step three analysis, such as those suggested by the Supreme Court in *Flowers*. *See supra* ¶¶ 14–17. Accordingly, the court's reasoning here is a reiteration of its step two analysis, and we do not give it weight with respect to step three.

¶57 We grant deference to the last reason the trial court provided. The court said,

> Not including what [Juror 13's] nationality is or not, the idea that

> his explanation that he had been repeatedly stopped by the police, and that he feels that that is profiling, I think is sufficient for the state to have been concerned in a case that we have where the police are again going to be—the question for the stop, what the circumstances are going to be an issue ....

It appears the court credited the prosecutor's explanation that Juror 13's repeated encounters with law enforcement, considered in conjunction with the nature of the case before it ***405** and Juror 13's body language, justifiably caused the prosecutor to worry that Juror 13 would not credit the State's law enforcement witnesses at trial. The court was within its discretion to believe the prosecutor's explanation. *See* *Hernandez*, 500 U.S. at 369, 111 S.Ct. 1859 ("The trial court took a permissible view of the evidence in crediting the prosecutor's explanation."). And the Supreme Court has instructed "that '[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' " *Id.* (alteration in original) (citation omitted).

¶58 Importantly, Aziakanou did not make arguments to the trial court related to step three, and he has mostly ignored this argument on appeal. Instead, his briefing as to step three reiterates his step-two argument—that the prosecutor's reason for the strike was based on Juror 13's experience being racially profiled, which is not race-neutral as a matter of law. But, as explained above, once the trial court determined the explanation was race-neutral, to prevail on his *Batson* challenge Aziakanou had "an *absolute obligation*" to bring to the trial court evidence of the State's purposeful discrimination. *State v. Harris*, 2012 UT 77, ¶ 17, 289 P.3d 591. He did not. Instead, he argued that a person's experience being racially profiled is not a race-neutral reason for a peremptory strike; in other words, he focused on step two.

[28] **[29]** ¶59 To the extent that Aziakanou has argued that the trial court erroneously applied step three, he focuses on what the State *could* have done: if the prosecutor thought Juror 13 could not remain impartial, "he could have questioned the juror about it"; if Juror 13 had indeed been shaking his head and making faces, the prosecutor could have struck him for cause. But neither option is required to overcome a *Batson* challenge. In fact, the Supreme Court has said just the opposite: the proponent of the strike need not give a reason that rises to the level of a strike for cause. *Batson*, 476 U.S. at 97, 106 S.Ct. 1712. And neither party is required to ask specific questions of potential jurors they suspect might harbor bias against their case or witnesses. This is the point of a peremptory strike. To be sure, evidence of disparate questioning of the venire can be relevant to the trial court's step-three analysis. But because the party raising the *Batson* challenge carries the burden of persuasion, it is their duty to bring that evidence to the trial court's attention. Aziakanou did not do so.

[30] ¶60 The first time Aziakanou has proffered such an argument is in his reply brief. He argues there that the prosecutor did not *voir dire* a white potential juror who had expressed being "a victim of the [justice] system's treatment of drug crimes." But Aziakanou did not make this argument to the trial court, so that court did not have the opportunity to consider this factual assertion when assessing the prosecutor's explanation. Accordingly, this argument is both unpreserved and waived. *See* *State v. Johnson*, 2017 UT 76, ¶¶ 15–16, 416 P.3d 443 (explaining that "[w]hen a party fails to raise and argue an issue in the trial court, it has failed to preserve the issue" and that "[w]hen a party fails to raise and argue an issue on appeal, or raises it for the first time in a reply brief, that issue is waived").

¶61 Given the deferential standard with which we must apply the trial court's step-three determination, and the argument and evidence that was before the trial court, Aziakanou has not established that the court clearly erred when it overruled his *Batson* challenge.

II. SUFFICIENCY OF THE EVIDENCE

¶62 Next, Aziakanou contends the trial court erred when it denied his motion for a directed verdict. He argues the State failed to present evidence that he took active steps in furtherance of arranging to distribute or distributing a controlled substance. Aziakanou claims there was no evidence of statements he made to the buyers about purchasing spice and whether, even if he had the requisite intent, "his conduct 'would, or would be likely to' lead to any kind of distribution." (Citation omitted.) He further claims the evidence against him was "so inconclusive or inherently

improbable that reasonable minds must have entertained a reasonable doubt" that he committed the crime, such ***406** that the jury must have "take[n] speculative leaps" to arrive at its verdict. (Citation omitted.) (Internal quotation marks omitted.) We disagree. There was sufficient circumstantial evidence for a jury to convict Aziakanou of distribution of or arranging to distribute a controlled substance.

[31] [32] [33] [34] [35] [36] ¶63 "A conviction not based on substantial reliable evidence cannot stand." *State v. Robbins*, 2009 UT 23, ¶ 14, 210 P.3d 288 (citation omitted). On appeal, we view "the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the jury verdict." *Id.* (citation omitted). We will reverse a jury verdict only if "the evidence is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted." *Id.* (citation omitted). And "a conviction can be based on sufficient circumstantial evidence." *State v. Brown*, 948 P.2d 337, 344 (Utah 1997). Where a conviction is based on circumstantial evidence, we must

> determine (1) whether there is any evidence that supports each and every element of the crime charged, and (2) whether the inferences that can be drawn from that evidence have a basis in logic and reasonable human experience sufficient to prove each legal element of the offense beyond a reasonable doubt. A guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt.

Id. (citation omitted).

¶64 The jury convicted Aziakanou of distribution of or arranging to distribute a controlled substance, namely, spice. Under Utah law, "it is unlawful for a person to knowingly and intentionally ... distribute a controlled ... substance, or to ... arrange to distribute a controlled ... substance." UTAH CODE § 58-37-8(1)(a)(ii).

[37] [38] [39] ¶65 Aziakanou asserts there was no evidence that he intended a drug transaction to occur. He also argues there was no evidence he made statements to the buyers about purchasing spice. It is true that the State did not offer direct evidence of statements Aziakanou made during the observed transactions. But direct evidence is not required to sustain a conviction. A jury may rely on "all reasonable inferences" that can be drawn from the evidence at trial. *See* *Robbins*, 2009 UT 23, ¶ 14, 210 P.3d 288 (citation omitted).

¶66 The State's only witnesses at trial were the officers who surveilled and arrested Aziakanou. Each officer testified that they observed Aziakanou approach passersby on three separate occasions and lead them to his companion. And both officers testified that Aziakanou watched the transaction that then took place, specifically the exchange of money for canisters of spice. This evidence is not inconclusive or inherently improbable. Rather, from this evidence a reasonable inference can be drawn that Aziakanou sought out buyers and led them to his companion to complete a drug transaction. And this is not a scenario in which it could have been a coincidental, one-off occurrence. The officers watched as Aziakanou repeated the process two more times. It was reasonable for the jury to infer from the circumstances that Aziakanou knowingly or intentionally arranged for the distribution of or distributed a controlled substance. Thus, the trial court did not err in denying his motion for a directed verdict.

CONCLUSION

¶67 We conclude that the trial court did not err in denying Aziakanou's *Batson* challenge. But we reiterate the importance of a clear analysis of each step of the *Batson* inquiry. We also conclude there was sufficient evidence to support Aziakanou's conviction. Accordingly, we affirm.

¶68 However, although Aziakanou has not prevailed on his *Batson* challenge, he has raised an important issue: that peremptory strikes based on the concern that potential jurors will be biased against law enforcement witnesses due to past negative experiences with the police may lead to the disproportionate removal of persons of color from juries. Yet *Batson* is aimed only at purposeful discrimination. It does not reach peremptory practices that result in the

disproportionate removal of racial minorities from juries unless ***407** the practice was *intended* to have such a consequence. And it does not address the impact of implicit bias on jury selection. When the Supreme Court decided *Batson*, Justice Marshall concurred, but argued separately that the opinion would not end the discriminatory use of peremptory strikes in part because of the "difficult burden" faced by trial courts in assessing and "second-guess[ing]" the reasons given for a peremptory strike and because the opinion did not reach what Justice Marshall termed "unconscious racism." *Batson v. Kentucky*, 476 U.S. 79, 105–06, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (Marshall, J., concurring).

¶69 The U.S. Supreme Court has observed that discrimination during jury selection not only harms the defendant on trial, but also those who are denied this opportunity of civic participation. *Id.* at 87, 106 S.Ct. 1712. And even where a *Batson* violation has not occurred, the disproportionate removal of racial minorities from juries—whether it is due to peremptory strike criterion that disparately impact persons of color, implicit bias, or some other factor—erodes confidence in the justice system and weakens the very notion of a fair trial by an impartial jury. *Id.* These are important concerns that deserve attention and an earnest search for solutions. [12]

Associate Chief Justice Lee authored a concurring opinion.

Justice Himonas authored a concurring opinion, in which Chief Justice Durrant, Justice Pearce, and Justice Petersen joined.

Associate Chief Justice Lee, concurring:

¶70 Justice Himonas raises important questions about a judge's *sua sponte* role in detecting and foreclosing race-based uses of a peremptory challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). *See infra* ¶¶ 80–84. Such questions, however, are not presented for resolution in a case in which the defendant objected to the prosecution's use of a peremptory strike and we have no briefing on the nature and extent of a judge's *sua sponte* role in this process. This role can better be explored through our rulemaking process.

Justice Himonas, concurring:

¶71 Our constitution promises a right not to be excluded from jury service on the basis of race, and it is a right that, in and of itself, protects the legitimacy of our judicial system and promotes the constitutional right of a defendant to an impartial jury. But the right not to be excluded from a jury on account of race is not self-enforcing—it must be enforced. And when it is not enforced, the judicial process is compromised and our justice system becomes complicit in the social inequities of racism.

[40] ¶72 I write separately only to drive home the point that trial courts have the power, if not the duty, to raise *Batson* challenges *sua sponte*. Such a challenge serves as a paradigmatic example of where and how trial courts can work to eradicate racism in the courts.

¶73 In a criminal trial, the defendant enjoys a panoply of constitutional protections, including Fourth Amendment rights to freedom from unreasonable search and seizure, Fifth Amendment rights to due process, and Sixth Amendment rights to assistance of counsel and the ability to confront one's accuser. U.S. CONST. amends. IV–VI. Typically, the onus is on defense counsel to raise constitutional ***408** challenges on behalf of their clients, and this makes sense—the criminal defendant is the one in the room who stands to lose most when they are, say, precluded from confronting a witness or forced to testify.

[41] ¶74 Among a defendant's other constitutional rights is the right to be tried before an impartial jury "drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). Supreme Court jurisprudence, including the holding in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), enforces this right.

[42] ¶75 In *Batson* the Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89, 106 S.Ct. 1712. But while *Batson* spoke specifically to a *defendant's* Equal Protection rights, it certainly raised the question of whether the potential jurors also enjoyed a right to be free from purposeful discrimination in jury selection.

¶76 The answer is yes, plain and simple.

¶77 In *Powers v. Ohio*, the Supreme Court expanded on its *Batson* holding, ruling that a defendant may object to the race-based exclusion of jurors, regardless of the defendant's own race. 499 U.S. 400, 415–16, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). In so doing, the court explained that an individual juror "possess[es] the right not to be excluded from [a jury] on account of race." *Id.* at 409, 111 S.Ct. 1364. In rejecting the Ohio Court of Appeals' holding that the challenged juror must be of the same race as the defendant, the Supreme Court stated that *Batson* was "designed to serve multiple ends" and is not limited to situations in which the defendant is harmed by discriminatory removal of jurors of the same race. *Id.* at 406, 111 S.Ct. 1364 (quoting *Allen v. Hardy*, 478 U.S. 255, 259, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986) (per curiam)) (citation omitted) (internal quotation marks omitted). Of these "multiple ends," the Court focused on the following: First, regardless of harm to the defendant, jury service is a valuable right to citizens. As the Court wrote,

> "The jury system postulates a conscious duty of participation in the machinery of justice. ... One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse."
>
> ....
>
> Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

Id. at 406–07, 111 S.Ct. 1364 (first alteration in original) (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 310, 42 S.Ct. 343, 66 L.Ed. 627 (1922)).

¶78 Second, discrimination in jury selection is harmful to the justice system as a whole, and therefore to the defendant. *Id.* at 412–13, 111 S.Ct. 1364. "The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause." *Id.* at 412, 111 S.Ct. 1364. The Court noted that "[b]oth the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom" and that "[a] venireperson excluded from jury service because of race suffers a profound personal humiliation" and thus "may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard." *Id.* at 413–14, 111 S.Ct. 1364.

¶79 And third, jurors are unlikely to pursue their own rights because they face significant barriers to doing so:

> Potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion. Nor can excluded jurors easily obtain declaratory or injunctive relief when discrimination occurs through an individual prosecutor's exercise of peremptory challenges. ... [because] it would be difficult for an individual juror to show a likelihood that discrimination against him at the *voir dire* ***409** stage will recur. And, there exist considerable practical barriers to suit by the excluded juror because of the small financial stake involved and the economic burdens of litigation.

Id. at 414–15, 111 S.Ct. 1364 (citations omitted). Ultimately, the court held that these "multiple ends" give a third party (often the defendant) standing to raise a *Batson* challenge on behalf of the juror to vindicate the juror's right to not be excluded on account of race. *Id.* at 406, 415, 111 S.Ct. 1364.

¶80 But it isn't just the defendant and the excluded juror who share a "common interest in eliminating racial discrimination from the courtroom"—indeed, the judiciary shares in that interest as well. *See id.* at 413, 111 S.Ct. 1364; *id.* at 415, 111 S.Ct. 1364 ("The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system.") As such, courts also have the ability to raise third-party *Batson* challenges. To this end, states have

interpreted the reasoning in *Powers* as justification for *Batson* challenges *sua sponte* by the courts. The Supreme Court of Illinois, for example, cited *Powers* in its holding that a trial court, like a defendant, has standing to raise a *Batson* issue *sua sponte*. *People v. Rivera*, 221 Ill.2d 481, 304 Ill.Dec. 315, 852 N.E.2d 771, 781–82, 784–85, 791 (2006). In addition to the harms to the defendant and the integrity of the judicial system writ large, as well as the barriers faced by wrongfully excluded jurors in raising a claim of discrimination, the *Rivera* court found that the court has a closer relationship to the jury than does the defendant, thus giving the court third-party standing. *Id.*, 304 Ill.Dec. 315, 852 N.E.2d at 784–85. The *Rivera* court listed several other jurisdictions with consistent holdings, *id.* 304 Ill.Dec. 315, 852 N.E.2d at 785, including New Jersey, *Hitchman v. Nagy*, 382 N.J.Super. 433, 889 A.2d 1066 (N.J. Super. Ct. App. Div. 2006), Michigan, *People v. Bell*, 473 Mich. 275, 702 N.W.2d 128 (2005), Washington, *State v. Evans*, 100 Wash.App. 757, 998 P.2d 373 (2000), Indiana, *Williams v. State*, 669 N.E.2d 1372 (Ind. 1996), Maryland, *Brogden v. State*, 102 Md.App. 423, 649 A.2d 1196 (Md. Ct. Spec. App. 1994), and Alabama, *Lemley v. State*, 599 So.2d 64 (Ala. Crim. App. 1992). However, the *Rivera* court was also careful to note that raising a *Batson* challenge *sua sponte* is appropriate only when a prima facie case of discrimination is "abundantly clear." *Rivera*, 304 Ill.Dec. 315, 852 N.E.2d at 785, 791. [13]

¶81 The Supreme Court of Pennsylvania took *Rivera*'s holding even further, suggesting that U.S. Supreme Court dicta may place an affirmative duty on a trial court to raise a *Batson* issue *sua sponte* "after observing a prima facie case of purposeful discrimination by way of peremptory challenges." *Commonwealth v. Carson*, 559 Pa. 460, 741 A.2d 686, 695, 696 n.6 (1999) (noting, however, that such an affirmative duty may require an extensive record developed at *voir dire* to facilitate appellate review), *abrogated on other grounds by* *Commonwealth v. Freeman*, 573 Pa. 532, 827 A.2d 385 (2003).

¶82 And though courts have largely eschewed imposing an affirmative duty on courts to raise a *Batson* challenge *sua sponte* (wrongfully so in my view), the power of a court to do so is, as noted above, clearly recognized. [14]

***410** ¶83 Our own Code of Judicial Conduct further cements the power, if not the obligation, of a trial court to raise a *Batson* challenge *sua sponte*. Rule 2.3(C) provides:

> A judge shall take reasonable measures to require lawyers in proceedings before the court to refrain from manifesting bias or prejudice ... based upon attributes including but not limited to race, sex, [or] gender ... against parties, witnesses, lawyers, *or others*.

UTAH CODE JUD. CONDUCT 2.3(C) (emphasis added). This rule would require, for example, that a judge appropriately admonish a lawyer for using a racial epithet during a proceeding in order to dispel bias and prejudice from the court room. I find it impossible to imagine that this rule would not apply with equal or greater force to a racially motivated peremptory challenge in which a juror's constitutional right has been violated.

¶84 In sum, given this continuing jurisprudence, I take this time today to remind all of us who toil in Utah's courts of our responsibility to preserve our citizens' confidence in our system of justice. When purposeful discrimination in jury selection is a clear possibility, justice will be best served by a court's *sua sponte* objection. Certainly, raising a *Batson* challenge in the appropriate context won't violate the Utah Code of Judicial Conduct; rather, it will serve to buttress the justice system we judges have sworn an oath to preserve. Going forward, I urge our courts to keep a watchful eye for clear threats to the judiciary's integrity, particularly as they concern peremptory challenges. This commitment will uphold this branch of government while simultaneously dismantling the discriminatory structures that serve only to undermine it.

All Citations

498 P.3d 391, 2021 UT 57

Footnotes

1 "On appeal from a jury verdict, we view the evidence and all reasonable inferences in the light most favorable to that verdict and recite the facts accordingly. We present conflicting evidence when necessary to provide a full and fair understanding of the issues on appeal." *State v. Scott*, 2020 UT 13, ¶ 5 n.3, 462 P.3d 350 (citation omitted).

2 Spice is a synthetic cannabinoid. *See* *Carter v. Lehi City*, 2012 UT 2, ¶ 45 n.33, 269 P.3d 141 (explaining that it is illegal to possess, manufacture, and deal synthetic cannabinoids such as spice in Utah).

3 *Voir dire* is the "preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury." *Voir dire*, BLACK'S LAW DICTIONARY (11th ed. 2019).

4 Juror 13 did not say he had an addiction. Rather, during *voir dire*, he said he had people in his life, "an uncle, a cousin, a friend, [who] struggled with addiction, but ... [it] doesn't affect [him] personally."

5 *Batson* has since been extended to apply to "defendant[s] of any race," regardless of whether "the defendant and the excluded juror are of different races, ...to gender discrimination, to a criminal defendant's peremptory strikes, and to civil cases." *Flowers v. Mississippi*, —— U.S. ——, 139 S. Ct. 2228, 2243, 204 L.Ed.2d 638 (2019) (citations omitted).

6 A venire is a "panel of persons selected for jury duty and from among whom the jurors are to be chosen." *Venire*, BLACK'S LAW DICTIONARY (11th ed. 2019).

7 The State argues that the issue Aziakanou raises has already been decided by the United States Supreme Court in *Felkner v. Jackson*, asserting that the Court held that striking a venireperson who may "still harbor[ ] ... animosity" toward law enforcement based on experiences of racial profiling was race-neutral. 562 U.S. 594, 595, 131 S.Ct. 1305, 179 L.Ed.2d 374 (2011) (per curiam). We disagree that *Felkner* resolves this case for two reasons. First, as we will explain, we disagree with Aziakanou's assertion that the prosecutor here struck Juror 13 *because* he had been racially profiled. So we do not decide the case on that basis. And second, it is not clear that *Felkner* directly addressed this question. In *Felkner*, defense counsel raised a *Batson* challenge after the prosecutor struck two Black potential jurors. *Id.* One person was struck because the prosecutor thought the potential juror may "still harbor[ ] ... animosity" toward law enforcement because between "the ages of 16 to 30 years old, he was frequently stopped by California police officers because—in his view—of his race and age." *Id.* In its recitation of the facts, the Court characterized this as "a race-neutral explanation." *Id.*

Notably, this language was not part of the court's legal analysis. It appeared only in the recitation of facts. Further, the Court's analysis focused on *Batson* step three, and it does not appear that the defendant raised

an argument regarding step two. Accordingly, we do not view *Felkner* as resolving whether a potential juror's prior experience with racial profiling is, *as a matter of law*, a race-neutral reason for a peremptory strike.

8 The Supreme Court noted that the parties used the term "Latino" in their briefs to the Court, so the Court used that term "in deference to the terminology preferred by the parties before the Court." *Hernandez v. New York*, 500 U.S. 352, 355, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion).

9 We used similar language in *State v. Cantu*, in which we held that the proponent of a peremptory strike must give an explanation that is "(1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate." 778 P.2d 517, 518 (Utah 1989) (citation omitted). Given the Supreme Court's holding in *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam), the State asks us to clarify these requirements. In *Purkett*, the Supreme Court explained that the "related to the particular case to be tried" requirement "was meant to refute the notion that a prosecutor could satisfy his [or her] burden of production by merely denying that he had a discriminatory motive or by merely affirming his [or her] good faith" and that the "legitimate reason" requirement "is not a reason that makes sense, but a reason that does not deny equal protection." *Id.* at 768–69, 115 S.Ct. 1769 (citation omitted). As we are bound by Supreme Court case law related to *Batson* and its progeny, we take the opportunity to clarify that the step two requirement is mere facial validity. It can be absurd, "silly," "superstitious," *id.* at 768, 115 S.Ct. 1769, or even "frivolous or utterly nonsensical," *Johnson v. California*, 545 U.S. 162, 171, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005). Once the proponent of the strike offers a facially race-neutral reason for the strike, the inquiry moves to step three and factors—like whether the explanation is related to the case or if it is legitimate—may become relevant. *Purkett*, 514 U.S. at 769, 115 S.Ct. 1769.

10 *See also State v. Sanders*, 388 Wis.2d 502, 933 N.W.2d 670, 679 (Wis. Ct. App. 2019) ("That [two Black venirepersons were struck after they] alleged that their prior experiences with law enforcement may have involved discriminatory intent does not detract from the prosecutor's legitimate, nondiscriminatory concern about potential bias against the State's case in this wholly unrelated proceeding.").

11 It appears the court may have conflated steps two and three of the *Batson* inquiry. Although it is the movant's burden to establish a violation of *Batson*, we emphasize the necessity for trial courts to clearly walk through each step of their analysis for a clear record on appeal.

12 We therefore refer this issue to our advisory committee on the rules of criminal procedure. Specifically, the committee should consider whether and how our criminal rules could (1) address the concerns identified in paragraphs sixty-eight through sixty-nine of this opinion and (2) give trial courts guidance in applying *Batson*. We note that other states have addressed these matters through procedural rules or other enactments. *See* WASH. GEN. R. 37; CAL. CIV. PRO. CODE § 231.7 (West 2021); MINN. R. CRIM. P. 26.02(7)(2); *see also State v. Holmes*, 334 Conn. 202, 221 A.3d 407, 412 (2019) (creating a "Jury Selection Task Force" to consider "measures intended to promote the selection of diverse jury panels"); *State v. Andujar*, 247 N.J. 275, 254 A.3d 606, 631 (2021) (directing a "Judicial Conference on Jury Selection" to convene and "make recommendations for proposed rule changes" to address "the nature of discrimination in the jury selection process"); Sponsor Memo, 2021 N.Y. S.B. 6066 (as before the S. Rules Comm., June 10, 2021) (proposing "[a]n act to repeal section 270.25 of the criminal procedure law" relating to "abolishing

peremptory challenges of jurors in criminal cases"). In identifying these rules, we do not intend to express an opinion on their content.

13 Additional support for a court's ability to raise *Batson* challenges *sua sponte* comes from the Supreme Court's opinion in *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). There, the Court found that *Batson* challenges may be raised against criminal defendants exercising purposefully discriminatory peremptory challenges because peremptory challenges inherently "perform a traditional function of the government" and thus constitute state action subject to the Equal Protection Clause. *Id.* at 52–55, 112 S.Ct. 2348. The Court noted that,

> [a]s the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial. Indeed, the Fourteenth Amendment forbids the State to deny persons within its jurisdiction the equal protection of the laws.

Id. at 56, 112 S.Ct. 2348. And, of course, the "State" to which the *McCollum* Court refers includes the judiciary. Thus, "if a court allows jurors to be excluded because of group bias, '[it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it.' " *Id.* at 49–50, 112 S.Ct. 2348 (alterations in original) (quoting *State v. Alvarado*, 221 N.J.Super. 324, 534 A.2d 440, 442 (N.J. Super. Ct. Law Div. 1987)).

14 The Supreme Court of Wyoming, for example, noted as recently as this year that "trial judges possess the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process," even if there is no affirmative duty to raise such an objection. *Yazzie v. State*, 487 P.3d 555, 565 (Wyo. 2021) (quoting *Flowers v. Mississippi*, —— U.S. ——, 139 S. Ct. 2228, 2243, 204 L.Ed.2d 638 (2019)). And in *Flowers v. Mississippi*, the Supreme Court remarked that "the job of enforcing *Batson* rests first and foremost with trial judges. America's trial judges operate at the front lines of American justice. In criminal trials, trial judges possess the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process." 139 S.Ct. at 2243 (citation omitted). *Flowers* specifically discussed a trial judge's responsibility in terms of "consider[ing] the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances" in ruling on a *Batson* objection. *Id.* However, the "responsibility to enforce *Batson*" certainly encompasses *sua sponte* objections when necessary and appropriate to "prevent racial discrimination" from pervading a trial. *See id.*