Utah Supreme Court
Rules of Criminal Procedure Committee

Meeting Agenda

Will Carlson, Chair

Location: Webex
Date: January 30, 2026 **Time:** 9:00 a.m. – 11:00 a.m. MST

Introduce new staff attorney (Alex Jacobson)		Keisa Williams
Approve November 18, 2025, meeting minutes	Tab 1	Will Carlson
S.J.R. 10 (Rules 17.5 & 18) Create rapid response legislative subcommittee	Tab 2	Will Carlson
Rule 18 (*State v. Aziakanou*, fn. 12)	Tab 3	Will Carlson
Rule 14	Tab 4	Will Carlson
Rule 22	Tab 5	Lori Seppi
Rule 17.5	Tab 6	Keri Sargent

Meeting Schedule for 2026:

March 17th September 15th
May 19th November 17th
July 21st

Tab 1

Utah Supreme Court
Rules of Criminal Procedure Committee

Meeting Minutes
November 18, 2025

Committee members	Present	Excused	Guests/Staff Present
William Carson, Chair	**X**		Keisa Williams, Staff
Kent A. Burggraaf	**X**		Trent Dressen
Lisa Crawford	**X**		
Adam Crayk		**X**	
David Ferguson	**X**		
Karin Fojtik	**X**		
Judge Kristine Johnson		**X**	
Judge Denise Porter		**X**	
Janet Reese		**X**	
Shawn Robinson	**X**		
Lori Seppi	**X**		
Michael Samantha Starks	**X**		
Lindsey Wheeler	**X**		

Agenda Item 1: Welcome and Approval of Minutes

Will Carlson welcomed the Committee to the meeting. Karen Fojtik moved to approve the minutes. Lori Seppi seconded the motion. Without opposition, the motion carried and the minutes were approved.

Agenda Item 2: Rule Amendments for 27A, 27B, 38

Mr. Carlson noted that Bryson King and Doug Thompson presented proposed amendments to Rules 7, 7A, 27A, 27B and 38 to the Supreme Court. Rules 7 and 7A were approved with a November 1st effective date, but Rules 27A, 27B, and 38 were returned to the committee for revisions. The Supreme Court requested amendments that define or explain the terms "trial de novo" and "hearing de novo" using plain language. The Committee discussed the history of the proposed amendments. The primary reason for removing statutory references was to comply with the Supreme Court's style guide. Mr. Burggraaf will send proposed amendments to the committee members by email and members will provide feedback before the next committee meeting.

Agenda Item 3: The trial - Rule 17 Proposal

Trent Dressen presented proposed amendments to Rule 17 to give judges more discretion on trial calendar priority. The Committee discussed the language in the proposed amendments, with Mr. Dressen noting that they intentionally left the language vague because there are a lot of competing interests and each party would have the opportunity to be heard. Ms. Wheeler explained that the proposed amendments are intended to address wait times for victims, factoring in costs expended by the parties and the impact of delays on defendants.

The Committee questioned the origin and history of the calendar priorities case list and discussed whether "in the interest of justice" might swallow the rule. Mr. Carlson noted that stylistically, the committee should avoid including code references to comply with the style guide. The Committee agreed that the rule could benefit from more clarity, particularly with the "in the interest of justice" exception. The Committee discussed whether adding a speedy trial assertion was appropriate.

Lindsey Wheeler, Lori Seppi, Karin Fojtik, Shawn Robinson, and Lisa Crawford volunteered to participate in a subcommittee and will work on a solution for the next meeting.

Agenda Item 4: Discovery - Rule 16 Update

Ms. Wheeler and Ms. Seppi discussed limited amendments to Rule 16. Individuals at the legislature expressed concerns about the disclosure of victim cell phone data to parties beyond the prosecution when the data is unrelated to the case. After working on various proposals, Ms. Wheeler and Ms. Seppi believe the rule currently allows the prosecution to protect victims' information either by not disclosing it at all or by getting a protective order if data needs to be disclosed.

The committee discussed addressing a related issue regarding Rule 16's reverse discovery provisions, prompted by a previous member of the committee and a recent

appellate decision. Mr. Carlson noted that some agencies are heavily invested in this issue and will likely pursue legislative amendments if the committee declines to act. Previous members of the subcommittee discussed the challenges associated with making amendments and whether making minor adjustments to the rule would be of any benefit if legislative changes are inevitable. Ms. Williams explained the Supreme Court's requirement that each advisory committee create a rapid response legislative subcommittee during legislative sessions to quickly address joint resolutions amending rules of procedure.

The committee debated the merits of creating a new subcommittee to look at revisions to the rule with fresh eyes or a subcommittee with a combination of new members and veteran members of the criminal bar.

David Ferguson, Kent Burggraaf, Shawn Robinson, Lisa Crawford, and Michael Samantha Sparks volunteered to participate in the subcommittee to review options and formulate a plan moving forward. David Ferguson volunteered to Chair the subcommittee and will circulate the latest version of the proposed amendments.

Agenda Item 5: Subpoena - Rule 14 Amendments

Mr. Carlson briefly discussed proposed amendments to Rule 14. Under the current rule, subpoenas must be personally served. There is no waiver provision or exception, and they must be personally served by a law enforcement officer. Mr. Carlson will prepare a proposal to bring back for the next committee meeting.

Adjourn:

After reviewing the meeting dates for 2026, the meeting adjourned at approximately 1:30 p.m. The next meeting will be January 20, 2026, via Webex.

Tab 2

Joint Resolution Amending Court Rules Regarding Jury Selection

2026 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Michael K. McKell

House Sponsor:

LONG TITLE

General Description:

This resolution amends court rules regarding jury selection.

Highlighted Provisions:

This resolution:

- amends Rule 17.5 of the Utah Rules of Criminal Procedure to address an exception for jury selection in a felony case;
- amends Rule 18 of the Utah Rules of Criminal Procedure to address jury selection in a felony case; and
- makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

This resolution provides a special effective date.

Utah Rules of Criminal Procedure Affected:

AMENDS:

Rule 17.5, Utah Rules of Criminal Procedure

Rule 18, Utah Rules of Criminal Procedure

Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of all members of both houses of the Legislature:

Section 1. **Rule 17.5,** Utah Rules of Criminal Procedure is amended to read:

Rule 17.5 . In-person, remote, and hybrid hearings; request for different format.

(a) **Definitions.**

(1) "Participant" means a party, a participating victim, or an attorney for a party or

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participating victim.

(2) "In-person" means a participant will be physically present in the courtroom.

(3) "In-person hearing" means a hearing where all participants appear in person.

(4) "Remote" or "remotely" means a participant will appear by video conference or other electronic means approved by the court.

(5) "Remote hearing" means no participants will be physically present in the courtroom and all participants will appear remotely.

(6) "Hybrid hearing" means a hearing at which some participants appear in person and others appear remotely.

(b) **Setting hearing format; factors to consider.** [~~The~~] Except as provided in Rule 18(b), the court has discretion to set a hearing as an in-person hearing, a remote hearing, or a hybrid hearing. In determining which format to use for a hearing, the court will consider:

(1) the preference of the participants, if known;

(2) the anticipated hearing length;

(3) the number of participants;

(4) the burden on a participant of appearing in person compared to appearing remotely, including time and economic impacts;

(5) the complexity of issues to be addressed;

(6) whether and to what extent documentary or testimonial evidence is likely to be presented;

(7) the availability of adequate technology to accomplish the hearing's purpose;

(8) the availability of language interpretation or accommodations for communication with individuals with disabilities;

(9) the possibility that the court may order a party, who is not already in custody, into custody;

(10) the preference of the incarcerating custodian where a party is incarcerated, if the hearing does not implicate significant constitutional rights; and

(11) any other factor, based on the specific facts and circumstances of the case or the court's calendar, that the court deems relevant.

(c) **Request to appear by a different format.**

(1) **Manner of request.** A participant may request that the court allow the participant or a witness to appear at a hearing by a different format than that set by the court. Any request must be made verbally during a hearing, by email, by letter, or by written motion, and the participant must state the reason for the request. If a participant is represented by an attorney,

all requests must be made by the attorney.

(A) **Email and letter requests.**

(i) An email or letter request must be copied on all parties;

(ii) An email or letter request must include in the subject line, "REQUEST TO APPEAR IN PERSON, Case _____" or "REQUEST TO APPEAR REMOTELY, Case _____;" and

(iii) An email request must be sent to the court's email address, which may be obtained from the court clerk.

(B) **Request by written motion.** If making a request by written motion, the motion must succinctly state the grounds for the request and be accompanied by a request to submit for decision and a proposed order. The motion need not be accompanied by a supporting memorandum.

(2) **Timing.** All requests, except those made verbally during a hearing, must be sent to the court at least seven days before the hearing unless there are exigent circumstances or the hearing was set less than seven days before the hearing date, in which cases the request must be made as soon as reasonably possible.

(d) **Resolution of the request.**

(1) **Timing and manner of resolution.** The court may rule on a request under paragraph (c) without awaiting a response. The court may rule on the request in open court, by email, by minute entry, or by written order. If the request is made by email, the court will make a record of the request if the request is denied.

(2) **Court's accommodation of participant's preference; factors to consider.** The court will accommodate a timely request unless the court makes, on the record, a finding of good cause to order the participant to appear in the format originally noticed. The court may find good cause to deny a request based on:

(A) a constitutional or statutory right that requires a particular manner of appearance or a significant possibility that such a right would be impermissibly diminished or infringed by appearing remotely;

(B) a concern for a participant's or witness's safety, well-being, or specific situational needs;

(C) a prior technological challenge in the case that unreasonably contributed to delay or a compromised record;

(D) a prior failure to demonstrate appropriate court decorum, including attempting to participate from a location that is not conducive to accomplishing the purpose of the hearing;

(E) a prior failure to appear for a hearing of which the participant had notice;

(F) the possibility that the court [~~m ay~~] may order a party, who is not already in custody, into custody;

(G) the preference of the incarcerating custodian where a party is incarcerated, if the hearing does not implicate significant constitutional rights;

(H) a participant's involvement in a problem-solving court;

(I) an agreement or any objection of the parties;

(J) the court's determination that the consequential nature of a specific hearing requires all participants to appear in person; or

(K) the capacity of the court, including but not limited to the required technology equipment, staff, or security, to accommodate the request.

(3) **Effect on other participants.** The preference of one participant, and the court's accommodation of that preference, does not:

(A) change the format of the hearing for any other participant unless otherwise ordered by the court; or

(B) affect any other participant's opportunity to make a timely request to appear by a different format or the court's consideration of that request.

Section 2. **Rule 18,** Utah Rules of Criminal Procedure is amended to read:

Rule 18 . Selection of the jury.

(a) **Method of selection.** The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following procedures for selection are not exclusive.

[~~(a)~~](1) **Strike and replace method**. The court shall summon the number of the jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn, as the court may direct, until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to

constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

[~~(a)~~](2) **Struck method**. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

[~~(a)~~](3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(b) **Examination of prospective jurors.**

(1) In a felony case, the court shall conduct jury selection in person at the place of trial unless both parties agree, on the record, that jury selection be conducted virtually.

(2) The court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court may permit counsel or the defendant to supplement the examination by such further inquiry as [~~it~~] the court deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant.

(3) Prior to examining the jurors, the court may make a preliminary statement of the case. The court may permit the parties or their attorneys to make a preliminary statement of the case, and notify the parties in advance of trial.

(c) **Challenges to panel or individuals.** A challenge may be made to the panel or to an individual juror.

[~~(c)~~](1) The panel is a list of jurors called to serve at a particular court or for the trial of a particular action. A challenge to the panel is an objection made to all jurors summoned and may be taken by either party.

[~~(c)(1)~~](i) A challenge to the panel can be founded only on a material departure from the procedure prescribed with respect to the selection, drawing, summoning and return of the panel.

[~~(c)(1)~~](ii) The challenge to the panel shall be taken before the jury is sworn and shall be in writing or made upon the record. It shall specifically set forth the facts constituting the grounds of the challenge.

[~~(c)(1)~~](iii) If a challenge to the panel is opposed by the adverse party, a hearing may be had to try any question of fact upon which the challenge is based. The jurors challenged, and any other persons, may be called as witnesses at the hearing thereon.

[~~(c)(1)~~](iv) The court shall decide the challenge. If the challenge to the panel is allowed, the court shall discharge the jury so far as the trial in question is concerned. If a challenge is denied, the court shall direct the selection of jurors to proceed.

[~~(c)~~](2) A challenge to an individual juror may be either peremptory or for cause. A challenge to an individual juror may be made only before the jury is sworn to try the action, except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented. In challenges for cause the rules relating to challenges to a panel and hearings thereon shall apply. All challenges for cause shall be taken first by the prosecution and then by the defense alternately. Challenges for cause shall be completed before peremptory challenges are taken.

(d) **Peremptory challenges.** A peremptory challenge is an objection to a juror for which no reason need be given. In capital cases, each side is entitled to 10 peremptory challenges. In other felony cases each side is entitled to four peremptory challenges. In misdemeanor cases, each side is entitled to three peremptory challenges. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(e) **Challenges for cause.** A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

[~~(e)~~](1) Want of any of the qualifications prescribed by law.

[~~(e)~~](2) Any mental or physical infirmity which renders one incapable of performing the duties of a juror.

[~~(e)~~](3) Consanguinity or affinity within the fourth degree to the person alleged to be

injured by the offense charged, or on whose complaint the prosecution was instituted.

[~~(e)~~](4) The existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because the juror is indebted to or employed by the state or a political subdivision thereof.

[~~(e)~~](5) Having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by the defendant in a criminal prosecution.

[~~(e)~~](6) Having served on the grand jury which found the indictment.

[~~(e)~~](7) Having served on a trial jury which has tried another person for the particular offense charged.

[~~(e)~~](8) Having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it.

[~~(e)~~](9) Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

[~~(e)~~](10) If the offense charged is punishable with death, the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the instructions of the court and the juror's oath in [~~subsection (h)~~] paragraph (g).

[~~(e)~~](11) Because the juror is or, within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense.

[~~(e)~~](12) Because the juror has been a witness, either for or against the defendant on the preliminary examination or before the grand jury.

[~~(e)~~](13) Having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged.

[~~(e)~~](14) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

(f) **Alternate jurors.** The court may impanel alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties. Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror. If one or two alternate jurors are called, the prosecution and defense shall each have one

additional peremptory challenge. If three or four alternate jurors are called, each side shall have two additional peremptory challenges. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

(g) **Juror oath.** When the jury is selected an oath shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

Section 3. **Effective Date.**

As provided in Utah Constitution, Article VIII, Section 4, this resolution takes effect upon a two-thirds vote of all members elected to each house.

Tab 3

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.

1 Case that cites this headnote

[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.

1 Case that cites this headnote

[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.

1 Case that cites this headnote

[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.

2 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.)

1 Case that cites this headnote

***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

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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.*

106 S.Ct. 1712
Supreme Court of the United States

James Kirkland BATSON, Petitioner,
v.
KENTUCKY.

No. 84–6263
|
Argued Dec. 12, 1985.
|
Decided April 30, 1986.

Synopsis
Petitioner, a black man, was convicted in a Kentucky state court, and he appealed. The Kentucky Supreme Court affirmed, and petitioner sought review. The Supreme Court, Justice Powell, held that: (1) Equal Protection Clause forbids prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant, and (2) to establish a prima facie case of purposeful discrimination in selection of the petit jury defendant must first show that he is a member of a cognizable racial group, that prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race and that the facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Reversed and remanded.

Justice White filed a concurring opinion.

Justice Marshall filed a concurring opinion.

Justice Stevens filed a concurring opinion in which Justice Brennan joined.

Justice O'Connor filed a concurring opinion.

Chief Justice Burger filed a dissenting opinion in which Justice Rehnquist joined.

Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger joined.

West Headnotes (6)

[1] **Constitutional Law** Juries
Jury Peremptory challenges
A state denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposely excluded. U.S.C.A. Const.Amend. 14.
448 Cases that cite this headnote

[2] **Constitutional Law** Peremptory challenges
Jury Peremptory challenges
State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause. U.S.C.A. Const.Amend. 14.
1816 Cases that cite this headnote

[3] **Constitutional Law** Peremptory challenges
Jury Peremptory challenges
Equal Protection Clause forbids prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant. U.S.C.A. Const.Amend. 14.
4966 Cases that cite this headnote

[4] **Jury** Peremptory challenges
A defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial; to establish such a case, defendant must first show that he is a member of a cognizable racial group, that prosecutor has exercised peremptory challenges

to remove from the venire members of the defendant's race and that the facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race; overruling *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759. U.S.C.A. Const.Amend. 14.

12899 Cases that cite this headnote

[5] **Jury** Affidavits and other evidence

In deciding whether a defendant has made a prima facie case of purposeful discrimination in the selection of the petit jury, trial court should consider all relevant circumstances. U.S.C.A. Const.Amend. 14.

4813 Cases that cite this headnote

[6] **Jury** Affidavits and other evidence

Once a defendant makes a prima facie showing of purposeful discrimination in selection of the petit jury, burden shifts to State to come forward with a neutral explanation for challenging black jurors; prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption where his intuitive judgment, that they would be partial to the defendant because of their shared race, but rather, must articulate a neutral explanation related to the particular case to be tried. U.S.C.A. Const.Amend. 14.

8617 Cases that cite this headnote

***79 **1713** *Syllabus* *

During the criminal trial in a Kentucky state court of petitioner, a black man, the judge conducted *voir dire* examination of the jury venire and excused certain jurors for cause. The prosecutor then used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Without expressly ruling on petitioner's request for a hearing, the trial judge denied the motion, and the jury ultimately convicted petitioner. Affirming the conviction, the Kentucky Supreme Court observed that recently, in another case, it had relied on *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759, and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire.

Held:

1. The principle announced in *Strauder v. West Virginia,* 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664, that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded, is reaffirmed. Pp. 1715–1719.

(a) A defendant has no right to a petit jury composed in whole or in part of persons of his own race. *Strauder v. West Virginia,* 10 Otto 303, 305, 100 U.S. 303, 305, 25 L.Ed. 664. However, the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. By denying a person participation in jury service on account of his race, the State also unconstitutionally discriminates against the excluded juror. Moreover, selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Pp. 1716–1718.

(b) The same equal protection principles as are applied to determine whether there is discrimination in selecting the venire also govern the State's use of peremptory challenges to strike individual jurors from the petit jury. Although a prosecutor ordinarily is entitled to exercise ***80** peremptory challenges for any reason, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be

unable impartially to consider the State's case against a black defendant. Pp. 1718–1719.

2. The portion of *Swain v. Alabama, supra,* concerning the evidentiary burden placed on a defendant who claims that he has been denied equal protection through ****1714** the State's discriminatory use of peremptory challenges is rejected. In *Swain,* it was held that a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system as a whole was being perverted. Evidence offered by the defendant in *Swain* did not meet that standard because it did not demonstrate the circumstances under which prosecutors in the jurisdiction were responsible for striking black jurors beyond the facts of the defendant's case. This evidentiary formulation is inconsistent with equal protection standards subsequently developed in decisions relating to selection of the jury venire. A defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case. Pp. 1719–1722.

3. A defendant may establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. The defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. The defendant may also rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race. Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut a prima facie showing by stating that he challenged the jurors on the assumption that they would be partial to the defendant because of their shared race or by affirming his good faith in individual selections. Pp. 1722–1724.

4. While the peremptory challenge occupies an important position in trial procedures, the above-stated principles will not undermine the contribution that the challenge generally makes to the administration of justice. Nor will application of such principles create serious administrative difficulties. Pp. 1724–1725.

***81** 5. Because the trial court here flatly rejected petitioner's objection to the prosecutor's removal of all black persons on the venire without requiring the prosecutor to explain his action, the case is remanded for further proceedings. Pp. 1725–1726.

Reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. WHITE and MARSHALL, JJ., filed concurring opinions, *post,* p. ——. STEVENS, J., filed a concurring opinion, in which BRENNAN, J., joined, *post,* p. ——. O'CONNOR, J., filed a concurring opinion, *post,* p. ——. BURGER, C.J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post,* p. ——. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C.J., joined, *post,* p. ——.

Attorneys and Law Firms

J. David Niehaus argued the cause for petitioner. With him on the briefs were Frank W. Heft, Jr., and Daniel T. Goyette.

Rickie L. Pearson, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief were David L. Armstrong, Attorney General, and Carl T. Miller, Jr., Assistant Attorney General.

Deputy Solicitor General Wallace argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Acting Solicitor General Fried, Assistant Attorney General Trott, and Sidney M. Glazer.*

* Briefs of amici curiae urging reversal were filed for the NAACP Legal Defense and Educational Fund, Inc., by Julius LeVonne Chambers, Charles Stephen Ralston, Steven L. Winter, Anthony G. Amsterdam, and Samuel Rabinove; for the Lawyers' Committee for Civil Rights Under Law by Barry Sullivan, Fred N. Fishman, Robert H. Kapp, Norman Redlich, William L. Robinson, and Norman J. Chachkin; and for Michael McCray et al. by Steven R. Shapiro.

Robert E. Weiss, Donald A. Kuebler, Robert J. Miller, and Jack E. Yelverton filed a brief for the National District Attorneys Association, Inc., as amicus curiae urging affirmance.

Briefs of amici curiae were filed for the National Legal Aid and Defender Association by Patricia Unsinn; and for

Elizabeth Holtzman by Elizabeth Holtzman, pro se, and Barbara D. Underwood.

Opinion

***82** Justice POWELL delivered the opinion of the Court.

This case requires us to reexamine that portion of *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to ****1715** exclude members of his race from the petit jury. [1]

I

Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. On the first day of trial in Jefferson Circuit Court, the judge conducted *voir dire* examination of the venire, excused certain jurors for cause, and permitted the parties to ***83** exercise peremptory challenges. [2] The prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Counsel requested a hearing on his motion. Without expressly ruling on the request for a hearing, the trial judge observed that the parties were entitled to use their peremptory challenges to "strike anybody they want to." The judge then denied petitioner's motion, reasoning that the cross-section requirement applies only to selection of the venire and not to selection of the petit jury itself.

The jury convicted petitioner on both counts. On appeal to the Supreme Court of Kentucky, petitioner pressed, among other claims, the argument concerning the prosecutor's use of peremptory challenges. Conceding that *Swain v. Alabama, supra,* apparently foreclosed an equal protection claim based solely on the prosecutor's conduct in this case, petitioner urged the court to follow decisions of other States, *People v. Wheeler,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); *Commonwealth v. Soares,* 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979), and to hold that such conduct violated his rights under the Sixth Amendment and § 11 of the Kentucky Constitution ****1716** to a jury drawn from a cross section of the community. Petitioner also contended ***84** that the facts showed that the prosecutor had engaged in a "pattern" of discriminatory challenges in this case and established an equal protection violation under *Swain.*

The Supreme Court of Kentucky affirmed. In a single paragraph, the court declined petitioner's invitation to adopt the reasoning of *People v. Wheeler, supra,* and *Commonwealth v. Soares, supra.* The court observed that it recently had reaffirmed its reliance on *Swain,* and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire. See *Commonwealth v. McFerron,* 680 S.W.2d 924 (1984). We granted certiorari, 471 U.S. 1052, 105 S.Ct. 2111, 85 L.Ed.2d 476 (1985), and now reverse.

II

[1] In *Swain v. Alabama,* this Court recognized that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." 380 U.S., at 203–204, 85 S.Ct., at 826–27. This principle has been "consistently and repeatedly" reaffirmed, *id.,* at 204, 85 S.Ct., at 827, in numerous decisions of this Court both preceding and following *Swain.* [3] We reaffirm the principle today. [4]

***85** A

More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Strauder v. West Virginia,* 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880). That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In *Strauder,* the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. *Id.,* at 306–307. Exclusion of black citizens from service as

jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

****1717** In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in *Strauder* recognized, however, that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race." *Id.,* at 305.[5] "The number of our races and nationalities stands in the way of evolution of such a conception" of the demand of equal protection. *Akins v. Texas,* 325 U.S. 398, 403, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945).[6] But the defendant does have the right to be ***86** tried by a jury whose members are selected pursuant to nondiscriminatory criteria. *Martin v. Texas,* 200 U.S. 316, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497 (1906); *Ex parte Virginia,* 10 Otto 339, 100 U.S. 339, 345, 25 L.Ed. 676 345 (1880). The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, *Strauder, supra,* 100 U.S., at 305,[7] or on the false assumption that members of his race as a group are not qualified to serve as jurors, see *Norris v. Alabama,* 294 U.S. 587, 599, 55 S.Ct. 579, 584, 79 L.Ed. 1074 (1935); *Neal v. Delaware,* 13 Otto 370, 397, 103 U.S. 370, 397, 26 L.Ed. 567 (1881).

Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body ... composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder, supra,* 100 U.S., at 308; see *Carter v. Jury Comm'n of Greene County,* 396 U.S. 320, 330, 90 S.Ct. 518, 524, 24 L.Ed.2d 549 (1970). The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. *Duncan v. Louisiana,* 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968).[8] Those on the ****1718** venire ***87** must be "indifferently chosen,"[9] to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." *Strauder, supra,* 100 U.S., at 309.

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. See *Thiel v. Southern Pacific Co.,* 328 U.S. 217, 223–224, 66 S.Ct. 984, 987–88, 90 L.Ed. 1181 (1946). A person's race simply "is unrelated to his fitness as a juror." *Id.,* at 227, 66 S.Ct., at 989 (Frankfurter, J., dissenting). As long ago as *Strauder,* therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. 100 U.S., at 308; see *Carter v. Jury Comm'n of Greene County, supra,* 396 U.S., at 329–330, 90 S.Ct., at 523–524; *Neal v. Delaware, supra,* 103 U.S., at 386.

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. See *Ballard v. United States,* 329 U.S. 187, 195, 67 S.Ct. 261, 265, 91 L.Ed. 181 (1946); *McCray v. New York,* 461 U.S. 961, 968, 103 S.Ct. 2438, 2443, 77 L.Ed.2d 1322 (1983) (MARSHALL, J., dissenting from denial of certiorari). Discrimination within the ***88** judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Strauder,* 100 U.S., at 308.

B

In *Strauder,* the Court invalidated a state statute that provided that only white men could serve as jurors. *Id.,* at 305. We can be confident that no State now has such a law. The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford "protection against action of the State through its administrative officers in effecting the prohibited discrimination." *Norris v. Alabama, supra,* 294 U.S., at 589, 55 S.Ct. 579, 580, 79 L.Ed. 1074; see *Hernandez v. Texas,* 347 U.S. 475, 478–479, 74

S.Ct. 667, 670–71, 98 L.Ed. 866 (1954); *Ex parte Virginia, supra,* 100 U.S., at 346–347. Thus, the Court has found a denial of equal protection where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds, [10] and has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors. [11] While decisions of this Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury. Since the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice, *Hill v. Texas,* 316 U.S. 400, 406, 62 S.Ct. 1159, 1162, 86 L.Ed. 1559 (1942), the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at "other stages in the selection process," *Avery v. Georgia,* 345 U.S. 559, 562, 73 S.Ct. 891, 893, 97 L.Ed. 1244 (1953); see ****1719** *McCray v. New York, supra,* 461 U.S., at 965, 968, 103 S.Ct., at 2440, 2443 ***89** (MARSHALL, J., dissenting from denial of certiorari); see also *Alexander v. Louisiana,* 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972).

[2] **[3]** Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause. [12] Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, *United States v. Robinson,* 421 F.Supp. 467, 473 (Conn.1976), mandamus granted *sub nom. United States v. Newman,* 549 F.2d 240 (CA2 1977), 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.

III

The principles announced in *Strauder* never have been questioned in any subsequent decision of this Court. ***90** Rather, the Court has been called upon repeatedly to review the application of those principles to particular facts. [13] A recurring question in these cases, as in any case alleging a violation of the Equal Protection Clause, was whether the defendant had met his burden of proving purposeful discrimination on the part of the State. *Whitus v. Georgia,* 385 U.S. 545, 550, 87 S.Ct. 643, 646–647, 17 L.Ed.2d 599 (1967); *Hernandez v. Texas, supra,* 347 U.S., at 478–481, 74 S.Ct., at 670–672; *Akins v. Texas,* 325 U.S., at 403–404, 65 S.Ct., at 1279; *Martin v. Texas,* 200 U.S. 316, 26 S.Ct. 338, 50 L.Ed. 497 (1906). That question also was at the heart of the portion of *Swain v. Alabama* we reexamine today. [14]

****1720** A

Swain required the Court to decide, among other issues, whether a black defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. 380 U.S., at 209–210, 85 S.Ct., at 830. The record in *Swain* showed that the prosecutor ***91** had used the State's peremptory challenges to strike the six black persons included on the petit jury venire. *Id.,* at 210, 85 S.Ct., at 830. While rejecting the defendant's claim for failure to prove purposeful discrimination, the Court nonetheless indicated that the Equal Protection Clause placed some limits on the State's exercise of peremptory challenges. *Id.,* at 222–224, 85 S.Ct., at 837–838.

The Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control, *id.,* at 214–220, 85 S.Ct., at 832–836, and the constitutional prohibition on exclusion of persons from jury service on account of race, *id.,* at 222–224, 85 S.Ct., at 837–838. While the Constitution does not confer a right to peremptory challenges, *id.,* at 219, 85 S.Ct., at 835 (citing *Stilson v. United States,* 250 U.S. 583, 586, 40 S.Ct. 28, 29–30, 63 L.Ed. 1154 (1919)), those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury, 380 U.S., at 219, 85 S.Ct., at 835. [15] To preserve the peremptory nature of the prosecutor's challenge, the Court in *Swain* declined to scrutinize his actions in a particular case by relying on a presumption that he properly exercised the State's challenges. *Id.,* at 221–222, 85 S.Ct., at 836–837.

The Court went on to observe, however, that a State may not exercise its challenges in contravention of the Equal Protection Clause. It was impermissible for a prosecutor to use his challenges to exclude blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.,* at 224, 85 S.Ct., at 838. Accordingly, a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system was "being perverted" in that manner. *Ibid.* For example, an inference of purposeful discrimination would be raised on evidence that a prosecutor, "in case after case, whatever the ***92** circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." *Id.,* at 223, 85 S.Ct., at 837. Evidence offered by the defendant in *Swain* did not meet that standard. While the defendant showed that prosecutors in the jurisdiction had exercised their strikes to exclude blacks from the jury, he offered no proof of the circumstances under which prosecutors were responsible for striking black jurors beyond the facts of his own case. *Id.,* at 224–228, 85 S.Ct., at 838–840.

A number of lower courts following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause. [16] ****1721** Since this interpretation of *Swain* has placed on defendants a crippling burden of proof, [17] prosecutors' peremptory challenges are now largely immune ***93** from constitutional scrutiny. For reasons that follow, we reject this evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause.

B

Since the decision in *Swain,* we have explained that our cases concerning selection of the venire reflect the general equal protection principle that the "invidious quality" of governmental action claimed to be racially discriminatory "must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis,* 426 U.S. 229, 240, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976). As in any equal protection case, the "burden is, of course," on the defendant who alleges discriminatory selection of the venire "to prove the existence of purposeful discrimination." *Whitus v. Georgia,* 385 U.S., at 550, 87 S.Ct., at 646–47 (citing *Tarrance v. Florida,* 188 U.S. 519, 23 S.Ct. 402, 47 L.Ed. 572 (1903)). In deciding if the defendant has carried his burden of persuasion, a court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977). Circumstantial evidence of invidious intent may include proof of disproportionate impact. *Washington v. Davis,* 426 U.S., at 242, 96 S.Ct., at 2049. We have observed that under some circumstances proof of discriminatory impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Ibid.* For example, "total or seriously disproportionate exclusion of Negroes from jury venires," *ibid.,* "is itself such an 'unequal application of the law ... as to show intentional discrimination,' " *id.,* at 241, 96 S.Ct., at 2048 (quoting *Akins v. Texas,* 325 U.S., at 404, 65 S.Ct., at 1279).

Moreover, since *Swain,* we have recognized that a black defendant alleging that members of his race have been impermissibly excluded from the venire may make out a prima ***94** facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *Washington v. Davis, supra,* 426 U.S., at 239–242, 96 S.Ct., at 2047–49. Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. *Alexander v. Louisiana,* 405 U.S., at 632, 92 S.Ct., at 1226. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. See *Alexander v. Louisiana, supra,* 405 U.S., at 632, 92 S.Ct., at 1226; *Jones v. Georgia,* 389 U.S. 24, 25, 88 S.Ct. 4, 5, 19 L.Ed.2d 25 (1967). Rather, the State must demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander v.*

Louisiana, supra, at 632, 92 S.Ct., at 1226; see *Washington v. Davis, supra,* 426 U.S., at 241, 96 S.Ct., at 2048. [18]

**1722 The showing necessary to establish a prima facie case of purposeful discrimination in selection of the venire may be discerned in this Court's decisions. *E.g.,* *Castaneda v. Partida,* 430 U.S. 482, 494–495, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977); *Alexander v. Louisiana, supra,* 405 U.S., at 631–632, 92 S.Ct., at 1225–1226. The defendant initially must show that he is a member of a racial group capable of being singled out for differential treatment. *Castaneda v. Partida, supra,* 430 U.S., at 494, 97 S.Ct., at 1280. In combination with that evidence, a defendant may then make a prima facie case by proving that in the particular jurisdiction members of his race have not been summoned for jury service over an extended period of time. *Id.,* at 494, 97 S.Ct., at 1280. Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the "result bespeaks discrimination." *95 *Hernandez v. Texas,* 347 U.S., at 482, 74 S.Ct., at 672–73; see *Arlington Heights v. Metropolitan Housing Development Corp., supra,* 429 U.S., at 266, 97 S.Ct., at 564.

Since the ultimate issue is whether the State has discriminated in selecting the defendant's venire, however, the defendant may establish a prima facie case "in other ways than by evidence of long-continued unexplained absence" of members of his race "from many panels." *Cassell v. Texas,* 339 U.S. 282, 290, 70 S.Ct. 629, 633, 94 L.Ed. 839 (1950) (plurality opinion). In cases involving the venire, this Court has found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination." *Whitus v. Georgia, supra,* 385 U.S., at 552, 87 S.Ct., at 647; see *Castaneda v. Partida, supra,* 430 U.S., at 494, 97 S.Ct., at 1280; *Washington v. Davis, supra,* 426 U.S., at 241, 96 S.Ct., at 2048; *Alexander v. Louisiana, supra,* 405 U.S., at 629–631, 92 S.Ct., at 1224–26. This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse. When circumstances suggest the need, the trial court must undertake a "factual inquiry" that "takes into account all possible explanatory factors" in the particular case. *Alexander v. Louisiana, supra,* at 630, 92 S.Ct., at 1225.

Thus, since the decision in *Swain,* this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case.* These decisions are in accordance with the proposition, articulated in *Arlington Heights v. Metropolitan Housing Department Corp.,* that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions." 429 U.S., at 266, n. 14, 97 S.Ct., at 564, n. 14. For evidentiary requirements *96 to dictate that "several must suffer discrimination" before one could object, *McCray v. New York,* 461 U.S., at 965, 103 S.Ct., at 2440 (MARSHALL, J., dissenting from denial of certiorari), would be inconsistent with the promise of equal protection to all. [19]

**1723 C

[4] The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since *Swain.* See *Castaneda v. Partida, supra,* 430 U.S., at 494–495, 97 S.Ct., at 1280; *Washington v. Davis,* 426 U.S., at 241–242, 96 S.Ct., at 2048–2049; *Alexander v. Louisiana, supra,* 405 U.S., at 629–631, 92 S.Ct., at 1224–1226. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida, supra,* 430 U.S., at 494, 97 S.Ct., at 1280, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to

discriminate." *Avery v. Georgia,* 345 U.S., at 562, 73 S.Ct., at 892. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

[5] In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. ***97** For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire,* will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

[6] Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. See *McCray v. Abrams,* 750 F.2d, at 1132; *Booker v. Jabe,* 775 F.2d 762, 773 (CA6 1985), cert. pending, No. 85–1028. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption —or his intuitive judgment—that they would be partial to the defendant because of their shared race. Cf. *Norris v. Alabama,* 294 U.S., at 598–599, 55 S.Ct., at 583–84; see *Thompson v. United States,* 469 U.S. 1024, 1026, 105 S.Ct. 443, 445, 83 L.Ed.2d 369 (1984) (BRENNAN, J., dissenting from denial of certiorari). Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, *supra,* at 1716, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of ***98** such assumptions, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by ****1724** denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." *Alexander v. Louisiana,* 405 U.S., at 632, 92 S.Ct., at 1226. If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement." *Norris v. Alabama, supra,* 294 U.S. at 598, 55 S.Ct., at 583–84. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. [20] The trial court then will have the duty to determine if the defendant has established purposeful discrimination. [21]

IV

The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge. Conceding that the Constitution does not guarantee a right to peremptory challenges and that *Swain* did state that their use ultimately is subject to the strictures of equal protection, the State argues that the privilege of unfettered exercise of the challenge is of vital importance to the criminal justice system.

While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the ***99** contribution the challenge generally makes to the administration of justice. The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. [22] In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those States applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens, [23] and the peremptory challenge

system has survived. We decline, however, to formulate particular procedures to be followed **1725 upon a defendant's timely objection to a prosecutor's challenges. [24]

*100 V

In this case, petitioner made a timely objection to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. *E.g.,* *Whitus v. Georgia,* 385 U.S., at 549–550, 87 S.Ct., at 646–47; *Hernandez v. Texas,* 347 U.S., at 482, 74 S.Ct., at 672–673; *Patton v. Mississippi,* 332 U.S., at 469, 68 S.Ct., at 187. [25]

It is so ordered.

Justice WHITE, concurring.

The Court overturns the principal holding in *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), that the Constitution does not require in any given case an inquiry into the prosecutor's reasons for using his peremptory challenges to strike blacks from the petit jury panel in the criminal trial of a black defendant and that in such a case it will be presumed that the prosecutor is acting for legitimate trial-related reasons. The Court now rules that such use of peremptory challenges in a given case may, but does not necessarily, raise an inference, which the prosecutor carries the burden of refuting, *101 that his strikes were based on the belief that no black citizen could be a satisfactory juror or fairly try a black defendant.

I agree that, to this extent, *Swain* should be overruled. I do so because *Swain* itself indicated that the presumption of legitimacy with respect to the striking of black venire persons could be overcome by evidence that over a period of time the prosecution had consistently excluded blacks from petit juries. * This should have warned prosecutors that using peremptories to exclude blacks on the assumption that no black juror could fairly judge a black defendant would violate the Equal Protection Clause.

It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs. If the defendant objects, the judge, in whom the Court puts considerable trust, may determine that the prosecution must respond. If not persuaded otherwise, the judge may conclude that the challenges rest on the belief that blacks could not fairly try a black defendant. This, in effect, attributes to the prosecutor the view that all blacks should be eliminated from the entire venire. Hence, the Court's prior cases dealing with jury venires rather than petit juries are not without relevance in this case.

**1726 The Court emphasizes that using peremptory challenges to strike blacks does not end the inquiry; it is not unconstitutional, without more, to strike one or more blacks from the jury. The judge may not require the prosecutor to respond at all. If he does, the prosecutor, who in most cases has had a chance to *voir dire* the prospective jurors, will have an opportunity to give trial-related reasons for his strikes—some *102 satisfactory ground other than the belief that black jurors should not be allowed to judge a black defendant.

Much litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid. But I agree with the Court that the time has come to rule as it has, and I join its opinion and judgment.

I would, however, adhere to the rule announced in *DeStefano v. Woods,* 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), that *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), which held that the States cannot deny jury trials in serious criminal cases, did not require reversal of a state conviction for failure to grant a jury trial where the trial began prior to the date of the announcement in the *Duncan* decision. The same result was reached in *DeStefano* with respect to the retroactivity of *Bloom v. Illinois,* 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), as it was in *Daniel v. Louisiana,* 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975) (*per curiam*), with respect to the decision in *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), holding that the systematic exclusion of women from jury panels violated the Sixth and Fourteenth Amendments.

Justice MARSHALL, concurring.

I join Justice POWELL's eloquent opinion for the Court, which takes a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries. The Court's opinion cogently explains the pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the Equal Protection Clause. The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that "justice ... sit supinely by" and be flouted in case after case before a remedy is available.[1] I nonetheless write separately to express my views. The decision today will not end the racial discrimination ***103** that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

I

A little over a century ago, this Court invalidated a state statute providing that black citizens could not serve as jurors. *Strauder v. West Virginia,* 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880). State officials then turned to somewhat more subtle ways of keeping blacks off jury venires. See *Swain v. Alabama,* 380 U.S. 202, 231–238, 85 S.Ct. 824, 841–846, 13 L.Ed.2d 759 (1965) (Goldberg, J., dissenting); Kuhn, Jury Discrimination: The Next Phase, 41 S.Cal.L.Rev. 235 (1968); see also J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 155–157 (1977) (hereinafter Van Dyke). Although the means used to exclude blacks have changed, the same pernicious consequence has continued.

Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics showing the extent of that practice, but the few cases setting out such figures are instructive. See ****1727** *United States v. Carter,* 528 F.2d 844, 848 (CA8 1975) (in 15 criminal cases in 1974 in the Western District of Missouri involving black defendants, prosecutors peremptorily challenged 81% of black jurors), cert. denied, 425 U.S. 961, 96 S.Ct. 1745, 48 L.Ed.2d 206 (1976); *United States v. McDaniels,* 379 F.Supp. 1243 (ED La.1974) (in 53 criminal cases in 1972–1974 in the Eastern District of Louisiana involving black defendants, federal prosecutors used 68.9% of their peremptory challenges against black jurors, who made up less than one-quarter of the venire); *McKinney v. Walker,* 394 F.Supp. 1015, 1017–1018 (SC 1974) (in 13 criminal trials in 1970–1971 in Spartansburg County, South Carolina, involving black defendants, prosecutors peremptorily challenged 82% of black jurors), affirmance order, 529 F.2d 516 (CA4 1975).[2] Prosecutors ***104** have explained to courts that they routinely strike black jurors, see *State v. Washington,* 375 So.2d 1162, 1163–1164 (La.1979). An instruction book used by the prosecutor's office in Dallas County, Texas, explicitly advised prosecutors that they conduct jury selection so as to eliminate " 'any member of a minority group.' "[3] In 100 felony trials in Dallas County in 1983–1984, prosecutors peremptorily struck 405 out of 467 eligible black jurors; the chance of a qualified black sitting on a jury was 1 in 10, compared to 1 in 2 for a white.[4]

The Court's discussion of the utter unconstitutionality of that practice needs no amplification. This Court explained more than a century ago that " 'in the selection of jurors to pass upon [a defendant's] life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.' " *Neal v. Delaware,* 13 Otto 370, 394, 103 U.S. 370, 394, 26 L.Ed. 567 (1881), quoting *Virginia v. Rives,* 10 Otto 313, 323, 100 U.S. 313, 323, 25 L.Ed. 667 (1880). Justice REHNQUIST, dissenting, concedes that exclusion of blacks from a jury, solely because they are black, is at best based upon "crudely stereotypical and ... in many cases hopelessly mistaken" notions. *Post,* at 1745. Yet the Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes—even an action that does not serve the State's interests. Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks ***105** lack the "intelligence, experience, or moral integrity," *Neal, supra,* 103 U.S., at 397, to be entrusted with that role.

II

I wholeheartedly concur in the Court's conclusion that use of the peremptory challenge to remove blacks from juries, on

the basis of their race, violates the Equal Protection Clause. I would go further, however, in fashioning a remedy adequate to eliminate that discrimination. Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.

Evidentiary analysis similar to that set out by the Court, *ante,* at 1723, has been adopted as a matter of state law in States including Massachusetts and California. Cases from those jurisdictions illustrate the **1728 limitations of the approach. First, defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case. This means, in those States, that where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race. See *Commonwealth v. Robinson,* 382 Mass. 189, 195, 415 N.E.2d 805, 809–810 (1981) (no prima facie case of discrimination where defendant is black, prospective jurors include three blacks and one Puerto Rican, and prosecutor excludes one for cause and strikes the remainder peremptorily, producing all-white jury); *People v. Rousseau,* 129 Cal.App.3d 526, 536–537, 179 Cal.Rptr. 892, 897–898 (1982) (no prima facie case where prosecutor peremptorily strikes only two blacks on jury panel). Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an "acceptable" level.

Second, when a defendant can establish a prima facie case, trial courts face the difficult burden of assessing prosecutors' motives. See *106 *King v. County of Nassau,* 581 F.Supp. 493, 501–502 (EDNY 1984). Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, see *People v. Hall,* 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (1983), or seemed "uncommunicative," *King, supra,* at 498, or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case," *Hall, supra,* at 165, 197 Cal.Rptr. at 73, 672 P.2d, at 856? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Nor is outright prevarication by prosecutors the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." *King, supra,* at 502. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As Justice REHNQUIST concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. *Post,* at 1745; see also THE CHIEF JUSTICE's dissenting opinion, *post,* at 1736–1737. Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet. It is worth remembering that "114 years after the close of the War Between the States and nearly 100 years after *Strauder,* racial and other forms of discrimination still remain a fact of life, in the administration of justice as in *107 our society as a whole." *Rose v. Mitchell,* 443 U.S. 545, 558–559, 99 S.Ct. 2993, 3001, 61 L.Ed.2d 739 (1979), quoted in *Vasquez v. Hillery,* 474 U.S. 254, 264, 106 S.Ct. 617, 624, 88 L.Ed.2d 598 (1986).

III

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system. See Van Dyke, at 167–169; Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loyola (LA) L.Rev. 247, 269–270 (1973). Justice Goldberg, dissenting in *Swain,* emphasized that "[w]ere it necessary to make an absolute choice between **1729 the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former." 380 U.S., at 244, 85 S.Ct., at 849. I believe that this case presents just such a choice, and I would resolve that choice by eliminating peremptory challenges entirely in criminal cases.

Some authors have suggested that the courts should ban prosecutors' peremptories entirely, but should zealously guard the defendant's peremptory as "essential to the fairness of trial by jury," *Lewis v. United States,* 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed. 1011 (1892), and "one of the most important of the rights secured to the accused," *Pointer v. United States,* 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894). See Van Dyke, at 167; Brown, McGuire, & Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse, 14 New England L.Rev. 192 (1978). I would not find that an acceptable solution. Our criminal justice system "requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes v. Missouri,* 120 U.S. 68, 70, 7 S.Ct. 350, 353, 30 L.Ed. 578 (1887). We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of ***108** peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptories as well.

Much ink has been spilled regarding the historic importance of defendants' peremptory challenges. The approving comments of the *Lewis* and *Pointer* Courts are noted above; the *Swain* Court emphasized the "very old credentials" of the peremptory challenge, 380 U.S., at 212, 85 S.Ct., at 813, and cited the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Id.,* at 219, 85 S.Ct., at 835. But this Court has also repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial. *Frazier v. United States,* 335 U.S. 497, 505, n. 11, 69 S.Ct. 201, 206, n. 11, 93 L.Ed. 187 (1948); *United States v. Wood,* 299 U.S. 123, 145, 57 S.Ct. 177, 185, 81 L.Ed. 78 (1936); *Stilson v. United States,* 250 U.S. 583, 586, 40 S.Ct. 28, 29–30, 63 L.Ed. 1154 (1919); see also *Swain,* 380 U.S., at 219, 85 S.Ct., at 835. The potential for racial prejudice, further, inheres in the defendant's challenge as well. If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay.

I applaud the Court's holding that the racially discriminatory use of peremptory challenges violates the Equal Protection Clause, and I join the Court's opinion. However, only by banning peremptories entirely can such discrimination be ended.

Justice STEVENS, with whom Justice BRENNAN joins, concurring.

In his dissenting opinion, THE CHIEF JUSTICE correctly identifies an apparent inconsistency between my criticism of the Court's action in *Colorado v. Connelly,* 474 U.S. 1050, 106 S.Ct. 785, 88 L.Ed.2d 763 (1986) (memorandum of BRENNAN, J., joined by STEVENS, J.), and *New Jersey v. T.L.O.,* 468 U.S. 1214, 104 S.Ct. 3583, 82 L.Ed.2d 881 (1984) (STEVENS, J., dissenting)—cases in which the Court directed the State to brief and argue questions not presented in its petition ***109** for certiorari—and our action today in finding a violation of the Equal Protection Clause despite the failure of petitioner's counsel to rely on that ground of decision. *Post,* at 1732–1733, nn. 1 and 2. In this case, however—unlike *Connelly* and *T.L.O.* —the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance. In defending the ****1730** Kentucky Supreme Court's judgment, Kentucky's Assistant Attorney General emphasized the State's position on the centrality of the equal protection issue:

> "... Mr. Chief Justice, and may it please the Court, the issue before this Court today is simply whether Swain versus Alabama should be reaffirmed....
>
> . . .
>
> "... We believe that it is the Fourteenth Amendment that is the item that should be challenged, and presents perhaps an address to the problem. Swain dealt primarily with the use of peremptory challenges to strike individuals who were of a cognizable or identifiable group.
>
> "Petitioners show no case other than the State of California's case dealing with the use of peremptories wherein the Sixth Amendment was cited as authority for resolving the problem. So, we believe that the Fourteenth Amendment is indeed the issue. That was the guts and primarily the basic concern of Swain.
>
> . . .
>
> "In closing, we believe that the trial court of Kentucky and the Supreme Court of Kentucky have firmly embraced Swain, and we respectfully request that this Court affirm

the opinion of the Kentucky court as well as to reaffirm Swain versus Alabama." [1]

In addition to the party's reliance on the equal protection argument in defense of the judgment, several *amici curiae* ***110** also addressed that argument. For instance, the argument in the brief filed by the Solicitor General of the United States begins:

"PETITIONER DID NOT ESTABLISH THAT HE WAS DEPRIVED OF A PROPERLY CONSTITUTED PETIT JURY OR DENIED EQUAL PROTECTION OF THE LAWS

"A. Under *Swain v. Alabama* A Defendant Cannot Establish An Equal Protection Violation By Showing Only That Black Veniremen Were Subjected To Peremptory Challenge By The Prosecution In His Case" [2]

Several other *amici* similarly emphasized this issue. [3]

In these circumstances, although I suppose it is possible that reargument might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years, [4] ****1731** I believe the Court acts wisely in ***111** resolving the issue now on the basis of the arguments that have already been fully presented without any special invitation from this Court. [5]

Justice O'CONNOR, concurring.

I concur in the Court's opinion and judgment, but also agree with the views of THE CHIEF JUSTICE and Justice WHITE that today's decision does not apply retroactively.

***112** Chief Justice BURGER, joined by Justice REHNQUIST, dissenting.

We granted certiorari to decide whether petitioner was tried "in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community." Pet. for Cert. i.

I

Today the Court sets aside the peremptory challenge, a procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years. It does so on the basis of a constitutional argument that was rejected, without a single dissent, in *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Reversal of such settled principles would be unusual enough on its own terms, for only three years ago we said that "*stare decisis,* while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 420, 103 S.Ct. 2481, 2487, 76 L.Ed.2d 687 (1983). What makes today's holding truly extraordinary is that it is based on a constitutional argument that the petitioner has *expressly* declined to raise, both in this Court and in the Supreme Court of Kentucky.

In the Kentucky Supreme Court, petitioner disclaimed specifically any reliance on the Equal Protection Clause of the Fourteenth Amendment, pressing instead only a claim based on the Sixth Amendment. See Brief for Appellant 14 and Reply Brief for Appellant 1 in No. 84–SC–733–MR (Ky.). As petitioner explained at oral argument here: "We have not made an equal protection claim.... We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such." Tr. of Oral Arg. 6–7. Petitioner has not suggested any barrier prevented raising an equal protection claim in the Kentucky courts. In such circumstances, review of an equal protection argument is improperin ***113** this Court: " 'The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state ****1732** court decisions....' " *Illinois v. Gates,* 459 U.S. 1028, 1029, n. 2, 103 S.Ct. 436, 437, n. 2, 74 L.Ed.2d 595 (1982) (STEVENS, J., dissenting) (quoting *Cardinale v. Louisiana,* 394 U.S. 437, 438, 89 S.Ct. 1161, 1162–63, 22 L.Ed.2d 398 (1969)). Neither the Court nor Justice STEVENS offers any justification for departing from this time-honored principle, which dates to *Owings v. Norwood's Lessee,* 5 Cranch 344, 3 L.Ed. 120 (1809), and *Crowell v. Randell,* 10 Pet. 368, 9 L.Ed. 458 (1836).

Even if the equal protection issue had been pressed in the Kentucky Supreme Court, it has surely not been pressed here. This provides an additional and completely separate procedural novelty to today's decision. Petitioner's "question presented" involved only the "constitutional provisions guaranteeing the defendant an impartial jury and a jury

composed of persons representing a fair cross section of the community." Pet. for Cert. i. These provisions are found in the Sixth Amendment, not the Equal Protection Clause of the Fourteenth Amendment relied upon by the Court. In his brief on the merits, under a heading distinguishing equal protection cases, petitioner noted "the irrelevance of the *Swain* analysis to the present case," Brief for Petitioner 11; instead petitioner relied solely on Sixth Amendment analysis found in cases such as *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). During oral argument, counsel for petitioner was pointedly asked:

"QUESTION: Mr. Niehaus, Swain was an equal protection challenge, was it not?

"MR. NIEHAUS: Yes.

"QUESTION: Your claim here is based solely on the Sixth Amendment?

"MR. NIEHAUS: Yes.

"QUESTION: Is that correct?

"MR. NIEHAUS: That is what we are arguing, yes.

***114** "QUESTION: You are not asking for a reconsideration of Swain, and you are making no equal protection claim here. Is that correct?

"MR. NIEHAUS: We have not made an equal protection claim. I think that Swain will have to be reconsidered to a certain extent if only to consider the arguments that are made on behalf of affirmance by the respondent and the solicitor general.

. . .

"MR. NIEHAUS: We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such...." Tr. of Oral Arg. 5–7.

A short time later, after discussing the difficulties attendant with a Sixth Amendment claim, the following colloquy occurred:

"QUESTION: So I come back again to my question why you didn't attack Swain head on, but I take it if the Court were to overrule Swain, you wouldn't like that result.

"MR. NIEHAUS: Simply overrule Swain without adopting the remedy?

"QUESTION: Yes.

"MR. NIEHAUS: I do not think that would give us much comfort, Your Honor, no.

"QUESTION: That is a concession." *Id.,* at 10.

Later, petitioner's counsel refused to answer the Court's questions concerning the implications of a holding based on equal protection concerns:

"MR. NIEHAUS: ... [T]here is no state action involved where the defendant is exercising his peremptory challenge.

***115** "QUESTION: But there might be under an equal protection challenge if it is the state system that allows that kind of a strike.

"MR. NIEHAUS: I believe that is possible. I am really not prepared to answer that specific question...." *Id.,* at 20.

In reaching the equal protection issue despite petitioner's clear refusal to present ****1733** it, the Court departs dramatically from its normal procedure without any explanation. When we granted certiorari, we could have—as we sometimes do—directed the parties to brief the equal protection question in addition to the Sixth Amendment question. See, *e.g., Paris Adult Theatre I v. Slaton,* 408 U.S. 921, 92 S.Ct. 2487, 33 L.Ed.2d 331 (1972); *Colorado v. Connelly,* 474 U.S. 1050, 106 S.Ct. 785, 88 L.Ed.2d 763 (1986). [1] Even following oral argument, we could have—as we sometimes do—directed reargument on this particular question. See, *e.g., Brown v. Board of Education,* 345 U.S. 972, 73 S.Ct. 1114, 97 L.Ed. 1388 (1953); *Illinois v. Gates, supra; New Jersey v. T.L.O.,* 468 U.S. 1214, 82 L.Ed.2d 881, 104 S.Ct. 3583, (1984). [2] This step is particularly appropriate where reexamination ***116** of a prior decision is under consideration. See, *e.g., Garcia v. San Antonio Metropolitan Transit Authority,* 468 U.S. 1213, 104 S.Ct. 3582, 82 L.Ed.2d 880 (1984) (directing reargument and briefing on issue of whether *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), should be reconsidered); *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 422 U.S. 1005, 95 S.Ct. 2624, 45 L.Ed.2d 668 (1975) (directing reargument and briefing on issue of whether the holding in *Banco Nacional*

de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), should be reconsidered). Alternatively, we could have simply dismissed this petition as improvidently granted.

The Court today rejects these accepted courses of action, choosing instead to reverse a 21-year-old unanimous constitutional holding of this Court on the basis of constitutional arguments expressly disclaimed by petitioner. The only explanation for this action is found in Justice STEVENS' concurrence. Justice STEVENS apparently believes that this issue is properly before the Court because "the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance." *Ante,* at 1729. Cf. *Illinois v. Gates,* 459 U.S., at 1029, n. 1, 103 S.Ct., at 437, n. 1 (STEVENS, J., dissenting) ("[T]here is no impediment to presenting a new argument as an alternative basis for *affirming* the decision below") (emphasis in original). To be sure, respondent and supporting *amici* did cite *Swain* and the Equal Protection Clause. But their arguments were largely limited to explaining ***117** that *Swain* placed a negative gloss on the Sixth Amendment claim actually raised by petitioner. In any event, ****1734** it is a strange jurisprudence that looks to the arguments made by respondent to determine the breadth of the questions presented for our review by petitioner. Of course, such a view is directly at odds with our Rule 21.1(a), which provides that "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." Justice STEVENS does not cite, and I am not aware of, *any* case in this Court's nearly 200-year history where the alternative grounds urged by respondent to affirm a judgment were then seized upon to permit petitioner to obtain relief from that very judgment despite petitioner's failure to urge that ground.

Justice STEVENS also observes that several *amici curiae* address the equal protection argument. *Ante,* at 1730. But I thought it well settled that, even if a "point is made in an *amicus curiae* brief," if the claim "has never been advanced by petitioners ... we have no reason to pass upon it." *Knetsch v. United States,* 364 U.S. 361, 370, 81 S.Ct. 132, 137, 5 L.Ed.2d 128 (1960).

When objections to peremptory challenges were brought to this Court three years ago, Justice STEVENS agreed with Justice MARSHALL that the challenge involved "a significant and recurring question of constitutional law." *McCray v. New York,* 461 U.S. 961, 963, 103 S.Ct. 2438, 2439, 77 L.Ed.2d 1322 (1983) (MARSHALL, J., dissenting from denial of certiorari), referred to with approval, *id.,* at 961, 103 S.Ct., at 2438 (opinion of STEVENS, J., respecting denial of certiorari). Nonetheless, Justice STEVENS wrote that the issue could be dealt with "more wisely at a later date." *Id.,* at 962, 103 S.Ct., at 2439. The same conditions exist here today. Justice STEVENS concedes that reargument of this case "might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years." *Ante,* at 1730. Thus, at bottom his position is that we should overrule an extremely important prior constitutional decision of this Court on a claim not advanced here, even though briefing and oral ***118** argument on this claim might convince us to do otherwise.[3] I believe that "[d]ecisions made in this manner are unlikely to withstand the test of time." *United States v. Leon,* 468 U.S. 897, 962, 104 S.Ct. 3430, 3448, 82 L.Ed.2d 702 (1984) (STEVENS, J., dissenting). Before contemplating such a holding, I would at least direct reargument and briefing on the issue of whether the equal protection holding in *Swain* should be reconsidered.

II

Because the Court nonetheless chooses to decide this case on the equal protection grounds not presented, it may be useful to discuss this issue as well. The Court acknowledges, albeit in a footnote, the " 'very old credentials' " of the peremptory challenge and the " 'widely held belief that ****1735** peremptory challenge is a necessary part of trial by jury.' " *Ante,* at 1720, n. 15 (quoting *Swain,* 380 U.S., at 219, 85 S.Ct., at 835). But proper resolution of this case requires more than a nodding reference to the purpose of the challenge. Long ago it was ***119** recognized that "[t]he right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial." W. Forsyth, History of Trial by Jury 175 (1852). The peremptory challenge has been in use without scrutiny into its basis for nearly as long as juries have existed. "It was in use amongst the Romans in criminal cases, and the *Lex Servilia* (B.C. 104) enacted that the accuser and the accused should severally propose one hundred *judices,* and that each might reject fifty from the list of the other, so that one hundred would remain to try the alleged crime." *Ibid.;* see also J. Pettingal, An Enquiry into the Use and Practice of Juries Among the Greeks and Romans 115, 135 (1769).

In *Swain* Justice WHITE traced the development of the peremptory challenge from the early days of the jury trial in England:

> "In all trials for felonies at common law, the defendant was allowed to challenge peremptorily 35 jurors, and the prosecutor originally had a right to challenge any number of jurors without cause, a right which was said to tend to 'infinite delayes and danger.' Coke on Littleton 156 (14th ed. 1791). Thus The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), provided that if 'they that sue for the King will challenge any ... Jurors, they shall assign ... a Cause certain.' So persistent was the view that a proper jury trial required peremptories on both sides, however, that the statute was construed to allow the prosecution to direct any juror after examination to 'stand aside' until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect to jurors recalled to make up the required number. Peremptories on both sides became the settled law of England, continuing in the above form until after the separation of the Colonies." 380 U.S., at 212–213, 85 S.Ct., at 831–32 (footnotes omitted).

***120** Peremptory challenges have a venerable tradition in this country as well:

> "In the federal system, Congress early took a part of the subject in hand in establishing that the defendant was entitled to 35 peremptories in trials for treason and 20 in trials for other felonies specified in the 1790 Act as punishable by death, 1 Stat. 119 (1790). In regard to trials for other offenses without the 1790 statute, both the defendant and the Government were thought to have a right of peremptory challenge, although the source of this right was not wholly clear....
>
> "The course in the States apparently paralleled that in the federal system. The defendant's right of challenge was early conferred by statute, the number often corresponding to the English practice, the prosecution was thought to have retained the Crown's common-law right to stand aside, and by 1870, most if not all, States had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half, but often equal to, the number had by the defendant." *Id.,* at 214–216, 85 S.Ct., at 833 (footnotes omitted).

The Court's opinion, in addition to ignoring the teachings of history, also contrasts with *Swain* in its failure to even discuss the rationale of the peremptory challenge. *Swain* observed:

> "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed for them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high ****1736** function in the best way, "justice must satisfy the appearance of justice." ' " *Id.,* at 219, 85 S.Ct., at 835 (quoting *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955)).

***121** Permitting unexplained peremptories has long been regarded as a means to strengthen our jury system in other ways as well. One commentator has recognized:

> "The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes.... Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals and in which each is held reasonable and open to compromise.... [For example,] [a]lthough experience reveals that black males as a class can be biased against young alienated blacks who have not tried to join the middle class, to enunciate this in the concrete expression required of a challenge for cause is societally divisive. Instead we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not." Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan.L.Rev. 545, 553–554 (1975).

For reasons such as these, this Court concluded in *Swain* that "the [peremptory] challenge is 'one of the most important of the rights' " in our justice system. *Swain,* 380 U.S., at 219, 85 S.Ct., at 835 (quoting *Pointer v. United States,* 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894)). For close to a century, then, it has been settled that "[t]he denial or impairment of the right is reversible error without a showing of prejudice." *Swain, supra,* at 219, 85 S.Ct., at 835 (citing *Lewis v. United States,* 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892)).

Instead of even considering the history or function of the peremptory challenge, the bulk of the Court's opinion is spent recounting the well-established principle that intentional exclusion of racial groups from jury venires is a ***122** violation of the Equal Protection Clause. I too reaffirm that principle, which has been a part of our constitutional tradition since at least *Strauder v. West Virginia,* 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880). But if today's decision is nothing more than mere "application" of the "principles announced in *Strauder,*" as the Court maintains, *ante,* at 1719, some will consider it curious that the application went unrecognized for over a century. The Court in *Swain* had no difficulty in unanimously concluding that cases such as *Strauder* did not require inquiry into the basis for a peremptory challenge. See *post,* at 1743–1744 (REHNQUIST, J., dissenting). More recently we held that "[d]efendants are not entitled to a jury of any particular composition...." *Taylor v. Louisiana,* 419 U.S., at 538, 95 S.Ct, at 702.

A moment's reflection quickly reveals the vast differences between the racial exclusions involved in *Strauder* and the allegations before us today:

> "Exclusion from the venire summons process implies that the government (usually the legislative or judicial branch) ... has made the general determination that those excluded are unfit to try *any* case. Exercise of the peremptory challenge, by contrast, represents the discrete decision, made by one of two or more opposed *litigants* in the trial phase of our adversary system of justice, that the challenged venireperson will likely be more unfavorable to that litigant in that *particular case* than others on the same venire.
>
> "Thus, excluding a particular cognizable group from all venire pools is stigmatizing and discriminatory in several interrelated ways that the peremptory ****1737** challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclusion bespeaks *a priori* across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular ***123** isolated case. Exclusion from venires focuses on the inherent attributes of the excluded group and infers its *inferiority,* but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not." *United States v. Leslie,* 783 F.2d 541, 554 (CA5 1986) (en banc).

Unwilling to rest solely on jury venire cases such as *Strauder,* the Court also invokes general equal protection principles in support of its holding. But peremptory challenges are often lodged, of necessity, for reasons "normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." *Swain, supra,* 380 U.S., at 220, 85 S.Ct., at 835–36. Moreover, in making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch. The process cannot be indicted on the sole basis that such decisions are made on the basis of "assumption" or "intuitive judgment." *Ante,* at 1723. As a result, unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum "rationality" in government actions has no application to " 'an arbitrary and capricious right,' " *Swain, supra,* at 219, 85 S.Ct., at 835 (quoting *Lewis v. United States, supra,* 146 U.S., at 378, 13 S.Ct., at 139); a constitutional principle that may invalidate state action on the basis of "stereotypic notions," *Mississippi University for Women v. Hogan,* 458 U.S. 718, 725, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982), does not explain the breadth of a procedure exercised on the " 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.' " *Lewis, supra,* 146 U.S., at 376, 13 S.Ct., at 138 (quoting 4 W. Blackstone, Commentaries * 353).

That the Court is not applying conventional equal protection analysis is shown by its limitation of its new rule to allegations of impermissible challenge *on the basis of race;* the ***124** Court's opinion clearly contains such a limitation. See *ante,* at 1723 (to establish a prima facie case, "the defendant first must show that he is a member of a cognizable *racial group*") (emphasis added); *ibid.* ("Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury *on account of their race* ") (emphasis added). But if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex, *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397

(1976); age, *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976); religious or political affiliation, *Karcher v. Daggett,* 462 U.S. 725, 748, 103 S.Ct. 2653, 2668–2669, 77 L.Ed.2d 133 (1983) (STEVENS, J., concurring); mental capacity, *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); number of children, *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); living arrangements, *Department of Agriculture v. Moreno,* 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); and employment in a particular industry, *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981), or profession, ****1738** *Williamson v. Lee Optical Co.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). [4]

In short, it is quite probable that every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristic not shared by the remaining members of the venire, it constituted a "classification" subject to equal protection scrutiny. See *McCray v. Abrams,* 750 F.2d 1113, 1139 (CA2 1984) (Meskill, J., dissenting), cert. pending, No. 84–1426. Compounding the difficulties, under conventional equal protection principles some uses of peremptories would be reviewed under "strict scrutiny and ... sustained only if ... suitably tailored to serve a compelling state interest," ***125** *Cleburne,* 473 U.S., at 440, 105 S.Ct., at 3255; others would be reviewed to determined if they were "substantially related to a sufficiently important government interest," *id.,* at 441, 105 S.Ct., at 3255; and still others would be reviewed to determine whether they were "a rational means to serve a legitimate end." *Id.,* at 442, 105 S.Ct., at 3255.

The Court never applies this conventional equal protection framework to the claims at hand, perhaps to avoid acknowledging that the state interest involved here has historically been regarded by this Court as substantial, if not compelling. Peremptory challenges have long been viewed as a means to achieve an impartial jury that will be sympathetic toward neither an accused nor witnesses for the State on the basis of some shared factor of race, religion, occupation, or other characteristic. Nearly a century ago the Court stated that the peremptory challenge is "essential to the fairness of trial by jury." *Lewis v. United States,* 146 U.S., at 376, 13 S.Ct., at 138. Under conventional equal protection principles, a state interest of this magnitude and ancient lineage might well overcome an equal protection objection to the application of peremptory challenges. However, the Court is silent on the strength of the State's interest, apparently leaving this issue, among many others, to the further "litigation [that] will be required to spell out the contours of the Court's equal protection holding today...." *Ante,* at 1725 (WHITE, J., concurring). [5]

The Court also purports to express "no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by *defense* counsel." *Ante,* at 1718, n. 12 (emphasis added). But the clear and inescapable import of this novel holding will inevitably be to limit the use of this valuable ***126** tool to both prosecutors and defense attorneys alike. Once the Court has held that *prosecutors* are limited in their use of peremptory challenges, could we rationally hold that defendants are not? [6] "Our criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' " *Ante,* at 1729 (MARSHALL, J., concurring) (quoting *Hayes v. Missouri,* 120 U.S. 68, 70, 7 S.Ct. 350, 351, 30 L.Ed. 578 (1887)).

Rather than applying straightforward equal protection analysis, the Court substitutes ****1739** for the holding in *Swain* a curious hybrid. The defendant must first establish a "prima facie case," *ante,* at 1721, of invidious discrimination, then the "burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Ante,* at 1723. The Court explains that "the operation of prima facie burden of proof rules" is established in "[o]ur decisions concerning 'disparate treatment'...." *Ante,* at 1721, n. 18. The Court then adds, borrowing again from a Title VII case, that "the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Ante,* at 1723, n. 20 (quoting *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 258, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981)). [7]

While undoubtedly these rules are well suited to other contexts, particularly where (as with Title VII) they are required by an Act of Congress, [8] they seem curiously out

***127** of place when applied to peremptory challenges in criminal cases. Our system permits two types of challenges: challenges for cause and peremptory challenges. Challenges for cause obviously have to be explained; by definition, peremptory challenges do not. "It is called a peremptory challenge, because the prisoner may challenge peremptorily, on his own dislike, *without showing of any cause.*" H. Joy, On Peremptory Challenge of Jurors 1 (1844) (emphasis added). Analytically, there is no middle ground: A challenge either has to be explained or it does not. It is readily apparent, then, that to permit inquiry into the basis for a peremptory challenge would force "the peremptory challenge [to] collapse into the challenge for cause." *United States v. Clark,* 737 F.2d 679, 682 (CA7 1984). Indeed, the Court recognized without dissent in *Swain* that, if scrutiny were permitted, "[t]he challenge, *pro tanto,* would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards." *Swain,* 380 U.S., at 222, 85 S.Ct., at 837.

Confronted with the dilemma it created, the Court today attempts to decree a middle ground. To rebut a prima facie case, the Court requires a "neutral explanation" for the challenge, but is at pains to "emphasize" that the "explanation need not rise to the level justifying exercise of a challenge for cause." *Ante,* at 1723. I am at a loss to discern the governing principles here. A "clear and reasonably specific" explanation of "legitimate reasons" for exercising the challenge will be difficult to distinguish from a challenge for cause. Anything ***128** short of a challenge for cause may well be seen as an "arbitrary and capricious" challenge, to use Blackstone's characterization of the peremptory. See 4 W. Blackstone, Commentaries * 353. Apparently the Court envisions permissible challenges short of a challenge for cause that are just a little bit arbitrary—but not too much. While our trial judges are "experienced in supervising *voir dire,*" *ante,* at 1723, they have no experience in administering rules like this.

****1740** An example will quickly demonstrate how today's holding, while purporting to "further the ends of justice," *ante,* at 1724, will not have that effect. Assume an Asian defendant, on trial for the capital murder of a white victim, asks prospective jury members, most of whom are white, whether they harbor racial prejudice against Asians. See *Turner v. Murray,* 476 U.S. 28, 36–37, 106 S.Ct. 1683, ——, 90 L.Ed.2d 27 (1986). The basis for such a question is to flush out any "juror who believes that [Asians] are violence-prone or morally inferior...." *Ante,* at ——.[9] Assume further that all white jurors deny harboring racial prejudice but that the defendant, on trial for his life, remains unconvinced by these protestations. Instead, he continues to harbor a hunch, an "assumption," or "intuitive judgment," *ante,* at 1723, that these white jurors will be prejudiced against him, presumably based in part on race. The time-honored rule before today was that peremptory challenges could be exercised on such a basis. The Court explained in *Lewis v. United States:*

> "[H]ow necessary it is that a prisoner (when put to defend his life) should have good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom ***129** he has conceived a prejudice even without being able to assign a reason for such his dislike." 146 U.S., at 376, 13 S.Ct., at 138.

The effect of the Court's decision, however, will be to force the defendant to come forward and "articulate a neutral explanation," *ante,* at 1723, for his peremptory challenge, a burden he probably cannot meet. This example demonstrates that today's holding will produce juries that the parties do not believe are truly impartial. This will surely do more than "disconcert" litigants; it will diminish confidence in the jury system.

A further painful paradox of the Court's holding is that it is likely to interject racial matters back into the jury selection process, contrary to the general thrust of a long line of Court decisions and the notion of our country as a "melting pot." In *Avery v. Georgia,* 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953), for instance, the Court confronted a situation where the selection of the venire was done through the selection of tickets from a box; the names of whites were printed on tickets of one color and the names of blacks were printed on different color tickets. The Court had no difficulty in striking down such a scheme. Justice Frankfurter observed that "opportunity for working of a discriminatory system exists whenever the mechanism for jury selection *has a component part,* such as the slips here, *that differentiates between white and colored* ...." *Id.,* at 564, 73 S.Ct., at 894 (concurring) (emphasis added).

Today we mark the return of racial differentiation as the Court accepts a positive evil for a perceived one. Prosecutors and defense attorneys alike will build records in support of

their claims that peremptory challenges have been exercised in a racially discriminatory fashion by asking jurors to state their racial background and national origin for the record, despite the fact that "such questions may be offensive to some jurors and thus are not ordinarily asked on voir dire." ***130** *People v. Motton,* 39 Cal.3d 596, 604, 217 Cal.Rptr. 416, 420, 704 P.2d 176, 180, modified, 40 Cal.3d 4b (1985) (advance sheet). [10] This process is sure to ****1741** tax even the most capable counsel and judges since determining whether a prima facie case has been established will "require a continued monitoring and recording of the 'group' composition of the panel present and prospective...." *People v. Wheeler,* 22 Cal.3d 258, 294, 148 Cal.Rptr. 890, 915, 583 P.2d 748, 773 (1978) (Richardson, J., dissenting).

Even after a "record" on this issue has been created, disputes will inevitably arise. In one case, for instance, a conviction was reversed based on the assumption that no blacks were on the jury that convicted a defendant. See *People v. Motton, supra.* However, after the court's decision was announced, Carolyn Pritchett, who had served on the jury, called the press to state that the court was in error and that she was black. 71 A.B.A.J. 22 (Nov. 1985). The California court nonetheless denied a rehearing petition. [11]

The Court does not tarry long over any of these difficult, sensitive problems, preferring instead to gloss over them as swiftly as it slides over centuries of history: "[W]e make no attempt to instruct [trial] courts how best to implement ***131** our holding today." *Ante,* at 1724, n. 24. That leaves roughly 7,000 general jurisdiction state trial judges and approximately 500 federal trial judges at large to find their way through the morass the Court creates today. The Court essentially wishes these judges well as they begin the difficult enterprise of sorting out the implications of the Court's newly created "right." I join my colleagues in wishing the Nation's judges well as they struggle to grasp how to implement today's holding. To my mind, however, attention to these "implementation" questions leads quickly to the conclusion that there is no "good" way to implement the holding, let alone a "best" way. As one apparently frustrated judge explained after reviewing a case under a rule like that promulgated by the Court today, judicial inquiry into peremptory challenges

> "from case to case will take the courts into the quagmire of quotas for groups that are difficult to define and even more difficult to quantify in the courtroom. The pursuit of judicial perfection will require both trial and appellate courts to provide speculative and impractical answers to artificial questions." *Holley v. J & S Sweeping Co.,* 143 Cal.App.3d 588, 595–596, 192 Cal.Rptr. 74, 79 (1983) (Holmdahl, J., concurring) (footnote omitted).

The Court's effort to "furthe[r] the ends of justice," *ante,* at 1724, and achieve hoped-for utopian bliss may be admired, but it is far more likely to enlarge the evil "sporting contest" theory of criminal justice roundly condemned by Roscoe Pound almost 80 years ago to the day. See Pound, Causes of Popular Dissatisfaction with the Administration of Justice, August 29, 1906, reprinted in The Pound Conference: Perspectives on Justice in the Future 337 (A. Levin & R. Wheeler eds. 1979). Pound warned then that "too much of the current dissatisfaction has a just origin in our judicial organization and procedure." *Id.,* at 352. I am afraid that today's newly created constitutional right will justly give rise to similar disapproval.

***132** III

I also add my assent to Justice WHITE's conclusion that today's decision does not apply retroactively. *Ante,* at 1726 (concurring); see also *ante,* at 1731 (O'CONNOR, J., concurring). We held in ****1742** *Solem v. Stumes,* 465 U.S. 638, 643, 104 S.Ct. 1338, 1343, 79 L.Ed.2d 579 (1984), that

> " '[t]he criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.' *Stovall v. Denno,* 388 U.S. 293, 297 [87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199] (1967)."

If we are to ignore Justice Harlan's admonition that making constitutional changes prospective only "cuts this Court loose from the force of precedent," *Mackey v. United States,* 401 U.S. 667, 680, 91 S.Ct. 1160, 1174, 28 L.Ed.2d 404 (1971) (concurring in judgment), then all three of these factors point conclusively to a nonretroactive holding. With respect to the first factor, the new rule the Court announces today is not designed to avert "the clear danger of convicting the innocent." *Tehan v. United States ex rel. Shott,* 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453 (1966). Second,

it is readily apparent that "law enforcement authorities and state courts have justifiably relied on a prior rule of law...." *Solem,* 465 U.S., at 645–646, 104 S.Ct., at 1343. Today's holding clearly "overrule[s] [a] prior decision" and drastically "transform[s] standard practice." *Id.,* at 647, 104 S.Ct., at 1343–1344. This fact alone "virtually compel[s]" the conclusion of nonretroactivity. *United States v. Johnson,* 457 U.S. 537, 549–550, 102 S.Ct. 2579, 2586–87, 73 L.Ed.2d 202 (1982). Third, applying today's decision retroactively obviously would lead to a whole host of problems, if not utter chaos. Determining whether a defendant has made a "prima facie showing" of invidious intent, *ante,* at 1723, and, if so, whether the state has a sufficient "neutral explanation" for its actions, *ibid.,* essentially requires reconstructing ***133** the entire *voir dire,* something that will be extremely difficult even if undertaken soon after the close of the trial. [12] In most cases, therefore, retroactive application of today's decision will be "a virtual impossibility." *State v. Neil,* 457 So.2d 481, 488 (Fla.1984).

In sum, under our prior holdings it is impossible to construct even a colorable argument for retroactive application. The few States that have adopted judicially created rules similar to that announced by the Court today have all refused full retroactive application. See *People v. Wheeler,* 22 Cal.3d, at 283, n. 31, 148 Cal.Rptr., at 908, n. 31, 583 P.2d, at 766, n. 31; *State v. Neil, supra,* at 488; *Commonwealth v. Soares,* 377 Mass. 461, 493, n. 38, 387 N.E.2d 499, 518, n. 38, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979). [13] I therefore am persuaded by Justice WHITE's position, *ante,* at 1725–26 (concurring), that today's novel decision is not to be given retroactive effect.

IV

An institution like the peremptory challenge that is part of the fabric of our jury system should not be casually cast aside, especially on a basis not raised or argued by the petitioner. As one commentator aptly observed:

> "The real question is whether to tinker with a system, be it of jury selection or anything else, that has done the job for centuries. We stand on the shoulders of our ancestors, as Burke said. It is not so much that the past is always worth preserving, he argued, but rather that 'it is with infinite caution that any man ought to venture upon pulling down an edifice, which has answered in any tolerable degree for ages the common purposes ***134** of ****1743** society....' " Younger, Unlawful Peremptory Challenges, 7 Litigation 23, 56 (Fall 1980).

At the very least, this important case reversing centuries of history and experience ought to be set for reargument next Term.

Justice REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court states, in the opening line of its opinion, that this case involves only a reexamination of that portion of *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), concerning "the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Ante,* at 1714 (footnote omitted). But in reality the majority opinion deals with much more than "evidentiary burden[s]." With little discussion and less analysis, the Court also overrules one of the fundamental substantive holdings of *Swain,* namely, that the State may use its peremptory challenges to remove from the jury, on a case-specific basis, prospective jurors of the same race as the defendant. Because I find the Court's rejection of this holding both ill considered and unjustifiable under established principles of equal protection, I dissent.

In *Swain,* this Court carefully distinguished two possible scenarios involving the State's use of its peremptory challenges to exclude blacks from juries in criminal cases. In Part III of the majority opinion, the *Swain* Court concluded that the first of these scenarios, namely, the exclusion of blacks "for reasons wholly unrelated to the outcome of the particular case on trial ... to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population," 380 U.S., at 224, 85 S.Ct., at 838, might violate the guarantees of equal protection. See *id.,* at 222–228, 85 S.Ct., at 837–40. The Court felt that the important and historic purposes of the peremptory challenge were not furthered by the ***135** exclusion of blacks "in case after case, whatever the circumstances, whatever the crime *and whoever the defendant or the victim may be.*" *Id.,* at 223, 85 S.Ct., at 837 (emphasis added). Nevertheless, the Court ultimately held that "the record in

this case is not sufficient to demonstrate that th[is] rule has been violated.... Petitioner has the burden of proof and he has failed to carry it." *Id.,* at 224, 226, 85 S.Ct., at 838, 839. Three Justices dissented, arguing that the petitioner's evidentiary burden was satisfied by testimony that no black had ever served on a petit jury in the relevant county. See *id.,* at 228–247, 85 S.Ct., at 840–50 (Goldberg, J., joined by Warren, C.J., and Douglas, J., dissenting).

Significantly, the *Swain* Court reached a very different conclusion with respect to the second kind of peremptory-challenge scenario. In Part II of its opinion, the Court held that the State's use of peremptory challenges to exclude blacks from a particular jury based on the assumption or belief that they would be more likely to favor a black defendant does not violate equal protection. *Id.,* at 209–222, 85 S.Ct., at 829–37. Justice WHITE, writing for the Court, explained:

> "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a *real or imagined* partiality that is less easily designated or demonstrable. *Hayes v. Missouri,* 120 U.S. 68, 70 [7 S.Ct. 350, 352, 30 L.Ed. 578] [1887]. It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' *Lewis [v. United States,* 146 U.S. 370,] 376 [13 S.Ct. 136, 138, 36 L.Ed. 1011] [1892], upon a juror's 'habits and associations,' *Hayes v. Missouri, supra,* [120 U.S.,] at 70, [7 S.Ct., at 351], or upon the feeling that 'the bare questioning [a juror's] indifference may sometimes provoke a resentment,' *Lewis, supra,* [146 U.S.,] at 376 [13 S.Ct., at 138]. It is no less frequently ****1744** exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people ***136** summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.... Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, *which may include their group affiliations,* in the context of the case to be tried.
>
> With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto,* would no longer be peremptory...." *Id.,* at 220–222, 85 S.Ct., at 835–837 (emphasis added; footnotes omitted).

At the beginning of Part III of the opinion, the *Swain* Court reiterated: "We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, *the particular defendant involved* and the particular crime charged." *Id.,* at 223, 85 S.Ct., at 837 (emphasis added).

Even the *Swain* dissenters did not take issue with the majority's position that the Equal Protection Clause does not prohibit the State from using its peremptory challenges to exclude blacks based on the assumption or belief that they would be partial to a black defendant. The dissenters emphasized that their view concerning the evidentiary burden facing a defendant who alleges an equal protection claim based on the State's use of peremptory challenges "would ***137** [not] mean that where systematic exclusion of Negroes from jury service has not been shown, a prosecutor's motives are subject to question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury *in a particular case.*" *Id.,* at 245, 85 S.Ct., at 849 (Goldberg, J., dissenting) (emphasis added).

The Court today asserts, however, that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely ... on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Ante,* at 1719. Later, in discussing the State's need to establish a nondiscriminatory basis for striking blacks from the jury, the Court states that "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." *Ante,* at 1723. Neither of these statements has anything to

do with the "evidentiary burden" necessary to establish an equal protection claim in this context, and both statements are directly contrary to the view of the Equal Protection Clause shared by the majority and the dissenters in *Swain.* Yet the Court in the instant case offers absolutely no analysis in support of its decision to overrule *Swain* in this regard, and in fact does not discuss Part II of the *Swain* opinion at all.

I cannot subscribe to the Court's unprecedented use of the Equal Protection Clause to restrict the historic scope of the peremptory challenge, which has been described as "a necessary part of trial by jury." *Swain,* 380 U.S., at 219, 85 S.Ct., at 835. In my view, there is simply nothing "unequal" about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving hispanic ****1745** defendants, Asians in cases involving Asian defendants, and so ***138** on. This case-specific use of peremptory challenges by the State does not single out blacks, or members of any other race for that matter, for discriminatory treatment.[1] Such use of peremptories is at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken. But as long as they are applied across-the-board to jurors of all races and nationalities, I do not see —and the Court most certainly has not explained—how their use violates the Equal Protection Clause.

Nor does such use of peremptory challenges by the State infringe upon any other constitutional interests. The Court does not suggest that exclusion of blacks from the jury through the State's use of peremptory challenges results in a violation of either the fair-cross-section or impartiality component of the Sixth Amendment. See *ante,* at 1716, n. 4. And because the case-specific use of peremptory challenges by the State does not deny blacks the right to serve as jurors in cases involving nonblack defendants, it harms neither the excluded jurors nor the remainder of the community. See *ante,* at 1717–1718.

The use of group affiliations, such as age, race, or occupation, as a "proxy" for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges. See *Swain, supra; United States v. Leslie,* 783 F.2d 541 (CA5 1986) (en banc); *United States v. Carter,* 528 F.2d 844 (CA8 1975), cert. denied, 425 U.S. 961, 96 S.Ct. 1745, 48 L.Ed.2d 206 (1976). Indeed, given the need for reasonable ***139** limitations on the time devoted to *voir dire,* the use of such "proxies" by both the State and the defendant[2] may be extremely useful in eliminating from the jury persons who might be biased in one way or another. The Court today holds that the State may not use its peremptory challenges to strike black prospective jurors on this basis without violating the Constitution. But I do not believe there is anything in the Equal Protection Clause, or any other constitutional provision, that justifies such a departure from the substantive holding contained in Part II of *Swain.* Petitioner in the instant case failed to make a sufficient showing to overcome the presumption announced in *Swain* that the State's use of peremptory challenges was related to the context of the case. I would therefore affirm the judgment of the court below.

All Citations

476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, 54 USLW 4425

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Following the lead of a number of state courts construing their State's Constitution, two Federal Courts of Appeals recently have accepted the view that peremptory challenges used to strike black jurors in a particular case may violate the Sixth Amendment. *Booker v. Jabe,* 775 F.2d 762 (CA6 1985), cert. pending, No.

85–1028; *McCray v. Abrams,* 750 F.2d 1113 (CA2 1984), cert. pending, No. 84–1426. See *People v. Wheeler,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); *Riley v. State,* 496 A.2d 997, 1009–1013 (Del.1985); *State v. Neil,* 457 So.2d 481 (Fla.1984); *Commonwealth v. Soares,* 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979). See also *State v. Crespin,* 94 N.M. 486, 612 P.2d 716 (App.1980). Other Courts of Appeals have rejected that position, adhering to the requirement that a defendant must prove systematic exclusion of blacks from the petit jury to establish a constitutional violation. *United States v. Childress,* 715 F.2d 1313 (CA8 1983) (en banc), cert. denied, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984); *United States v. Whitfield,* 715 F.2d 145, 147 (CA4 1983). See *Beed v. State,* 271 Ark. 526, 530–531, 609 S.W.2d 898, 903 (1980); *Blackwell v. State,* 248 Ga. 138, 281 S.E.2d 599, 599–600 (1981); *Gilliard v. State,* 428 So.2d 576, 579 (Miss.), cert. denied, 464 U.S. 867, 104 S.Ct. 40, 78 L.Ed.2d 179 (1983); *People v. McCray,* 57 N.Y.2d 542, 546–549, 457 N.Y.S.2d 441, 442–445, 443 N.E.2d 915, 916–919 (1982), cert. denied, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983); *State v. Lynch,* 300 N.C. 534, 546–547, 268 S.E.2d 161, 168–169 (1980). Federal Courts of Appeals also have disagreed over the circumstances under which supervisory power may be used to scrutinize the prosecutor's exercise of peremptory challenges to strike blacks from the venire. Compare *United States v. Leslie,* 783 F.2d 541 (CA5 1986) (en banc), with *United States v. Jackson,* 696 F.2d 578, 592–593 (CA8 1982), cert. denied, 460 U.S. 1073, 103 S.Ct. 1531, 75 L.Ed.2d 952 (1983). See also *United States v. McDaniels,* 379 F.Supp. 1243 (ED La.1974).

2 The Kentucky Rules of Criminal Procedure authorize the trial court to permit counsel to conduct *voir dire* examination or to conduct the examination itself. Ky.Rule Crim.Proc. 9.38. After jurors have been excused for cause, the parties exercise their peremptory challenges simultaneously by striking names from a list of qualified jurors equal to the number to be seated plus the number of allowable peremptory challenges. Rule 9.36. Since the offense charged in this case was a felony, and an alternate juror was called, the prosecutor was entitled to six peremptory challenges, and defense counsel to nine. Rule 9.40.

3 See, *e.g.,* *Strauder v. West Virginia,* 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880); *Neal v. Delaware,* 13 Otto 370, 103 U.S. 370, 26 L.Ed. 567 (1881); *Norris v. Alabama,* 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); *Hollins v. Oklahoma,* 295 U.S. 394, 55 S.Ct. 784, 79 L.Ed. 1500 (1935) (*per curiam*); *Pierre v. Louisiana,* 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939); *Patton v. Mississippi,* 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76 (1947); *Avery v. Georgia,* 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953); *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954); *Whitus v. Georgia,* 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967); *Jones v. Georgia,* 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed.2d 25 (1967) (*per curiam*); *Carter v. Jury Comm'n of Greene County,* 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970); *Castaneda v. Partida,* 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Rose v. Mitchell,* 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979); *Vasquez v. Hillery,* 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

The basic principles prohibiting exclusion of persons from participation in jury service on account of their race "are essentially the same for grand juries and for petit juries." *Alexander v. Louisiana,* 405 U.S. 625, 626,

n. 3, 92 S.Ct. 1221, 1223, n. 3, 31 L.Ed.2d 536 (1972); see *Norris v. Alabama, supra,* 294 U.S., at 589, 55 S.Ct., at 583–584. These principles are reinforced by the criminal laws of the United States. 18 U.S.C. § 243.

4 In this Court, petitioner has argued that the prosecutor's conduct violated his rights under the Sixth and Fourteenth Amendments to an impartial jury and to a jury drawn from a cross section of the community. Petitioner has framed his argument in these terms in an apparent effort to avoid inviting the Court directly to reconsider one of its own precedents. On the other hand, the State has insisted that petitioner is claiming a denial of equal protection and that we must reconsider *Swain* to find a constitutional violation on this record. We agree with the State that resolution of petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments.

5 See *Hernandez v. Texas, supra,* 347 U.S., at 482, 74 S.Ct., at 672–73; *Cassell v. Texas,* 339 U.S. 282, 286–287, 70 S.Ct. 629, 631–32, 94 L.Ed. 839 (1950) (plurality opinion); *Akins v. Texas,* 325 U.S. 398, 403, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945); *Martin v. Texas,* 200 U.S. 316, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497 (1906); *Neal v. Delaware, supra,* 103 U.S., at 394.

6 Similarly, though the Sixth Amendment guarantees that the petit jury will be selected from a pool of names representing a cross section of the community, *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), we have never held that the Sixth Amendment requires that "petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population," *id.,* at 538, 95 S.Ct., at 702. Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society. Such impossibility is illustrated by the Court's holding that a jury of six persons is not unconstitutional. *Williams v. Florida,* 399 U.S. 78, 102–103, 90 S.Ct. 1893, 1906–1907, 26 L.Ed.2d 446 (1970).

7 See *Hernandez v. Texas, supra,* 347 U.S., at 482, 74 S.Ct., at 672–673; *Cassell v. Texas, supra,* 339 U.S., at 287, 70 S.Ct., at 632; *Atkins v. Texas, supra,* 325 U.S., at 403, 65 S.Ct., at 1279; *Neal v. Delaware, supra,* 103 U.S., at 394.

8 See *Taylor v. Louisiana, supra,* 419 U.S., at 530, 95 S.Ct., at 697–698; *Williams v. Florida, supra,* 399 U.S., at 100, 90 S.Ct., at 1905–1906. See also Powell, Jury Trial of Crimes, 23 Wash. & Lee L.Rev. 1 (1966).

In *Duncan v. Louisiana,* decided after *Swain,* the Court concluded that the right to trial by jury in criminal cases was such a fundamental feature of the American system of justice that it was protected against state action by the Due Process Clause of the Fourteenth Amendment. 391 U.S., at 147–158, 88 S.Ct., at 1446–52. The Court emphasized that a defendant's right to be tried by a jury of his peers is designed "to prevent oppression by the Government." *Id.,* at 155, 156–157, 88 S.Ct., at 1450–52. For a jury to perform its intended function as a check on official power, it must be a body drawn from the community. *Id.,* at 156, 88 S.Ct., at 1451; *Glasser v. United States,* 315 U.S. 60, 86–88, 62 S.Ct. 457, 473, 86 L.Ed. 680 (1942). By compromising the representative quality of the jury, discriminatory selection procedures make "juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities." *Akins v. Texas, supra,* 325 U.S., at 408, 65 S.Ct., at 1281 (Murphy, J., dissenting).

9 4 W. Blackstone, Commentaries 350 (Cooley ed. 1899) (quoted in *Duncan v. Louisiana,* 391 U.S., at 152, 88 S.Ct., at 1449).

10 *E.g., Sims v. Georgia,* 389 U.S. 404, 407, 88 S.Ct. 523, 525, 19 L.Ed.2d 634 (1967) (*per curiam*); *Whitus v. Georgia,* 385 U.S., at 548–549, 87 S.Ct., at 645–46; *Avery v. Georgia,* 345 U.S., at 561, 73 S.Ct., at 892.

11 See *Norris v. Alabama,* 294 U.S., at 589, 55 S.Ct., at 580; *Martin v. Texas,* 200 U.S., at 319, 26 S.Ct., at 338; *Neal v. Delaware,* 103 U.S., at 394, 397.

12 We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.

Nor do we express any views on the techniques used by lawyers who seek to obtain information about the community in which a case is to be tried, and about members of the venire from which the jury is likely to be drawn. See generally J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 183–189 (1977). Prior to *voir dire* examination, which serves as the basis for exercise of challenges, lawyers wish to know as much as possible about prospective jurors, including their age, education, employment, and economic status, so that they can ensure selection of jurors who at least have an open mind about the case. In some jurisdictions, where a pool of jurors serves for a substantial period of time, see *id.,* at 116–118, counsel also may seek to learn which members of the pool served on juries in other cases and the outcome of those cases. Counsel even may employ professional investigators to interview persons who have served on a particular petit jury. We have had no occasion to consider particularly this practice. Of course, counsel's effort to obtain possibly relevant information about prospective jurors is to be distinguished from the practice at issue here.

13 See, *e.g., Vasquez v. Hillery,* 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); *Rose v. Mitchell,* 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979); *Castaneda v. Partida,* 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Alexander v. Louisiana,* 405 U.S., at 628–629, 92 S.Ct., at 1224–1225; *Whitus v. Georgia, supra,* 385 U.S., at 549–550, 87 S.Ct., at 646–647, 17 L.Ed.2d 599 (1967); *Swain v. Alabama,* 380 U.S. 202, 205, 85 S.Ct. 824, 827–828, 13 L.Ed.2d 759 (1965); *Coleman v. Alabama,* 377 U.S. 129 (1964); *Norris v. Alabama, supra,* 294 U.S., at 589, 55 S.Ct., at 580; *Neal v. Delaware, supra,* 103 U.S., at 394.

14 The decision in *Swain* has been the subject of extensive commentary. Some authors have argued that the Court should reconsider the decision. *E.g.,* Van Dyke, *supra,* at 166–167; Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loyola (LA) L.Rev. 247, 268–270 (1973); Kuhn, Jury Discrimination: The Next Phase, 41 S.Cal.L.Rev. 235, 283–303 (1968); Note, Rethinking Limitations on the Peremptory Challenge, 85 Colum.L.Rev. 1357 (1985); Note, Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race, 39 Miss.L.J. 157 (1967); Comment, *Swain v. Alabama:* A Constitutional Blueprint for the Perpetuation of the All-White Jury, 52 Va.L.Rev. 1157 (1966). See also Johnson, Black Innocence and the White Jury, 83 Mich.L.Rev. 1611 (1985).

On the other hand, some commentators have argued that we should adhere to *Swain.* See Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md.L.Rev. 337 (1982).

15 In *Swain,* the Court reviewed the "very old credentials" of the peremptory challenge system and noted the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." 380 U.S., at 219, 85 S.Ct., at 835; see *id.,* at 212–219, 85 S.Ct., at 831–835.

16 *E.g.,* *United States v. Jenkins,* 701 F.2d 850, 859–860 (CA10 1983); *United States v. Boykin,* 679 F.2d 1240, 1245 (CA8 1982); *United States v. Pearson,* 448 F.2d 1207, 1213–1218 (CA5 1971); *Thigpen v. State,* 49 Ala.App. 233, 241, 270 So.2d 666, 673 (1972); *Jackson v. State,* 245 Ark. 331, 336, 432 S.W.2d 876, 878 (1968); *Johnson v. State,* 9 Md.App. 143, 148–150, 262 A.2d 792, 796–797 (1970); *State v. Johnson,* 125 N.J.Super. 438, 311 A.2d 389 (1973) (*per curiam*); *State v. Shaw,* 284 N.C. 366, 200 S.E.2d 585 (1973).

17 See *McCray v. Abrams,* 750 F.2d, at 1120, and n. 2. The lower courts have noted the practical difficulties of proving that the State systematically has exercised peremptory challenges to exclude blacks from the jury on account of race. As the Court of Appeals for the Fifth Circuit observed, the defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges. *United States v. Pearson,* 448 F.2d 1207, 1217 (1971). The court believed this burden to be "most difficult" to meet. *Ibid.* In jurisdictions where court records do not reflect the jurors' race and where *voir dire* proceedings are not transcribed, the burden would be insurmountable. See *People v. Wheeler,* 22 Cal.3d, at 285–286, 148 Cal.Rptr., at 908–909, 583 P.2d, at 767–768 (1978).

18 Our decisions concerning "disparate treatment" under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules. See *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion. *Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S., at 252–256, 101 S.Ct., at 1093–95.

19 Decisions under Title VII also recognize that a person claiming that he has been the victim of intentional discrimination may make out a prima facie case by relying solely on the facts concerning the alleged discrimination against him. See cases in n. 18, *supra.*

20 The Court of Appeals for the Second Circuit observed in *McCray v. Abrams,* 750 F.2d, at 1132, that "[t]here are any number of bases" on which a prosecutor reasonably may believe that it is desirable to strike a juror who is not excusable for cause. As we explained in another context, however, the prosecutor must give a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S., at 258, 101 S.Ct., at 1096.

21 In a recent Title VII sex discrimination case, we stated that "a finding of intentional discrimination is a finding of fact" entitled to appropriate deference by a reviewing court. *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Since the trial judge's findings in the context under

consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. *Id.,* at 575–576, 105 S.Ct., at 1512–1513.

22 While we respect the views expressed in Justice MARSHALL's concurring opinion concerning prosecutorial and judicial enforcement of our holding today, we do not share them. The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race. We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes. Certainly, this Court may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination. Nor do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution.

23 For example, in *People v. Hall,* 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (1983), the California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard, imposed five years earlier, were burdensome for trial judges.

24 In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, see *Booker v. Jabe,* 775 F.2d, at 773, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire, see *United States v. Robinson,* 421 F.Supp. 467, 474 (Conn.1976), mandamus granted *sub nom. United States v. Newman,* 549 F.2d 240 (CA2 1977).

25 To the extent that anything in *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), is contrary to the principles we articulate today, that decision is overruled.

* Nor would it have been inconsistent with *Swain* for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant.

1 *Commonwealth v. Martin,* 461 Pa. 289, 299, 336 A.2d 290, 295 (1975) (Nix, J., dissenting), quoted in *McCray v. New York,* 461 U.S. 961, 965, n. 2, 103 S.Ct. 2438, 2440, n. 2, 77 L.Ed.2d 1322 (1983) (MARSHALL, J., dissenting from denial of certiorari).

2 See also *Harris v. Texas,* 467 U.S. 1261, 104 S.Ct. 3556, 82 L.Ed.2d 858 (1984) (MARSHALL, J., dissenting from denial of certiorari); *Williams v. Illinois,* 466 U.S. 981, 104 S.Ct. 2364, 80 L.Ed.2d 836 (1984) (MARSHALL, J., dissenting from denial of certiorari).

3 Van Dyke, at 152, quoting Texas Observer, May 11, 1973, p. 9, col. 2. An earlier jury-selection treatise circulated in the same county instructed prosecutors: “Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.” Quoted in Dallas Morning News, Mar. 9, 1986, p. 29, col. 1.

4 *Id.,* at 1, col. 1; see also Comment, A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process, 18 St. Louis U.L.J. 662 (1974).

1 Tr. of Oral Arg. 27–28, 43.

2 Brief for United States as *Amicus Curiae* 7.

3 The argument section of the brief for the National District Attorneys Association, Inc., as *amicus curiae* in support of respondent begins as follows:

"This Court should conclude that the prosecutorial peremptory challenges exercised in this case were proper under the fourteenth amendment equal protection clause and the sixth amendment. This Court should further determine that there is no constitutional need to change or otherwise modify this Court's decision in *Swain v. Alabama.*" *Id.,* at 5.

Amici supporting petitioner also emphasized the importance of the equal protection issue. See, *e.g.,* Brief for NAACP Legal Defense and Educational Fund, American Jewish Committee, and American Jewish Congress as *Amici Curiae* 24–36; Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* 11–17; Brief for Elizabeth Holtzman as *Amicus Curiae* 13.

4 See *McCray v. New York,* 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983) (opinion of STEVENS, J., respecting denial of certiorari); *id.,* at 963, 103 S.Ct., at 2439 (MARSHALL, J., dissenting from denial of certiorari).

The eventual federal habeas corpus disposition of *McCray,* of course, proved to be one of the landmark cases that made the issues in this case ripe for review. *McCray v. Abrams,* 750 F.2d 1113 (CA2 1984), cert. pending, No. 84–1426. See also Pet. for Cert. 5–7 (relying heavily on *McCray* as a reason for review). In *McCray,* as in almost all opinions that have considered similar challenges, the Court of Appeals for the Second Circuit explicitly addressed the equal protection issue and the viability of *Swain.* 750 F.2d, at 1118–1124. The pending petition for certiorari in *McCray* similarly raises the equal protection question that has long been central to this issue. Pet. for Cert. in No. 84–1426 (Question 2). Indeed, shortly after agreeing to hear *Batson,* the Court was presented with a motion to consolidate *McCray* and *Batson,* and consider the cases together. Presumably because the Court believed that *Batson* adequately presented the issues with which other courts had consistently grappled in considering this question, the Court denied the motion. See *Abrams v. McCray,* 471 U.S. 1097, 105 S.Ct. 2318, 85 L.Ed.2d 837 (1985). Cf. *Ibid.* (BRENNAN, MARSHALL, and STEVENS, JJ., dissenting from denial of motion to consolidate).

5 Although I disagree with his criticism of the Court in this case, I fully subscribe to THE CHIEF JUSTICE's view, expressed today, that the Court should only address issues necessary to the disposition of the case or petition. For contrasting views, see, *e.g.,* *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 551, 106 S.Ct. 1326, 1336, 89 L.Ed.2d 501 (1986) (BURGER, C.J., dissenting) (addressing merits even though majority of the Court found a lack of standing); *Colorado v. Nunez,* 465 U.S. 324, 104 S.Ct. 1257, 79 L.Ed.2d 338 (1984) (concurring opinion, joined by BURGER, C.J.) (expressing view on merits even though writ was dismissed as improvidently granted because state-court judgment rested on adequate and independent state grounds); *Florida v. Casal,* 462 U.S. 637, 639, 103 S.Ct. 3100, 3101–3102, 77 L.Ed.2d 277 (1983) (BURGER, C.J., concurring) (agreeing with Court that writ should be dismissed as improvidently granted because judgment rested on adequate and independent state grounds, but noting that "the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement"). See also *Colorado v. Connelly,* 474 U.S. 1050, 106 S.Ct. 785, 88 L.Ed.2d 763 (1986) (ordering parties to address issue that neither party raised); *New Jersey v. T.L.O.,* 468 U.S. 1214 (1984) (same).

1 In *Colorado v. Connelly,* Justice BRENNAN, joined by Justice STEVENS, filed a memorandum objecting to this briefing of an additional question, explaining that "it is hardly for this Court to 'second chair' the prosecutor

to alter his strategy or guard him from mistakes. Under this Court's Rule 21.1(a), '[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court.' Given petitioner's express disclaimer that [this] issue is presented, that question obviously is not 'fairly included' in the question submitted. The Court's direction that the parties address it anyway makes meaningless in this case the provisions of this Rule and is plainly cause for concern, particularly since it is clear that a similar dispensation would not be granted a criminal defendant, however strong his claim." 474 U.S., at 1052, 106 S.Ct., at 786–87. If the Court's limited step of directing briefing on an additional point at the time certiorari was granted was "cause for concern," I would think *a fortiori* that the far more expansive action the Court takes today would warrant similar concern.

2 Justice STEVENS, joined by Justice BRENNAN and Justice MARSHALL, dissented from the order directing reargument in *New Jersey v. T.L.O.* They explained:

> "The single question presented to the Court has now been briefed and argued. Evidently unable or unwilling to decide the question presented by the parties, the Court, instead of dismissing the writ of certiorari as improvidently granted, orders reargument directed to the questions that [petitioner] decided not to bring here.... Volunteering unwanted advice is rarely a wise course of action.

. . .

"I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review." 468 U.S., at 1215–1216, 104 S.Ct., at 3584–3585.

Justice STEVENS' proffered explanation notwithstanding, see *ante,* at 1729 (concurring opinion), I am at a loss to discern how one can consistently hold these views and still reach the question the Court reaches today.

3 This fact alone distinguishes the cases cited by Justice STEVENS as support for today's unprecedented action. See *ante,* at 1730–1731, n. 5. In *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 551, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) (BURGER, C.J., dissenting), *Colorado v. Nunez,* 465 U.S. 324, 104 S.Ct. 1257, 79 L.Ed.2d 338 (1984) (WHITE, J., concurring), and *Florida v. Casal,* 462 U.S. 637, 639, 103 S.Ct. 3100, 3101–02, 77 L.Ed.2d 277 (1983) (BURGER, C.J., concurring), the issues discussed were all the primary issues advanced, briefed, and argued by the petitioners in this Court or related directly to the Court's basis for deciding the case. To be sure, some of the discussion in these separate statements might be parsimoniously viewed as "[un]necessary to the disposition of the case or petition." *Ante,* at 1730–1731, n. 5. But under this approach, many dissenting opinions and dissents from the denial of certiorari would have to be condemned as well. More important, in none of these separate statements was it even suggested that it would be proper to overturn a state-court judgment on issues that had not been briefed and argued by petitioner in this Court, as the Court does today. Finally, in *Colorado v. Connelly,* 474 U.S. 1050, 106 S.Ct. 824, 13 L.Ed.2d 759 (1986), and *New Jersey v. T.L.O.,* 468 U.S. 1214, 104 S.Ct. 3583, 82 L.Ed.2d 881 (1984), we directed briefing and argument on particular questions before deciding them. Such a procedure serves the desirable end of ensuring that the issues which the Court wishes to consider will be fully briefed and argued. My suggestion that the Court hear reargument of this case serves the same end.

4 While all these distinctions might support a claim under conventional equal protection principles, a defendant would also have to establish standing to raise them before obtaining any relief. See *Alexander v. Louisiana,* 405 U.S. 625, 633, 92 S.Ct. 1221, 1226–27, 31 L.Ed.2d 536 (1972).

5 The Court is also silent on whether a State may demonstrate that its use of peremptories rests not merely on "assumptions," *ante,* at 1723, but on sociological studies or other similar foundations. See Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md.L.Rev. 337, 365, and n. 124 (1982). For "[i]f the assessment of a juror's prejudices based on group affiliation is accurate, ... then counsel has exercised the challenge as it was intended—to remove the most partial jurors." *Id.,* at 365.

6 "[E]very jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited." *United States v. Leslie,* 783 F.2d 541, 565 (CA5 1986) (en banc).

7 One court has warned that overturning *Swain* has "[t]he potential for stretching out criminal trials that are already too long, by making the voir dire a Title VII proceeding in miniature." *United States v. Clark,* 737 F.2d 679, 682 (CA7 1984). That "potential" is clearly about to be realized.

8 It is worth observing that Congress has been unable to locate the constitutional deficiencies in the peremptory challenge system that the Court discerns today. As the Solicitor General explains in urging a rejection of the Sixth Amendment issue presented by this petition and an affirmance of the decision below, "[i]n reconciling the traditional peremptory challenge system with the requirements of the Sixth Amendment it is instructive to consider the accommodation made by Congress in the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* ... [T]he House Report makes clear that ... 'the bill leaves undisturbed the right of a litigant to exercise his peremptory challenges to eliminate jurors for purely subjective reasons.' " Brief for United States as Amicus Curiae at 20, n. 11 (quoting H.R.Rep. No. 1076, 90th Cong., 2d Sess., 5–6 (1968)), U.S.Code Cong. & Admin.News 1968, pp. 1792, 1795.

9 This question, required by *Turner* in certain capital cases, demonstrates the inapplicability of traditional equal protection analysis to a jury *voir dire* seeking an impartial jury. Surely the question rests on generalized, stereotypic racial notions that would be condemned on equal protection grounds in other contexts.

10 The California Supreme Court has attempted to finesse this problem by asserting that "discrimination is more often based on appearances than verified racial descent, and a showing that the prosecution was systematically excusing persons who appear to be Black would establish a prima facie case" of racial discrimination. *People v. Motton,* 39 Cal.3d, at 604, 217 Cal.Rptr., at 420, 704 P.2d, at 180. This suggests, however, that proper inquiry here concerns not the actual race of the jurors who are excluded, but rather counsel's subjective impressions as to what race they spring from. It is unclear just how a "record" of such impressions is to be made.

11 Similar difficulties may lurk in this case on remand. The Court states as fact that "a jury composed only of white persons was selected." *Ante,* at 1715. The only basis for the Court's finding is the prosecutor's statement, in response to a question from defense counsel, that "[i]n looking at them, yes; it's an all-white jury." App. 3.

It should also be underscored that the Court today does *not* hold that petitioner has established a "prima facie case" entitling him to any form of relief. *Ante,* at 1725.

12 Petitioner concedes that it would be virtually impossible for the prosecutor in this case to recall why he used his peremptory challenges in the fashion he did. Brief for Petitioner 35.

13 Although Delaware has suggested that it might follow a rule like that adopted by the Court today, see *Riley v. State,* 496 A.2d 997 (1985), the issue of retroactive application of the rule does not appear to have been litigated in a published decision.

1 I note that the Court does not rely on the argument that, because there are fewer "minorities" in a given population than there are "majorities," the equal use of peremptory challenges against members of "majority" and "minority" racial groups has an unequal impact. The flaws in this argument are demonstrated in Judge Garwood's thoughtful opinion for the en banc Fifth Circuit in *United States v. Leslie,* 783 F.2d 541, 558–561 (1986).

2 See, *e.g., Commonwealth v. DiMatteo,* 12 Mass.App. 547, 427 N.E.2d 754 (1981) (under State Constitution, trial judge properly rejected white defendant's attempted peremptory challenge of black prospective juror).

West's Utah Code Annotated
State Court Rules
Rules of Criminal Procedure

Utah Rules of Criminal Procedure Rule 18

Rule 18. Selection of the Jury

Currentness

(a) Method of Selection. The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following procedures for selection are not exclusive.

(1) *Strike and Replace Method.* The court shall summon the number of the jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn, as the court may direct, until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(2) *Struck Method.* The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(b) Examination of Prospective Jurors. The court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court may permit counsel or the defendant to supplement the examination by such further inquiry as it deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant. Prior to examining the jurors, the court may make a preliminary statement

of the case. The court may permit the parties or their attorneys to make a preliminary statement of the case, and notify the parties in advance of trial.

(c) Challenges to Panel or Individuals. A challenge may be made to the panel or to an individual juror.

(1) The panel is a list of jurors called to serve at a particular court or for the trial of a particular action. A challenge to the panel is an objection made to all jurors summoned and may be taken by either party.

(i) A challenge to the panel can be founded only on a material departure from the procedure prescribed with respect to the selection, drawing, summoning and return of the panel.

(ii) The challenge to the panel shall be taken before the jury is sworn and shall be in writing or made upon the record. It shall specifically set forth the facts constituting the grounds of the challenge.

(iii) If a challenge to the panel is opposed by the adverse party, a hearing may be had to try any question of fact upon which the challenge is based. The jurors challenged, and any other persons, may be called as witnesses at the hearing thereon.

(iv) The court shall decide the challenge. If the challenge to the panel is allowed, the court shall discharge the jury so far as the trial in question is concerned. If a challenge is denied, the court shall direct the selection of jurors to proceed.

(2) A challenge to an individual juror may be either peremptory or for cause. A challenge to an individual juror may be made only before the jury is sworn to try the action, except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented. In challenges for cause the rules relating to challenges to a panel and hearings thereon shall apply. All challenges for cause shall be taken first by the prosecution and then by the defense alternately. Challenges for cause shall be completed before peremptory challenges are taken.

(d) Peremptory Challenges. A peremptory challenge is an objection to a juror for which no reason need be given. In capital cases, each side is entitled to 10 peremptory challenges. In other felony cases each side is entitled to four peremptory challenges. In misdemeanor cases, each side is entitled to three peremptory challenges. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(e) Challenges for Cause. A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

(1) Want of any of the qualifications prescribed by law.

(2) Any mental or physical infirmity which renders one incapable of performing the duties of a juror.

(3) Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted.

(4) The existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because the juror is indebted to or employed by the state or a political subdivision thereof.

(5) Having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by the defendant in a criminal prosecution.

(6) Having served on the grand jury which found the indictment.

(7) Having served on a trial jury which has tried another person for the particular offense charged.

(8) Having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it.

(9) Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

(10) If the offense charged is punishable with death, the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the instructions of the court and the juror's oath in subsection (h).

(11) Because the juror is or, within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense.

(12) Because the juror has been a witness, either for or against the defendant on the preliminary examination or before the grand jury.

(13) Having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged.

(14) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

(f) Alternate Jurors. The court may impanel alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties. Alternate jurors must have the same qualifications and be selected and sworn in

the same manner as any other juror. If one or two alternate jurors are called, the prosecution and defense shall each have one additional peremptory challenge. If three or four alternate jurors are called, each side shall have two additional peremptory challenges. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

(g) Juror Oath. When the jury is selected an oath shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

Credits

[Amended effective November 1, 2001; November 1, 2007; May 1, 2017; November 1, 2018.]

Editors' Notes

ADVISORY COMMITTEE NOTES

Paragraph (b). The preliminary statement of the case does not serve the same purpose as the opening statement presented after the jury is selected. The preliminary statement of the case serves only to provide a brief context in which the jurors might more knowledgeably answer questions during voir dire. A preliminary opening statement is not required and may serve no useful purpose in short trials or trials with relatively simple issues. The judge should be particularly attuned to prevent argument or posturing at this early stage of the trial.

Paragraph (e)(14). The Utah Supreme Court has noted a tendency of trial court judges to rule against a challenge for cause in the face of legitimate questions about a juror's biases. The Supreme Court limited the following admonition to capital cases, but it is a sound philosophy even in trials of lesser consequence.

[W]e take this opportunity to address an issue of growing concern to this court. We are perplexed by the trial courts' frequent insistence on passing jurors for cause in death penalty cases when legitimate concerns about their suitability have been raised during voir dire. While the abuse-of-discretion standard of review affords trial courts wide latitude in making their for-cause determinations, we are troubled by their tendency to "push the edge of the envelope," especially when capital voir dire panels are so large and the death penalty is at issue. Moreover, capital cases are extremely costly, in terms of both time and money. Passing questionable jurors increases the drain on the state's resources and jeopardizes an otherwise valid conviction and/or sentence. ... If a party raises legitimate questions as to a potential juror's beliefs, biases, or physical ability to serve, the potential juror should be struck for cause, even where it would not be legally erroneous to refuse. State v. Carter, 888 P.2d 629 (Utah 1995).

In determining challenges for cause, the task of the judge is to find the proper balance. It is not the judge's duty to seat a jury from a too-small venire panel or to seat a jury as quickly as possible. Although thorough questioning of a juror to determine the existence, nature and extent of a bias is appropriate, it is not the judge's duty to extract the "right" answer from or to "rehabilitate" a juror. The judge should accept honest answers to understood questions and, based on that evidence, make the sometimes difficult decision to seat only those jurors the judge is convinced will act fairly and impartially. This higher duty demands a sufficient venire panel and sufficient voir dire. The trial court judge enjoys considerable discretion in limiting voir dire when there is no apparent link between a question and potential bias, but "when proposed voir dire questions go directly to the existence of an actual bias, that discretion disappears. The trial court must allow such inquiries." The court should ensure the parties have a meaningful opportunity to explore grounds for challenges for cause and to ask follow-up questions, either through direct questioning or questioning by the court.

The objective of a challenge for cause is to remove from the venire panel persons who cannot act impartially in deliberating upon a verdict. The lack of impartiality may be due to some bias for or against one of the parties; it may be due to an opinion about the subject matter of the action or about the action itself. The civil rules of procedure have a few--and the criminal rules many more--specific circumstances, usually a relationship with a party or a circumstance of the juror, from which the bias of the juror is inferred. In addition to these enumerated grounds for a challenge for cause, both the civil rules and the criminal rules close with the following grounds: formulation by the juror of a state of mind that will prevent the juror from acting impartially. However, the rules go on to provide that no person shall be disqualified as a juror by reason of having formed an opinion upon the matter if it satisfactorily appears to the court that the person will, notwithstanding that opinion, act impartially.

The amendments focus on the "state of mind" clause. In determining whether a person can act impartially, the court should focus not only on that person's state of mind but should consider the totality of the circumstances. These circumstances might include the experiences, conduct, statements, opinions, or associations of the juror. Rather than determining that the juror is "prevented" from acting impartially, the court should determine whether the juror "is not likely to act impartially." These amendments conform to the directive of the Supreme Court: If there is a legitimate question about the ability of a person to act impartially, the court should remove that person from the panel.

There is no need to modify this determination with the statement that a juror who can set aside an opinion based on public journals, rumors or common notoriety and act impartially should not be struck. Having read or heard of the matter and even having an opinion about the matter do not meet the standard of the rule. Well-informed and involved citizens are not automatically to be disqualified from jury service. Sound public policy supports knowledgeable, involved citizens as jurors. The challenge for the court is to evaluate the impact of this extra-judicial information on the ability of the person to act impartially. Information and opinions about the case remain relevant to but not determinative of the question: "Will the person be a fair and impartial juror?"

In stating that no person may serve as a juror unless the judge is "convinced" the juror will act impartially, the Committee uses the term "convinced" advisedly. The term is not intended to suggest the application of a clear and convincing standard of proof in determining juror impartiality, such a high standard being contrary to the Committee's objectives. Nor is the term intended to undermine the long-held presumption that potential jurors who satisfy the basic requirements imposed by statutes and rules are qualified to serve. Rather, the term is intended to encourage the trial judge to be thorough and deliberative in evaluating challenges for cause. Although not an evidentiary standard at all, the term "convinced" implies a high standard for judicial decision-making. Review of the decision should remain limited to an abuse of discretion.

This new standard for challenges for cause represents a balance more easily stated than achieved. These amendments encourage judges to exercise greater care in evaluating challenges for cause and to resolve legitimate doubts in favor of removal. This may mean some jurors now removed by peremptory challenge will be removed instead for cause. It may also mean the court will have to summon more prospective jurors for voir dire. Whether lawyers will use fewer peremptory challenges will have to await the judgment of experience.

Notes of Decisions (295)

Rules Crim. Proc., Rule 18, UT R RCRP Rule 18
Current with amendments received through January 1, 2026. Some rules may be more current, see credits for details.

Tab 4

Rule 14

Will Carlson:

Considering evolving service-process practices in other states and comparative inefficiencies under the current version of Utah Rules of Criminal Procedure Rule 14(a)(3) (hereafter "Rule 14(a)(3)"), I respectfully submit the following recommendations for the Advisory Committee's consideration. The goal is to modernize the service provisions for subpoenas in criminal proceedings to enhance operational efficiency while preserving due-process safeguards for witnesses and parties.

I. Background

Under current Rule 14(a)(3), service of a subpoena in criminal proceedings requires personal delivery of a copy of the subpoena to the witness (or interpreter) and notification of its contents. Moreover, the personal service requirement is further constrained by requiring by requiring the service be completed by a peace officer from within the county where it is served. This rigid personal-delivery format can pose operational challenges: locating witnesses in remote areas, coordinating service across counties (or states), handling witness availability issues, and increased cost/time burdens on criminal law offices, both prosecution and defense. Given that other jurisdictions permit substituted or alternative methods of service (e.g., leaving at dwelling address, mailing, or emailing), there is a mismatch between the criminal subpoena service rule and practical realities.

II. Recommendation for Rule Revision

I recommend that the Committee consider one or more of the following changes to Rule 14(a)(3):

1. **Amend the service-method language** to permit, in addition to personal delivery by law enforcement, substituted service (e.g., service by a non-party other than law enforcement, leaving the subpoena at the witness's usual place of abode or business with a person of suitable age and discretion, mailing a copy, email, and verbal service are all used various forms in other states).
2. **Clarify return/proof of service requirements**: Require that the server (or process server) execute a written return specifying date/time, method of service (personal vs substituted), address of service, and identity of person served (or with whom left).
3. **Consider a safe-harbor, waiver, or motion to approve alternative service clause**: For witness service across county lines, or where unsuccessful attempts at personal service have been made, permit a waiver of personal service, or a filing

with the court requesting approval of alternative method of service with the court retaining discretion to approve. The Committee should consider whether to require "reasonable diligence" (e.g., two service attempts at different times/days) before substituted service applies.

4. **Maintain witness protection and perception of fairness**: While relaxing methods, continue to require that the witness be informed of the contents of the subpoena (as currently required) and given reasonable time to respond or raise objections, thereby preserving due-process integrity.

III. Rationale for Change

- Efficiency gains: By allowing substituted service in appropriate cases, service can be effected faster and more reliably, reducing delays and motion practice over service defects.

- Alignment with civil practice: Permitting more flexible methods brings criminal subpoena service in Utah into closer alignment with civil practice within the state and with practices in other states, thereby simplifying cross-system workflows.

- Preservation of rights: The proposed changes would not eliminate personal service as a method, they simply recognize substitute methods in a digital era. The core protections (notification of contents, right to object or motion, return of service) remain intact.

- Practical need in rural/remote contexts: Utah's geography and inter-county witness logistics make rigid personal-delivery burdensome-flexible service methods reduce risk of service failure and hearing/trial continuances.

- Reduction of service-related litigation: Clearer rule language permitting substituted methods should reduce contested hearings over "service was invalid" issues and free court and party resources for substantive issues rather than technical service disputes.

Incorporating a more flexible service framework in Rule 14(a)(3) will enhance the practicality of subpoena service in criminal proceedings in Utah while maintaining essential fairness and witness rights.

Rule 14(a)(3). Service of Subpoenas

Current Version:

(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.

Revision 1: Expand Methods of Service

(a)(3) A subpoena's delivery must include notification of the contents of the subpoena. Subpoenas may be served by:

(A) reading the subpoena in the hearing of the witness;

(B) electronically transmitting a copy of the subpoena, acknowledgment of receipt requested, to the last known electronic address or mobile number of the witness;

(C) sending a copy by mail or commercial courier services provided the witness signs a document indicating receipt; or

(D) delivering a copy personally by any person over the age of 18 years who is not a party or by a peace officer. ~~Service must be made by delivering a copy of the subpoena to the witness or interpreter personally and~~Personal delivery must include 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~~ method of service ~~and by whom service was made~~.

Revision 2: Allow Waivers of Service

(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) A subpoena to require attendance may also be served by electronic or first-class mail, postage prepaid, together with a waiver of personal service and instructions for returning such waiver to the attorney of record of the party to the action in whose behalf the witness is required to appear. Service by mail shall be deemed complete upon the filing of the returned waiver of personal service, signed in affidavit or declaration form

(a)(5) 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~~ method of service ~~and by whom service was made~~.

Revision 3: Allow Substituted Service After Reasonable Diligence

(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) If a person attempting service of a subpoena has been unsuccessful after two service attempts are made at different times and days, substituted service may be completed by:

(A) reading the subpoena in the hearing of a witness;

(B) electronically transmitting a copy of the subpoena, acknowledgment of receipt requested, to the last known electronic address or mobile number of the witness; or

(C) sending a copy by mail or commercial courier services.

(a)(5)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, and whether substituted service was completed.

Tab 5

UTAH JUDICIARY

Keisa Williams <keisaw@utcourts.gov>

Crim Rules Committee - URCrP 22

Lori Seppi <lseppi@sllda.com> Fri, Nov 14, 2025 at 1:57 PM
To: Keisa Williams <keisaw@utcourts.gov>, William Carlson <wcarlson@saltlakecounty.gov>

Hi Keisa and Will,

For an upcoming committee meeting, could you please put rule 22 on the agenda? In State v. James, Justice Hagen (joined by Chief Justice Durrant) invited us to discuss whether rule 22 should be amended to require a district court judge to personally invite a defendant to allocute at sentencing and to require a new sentencing hearing if the defendant's right to allocute is violated. I'm happy to put together some proposed language if that would be helpful. I've attached the opinion.

Thanks!

Lori

Lori J. Seppi

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State v. James 20251113.pdf
364K

This opinion is subject to revision before final publication in the Pacific Reporter

2025 UT 53

IN THE

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Petitioner,

v.

FRANKLIN JAMES,
Respondent.

No. 20230883
Heard December 11, 2024
Filed November 13, 2025

On Certiorari to the Utah Court of Appeals

Third District Court, Salt Lake County
The Honorable Randall N. Skanchy
No. 201914105

Attorneys:

Derek E. Brown, Att'y Gen., Daniel W. Boyer, Asst. Solic. Gen., Salt Lake City, for petitioner

Erick Grange, Salt Lake City, for respondent

ASSOCIATE CHIEF JUSTICE PEARCE authored the opinion of the Court, in which JUSTICE PETERSEN and JUSTICE POHLMAN joined.

JUSTICE HAGEN authored a dissenting opinion, in which CHIEF JUSTICE DURRANT joined.

JUSTICE PEARCE, opinion of the Court:

INTRODUCTION

¶1 As part of a plea bargain, Franklin James pleaded guilty to multiple felony counts. In exchange, the State dropped several charges against James and agreed to recommend probation. The district court rejected that recommendation and sentenced James to prison. Our court of appeals reversed for a new sentencing

proceeding because James was not invited to allocute—that is, to personally address the district court prior to sentencing. Although James did not ask the court for the opportunity to speak, our court of appeals nevertheless concluded that the district court's error merited reversal under our plain error test. To reach this result, the court of appeals borrowed a holding from the United States Court of Appeals for the Tenth Circuit that defendants may shoulder their burden of demonstrating prejudice by showing that the district court failed to offer them the opportunity to allocute. We decline to adopt such a rule. The Tenth Circuit based its holding on data from federal sentencing proceedings. Whatever the implications of that data, they do not carry over to Utah's sentencing regime, which differs in important ways from its federal counterpart. Accordingly, we reverse and remand the case for the court of appeals to consider James's remaining challenge to his sentence—that the district court abused its discretion in sentencing him to prison.

BACKGROUND

¶2 A police search of Franklin James's apartment turned up illegal drugs, drug paraphernalia, and firearms. The State originally charged James with eleven counts of various drug- and firearm-related offenses. Later, in exchange for a guilty plea on three of those counts, the State agreed to drop the other charges. As part of the same deal, the parties agreed to "jointly recommend that the prison sentences be run concurrent to each other and suspended" in favor of probation. The parties recommended probation over prison in part to enable James to receive treatment for drug addiction. Before his change of plea hearing, James wrote two letters to the district court expressing remorse for his actions.

¶3 At that hearing, the district court expressed skepticism about the parties' recommendation, noting that James was "not the sort of person" the court typically sent to "a therapeutic community without some . . . compelling reason." To aid in its decision, the court requested a presentence investigation report from Adult Probation and Parole (AP&P).

¶4 AP&P's recommendation largely tracked that of the parties. AP&P endorsed supervised release to a residential treatment facility as soon as a bed opened, with prison until that time or until James had served a total of 300 days (including time served while awaiting his sentence).

¶5 Both parties spoke in favor of AP&P's recommendation at sentencing. James's attorney argued that James's "eloquent" letters,

the support of community members, and the approval of the target recovery facility all weighed in favor of accepting the presentence report. The State agreed and called James's addiction recovery "an investment worth taking."

¶6 The district court disagreed. It sentenced James to prison for the indeterminate terms set by statute, with the sentences to run concurrently. The court pointed to James's extensive criminal history to explain its decision. It also noted its belief that treatment for drug addiction would be "accessible and available" to James in prison.

¶7 At no time during the sentencing proceeding did the district court ask James to speak. Nor did James ask to address the court.

¶8 James appealed his sentence. Before the court of appeals, he argued that the district court violated his constitutional and statutory right to allocution when the court failed to ask him to speak before delivering its sentence. James further argued that the district court abused its discretion by ignoring the unanimous recommendation of the State, the defendant, and AP&P.

¶9 The court agreed with James's allocution argument and vacated his sentence. *See State v. James*, 2023 UT App 80, ¶ 1, 536 P.3d 31. Because the allocution argument was unpreserved, the court of appeals reviewed it for plain error. *See id.* ¶¶ 7–8. A defendant must ordinarily show three things to establish plain error: (1) an error occurred; (2) the error should have been obvious to the district court; and (3) the error was prejudicial—that is, there is a reasonable probability that the error affected the outcome of the proceedings. *See id.* ¶¶ 7, 22 n.5.

¶10 The court of appeals held that the district court made an obvious error when it failed to "afford [James] an opportunity to make a statement and to present any information in mitigation of punishment" before imposing sentence. *Id.* ¶ 18 (quoting UTAH R. CRIM. P. 22(a)); *see State v. Wanosik*, 2003 UT 46, ¶ 20, 79 P.3d 937 (recognizing allocution as "an inseparable part of the right to be present" under the state constitution (cleaned up)). This satisfied the first two elements of plain error.

¶11 The court of appeals then held that James had proved the third element by proving the first two. That is, the court of appeals held that defendants "necessarily demonstrate[]" prejudice merely by establishing a violation of their right to allocution, *James*, 2023 UT App 80, ¶ 22 (cleaned up)—unless they already received "the lightest possible sentence" or some other "extraordinary circumstance"

applies, *id.* ¶ 24 (cleaned up). Where James's case did not reflect any extraordinary circumstance, he demonstrated prejudice by showing that the court did not, on its own initiative, invite him to allocute. *See id.* ¶ 27.

¶12 To reach that result, our court of appeals adopted the United States Court of Appeals for the Tenth Circuit's approach, as articulated in *United States v. Bustamante-Conchas*, 850 F.3d 1130 (10th Cir. 2017) (en banc). *James*, 2023 UT App 80, ¶ 22. *Bustamante-Conchas* determined that a reasonable probability exists that allocution matters in "the usual case." 850 F.3d at 1139. Following the lead of a then-recent United States Supreme Court case, *Bustamante-Conchas* permitted defendants to substitute a statistical probability that an error mattered to the outcome of a proceeding for a case-specific showing of prejudice. *See id.* (discussing *Molina-Martinez v. United States*, 578 U.S. 189 (2016)).

¶13 Because the court of appeals resolved the case on James's allocution claim, it did not reach his abuse-of-discretion argument. *See James*, 2023 UT App 80, ¶ 7 n.1.

ISSUE AND STANDARD OF REVIEW

¶14 We granted certiorari to determine whether "the [c]ourt of [a]ppeals erred when it concluded that [James] had necessarily demonstrated prejudice when he established that the district court had denied his right to allocution." "On a writ of certiorari, we review the decision of the court of appeals, not that of the district court, and apply the same standards of review used by the court of appeals. We conduct that review for correctness, ceding no deference to the court of appeals." *State v. Gallegos*, 2020 UT 19, ¶ 31, 463 P.3d 641 (cleaned up).

ANALYSIS

¶15 We begin by clarifying the question presented for our review. Our court of appeals left some doubt as to which of two possible tests it meant to adopt from the Tenth Circuit. That ambiguity trickles down to the parties' arguments. We believe the test the Tenth Circuit adopted—and the one for which we granted certiorari review—is that, when a failure to allocute is on the line, the mere existence of the error can suffice to demonstrate prejudice.

¶16 We next address the State's argument that our caselaw prevents us from adopting this test and conclude that it does not. But we need not decide whether to adopt the test in this appeal because, as we next explain, state-level allocution errors do not meet the

preconditions of the Tenth Circuit's test. Because of differences between state and federal sentencing regimes, we are skeptical that a reasonable probability exists that allocution errors change the outcome of the typical Utah sentencing proceeding.

¶17 Finally, we conclude that James has presented no case-specific evidence of prejudice.

I. THE QUESTION UNDER REVIEW

¶18 The State argues that the court of appeals erred when it adopted the Tenth Circuit Court of Appeals' approach to prejudice related to unpreserved allocution errors. But before we address the merits of that contention, we must clarify what exactly the Tenth Circuit's approach is. The State characterizes it in at least three ways: (1) as "do[ing] away with harmlessness analysis altogether"; (2) as creating a presumption of prejudice; and (3) as establishing that defendants "necessarily demonstrate[] harm" by establishing a denial of the right to allocution.

¶19 Each of these purported glosses on the Tenth Circuit's approach describes a distinct exception to the ordinary standard of plain error prejudice. While federal courts have made use of all three exceptions, only one—the third—maps onto the rule the Tenth Circuit set forth in *United States v. Bustamante-Conchas*, 850 F.3d 1130 (10th Cir. 2017) (en banc). A close reading of *Bustamante-Conchas* illustrates this point. But to properly understand *Bustamante-Conchas*, we must first chart the firmament of federal plain error review in which that decision resides.

A. The Federal Plain Error Standard

¶20 The "starting point" for understanding the federal plain error standard is the United States Supreme Court's decision in *United States v. Olano*, 507 U.S. 725 (1993). *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016). *Olano* divided plain error review into "four steps, or prongs." *Puckett v. United States*, 556 U.S. 129, 135 (2009). First, there must have been an error in the district court proceedings, with "error" defined as an un-waived deviation from a legal rule. *See Olano*, 507 U.S. at 732–34. Second, the error must be plain, or "clear under current law." *Id.* at 734; *see also Henderson v. United States*, 568 U.S. 266, 273 (2013) (clarifying that the error need only be plain as of "the time of appellate review"). Third, the error must "affect substantial rights." *Olano*, 507 U.S. at 734 (cleaned up) (citing rule 52(b) of the Federal Rules of Criminal Procedure). "[I]n most cases," this third prong "means that the error must have been

prejudicial." *Id*. Finally, if the first three prongs are present, a court of appeals may exercise its discretion to correct the error. *Id.* at 735–36. It should exercise this discretion only where the error is one that "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id*. at 736 (cleaned up); *Puckett*, 556 U.S. at 135.

¶21 We pause to say a few more words about the prejudice requirement, since that is at issue in this appeal. Which party bears the burden of persuasion is "one important difference" separating the standards for preserved and unpreserved error in the federal system. *Olano*, 507 U.S. at 734. When an error is preserved, the government generally bears the burden of persuading an appellate court that the error was harmless. *Molina-Martinez*, 578 U.S. at 202–03. When an error is unpreserved, however, the burden shifts to the defendant to demonstrate "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different."[1] *United States v. Dominguez Benitez*, 542 U.S. 74, 81–82 (2004) (cleaned up).

¶22 The Supreme Court has emphasized that it is—and "should be"—difficult to establish plain error. *Puckett*, 556 U.S. at 135 (cleaned up). This policy flows from the standard's "careful balancing of [the] need to encourage all trial participants to seek a fair and accurate trial the first time around against [the] insistence that obvious injustice be promptly redressed." *Johnson v. United States*, 520 U.S. 461, 466 (1997) (cleaned up). The rigor of the plain error test induces "the timely raising of claims and objections" before the district court. *Puckett*, 556

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[1] Allocation of the burden of persuasion on the prejudice prong is not the only difference separating the treatment of preserved and unpreserved error under the federal standard. *See United States v. Olano*, 507 U.S. 725, 734 (1993). Another is the "distinction between automatic and discretionary reversal," with preserved error subject to automatic reversal (if not show to be harmless) and unpreserved error subject to appellate court discretion under the fourth prong of *Olano*. *Id.* at 744 (Stevens, J., dissenting).

In Utah, we have not differentiated between preserved and unpreserved claims as sharply. Except when an error is "of constitutional dimension," the defendant bears the burden of demonstrating harm on appeal, regardless of preservation. *State v. Leech*, 2020 UT App 116, ¶ 43 n.7, 473 P.3d 218; *see also State v. Reece*, 2015 UT 45, ¶ 33, 349 P.3d 712. Utah also lacks a corollary to the discretionary fourth element of the federal test. *State v. Bond*, 2015 UT 88, ¶ 42 n.15, 361 P.3d 104.

U.S. at 134. This is desirable because district courts can address errors in the first instance and can, unlike appellate courts, correct errors before they are able to "affect the ultimate outcome." *See id.* Additionally, the difficulty of demonstrating plain error discourages litigants from "sandbagging the court—remaining silent about [their] objection[s] and belatedly raising the error only if the case does not conclude in [their] favor." *Id.* (cleaned up); *see also id.* at 140 ("Requiring [contemporaneous] objection means the defendant cannot 'game' the system, waiting to see if the sentence later strikes him as satisfactory." (cleaned up)).

¶23 The Supreme Court has "repeatedly cautioned" against the creation of "unjustified exception[s]" to plain error review, *id*. at 135–36, or to any of its component prongs, *see id*. at 141. Indeed, even some "essential" and "highly desirable" features of criminal procedure are not so essential or desirable as to trump the defendant's "usual burden of showing prejudice." *Id*. (cleaned up).

¶24 Nevertheless, federal courts have recognized three exceptions that can justify relieving a defendant from the requirement of making a case-specific showing of prejudice. First, "a special category of forfeited errors . . . can be corrected regardless of their effect on the outcome" because the errors are not amenable to harmless-error review. *Olano*, 507 U.S. at 735. Second, some errors "should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Id.* Third, for some errors, "the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez*, 578 U.S. at 198.

1. Structural Errors

¶25 Since *Olano*, the Court has continued to entertain the possibility that some errors can "automatically satisfy the third prong of the plain error test." *See Puckett*, 556 U.S. at 140 (collecting cases). Most often, the Court has linked this exception to the concept of "structural error" articulated in *Arizona v. Fulminante*, 499 U.S. 279 (1991). *See Puckett*, 556 U.S. at 140–41. *Fulminante* divided constitutional errors into trial and structural types. 499 U.S. at 309–10. Structural errors differ from trial errors in that they "defy analysis by 'harmless-error' standards" because they affect "[t]he entire conduct of the trial from beginning to end" or "the framework within which the trial proceeds." *Id.* at 309–10. Put differently, they "transcend[] the criminal process." *Id.* at 311. Errors deemed structural include total deprivation of the right to counsel, lack of an

impartial trial judge, unlawful exclusion of grand jurors of the defendant's race, denial of the right to self-representation at trial, denial of the right to a public trial, and an erroneous reasonable-doubt jury instruction. *See Johnson*, 520 U.S. at 468–69.

¶26 *Fulminante* identified two primary hallmarks of structural error: (1) a lack of comparable, admissible evidence against which to measure the effect of the error; and (2) a tendency for the error to compromise the trial's reliability "as a vehicle for determination of guilt or innocence," such that it is difficult to regard any criminal punishment as "fundamentally fair." 499 U.S. at 307–08, 310 (cleaned up). The Court has since suggested structural errors need not carry both hallmarks as long as they bear one—or if there is some other compelling reason to deem an error structural. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006). In some cases, the Court has "rest[ed] [its] conclusion" solely on "the difficulty of assessing the effect of the error," while in others fundamental unfairness was the dominant consideration. *Id.* Still others have relied on the "irrelevance of harmlessness." *Id.*

¶27 The Court has also explained that its approach to structural error tends to be "categorical." *Neder v. United States*, 527 U.S. 1, 14 (1999). That is, for an error to qualify as structural, it must "produce[] consequences that are *necessarily* unquantifiable and indeterminate," *id*. at 11 (emphasis added), or "*necessarily* render a criminal trial fundamentally unfair," *id*. at 9. These are the sort of errors that "deprive defendants of 'basic protections' without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair." *Id.* at 8–9 (cleaned up). In so holding, the Court rejected a proposal to divide a single kind of constitutional error into trial and structural subtypes based on an initial factual determination, explaining that the proposal was incompatible with the concept of structural error. *See id*. at 13–14 (criticizing a party for "import[ing] into the initial structural-error determination . . . a case-by-case approach that is more consistent with our traditional harmless-error inquiry").

¶28 As noted, the Court has in several cases considered the claim that structural errors should be exempt from the plain error standard's prejudice inquiry. *Puckett*, 556 U.S. at 140 (collecting cases). However, in each case, the Court rejected the argument that the constitutional violation at issue was structural, obviating any need to rule on the ultimate question. *See id.* at 140–41.

2. Errors Entitled to a Presumption of Prejudice

¶29 In contrast to its frequent discussion of a potential relationship between structural error and the prejudice requirement of plain error, the Court has not revisited the possibility of presuming prejudice post-*Olano*. Several circuit courts, however, have adopted such presumptions. To determine whether a presumption of prejudice is appropriate, courts have typically looked to (1) whether "the inherent nature of the error [makes] it exceptionally difficult for the defendant to demonstrate" prejudice, *United States v. Barnett*, 398 F.3d 516, 526–27 (6th Cir. 2005), and sometimes also (2) whether the error affects an important right, such that the trial or sentencing process has been rendered "presumptively unreliable" or has had its "legitimacy . . . called into question," *United States v. Adams*, 252 F.3d 276, 288 (3d Cir. 2001).

¶30 Astute readers may notice these are similar to the criteria most often used to distinguish between trial and structural error. *See supra* ¶ 26; *cf. Gonzalez-Lopez*, 548 U.S. at 149 n.4. Despite that important overlap between the two inquiries, however, the question of whether to presume prejudice differs in several important ways from a structural error determination. First, structural errors are a subset of constitutional errors, whereas the presumption of prejudice can cover non-constitutional errors as well. *See Adams*, 252 F.3d at 288. Second, errors presumed prejudicial need not have a pervasive, all-encompassing effect on the proceedings—there is no requirement that the errors affect "[t]he entire conduct of the trial from beginning to end" or "the framework within which the trial proceeds." *See Fulminante*, 499 U.S. at 309–10.

¶31 Third, the presumption of prejudice is not always categorical. *Compare Neder*, 527 U.S. at 14, *with Adams*, 252 F.3d at 287 n.10. Some errors to which the presumption has been applied are not capable of causing prejudice in every case. For example, some courts have reasoned that when a judge hands down the lowest permissible sentence, there is no possibility that exercise of the right to allocution could have produced a lower sentence. *See, e.g.*, *Adams*, 252 F.3d at 287 n.10 ("[W]hen the defendant is sentenced at the bottom of a Guidelines range, there is [generally] no opportunity for a violation of the right of allocution to have played a role in the district court's sentencing decision . . . ."); *United States v. Reyna*, 358 F.3d 344, 351 n.6 (5th Cir. 2004) (en banc) ("[Several circuits] have concluded that resentencing is not required if the defendant received the lowest possible sentence at the bottom of the guideline range and no

arguments were made to the sentencing court that the range was incorrect for any reason."). Accordingly, depending on the right at issue, a defendant may need to make a threshold showing that the right "*could have*" influenced the outcome of the proceedings had it been properly exercised. *See United States v. Luepke*, 495 F.3d 443, 451 (7th Cir. 2007); *see also, e.g.*, *Adams*, 252 F.3d at 287 ("[W]e should presume prejudice when a defendant shows a violation of the right [to allocution] *and* the opportunity for such a violation to have played a role in the district court's sentencing decision."); *Barnett*, 398 F.3d at 529 (presuming prejudice where a "distinct possibility" existed that the defendant might have received a lesser sentence absent the error).

¶32 Flowing from this non-categorical approach, many courts permit the government to offer evidence to rebut the presumption of prejudice—effectively shifting the burden to the government to prove any error was harmless. *See, e.g.*, *United States v. Greenspan*, 923 F.3d 138, 156–57 (3d Cir. 2019) (specifying that the presumption of prejudice is rebuttable); *United States v. Syme*, 276 F.3d 131, 154–55 (3d Cir. 2002) (same); *Barnett*, 398 F.3d at 529 (same). As the Sixth Circuit explained, "while an appellate court will normally be unable to assess the significance of any . . . error that might have been made, we can imagine cases where the trial record contains clear and specific evidence" that exercise of the right would not have made a difference. *Barnett*, 398 F.3d at 529 (cleaned up).

3. Errors That Demonstrate Prejudice by Themselves

¶33 While the Supreme Court has yet to ratify either *Olano* exception, it did adopt a quasi-exception to plain error prejudice in *Molina-Martinez*, 578 U.S. 189. *Molina-Martinez* dealt with a challenge to a criminal sentence calculated under an incorrect guidelines range. *See id.* at 191. Under the federal sentencing scheme, the United States Probation Office calculates a sentencing range based on the Federal Sentencing Guidelines and factors described in rule 32 of the Federal Rules of Criminal Procedure. *See id.* at 193. The district court must consult this Guidelines range but retains discretion to depart from it. *Id.*

¶34 The question in *Molina-Martinez* was whether a defendant could demonstrate plain-error prejudice when the Probation Office calculated the incorrect Guidelines range and the district court handed down a sentence within that range. *See id.* at 194–95. The United States Court of Appeals for the Fifth Circuit held that Molina-Martinez could not demonstrate prejudice because he had not

pointed to any "additional evidence" in the record that "the Guidelines range was a primary factor in sentencing"—such as a statement from the judge to that effect. *Id.* at 197 (cleaned up).

¶35 On appeal to the Supreme Court, Molina-Martinez argued that Guidelines errors should be subject to a presumption of prejudice under *Olano*. Brief for Petitioner at 13, Molina-Martinez v. United States, 578 U.S. 189 (2016) (No. 14-8913), 2015 WL 7294866. Molina-Martinez's understanding of *Olano* differed somewhat from that of many federal circuits. He agreed that to qualify for a presumption of prejudice, an error must be of such a type that a defendant will likely not be able to make "a specific showing of prejudice." *Id.* at 12 (quoting *Olano*, 507 U.S. at 735). But in his view, something more was required. He argued that "any presumption of harm should be based upon empirical evidence and experience that the 'natural effect' of a particular type of error is to affect substantial rights." *Id.* at 27 (citing *Shinseki v. Sanders*, 556 U.S. 396, 411 (2009) and *Kotteakos v. United States*, 328 U.S. 750, 765–66 (1946)). Molina-Martinez accordingly marshalled empirical evidence to argue that Guidelines errors affect the typical federal sentence. *Id.* at 31–38.

¶36 The Supreme Court ruled in Molina-Martinez's favor and adopted his empirical mode of reasoning—but it pointedly refused to describe its approach as a presumption. It held that "[w]hen a defendant is sentenced under an incorrect Guidelines range . . . *the error itself* can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez*, 578 U.S. at 198 (emphasis added). The Court based this rule on its view that the Federal Sentencing Guidelines exercise a "real and pervasive effect" on sentencing outcomes. *Id.* at 199. Although federal sentencing is ultimately discretionary, the Guidelines "anchor the district court's discretion." *Id.* at 198–99 (cleaned up). District courts "understand that they *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Id.* at 198 (cleaned up). Thus, as a general matter, the Guidelines are "not only the starting point for most federal sentencing proceedings but also the lodestar." *Id.* at 200. Taking up Molina-Martinez's invitation, the Court relied on statistics to support its conclusion, noting that, in the preceding decade, more than 80% of federal sentences fell within the recommended Guidelines range absent a government motion for a sentence outside of that range. *Id.* at 199.

¶37 Accordingly, the Court held that "[a]bsent unusual circumstances," a defendant may "satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder." *Id.* at 201. The government remains free to point to record evidence to "counter" the defendant's "ostensible" prejudice showing. *Id.* at 200–01 (cleaned up). But where "the record is silent," the defendant will prevail—at least "in most instances." *Id.* at 201. The Court concluded that this rule was necessary because in "a significant number of cases the sentenced defendant will lack" specific evidence of the judge's thought process. *Id.* In other words, it will typically be difficult for a defendant to prove prejudice flowing from Guidelines errors using record evidence. *See id.*

¶38 *Molina-Martinez* fits somewhat uneasily within the Court's plain error jurisprudence. On the one hand, it conceived of defendants as satisfying their burden to show prejudice, *see id*. at 201, rather than, as under the *Olano* categories, qualifying for a presumption that shifts the prejudice burden to the government or else provides a categorical exemption from harmlessness review, *see id*. at 203. On the other hand, *Molina-Martinez* recognized that allowing "the error itself" to speak to prejudice had the effect of awarding "most" ties—cases where "the record is silent"—to the defendant. *Id*. at 198–99, 201. Despite the Court's caveat limiting the implications of a silent record to "most" cases, it is not readily apparent how the government *could* counter the systemic likelihood of prejudice from Guidelines error without direct evidence. Nevertheless, *Molina-Martinez* insisted that its holding did not amount to a burden-shifting presumption but merely foreclosed operation of "a categorical rule" against demonstrating prejudice through non-record evidence. *See id.* at 203.

B. Plain Error and the Right to Allocute in the Federal Circuits

¶39 The majority of federal circuits have declined to require the ordinary prejudice showing from defendants on plain error review of denial of the right to allocution. *See United States v. Bustamante-Conchas*, 850 F.3d at 1137–38 (collecting cases). But their approaches differ. Some circuits apply a tradition of per se reversal that predates *Olano* and thus does not situate the exception within more recent plain error jurisprudence. *See, e.g.*, *United States v. De Alba Pagan*, 33 F.3d 125, 129–30 (1st Cir. 1994) (tracing per se reversal back to a 1689 English common law decision); *see also Adams*, 252 F.3d at 285 n.7 (collecting cases).

¶40 Other circuits employ some version of the *Olano* presumption. *See, e.g.*, *Adams*, 252 F.3d at 287; *United States v. Haygood*, 549 F.3d 1049, 1055 (6th Cir. 2008). These circuits have tended to ground this result in "the nature of the right" to allocution and "the difficulty of proving prejudice from its violation." *Adams*, 252 F.3d at 287. On the nature of the right, the Third Circuit reasoned that allocution is "the type of important safeguard" without which a sentencing proceeding's "legitimacy is called into question." *Id.* at 288. To deny the right of allocution is "tantamount to denying [a defendant's] . . . most persuasive and eloquent advocate," *id.*, because, as a plurality of the Supreme Court once put it, "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself," *id*. (quoting *Green v. United States*, 365 U.S. 301, 304 (1961) (plurality opinion)). A sentence rendered without the benefit of a defendant's "unique perspective on the circumstances relevant to his sentence, delivered by his own voice," is, some circuits have concluded, "presumptively unreliable." *Id*.

¶41 Relative to the difficulty of proving prejudice, various circuits have noted that "the impact of the omission [of allocution] on a judge's discretionary sentencing decision is usually enormously difficult to ascertain." *Id*. at 288 (cleaned up); *accord Reyna*, 358 F.3d at 351 (concluding that a defendant would have an "onerous burden" establishing prejudice under the traditional standard); *Haygood*, 549 F.3d at 1055 (explaining that "prejudice is effectively presumed when allocution is overlooked because of the difficulty in establishing that the allocution error affected the outcome of the district court proceedings" (cleaned up)); *Luepke*, 495 F.3d at 451 (noting "the immense practical difficulty facing a defendant who otherwise would have to attempt to prove that a violation affected a specific sentence").

¶42 Many of these decisions posit a correlation between a sentencing court's degree of discretion and a defendant's ability to demonstrate prejudice: generally speaking, the greater a court's discretion, the harder it will be for a defendant to prove prejudice. *See, e.g.*, *Adams*, 252 F.3d at 287; *Luepke*, 495 F.3d at 451. The Seventh Circuit drew out this relationship the most explicitly. It noted that the argument for presuming prejudice stemming from allocution errors "ha[d] even more to recommend it" in the wake of a Supreme Court decision that rendered the federal sentencing Guidelines advisory. *Luepke*, 495 F.3d at 451 (discussing *United States v. Booker*, 543 U.S. 220 (2005)). That decision left district courts to the

"reasonable exercise of [their] discretion" in sentencing. *See id.* Under such a regime, the Seventh Circuit reasoned, it is "almost impossible" to determine the likely effect of a hypothetical allocution statement on sentencing. *Id.*

¶43 The Tenth Circuit charted a different course in *Bustamante-Conchas*. Prior to that decision, the Tenth Circuit treated allocution errors as either per se or presumptively prejudicial. 850 F.3d at 1138. However, it came to view these descriptors as "technically inaccurate." *Id.* at 1139. Instead, it reconceived its approach under a framework inspired by *Molina-Martinez*, holding that "a defendant who shows he has been denied the right to allocute has *met his burden* of demonstrating prejudice absent some extraordinary circumstance." *Id.* (emphasis added).

¶44 *Bustamante-Conchas* mirrored *Molina-Martinez* every step of the way. Where the latter cited statistics showing more than 80% of federal sentences fall within the recommended Guidelines range (absent a government motion to depart from it), 578 U.S. at 199, the former cited a survey that found that over 80% of federal district judges consider allocution "at least 'somewhat important' in arriving at a final sentence," 850 F.3d at 1139 (citation omitted). Just as *Molina-Martinez* reasoned that the "ordinary" impact of the Guidelines range on sentencing may substitute for a more direct showing of prejudice, so *Bustamante-Conchas* held that the likelihood that allocution matters in "the usual case" may satisfy the prejudice requirement without additional, case-specific evidence. *See id.*

¶45 *Bustamante-Conchas* acknowledged that in some cases, there may be "exceptionally good reason to doubt" that allocution would have mattered. *See id.* at 1140. This bucket of "exceptional circumstance[s]" includes, but is not necessarily limited to, cases where the defendant is sentenced at or below the statutory minimum. *Id.* This language tracks, although it is somewhat more restrictive than, *Molina-Martinez*'s allowance that the government may "counter" a defendant's error-alone prejudice showing with record evidence. *Compare id.*, *with Molina-Martinez*, 578 U.S. at 200–01.

C. The Utah Court of Appeals' Opinion

¶46 Our court of appeals wanted to "adopt" *Bustamante-Conchas*'s approach to prejudice for allocution errors. *See James*, 2023 UT App 80, ¶ 22. But, perhaps because *Bustamante-Conchas* is a bit slippery in its analysis, it is not always easy to discern what portion of *Bustamante-Conchas* the court of appeals sought to import into

Utah law. At times, the court of appeals quotes *Bustamante-Conchas* for the rule that, absent extraordinary circumstances, defendants may "satisfy" or "me[e]t" their burden of prejudice merely by showing that they have been deprived of the right to allocute. *Id.* ¶ 24 (quoting 850 F.3d at 1134, 1139). But at other times, the court of appeals describes *Bustamante-Conchas* as holding that allocution errors are "per se or presumptively prejudicial." *See id.* ¶¶ 24, 27 (cleaned up).

¶47 As explained above, we do not read *Bustamante-Conchas* to have adopted a presumption of prejudice framework. Rather, the language the court of appeals quotes to that effect comes from *Bustamante-Conchas*'s descriptions of the Tenth Circuit's *prior* approach, which *Bustamante-Conchas* itself disavowed. *See* 850 F.3d at 1133, 1139, 1141 n.7, 1142. *Bustamante-Conchas* instead tracked the approach of *Molina-Martinez*, *id.* at 1139–40, which had also rejected a presumption framework, *see Molina-Martinez*, 578 U.S. at 203. Ultimately, the court of appeals' opinion can be read to have adopted both approaches *Bustamante-Conchas* discussed—an *Olano* presumption of prejudice and a *Molina-Martinez*-type rule that error alone can demonstrate prejudice.

¶48 The haziness surrounding *Bustamante-Conchas* is understandable. The Tenth Circuit's opinion is not always precise about whether it is announcing a new rule or merely putting old wine in a new bottle—that is, recasting the existing rule in different language while leaving its substance intact. *Compare* 850 F.3d at 1139 (describing *Molina-Martinez* language as "a more precise description of our jurisprudence" than the *Olano* framework), *with id.* at 1141 n.7 ("choos[ing] not to accept" the "position that prejudice should be presumed"). Additionally, the opinion drew two dissents, each of which refused to credit the majority's fine distinctions. One declared that the majority had "effectively" shifted the burden to the government by not requiring a specific showing of prejudice "based on the record on appeal." *Id.* at 1145–46 (Tymkovich, C.J., dissenting) (cleaned up). The other averred that it could not distinguish the rule the majority adopted from a presumption. *See id.* at 1148 (Hartz, J., dissenting).

¶49 It may be true that *Molina-Martinez* error-alone prejudice and the *Olano* presumption of prejudice differ little in practical effect. But the two are distinguished by different substantive concerns and require different showings to persuade a court to adopt them. The two rules share an initial consideration in common: it must be

difficult for a defendant to prove prejudice from record evidence, at least in the typical case. *Compare Molina-Martinez*, 578 U.S. at 201 (noting that in "a significant number of cases . . . defendants will lack" evidence of a sentencing judge's view of the federal Guidelines), *with Adams*, 252 F.3d at 285 (holding that "some errors to which no objection was made should be 'presumed prejudicial' if the defendant cannot make a specific showing of prejudice" (quoting *Olano*, 507 U.S. at 735)).

¶50 From there, however, the standards diverge. The characteristic feature of *Molina-Martinez* error is that prejudice must be likely in the "usual," *Molina-Martinez*, 578 U.S. at 204, or "ordinary," *Bustamante-Conchas*, 850 F.3d at 1133, case. That likelihood—deduced from system-wide surveys or other data—justifies a court in concluding that a defendant has in fact shown a reasonable probability that the error mattered to the outcome. *See Molina-Martinez*, 578 U.S. at 1349 (concluding that the Guidelines range affects "most" federal sentences and that this probability "is all that is needed" to establish a reasonable probability of a different outcome in most cases); *Bustamante-Conchas*, 850 F.3d at 1139 (finding "a reasonable probability that allocution matters in the usual case" and concluding that this probability is enough to demonstrate prejudice absent extraordinary circumstances).

¶51 The *Olano* presumption, on the other hand, tends not to involve statistical probabilities of prejudice. Instead, it employs a less restrictive version of the framework often used for structural error. *See supra* ¶¶ 29–32. When weighing whether to apply an *Olano* presumption, courts consider the relative importance of the right at issue and the effect of its absence on the reliability and integrity of proceedings alongside the difficulty of proving prejudice from the record. *See, e.g.*, *Adams*, 252 F.3d at 288 (finding it "appropriate to presume prejudice because the sentencing process itself was rendered presumptively unreliable" by deprivation of the right to allocute); *Syme*, 276 F.3d at 154 (discussing *Adams* and concluding that "[l]ike a denial of the right of allocution, a constructive amendment [to an indictment] also violates a basic right of criminal defendants").

¶52 All of this leaves some question as to the nature of the task before us. Under which of these rubrics should we evaluate denial of Utah's constitutional right to allocute at sentencing? Ultimately, we think the applicability of the *Molina-Martinez* framework is what is properly under our review. The court of appeals found the Tenth

Circuit's approach "compelling," *James*, 2023 UT App 80, ¶ 22, so we turn directly to *Bustamante-Conchas* to see whether we also find its approach compelling. We do so bearing in mind that *Bustamante-Conchas* used *Molina-Martinez* as its blueprint and explicitly rejected the *Olano* presumption framework prevalent in other circuits. *See Bustamante-Conchas*, 850 F.3d at 1138–39, 1141 n.7.

¶53 Accordingly, we address the State's arguments to the extent they touch on our reading of the Tenth Circuit test—that is, to the extent they militate against treating allocution error as a species of *Molina-Martinez* error. We first take up the State's claim that our caselaw precludes adoption of the Tenth Circuit test by asking whether we have ever barred defendants from demonstrating plain error prejudice through non-record or systemic evidence. We conclude that we have not and next consider whether prejudice is so likely in the typical Utah sentencing proceeding that a defendant can be said to have demonstrated prejudice merely by presenting an appellate court with "an ordinary denial" of the right to allocute. *See Bustamante-Conchas*, 850 F.3d at 1141.

II. THIS CASE PRESENTS AN ISSUE OF FIRST IMPRESSION

¶54 The State argues that we have foreclosed adoption of a *Bustamante-Conchas*-style rule through two lines of caselaw. Most directly, the State contends that our allocution cases establish that even preserved allocution errors are reviewed "for harmlessness by examining what potential effect the defendant's proffered allocution would have had in light of the sentencing record as a whole." This line of cases is inconsistent with the court of appeals' opinion, the State argues, because it would not make sense to impose a higher burden on preserved claims than unpreserved claims of the same type. But even were we to "revisit" those cases, the State maintains that our plain error doctrine would still dispose of James's claim because that doctrine requires a showing of "actual prejudice" for *all* unpreserved claims. We address each argument in turn.

A. We Have Not Foreclosed an Indirect Showing of Prejudice for Denials of the Right to Allocution

¶55 The State points to *State v. Young*, 853 P.2d 327 (Utah 1993), for the proposition that preserved allocution errors are subject to harmless error review. But the State misidentifies the controlling holding of *Young*. The State's brief cites to *Young*'s lead opinion, which would have held that denial of the right to allocution is always subject to harmlessness review and was harmless in Young's case.

(Citing *Young*, 853 P.2d at 359–60.) But the lead opinion lost the majority on the allocution issue.

¶56 Instead, three justices, writing across three separate opinions, held that the allocution error required reversal. Justice Durham wished to subject preserved allocution errors in capital cases to per se reversal—i.e., to reverse without any inquiry into harmlessness. *Id.* at 375 (Durham, J., concurring in part and dissenting in part). The other two justices did not think they needed to go that far. *Id.* at 417–18 (Zimmerman, J., concurring in part and dissenting in part); *id.* at 418 (Stewart, J., concurring in part and dissenting in part). They believed that the denial of allocution had prejudiced Young, and so the court could reverse without deciding whether allocution error "warrants an automatic reversal or whether it is to be appraised under our usual harmless error rule." *Id.* at 417–18 (Zimmerman, J., concurring in part and dissenting in part); *see id.* at 418 (Stewart, J., concurring in part and dissenting in part). Although Justice Durham favored a per se rule, she agreed that, even without one, reversal of Young's death-penalty sentence was required because a different outcome was reasonably likely in the event Young had been permitted to speak. *Id.* at 376 (Durham, J., concurring in part and dissenting in part).

¶57 That narrower ground represents *Young*'s controlling reasoning on allocution. But it is not extraordinarily useful here, since it rested on *Young*'s facts and deferred the legal question of whether allocution errors are exempt from harmlessness review.

¶58 The State relies on *State v. Anderson*, 929 P.2d 1107 (Utah 1996), for the same proposition—that preserved allocution errors are subject to a prejudice requirement. But *Anderson* did not decide that question either. In *Anderson*, we held that a defendant waived his right to be present at sentencing when, despite having adequate notice and an opportunity to appear, he voluntarily absented himself from proceedings. *Id.* at 1111. As one "practical consideration[]" weighing in favor of our holding, we noted that the Eleventh Circuit had "held that a showing of prejudice is necessary to uphold a due process challenge against an in absentia proceeding" and that Anderson had failed to make such a showing. *Id.* (citing *Dasher v. Stripling*, 685 F.2d 385, 387–88 (11th Cir. 1982)). The parties spill much ink debating whether our brief discussion of the Eleventh Circuit's rule constituted an independent basis for our holding or dicta.

¶59 But we need not resolve that dispute. Even if we did adopt the Eleventh Circuit's rule in *Anderson*, it would not help the State.

First, all we discussed in the disputed passage of *Anderson* was the threshold question of whether a prejudice requirement applied to a claim at all. We did not list every way in which that requirement might be satisfied.

¶60 Second, *Anderson* did not deal with the same kind of error we confront in this case. We decided *Anderson* on the basis of waiver. *Id.* at 1111. But plain error rests on principles of forfeiture, not waiver. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (explaining that "[m]ere forfeiture, as opposed to waiver, does not extinguish an 'error'" for purposes of plain error review); *see also id.* ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." (cleaned up)); *accord State v. Bond*, 2015 UT 88, ¶ 42, 361 P.3d 104 (discussing *Olano*). Therefore, *Anderson* does not dictate our resolution of this appeal.

B. We Have Not Foreclosed an Indirect Showing of Prejudice for All Plain Error Claims

¶61 The State relies principally on *State v. Bond*, 2015 UT 88, 361 P.3d 104, for the proposition that all unpreserved claims require a defendant to show "actual prejudice." If we take the State's use of "actual prejudice" to mean a record-specific showing of a reasonable probability of a different outcome, then the State inflates the scope of *Bond*'s holding.

¶62 The appellant in *Bond* argued that when a defendant raises an unpreserved claim arising under the U.S. Constitution, the burden shifts to the State to prove that the error was "harmless beyond a reasonable doubt." *Id.* ¶¶ 35, 37. This proposed rule involved two distinct components: burden-shifting and the imposition of a "heightened review standard" on the State. *See id.* ¶¶ 37–39, 44. Whereas the default plain error standard requires the defendant to show a reasonable probability that an error was harmful, the appellant's preferred rule—derived from the Supreme Court's test in *Chapman v. California*, 386 U.S. 18 (1967)—would have the State prove constitutional error harmless beyond a reasonable doubt.

¶63 In rejecting the defendant's proposed application of *Chapman*'s "heightened standard of review," *Bond* did no more than affirm that unpreserved federal constitutional claims are, like other unpreserved claims, "to be reviewed under our plain error doctrine." *Bond*, 2015 U5 88, ¶ 44. *But see id.* ¶ 38 n.11 (noting that *Bond*'s holding does not necessarily extend to capital cases, "which may

garner unique review under our case law"). Notably, *Bond* did not say that under plain error review, the burden can never shift to the State to show a lack of prejudice under the mirror image of the defendant's standard—i.e., that there is no reasonable probability of a different outcome. Nor did *Bond* discuss whether defendants might ever employ non-record evidence to demonstrate prejudice.

¶64 In sum, we see no reason to read *Bond* as deciding anything more than what was necessary to dispose of the briefed argument that "preservation is immaterial" when a claimed error arises under the federal constitution. Preservation would remain material even under a burden-shifting presumption. Under such a presumption, it is true that the State would bear the *burden* of proof for both preserved and unpreserved errors. But the *standard* of proof would differ: harmlessness beyond a reasonable doubt for preserved errors and no reasonable probability of harm for unpreserved ones.

¶65 *Bond*'s use of federal case law reinforces our reading. *Bond* framed its holding as updating Utah law to track more recent federal cases. *See id*. ¶ 41. One of these federal cases, *Johnson v. United States*, 520 U.S. 461 (1997), had determined that even structural errors are subject to plain error review. *See id.* at 466. That is, as we parsed *Johnson*'s holding in *Bond*, unpreserved constitutional claims are neither "per se reversible" nor are they reviewed "under the heightened *Chapman* standard." *See Bond*, 2015 UT 88, ¶ 43. They are instead "subject to preservation requirements," including "a harmlessness analysis." *Id.*

¶66 But *Johnson* did not limit the ways in which harm might be shown under the plain error test. *See* 520 U.S. at 468–69. To the contrary: it entertained an argument that structural errors are per se prejudicial. *See id*. Ultimately, *Johnson* did not rule on that argument because it resolved the case on the discretionary fourth prong of the federal plain error standard. *See id.* at 469–70. But the Supreme Court has continued to consider similar arguments. *See Puckett v. United States*, 556 U.S. 129, 140–41 (2009) (collecting cases). And the Court has never imposed the kind of strict, record-specific prejudice requirement onto defendants that the State reads into *Bond*. Indeed, it did just the opposite in *Molina-Martinez*—the very case that inspired *Bustamante-Conchas*.

¶67 And that takes us to the critical flaw in the State's argument. It does not make much sense to read *Bond* as adopting any rule more stringent than the federal standard upon which it "[b]ased" its holding. *See* 2015 UT 88, ¶ 44. It makes even less sense to take a case

which endeavored to keep Utah law current with its federal counterpart, *see id.* ¶ 41, to foreclose our adoption of a federal standard promulgated subsequent to *Bond*.[2]

¶68 We have not decided whether defendants may meet their prejudice burden through the kind of indirect, system-wide evidence at issue in *Bustamante-Conchas* and *Molina-Martinez*. We now turn to whether application of the *Bustamante-Conchas* rule is warranted for denials of the right to allocution in state criminal proceedings.

III. THE COURT OF APPEALS ERRED WHEN IT ADOPTED *BUSTAMANTE-CONCHAS*'S APPROACH TO PREJUDICE

¶69 While we have left the door open to *Molina-Martinez* error, we decline to walk through it in this case. Allocution errors in state sentencing proceedings do not meet that exception's key requirement: a high probability of prejudice in the ordinary case. The court of appeals was not presented with any evidence that exercise of the right to allocution affects the typical *Utah* sentence. And we have reason to doubt that it does, given important differences between Utah and federal sentencing schemes.

¶70 Federal district courts sentence defendants to a fixed term of imprisonment in a version of what is known as a determinate sentencing regime. *See United States v. Booker*, 543 U.S. 220, 235–36 (2005). Judges retain wide discretion under this regime and can vary

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[2] The State also relies on *State v. Holgate*, 2000 UT 74, 10 P.3d 346. *Holgate* is not dispositive for the same reason *Bond* is not: it merely states the elements of plain error without addressing the question of whether prejudice might ever be shown through indirect or non-record evidence. *See id.* ¶ 13. Notably, in reciting the plain error standard, *Holgate* quotes a case wherein we qualified that the burden to establish prejudice rests on the appellant "[i]n general." *State v. Dunn*, 850 P.2d 1201, 1208–09 (Utah 1993), *abrogated on other grounds by State v. Silva*, 2019 UT 36, 456 P.3d 718; *see Holgate*, 2000 UT 74, ¶ 13. This phrasing aligns with federal cases that specify the defendant bears the burden of showing prejudice only in "the ordinary case" or in "most cases." *See, e.g.*, *Molina-Martinez v. United States*, 578 U.S. 189, 195 (2016); *Olano*, 507 U.S. at 734. By its terms, such language leaves open the possibility that the burden may appropriately shift or that the element may be met through non-record evidence.

the duration of a sentence by as little as one month.[3] By contrast, Utah employs an indeterminate sentencing regime, under which "the trial judge [ordinarily] has no discretion in fixing the term of imprisonment."[4] *Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 907 (Utah 1993) (cleaned up). Instead, the trial judge "simply imposes the statutorily prescribed range of years, and the Board of Pardons determines exactly how long the prisoner is to be confined." *Id.* (cleaned up). As such, the Board of Pardons "performs a function analogous to that of the trial judge in jurisdictions that have a determinate sentencing scheme."[5] *Id.* at 908 (cleaned up). Utah trial judges still have some discretion, but it is largely confined to two binary determinations: between probation and prison, *see* UTAH CODE § 77-18-105(2), and between consecutive and concurrent sentencing when a defendant is convicted of multiple crimes, *see id.* § 76-3-401.

¶71 The gulf in discretion granted state and federal judges undercuts the persuasive value of *Bustamante-Conchas*'s reasoning. Even if *Bustamante-Conchas* were correct that "allocution matters in the usual [federal] case," 850 F.3d at 1139, we see no warrant for

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[3] *See* U.S. SENT'G GUIDELINES MANUAL § 5A (Sentencing Table) (U.S. SENT'G COMM'N 2025), available at https://www.ussc.gov/guidelines/2025-guidelines-manual/annotated-2025-chapter-5 (last visited Nov. 4, 2025).

[4] The Legislature has excepted certain crimes from this general rule, permitting trial judges some discretion to hand down a lower sentence if they find that doing so is "in the interests of justice." *See* UTAH CODE §§ 76-5-302(5) (aggravated kidnapping), -402.1(5) (rape of a child), -402.3(4) (object rape of a child), -403.1(5) (sodomy on a child). Notably, a court "may not grant probation" for any of the crimes for which such an exception has been adopted. *Id.* § 76-3-406(2).

[5] After sentencing, the Board of Pardons generally schedules an "original hearing" where it fixes the length of an offender's prison term. *See* UTAH ADMIN. CODE R671-201. By rule, offenders have a "right to be present" at this hearing (as long as they are "housed in the state"). *Id.* R671-301-1(2). As part of the right to be present, "[t]he offender may speak, present documents, ask questions of the hearing official, and answer questions." *Id.* This right may serve some of the informational functions that allocution tends to serve in determinate sentencing regimes.

concluding that allocution matters in the same way or to the same extent in the typical Utah case. The sources *Bustamante-Conchas* relied upon do not include any Utah data, *see id.*, and the differences between our sentencing regimes sharply limit any inferences that might be drawn from federal data. At no point below has James cited additional sources, Utah-based or otherwise, tending to show that allocution makes a difference in the typical indeterminate sentencing proceeding.

¶72 And we are skeptical that it does. As a general rule, the wider a sentencing judge's discretion, the greater the chance that any information presented "in mitigation of punishment," including an allocution statement, *see* UTAH R. CRIM. P. 22(a), might affect a sentence. *Cf. Luepke*, 495 F.3d at 451. Because Utah judges are confined to largely binary decisions at sentencing, the odds that allocution will affect a given sentence are relatively small. Allocution certainly *might* matter, particularly in a close case. But that is not enough for us to conclude that the existence of an allocution error, where a defendant has not asked to allocute, by itself demonstrates prejudice flowing from that error.[6] Where we cannot conclude that an error matters in the typical case, *Bustamante-Conchas* and *Molina-Martinez* have no application.

IV. JAMES HAS NOT PROVIDED ANY DIRECT EVIDENCE OF PREJUDICE

¶73 Our default rule for unpreserved state constitutional claims is that a defendant must demonstrate prejudice. *See State v. Bond*, 2015 UT 88, ¶ 41 n.14, 361 P.3d 104. Although we explained above that plain error prejudice might be demonstrated indirectly, James has not done so here, because, in Utah, allocution errors are not of the type that generally affect the outcome of sentencing proceedings. The State argues that, at this stage, James's remaining route to sustaining the court of appeals' judgment lies in demonstrating

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[6] That is not to say that allocution is an unimportant part of sentencing in Utah. To the contrary, allocution has many potentially important roles. It can be salutary for victims to hear a defendant take responsibility for his actions and acknowledge the harm his crimes have caused. Allocution can help a defendant, who may have been largely silent throughout the proceedings, feel seen and heard by the criminal justice system. What we cannot conclude, on the briefing before us, is that prejudice generally occurs when a Utah defendant who has not asked for the opportunity to address the court is sentenced without allocuting.

prejudice through case-specific evidence. We agree and conclude that James has failed to make such a showing.[7]

¶74 To demonstrate prejudice in this setting, a defendant must establish what they would have said had they been permitted to allocute. In some cases, this can be done using material that is already in the record, such as statements from counsel or letters from the defendant to the court. The idea is to point to mitigating circumstances or expressions of remorse that could conceivably influence sentencing. Since the material is already in the record, the district court is presumed to have been aware of it when it handed down its sentence. But a defendant is free to point to evidence that the court failed to take adequate account of this information or to argue the court would have metabolized the same information differently if it had been presented in the defendant's own voice.

¶75 Other times, there may not be enough information in the record to establish the content of an allocution statement. In these cases, our decision might be aided by a record supplemented to include more information about the allocution the defendant would have made. To the extent that the Utah Rules of Appellate Procedure do not currently account for all circumstances in which a defendant in James's position would want to supplement the record, we encourage our appellate rules committee to consider changes to the rules.

¶76 Here, James has pointed to some record evidence that fleshes out a likely allocution statement. Counsel below told the district court that James's crimes had their roots in opioid addiction, and James himself wrote letters to the court expressing contrition and asking for a chance to "prove [his] valiancy in truly wanting to

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[7] As explained above, federal caselaw recognizes three potential exceptions to the ordinary plain error burden. Our holding in this case is limited to the application of a *Molina-Martinez* exception for allocution error. As outlined in section II, *supra*, we have not previously decided whether allocution errors are structural, nor whether they should be entitled to a rebuttable presumption of prejudice. Given the briefing and procedural posture of this case, we do not think it is wise to reach these questions. Thus, per our default rule, James is limited to showing prejudice from the record. But a future party should feel free to brief the applicability of the remaining federal exceptions to plain error prejudice or to advocate for a different test on state law grounds.

change." On the basis of these statements, James contends that "there is a reasonable likelihood of a more favorable result if [he had been] permitted to personally express his desire to change and receive treatment."

¶77 We disagree. The district court rejected the unanimous request of James, the State, and AP&P to grant probation—in large part because it believed that James's long criminal history undermined his claims of remorse. Under these circumstances, we are hard-pressed to conclude that a spoken statement of contrition, however emotional, would have changed the court's mind. As such, we conclude that James has failed to establish a reasonable probability of receiving a lesser sentence had he been permitted to allocute.[8]

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[8] We readily concede the dissent's point that it can be difficult for a defendant to demonstrate prejudice related to denial of the chance to allocute. *See infra* ¶¶ 87–93. But the same is true for many kinds of errors that occur during trial. This is why the inquiries into whether to presume prejudice or to deem an error structural tend to be comparative. *See, e.g.*, *United States v. Syme*, 276 F.3d 131, 154 (3d Cir. 2002) ("Like a denial of the right of allocution, a constructive amendment also violates a basic right of criminal defendants . . . ."); *Puckett v. United States*, 556 U.S. 129, 141 (2009) (declining to consider breach of a plea agreement structural error because "it shares no common features with errors we *have* held structural").

That is, the question to be answered is whether the difficulty of assessing the effect of allocution error is "greater . . . than with respect to other procedural errors at sentencing," *see Puckett*, 556 U.S. at 141, or whether "the inherent nature of [allocution] error [makes] it *exceptionally* difficult for the defendant to demonstrate that the outcome of the lower court proceeding would have been different had the error not occurred," *United States v. Barnett*, 398 F.3d 516, 526–27 (6th Cir. 2005) (emphasis added). The briefing has not done the work to situate allocution within the pantheon of rights—to establish whether the effect of its deprivation is more or less amenable to proof than its cousins. While acknowledging the dissent's careful reasoning, we are reluctant to decide that question ourselves without the benefit of briefing focused on that inquiry. *See supra* note 7.

CONCLUSION

¶78 The court of appeals erred when it adopted the Tenth Circuit's approach to conclude that James demonstrated that he was prejudiced when he showed that the district court did not invite him to allocute at sentencing. James has failed to establish the third element of plain error—that the error caused him to suffer prejudice—through either direct or indirect evidence. He is therefore not entitled to a new sentencing proceeding on his argument concerning the failure of the court to invite him to allocute. We remand to the court of appeals to consider James's claim that the district court abused its discretion when it sentenced James to prison instead of probation.

JUSTICE HAGEN, dissenting in the Opinion of the Court:

INTRODUCTION

¶79 The majority holds that the court of appeals erred in adopting the Tenth Circuit's approach to prejudice for allocution-related errors. *See supra* ¶¶ 69–72; *see also United States v. Bustamante-Conchas*, 850 F.3d 1130 (10th Cir. 2017) (en banc). We appreciate the majority's thoughtful discussion of federal plain error and the Tenth Circuit's *Bustamante-Conchas* rule. And we agree that the significant differences between our federal and state sentencing schemes make it less likely that affording a defendant the right to allocute would alter the sentence ultimately imposed in a state proceeding. For those reasons, we, too, would reject the Tenth Circuit's rule that the denial of the right to allocute is presumptively prejudicial because it is reasonably likely to have affected the sentence.

¶80 But we would affirm the court of appeals decision on other grounds.[9] *See Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158 (recognizing that we may affirm "on any legal ground or theory

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[9] The majority indicates that its holding is cabined—at least in part—by the briefing and procedural posture of the case. *See supra* ¶ 73 n.7. We granted certiorari to determine "[w]hether the court of appeals erred when it concluded that the defendant had necessarily demonstrated prejudice when he established that the district court had denied his right to allocution." So long as we have granted review on a particular issue, the way in which we articulate our certiorari grant should not prevent us from affirming on that issue if the court of appeals reached the right result for the wrong reasons.

apparent on the record" (cleaned up)). Instead of presuming that there is a reasonable probability that allocution would have resulted in a lower sentence, we would not require a showing of prejudice based on the likelihood of a different outcome. Allocution serves important purposes beyond mere sentence mitigation. Those purposes do not necessarily lead to a more favorable result but protect less outcome-driven goals of sentencing, the perception of procedural fairness, and a defendant's constitutional right to appear in a meaningful way. Because of the unique nature of allocution errors, we believe this is a rare instance in which it is "unnecessary and ill-advised to pursue a case-by-case inquiry to weigh actual prejudice." *State v. Arguelles*, 921 P.2d 439, 442 (Utah 1996) (cleaned up).

¶81 That said, we are sensitive to the danger of developing exceptions to the plain error rule through case law, and we respect our colleagues' objection to doing so in this case. Going forward, we support amending Utah Rule of Criminal Procedure 22 to allow defendants to obtain a new sentencing hearing when the district court fails to comply with its obligations under rule 22(a). We would welcome recommendations from our Advisory Committee on the Rules of Criminal Procedure on whether such a rule is advisable and under what circumstances resentencing should be permitted. To begin that conversation, we offer our thoughts on why the failure to invite allocution should be treated differently than other sentencing errors.

ANALYSIS

¶82 Allocution errors will almost always be unpreserved. It would be a rare case indeed where a defendant raises the issue at sentencing and the court nonetheless denies an opportunity to allocute. Given the affirmative obligation placed on district courts under rule 22(a), *see State v. Wanosik*, 2003 UT 46, ¶ 23, 79 P.3d 937, these errors are invariably raised under the plain error exception to preservation.

¶83 Under our test for plain error, a defendant must ordinarily show that "(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." *State v. Holgate*, 2000 UT 74, ¶ 13, 10 P.3d 346 (cleaned up). No one disputes that the court's failure to comply with rule 22(a) was error and "that the law governing the error was clear at the time the alleged error was made." *State v. Dean*, 2004 UT 63, ¶ 16, 95 P.3d 276. The dispute turns on the third prong.

¶84 To show that an error was harmful, a defendant must ordinarily show "a reasonable likelihood of a more favorable outcome" but for the error. *Holgate*, 2000 UT 74, ¶ 13 (cleaned up). But we have previously recognized that, "pursuant to our inherent supervisory power over the courts, we may presume prejudice in circumstances where it is unnecessary and ill-advised to pursue a case-by-case inquiry to weigh actual prejudice." *State v. Arguelles*, 921 P.2d 439, 442 (Utah 1996) (cleaned up).

¶85 For example, in *State v. Brown*, the defendant argued for the first time on appeal that his constitutional rights were violated by the appointment of a part-time prosecutor as his defense counsel. 853 P.2d 851, 856 & n.2 (Utah 1992). This court relieved the defendant of the burden to prove prejudice on appeal because the alleged error was not susceptible to a traditional showing of prejudice. *Id.* at 859. In part, this court explained:

> Because a concrete showing of prejudice would be very difficult to make when a prosecutor is appointed to assist in the defense of an accused, we conclude that it is unnecessary and ill-advised to pursue a case-by-case inquiry to weigh actual prejudice. Instead, we announce a per se rule of reversal wherever such dual representation is undertaken so as to prevent its recurrence.

Id.

¶86 We would adopt a similar per se rule of reversal for the type of allocution error that occurred here. We would do so because the traditional showing of prejudice—that "there is a reasonable likelihood of a more favorable outcome" but for the error—is a poor fit when a defendant's right to allocute is at issue. We reach this conclusion for three reasons: (1) the inherent difficulty in proving the likelihood of a different result in cases of allocution error, (2) the purposes served by allocution beyond sentence mitigation, and (3) the weaker justification for strict adherence to preservation rules in the case of allocution.

A. The Lack of a Record on Appeal Leaves an Appellate Court to Speculate Regarding the Prejudicial Impact of an Error Denying the Right to Allocute

¶87 Allocution errors do not lend themselves to a traditional prejudice analysis. The denial of a defendant's constitutional right to allocute necessarily means that the defendant's statement will be

absent from the record. And without a record of what a defendant would have said, "a concrete showing of prejudice would be very difficult to make." *Brown*, 853 P.2d at 859.

¶88 The majority opinion proposes two solutions to this problem. First, it suggests that a defendant use "material that is already in the record, such as statements from counsel or letters from the defendant to the court," to identify "mitigating circumstances or expressions of remorse that could conceivably influence sentencing." *See supra* ¶ 74. But, by definition, evidence in the record was already presented to the district court and resulted in the sentence imposed. Although the majority points out that "a defendant is free . . . to argue the court would have metabolized the same information differently if it had been presented in the defendant's own voice," *supra* ¶ 74, without any evidence of how the defendant would have presented the information differently, establishing a reasonable probability of a different result would be practically impossible.

¶89 Second, the majority suggests that the defendant could supplement the record with "more information about the allocution the defendant would have made." *Supra* ¶ 75. But there is no mechanism to supplement the record on appeal with new material not previously presented to the district court. On appellate review, we are limited to the facts in the record, which "consists of the documents and exhibits filed in or considered by the trial court." UTAH R. APP. P. 11(a). "We do not consider documents that fall outside the appellate record, no matter how much they might pique our interest." *Montes v. Nat'l Buick GMC, Inc.*, 2024 UT 42, ¶ 39 n.8, 562 P.3d 688. Although rule 11(d) of the Utah Rules of Appellate Procedure speaks of "supplementing" the record on appeal, the rule is limited to correcting material "omitted from or misstated in the record" to ensure "that the record accurately reflects the proceedings before the trial court." UTAH R. APP. P. 11(d)(1)–(2). The only instance in which new material can be added to the record on appeal is found in rule 23B(a), which allows for a temporary remand to the district court "for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel." *Id.* R. 23B.

¶90 The majority proposes that, if the Utah Rules of Appellate Procedure "do not currently account for all circumstances in which a defendant in James's position would want to supplement the record," we should consider modifying the rules. *See supra* ¶ 75. But even if we could discover the content of a defendant's allocution—

either by extrapolating from material already in the record or by supplementing the record through a yet-to-be-enacted rule—we would still have no way of discerning how that information would have been presented to the district court.

¶91 The right to allocute is not merely about the content conveyed in the statement; its impact lies in how it is conveyed and by whom. Defense counsel could just as easily present the information from an allocution statement to the court, but that "does not fulfill the requirements" of rule 22(a). *See United States v. Lewis*, 10 F.3d 1086, 1092 (4th Cir. 1993). "[M]uch of the value of an allocution statement lies in its ability to convey sincere remorse." *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1144 (10th Cir. 2017) (en banc). As Justice Frankfurter explained, "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green v. United States*, 365 U.S. 301, 304 (1961) (plurality opinion). As a defendant presents their statement to the court "[i]t is not only the content of the defendant's words that can influence a court, but also the way [the defendant] says them." *United States v. Noel*, 581 F.3d 490, 503 (7th Cir. 2009). Before sentence is imposed, the sentencing court should see "the teary eye and trembling hand, hear[] the quaking voice" and consider the defendant's "passionate pledge that this crime was the last." *United States v. McIntosh*, 198 F.3d 995, 1006 (7th Cir. 2000) (Rovner, J., dissenting in part). Appellate courts are simply in a poor position to assess such a proffer because "sincerity and credibility are difficult to discern from a cold record." *Bustamante-Conchas*, 850 F.3d at 1144.

¶92 We likewise cannot assess the probability that the sentencing court would have been moved by the defendant's words. As federal appellate courts have noted, "defendants who have been denied allocution face a practical difficulty under the [prejudice] prong because appellate courts 'cannot speculate as to the persuasive ability of anything a defendant may have said in his statement to the court.'" *Id.* at 1139 (quoting *United States v. O'Hallaren*, 505 F.3d 633, 636 (7th Cir. 2007)). Appellate courts have no place "speculat[ing] about the persuasive force of a hypothetical allocution." *Id.* But even if an appellate court somehow could speculate as to a defendant's persuasive abilities, it "could not say with any assurance that the denial of [the defendant's] right to allocution did not affect [the defendant's] sentence." *O'Hallaren*, 505 F.3d at 636.

¶93 Without a record to review, we are left to speculate about what a defendant might have said in allocution. And even if we could determine the substance of the allocution statement, we are still left to speculate about how the defendant would have presented the statement and the persuasive force it would have had on the sentencing court. As a result, not only will the defendant face the practical difficulty of proving prejudice on appeal, but appellate courts will face similar difficulty in properly engaging in appellate review. We therefore believe that allocution is a circumstance where it is "unnecessary and ill-advised to pursue a case-by-case inquiry to weigh actual prejudice." *See Brown*, 853 P.2d at 856.

B. In Modern Criminal Procedure, the Right to Allocute Plays a Larger Role in Sentencing than Mere Mitigation

¶94 If the difficulty of showing prejudice was our only concern, we might be inclined to adopt the rule followed by the Tenth Circuit and rejected by the majority. That rule provides that "a defendant who shows he has been denied the right to allocute has met his burden of demonstrating prejudice absent some extraordinary circumstance." *Bustamante-Conchas*, 850 F.3d at 1139; *see also supra* ¶ 43. The Tenth Circuit explained that this rule was not a per se rule or presumption of prejudice that shifted the burden of proof to the government. *Bustamante-Conchas*, 850 F.3d at 1139. Rather, under the *Bustamante-Conchas* rule, absent extraordinary circumstances, defendants would "*meet this burden* simply by showing that they were denied the right to meaningfully address the court." *Id.* at 1133 (emphasis added).

¶95 We agree with the majority that the *Bustamante-Conchas* rule relies on a statistical approach from federal sentencing that does not apply in the same way to Utah's nondiscretionary system. *See id.* at 1139–40; *see also supra* ¶¶ 44–45. We further agree that under Utah law, "the odds that allocution will affect a given sentence are relatively small." *Supra* ¶ 72. But our greater concern with the rule is that it assumes that the function of allocution is limited to the opportunity to speak in favor of mitigation. *Cf. Bustamante-Conchas*, 850 F.3d at 1140 (explaining that an "allocution error is not prejudicial if a defendant receives the lowest possible sentence").

¶96 Sentence mitigation may be the primary purpose of allocution, *see Wanosik*, 2003 UT 46, ¶ 19 (explaining that allocution allows the court to receive information regarding sentencing); UTAH R. CRIM. P. 22(a) (allowing a defendant to "present any information in mitigation of punishment"), but it plays a larger role in the

modern sentencing process. Even defendants who face mandatory sentences have a right to allocute. *See State v. Maestas*, 2002 UT 123, ¶ 48, 63 P.3d 621; UTAH CONST. art. I, § 12. And in Utah, despite the limited sentencing discretion afforded to district courts, we have recognized the right to allocution as a right of constitutional dimension. *See State v. Anderson*, 929 P.2d 1107, 1111 (Utah 1996). "Even in situations where a defendant's comments stand little chance of influencing the sentencing judge, the right retains a symbolic significance." *Bustamante-Conchas,* 850 F.3d at 1136 (cleaned up).

¶97 The Utah Constitution guarantees criminal defendants the "right to appear and defend in person" any criminal charges levied against them. UTAH CONST. art. I, § 12. While the right to allocute is not expressly granted in either the state or federal constitution, we have recognized that "[i]t is an inseparable part of the right to be present" granted in article I, section 12 of the Utah Constitution. *Anderson*, 929 P.2d at 1111. And a majority of this court later stated that *Anderson* "clearly and thoughtfully recognized a constitutionally guaranteed right to allocution." *Maestas*, 2002 UT 123, ¶ 48; *see also State v. Udy*, 2012 UT App 244, ¶ 25 n.7, 286 P.3d 345 (explaining the plurality opinion in *Maestas*, and that a majority of the court recognized a constitutional right to allocute). Due to its constitutional underpinnings, the right to allocute maintains symbolic significance because it furthers a defendant's personal participation in the proceedings against them.

¶98 We are also persuaded by other jurisdictions that have recognized that "allocution today serves purposes beyond that of sentence mitigation." *State v. Chow*, 883 P.2d 663, 672 (Haw. Ct. App. 1994). For instance, allocution is "the first step towards satisfying the sentencing objective of rehabilitation" because it presents a defendant with the opportunity to "acknowledge wrongful conduct" even where a mandatory sentence is imposed. *Id.* Such an acknowledgement can also "deter[] others from similar conduct." *Id.*

¶99 An allocution statement can serve an important therapeutic benefit for the defendant. As courts have noted, "the right of allocution has survived more for its therapeutic effect on the defendant than its practical effect on the judge's determination." *United States v. Jackson*, 700 F.2d 181, 191 (5th Cir. 1983) (cleaned up). As the Court of Appeals of Michigan stated:

> Standing convicted of a crime, the defendant should be accorded the right to speak regardless of whether it

> will actually affect the sentence ultimately impose[d]. While any statement the defendant may make might be 'meaningless' in terms of the sentence to be received, we cannot say that the individual defendant would regard his or her remarks as meaningless.

People v. Smith, 292 N.W.2d 206, 207 (Mich. Ct. App. 1980).

¶100 In some cases, allocution can be beneficial for victims as well. A defendant who admits wrongdoing and expresses remorse can promote healing and closure for victims, "purging, to some extent, feelings of any felt need for retribution in a victim, a victim's family, or the community as a whole." *Chow*, 883 P.2d at 672.

¶101 Allocution is also an important element of procedural fairness. *See id.* ("[W]e regard allocution to be a significant aspect of the fair treatment which should be accorded a defendant in the sentencing process."). In cases where the defendant has been convicted at trial, allocution provides an opportunity for the defendant to either admit wrongdoing or maintain his innocence. And because many defendants choose to either plead guilty or exercise their constitutional right to remain silent at trial, allocution may be the only time that a defendant is an active participant in the court proceedings against them. *See* Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2642–43 (2007). As Maryland's highest court explained, "the allocutory process provides a unique opportunity for the defendant himself to face the sentencing body, without subjecting himself to cross-examination, and to explain in his own words the circumstances of the crime and his feelings regarding his conduct, culpability, and sentencing." *Harris v. State*, 509 A.2d 120, 127 (Md. 1986).[10]

¶102 Additionally, many courts have noted that affording the right to allocute preserves the perceived equity of the sentencing process. "Allocution provides a defendant the opportunity to meaningfully participate in the sentencing process and to show that he or she is a complex individual and not merely an object to be acted upon." *Chow*, 883 P.2d at 672 (cleaned up). As a court makes a sentencing decision, "the defendant's right to be heard must never

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[10] Prior to 2022, Maryland's highest court was referred to as the Court of Appeals of Maryland. *See* MD. CONST. art. IV, pt. I, § 1 (1867). It has since been renamed the Maryland Supreme Court. *See* MD. CONST. art. IV, pt. I, § 1.

be reduced to a formality" and the court should "be cautious to avoid the appearance of dispensing assembly-line justice." *United States v. Barnes*, 948 F.2d 325, 331 (7th Cir. 1991). The personal nature of the right to allocute humanizes a procedure that could otherwise be a cold and perfunctory judicial action.

¶103 We have no way of assessing, nor does a defendant have any way of proving, the harm done to these interests when allocution is denied. We can only speculate as to whether allocution would have had a therapeutic effect on a defendant, would have aided in their rehabilitation or deterred others from engaging in similar conduct, and to what extent a defendant's allocution will have a positive impact on a victim. And we cannot assess the damage to public confidence when procedural fairness is not afforded in violation of a defendant's constitutional rights. But because these harms are not outcome determinative, they cannot be assessed under a traditional prejudice analysis.

C. The Traditional Policies Underlying the Preservation Rule Are Not as Strong in the Context of Allocution Errors

¶104 Beyond the additional purposes of allocution explained above, the policies underlying the preservation rule are not as strong in cases of allocution error. This further supports our view that a traditional showing of prejudice should not be required in this narrow category of cases.

¶105 We have recognized two primary policies for the preservation rule. First, "in the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error and, if appropriate, correct it." *Holgate*, 2000 UT 74, ¶ 11 (cleaned up). Ordinarily, our adversarial system charges parties with raising issues. *State v. Johnson*, 2017 UT 76, ¶ 14, 416 P.3d 443. But allocution is unique in that "it is the court which is responsible for raising the matter."[11] *Wanosik*, 2003 UT 46, ¶ 23. The obligation imposed on the district court requires that "both the defendant and counsel shall be

[11] Although our caselaw places the burden on the district court to affirmatively afford a defendant the opportunity to speak, that direction is not in the rule itself. The federal rule, in contrast, requires sentencing courts to "*address the defendant personally* in order to permit the defendant to speak or present any information to mitigate the sentence." FED. R. CRIM. P. 32(i)(4)(A)(ii) (emphasis added). Given the constitutional magnitude of the right at issue, we would support adding similar language to our rule 22.

affirmatively afforded an opportunity to make a statement, present any information in mitigation of punishment, or show any legal cause why sentence should not be imposed." *Id.* Thus, our usual insistence that the parties either bring the matter to the attention of the district court or establish an exception to preservation on appeal should give way when the court itself is charged with avoiding the error.

¶106 The second policy rationale for preservation is that it guards against the possibility that a party will deliberately choose to forgo an objection, knowing that it can be raised on appeal if the outcome is less favorable than hoped. *See Holgate*, 2000 UT 74, ¶ 11. But in the case of allocution, this scenario can be easily avoided if the district court simply complies with its affirmative obligation under rule 22(a). As the Supreme Court has stated "[t]rial judges before sentencing should, as a matter of good judicial administration, unambiguously address themselves to the defendant" and "trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing." *Green*, 365 U.S. at 305. The burden of administering the right is minimal and simply requires the court to inquire of the defendant: "Do you, the defendant, . . . have anything to say before I pass sentence?" *Id.* at 303.

¶107 Although automatic reversal for allocution errors would undermine the legitimate interest in finality, that interest is not strong in this context. The remedy for a violation is simply a new sentencing hearing in which the defendant is properly afforded the right to allocute. An allocution error does not affect a guilty plea, nor does it overturn a guilty verdict. It does not require a new trial or present the possibility of acquittal.

¶108 In cases involving victims, we recognize that resentencing might be painful and places a particular burden on those victims who wish to exercise their rights to attend or be heard. But a defendant's allocution has the potential to benefit victims as well. *See supra* ¶ 72 n.6. A defendant who admits wrongdoing and expresses remorse can provide the victim, their family, or their community with some measure of closure. *See Chow*, 883 P.2d at 672. Correcting these errors promptly by filing a stipulated motion to remand for immediate resentencing would mitigate the impact on victims.

¶109 To that end, we support amending the Utah Rules of Criminal Procedure to provide a mechanism to promptly correct an allocution error in the district court to avoid the need for time

consuming and costly appeals. While a change to our rules will ensure that allocution errors are more easily remedied moving forward, we would not allow the error in this case to go uncorrected. James was denied his well-established right—a right guaranteed by the Utah Constitution—to address the court and offer any information in mitigation of his sentence. And the result in this case was far from a foregone conclusion where both the State and Adult Probation and Parole joined in recommending that James be granted probation. But regardless of the likelihood of a different outcome, James was denied his most meaningful opportunity to personally participate in the judicial proceedings against him. He was denied the opportunity to publicly express remorse for his actions, acceptance of responsibility, and a commitment to rehabilitation. The harm resulting from those lost opportunities cannot be measured by assessing the likelihood of a different sentence.

CONCLUSION

¶110 In short, we believe the denial of the right to allocute is one of those rare instances in which "it is unnecessary and ill-advised to pursue a case-by-case inquiry to weigh actual prejudice." *State v. Arguelles*, 921 P.2d 439, 442 (Utah 1996) (cleaned up). We would instead adopt a per se rule of reversal and remand for resentencing.

Tab 6

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

July 30, 2025

Ronald B. Gordon, Jr.
State Court Administrator
Neira Siaperas
Deputy State Court Administrator

MEMORANDUM

TO: Utah Rules of Criminal Procedure Committee

FROM: Keri Sargent, Deputy District Court Administrator

RE: URCrP Rule 17.5

The Clerk of Court Group has identified an issue arising from URCrP 17.5 that governs in-person, remote, and hybrid hearings, and requests asking for a different format. The rule's definition of participant includes a "participating victim". Victims, unless they have representation, usually are not added to the case management system as a party, so often there is no knowledge of who the victim actually is, and no way to verify that identity. When requests from victims to change the manner of appearance are submitted to the court, clerical staff will direct these requests to the prosecutor, but in some instances, the prosecutor has declined to facilitate victims' requests for accommodations because they do not represent victims and therefore are not responsible for making such accommodations.

The Clerk of Court Group has discussed potential solutions, including a possible rule change. The URCrP Committee may also offer valuable insights on these issues, which have impacted courts statewide, beyond just amending the rule. I have intentionally omitted specific suggestions for rule changes, as further discussion may reveal alternative solutions.

I look forward to the discussion.