ADVANCE SHEET HEADNOTE
June 3, 2024

2024 CO 35

No. 22SC852, *People v. Johnson*—Jury Selection—Peremptory Challenge—Batson—Clear Error—Examination of Jurors—Particular Groups, Inclusion or Exclusion—Race.

The supreme court concludes that the prosecutor's explanation that a peremptory challenge against a Black potential juror who said law enforcement had been disrespectful to her or those close to her based on race was a facially race-neutral reason sufficient to satisfy step two of the framework in *Batson v. Kentucky*, 476 U.S. 79 (1986). Because, however, the trial court made no findings to indicate under step three that it had considered all the pertinent circumstances in concluding that the strike was not made with a discriminatory purpose, the record was insufficient for complete appellate review of Johnson's *Batson* claim.

The supreme court also holds that courts should use a substantial-motivating-factor approach to resolve *Batson* challenges when the striking party offers both race-based and race-neutral reasons. Because the court of appeals

applied a per se approach, the supreme court reverses the division's judgment and remands the case for further proceedings.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 35

Supreme Court Case No. 22SC852
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA768

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Raeaje Resshaud Johnson.

Judgment Reversed
en banc
June 3, 2024

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JUSTICE HOOD delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE GABRIEL**, and **JUSTICE BERKENKOTTER** joined. **JUSTICE MÁRQUEZ**, joined by **JUSTICE HART** and **JUSTICE SAMOUR**, specially concurred in the judgment.

JUSTICE HOOD delivered the Opinion of the Court.

¶1 The Equal Protection Clause prohibits excluding prospective jurors from jury service based on their race. More simply: "A person's race simply is unrelated to his [or her] fitness as a juror." *Valdez v. People*, 966 P.2d 587, 589 (Colo. 1998) (alteration in original) (quoting *Batson v. Kentucky*, 476 U.S. 79, 87 (1986)).

¶2 Although the Supreme Court's three-step *Batson* framework helps courts enforce equal protection rights in jury selection, it is not always clear when a peremptory strike is based on a juror's race. Consider, for example, the problem we confront today: A prosecutor explained that her peremptory strike against a Black potential juror was based in part on the juror's written statement in a questionnaire that law enforcement had been disrespectful to her or those close to her based on race. Was the prosecutor's strike race-neutral under *Batson*'s second step? Under the circumstances here, we say yes. Therefore, we reverse the judgment of the court of appeals to the contrary and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

¶3 Raeaje Resshaud Johnson was charged with one count each of first degree burglary, third degree assault, violation of bail bond conditions, tampering with a witness or victim, and attempting to influence a public servant; and three counts of violation of a protection order for conduct related to a domestic violence

incident. A jury pool was assembled for his trial. The potential jurors filled out a written questionnaire before the attorneys selected the jury.

¶4 At the end of the attorneys' questioning of the potential jurors, the prosecutor exercised a peremptory strike against Juror M. Defense counsel challenged this strike under *Batson* as violating equal protection. The prosecutor explained that the strike was based on (1) Juror M's questionnaire response in which she described "many" instances when law enforcement had been "disrespectful due to certain racial identities," and (2) Juror M's statements that she would wonder about a defendant's past actions in domestic violence cases. The court sustained the strike and excused Juror M.

¶5 The jury acquitted Johnson of attempting to influence a public servant and convicted him of the remaining counts.

¶6 On appeal, Johnson alleged numerous trial errors, including the trial court's denial of his *Batson* challenge to the prosecutor's peremptory strike of Juror M. *People v. Johnson*, 2022 COA 118, 523 P.3d 992. The division determined that the prosecutor had offered both race-based and race-neutral reasons for the strike. *Id.* at ¶ 6, 523 P.3d at 997. To resolve whether the strike demonstrated purposeful discrimination, the division adopted a "per se" approach. *Id.* at ¶ 7, 523 P.3d at 997. Under this approach, a race-neutral reason won't save an otherwise improper strike from a *Batson* challenge. *People v. Ojeda*, 2019 COA 137M, ¶ 18, 487 P.3d

1117, 1122 ("*Ojeda I*"). The division therefore concluded that the trial court had erred by denying Johnson's *Batson* challenge to the prosecutor's strike of Juror M, reversed his convictions, and remanded for a new trial. *Johnson*, ¶ 1, 523 P.3d at 996.

¶7 We agreed to review this decision.[1]

II. Analysis

¶8 We begin by explaining the constitutional context in which *Batson* arose. We then outline the Supreme Court's three-step *Batson* framework. After noting the different standards of review applicable to each step of *Batson*, we review what occurred here. Lastly, we consider whether a court should use a per se or a substantial-motivating-factor approach to resolve *Batson* challenges when the striking party offers both race-based and race-neutral reasons.

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[1] We granted the prosecution's petition to review the following issues:

1. [REFRAMED] Whether citing a Black juror's expression of concern that police do not treat minority persons equally constitutes a race-neutral justification for the purposes of *Batson*'s second step.
2. Whether the court of appeals erred in departing from supreme court precedent in adopting for the first time a "per se" test mandating a trial court to sustain a *Batson* objection when the challenged peremptory strike is supported by justification both race-neutral and race-based without regard to whether the strike was based on purposeful discrimination.

A. Criminal Trial Rights

¶9 "The due process clauses of the United States and Colorado constitutions guarantee every criminal defendant the right to a fair trial." *Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000); *see also* U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 25. An essential component of this guarantee is the right to an impartial jury. *Morrison*, 19 P.3d at 672; *accord Howard-Walker v. People*, 2019 CO 69, ¶ 23, 443 P.3d 1007, 1011.

¶10 To ensure an impartial jury, courts "must exclude from the jury persons who are prejudiced or biased as well as those who are 'unwilling or unable to accept the basic principles of criminal law and to render a fair and impartial verdict based upon the evidence admitted at trial and the court's instructions.'" *Marko v. People*, 2018 CO 97, ¶ 20, 432 P.3d 607, 613 (quoting *Morrison*, 19 P.3d at 672); *see also* § 16-10-103(1)(j), C.R.S. (2023). Voir dire helps counsel identify potential bias and helps the court to exclude jurors who may threaten a defendant's fair-trial rights. *See People v. Rodriguez*, 914 P.2d 230, 260 (Colo. 1996), *as modified on denial of reh'g* (Apr. 15, 1996); *Vigil v. People*, 2019 CO 105, ¶ 24, 455 P.3d 332, 338 ("[T]he ultimate aim of jury selection is to produce an unbiased and impartial jury.").

¶11 Colorado law provides two ways a party may excuse a potential juror. Crim. P. 24. First, a party may challenge a juror "for cause" by providing any of

the statutorily provided bases for disqualification, which generally relate to implied or actual conflicts of interest or the juror's inability to be fair and impartial. Crim. P. 24(b)(1); § 16-10-103(1); *see also Flowers v. Mississippi*, 588 U.S. 284, 293 (2019). Second, a party may use a peremptory strike, which allows the party to excuse a potential juror for almost any reason—"no questions asked." *Flowers*, 588 U.S. at 293; *see also* Crim. P. 24(d); § 16-10-104, C.R.S. (2023).

¶12 But the Equal Protection Clause sometimes interposes questions as it seeks "to eliminate all official state sources of invidious racial discrimination in the States." *Loving v. Virginia*, 388 U.S. 1, 10 (1967). It "protects not just defendants, but the jurors themselves." *Miller-El v. Dretke*, 545 U.S. 231, 270 (2005) (Breyer, J., concurring). After all, "[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers*, 588 U.S. at 293. And although "[d]efendants are harmed . . . when racial discrimination in jury selection compromises the right of trial by impartial jury, . . . racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish 'state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.'" *Miller-El*, 545 U.S. at 237–38 (citation omitted) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994)).

¶13 Under the Equal Protection Clause, a defendant is therefore "entitled 'to require that the State not deliberately and systematically deny to members of his

race the right to participate as jurors in the administration of justice.'" *Washington v. Davis*, 426 U.S. 229, 239 (1976) (quoting *Alexander v. Louisiana*, 405 U.S. 625, 628–29 (1972)). This protection can sometimes clash with a party's "blanket discretion to peremptorily strike prospective jurors for any reason," *Flowers*, 588 U.S. at 293, because it prohibits a party from using a peremptory strike to excuse a juror based on race or gender. *See J.E.B.*, 511 U.S. at 128–29; *People v. Beauvais*, 2017 CO 34, ¶ 20, 393 P.3d 509, 516.

¶14 But parties often rely on intuition or "gut feelings" in choosing a jury. This can sometimes bring false stereotypes or even unconscious bias into play. *See Miller-El*, 545 U.S. at 252; *Batson*, 476 U.S. at 106–07 (Marshall, J., concurring); *see also* Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. Rev. 155, 207–10 (2005). It also allows parties to use peremptory strikes to cloak purposeful discrimination. For these reasons, they have long been controversial. *Miller-El*, 545 U.S. at 266–67 (Breyer, J., concurring) ("The only way to 'end the racial discrimination that peremptories inject into the jury-selection process' . . . [is] to 'eliminat[e] peremptory challenges entirely.'" (second alteration in original) (quoting *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring))); Thomas Ward Frampton & Brandon Charles Osowski, *The End of* Batson*? Rulemaking, Race, and Criminal Procedure Reform*, 124 Colum. L. Rev. 1,

17–22 (2024); *see also generally* Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. Chi. L. Rev. 809 (1997).

¶15 At least one state has abolished peremptory strikes altogether, Sup. Ct. of Ariz., No. R-21-0020, Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure (Aug. 30, 2021), https://aboutblaw.com/ZpS [https://perma.cc/742M-J6DN], and several others are moving in that direction, *e.g.*, Wash. Rules of Gen. Application, Gen. Rules, WA GR 37(h) (providing a list of presumptively invalid reasons for a peremptory strike). *See* Nancy S. Marder, *Race, Peremptory Challenges, and State Courts: A Blueprint for Change*, 98 Chi.-Kent L. Rev. 65, 79–101 (2023); *see also Rivera v. Illinois*, 556 U.S. 148, 152 (2009) ("States may withhold peremptory challenges 'altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.'" (quoting *Georgia v. McCollum,* 505 U.S. 42, 57 (1992))).

¶16 Colorado has similarly considered making substantive changes to the rules and statutes governing peremptory strikes. *See* John Dailey, Chair, Colo. Rules of Crim. Proc. Comm., *Proposed Crim. P. 24 Majority, Minority, and Rule* (Oct. 4, 2022), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Criminal_Rules_Committee/Crim%20P%2024d%20submission%20documents.pdf [https://perma.cc/J9MZ-5TF5]; SB22-128, *Implicit Bias in Jury Selection*, https://leg.colorado.gov/bills/sb22-128 [https:/

perma.cc/Q2WC-EY9D] (indicating that on March 10, 2022, the Senate Committee on Judiciary voted to postpone the bill indefinitely).

¶17 But for now, peremptory strikes remain. *See* Crim. P. 24(d); § 16-10-104; *see also Rivera*, 556 U.S. at 152 ("The right to exercise peremptory challenges in state court is determined by state law."). And in Colorado, we adhere to the Supreme Court's three-step framework in *Batson* to reconcile peremptory strikes and the Equal Protection Clause. *See Batson*, 476 U.S. at 95–97; *see also People v. Rodriguez*, 2015 CO 55, ¶ 2 n.1, 351 P.3d 423, 426 n.1 (recognizing that *Batson*'s equal protection analysis encompasses not only race-based discrimination in criminal cases, but gender-based discrimination and civil cases as well).

B. The *Batson* Framework

¶18 At *Batson*'s first step, "the objecting party must make a prima facie showing that the striking party exercised a peremptory challenge based on race or gender." *People v. Owens*, 2024 CO 10, ¶ 76, 544 P.3d 1202, 1222; *accord Batson*, 476 U.S. at 93–94. The standard for doing so isn't high and requires the objecting party to present evidence sufficient to raise only an inference of discrimination rather than proof by a preponderance of the evidence that discrimination occurred. *Valdez*, 966 P.2d at 590; *accord People v. Madrid*, 2023 CO 12, ¶ 32, 526 P.3d 185, 193.

¶19 If the objecting party meets this standard, the burden shifts to the striking party to offer a race- or gender-neutral reason for the strike. *Beauvais*, ¶ 20,

393 P.3d at 516; *see Batson*, 476 U.S. at 94. "A neutral explanation in this context is 'an explanation based on something other than the race of the juror.'" *Owens*, ¶ 77, 544 P.3d at 1222 (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991)). At this second step, the court doesn't consider whether the explanation is plausible or persuasive. *Madrid*, ¶ 33, 526 P.3d at 193; *see also People v. Ojeda*, 2022 CO 7, ¶ 24, 503 P.3d 856, 862 ("*Ojeda II*"). The court merely considers "the facial validity of the proponent's explanation." *Madrid*, ¶ 33, 526 P.3d at 193 (quoting *Ojeda II*, ¶ 24, 503 P.3d at 862); *accord Valdez*, 966 P.2d at 590. The objecting party may present evidence or argument to rebut the striking party's stated reason. *Madrid*, ¶ 34, 526 P.3d at 193.

¶20 The court then moves to *Batson*'s third and final step when it considers "'all of the circumstances that bear upon the issue of' purposeful discrimination," including "the striking party's demeanor, the reasonableness of the proffered race-neutral explanations, and whether the rationales are rooted in accepted trial strategy." *Id.*, 526 P.3d at 193–94 (quoting *Beauvais*, ¶ 23, 393 P.3d at 517). "Though the trial court must evaluate all relevant facts, 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *People v. Wilson*, 2015 CO 54M, ¶ 14, 351 P.3d 1126, 1132 (quoting *Purkett v. Elem,* 514 U.S. 765, 768 (1995)); *see also Batson*, 476 U.S. at 93 ("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.'" (quoting *Whitus v. Georgia,* 385 U.S. 545, 550 (1967))).

C. Standard of Review

¶21 We review de novo a trial court's conclusions regarding whether the objecting party established a prima facie case at step one and whether the striking party has articulated a race-neutral reason at step two. *Owens*, ¶ 79, 544 P.3d at 1222. But we review the trial court's ultimate step-three conclusion, regarding "whether the objecting party proved purposeful discrimination by a preponderance of the evidence," for clear error. *Beauvais*, ¶ 2, 393 P.3d at 512; *accord Flowers*, 588 U.S. at 316. Under this standard, we defer to the trial court's ruling "so long as the record reflects that the trial court weighed all of the pertinent circumstances." *Beauvais*, ¶ 2, 393 P.3d at 512; *see also Owens*, ¶ 79, 544 P.3d at 1222.

¶22 If we determine that a *Batson* violation has occurred, the remedy is automatic reversal. *Owens*, ¶ 80, 544 P.3d at 1222. If, however, the trial court's analysis is inadequate to determine whether a violation has occurred, "the appropriate procedure is to remand the case for more detailed findings by the trial court." *Craig v. Carlson*, 161 P.3d 648, 654 (Colo. 2007).

D. Additional Facts: Jury Selection at Johnson's Trial

¶23 The potential jurors here filled out a standard questionnaire before trial. Question eight asked, "Have you, a member of your family, or a close friend had

a particularly good or bad experience with a police officer? If yes, describe." Juror M answered, "Yes[,] many cases where cops are disrespectful due to certain racial identities." Question ten asked, "Do you believe there is any reason why you cannot be a fair and impartial juror? If yes, please give your reasons." Juror M answered, "No, I would be great." Neither party asked Juror M about her questionnaire.

¶24 During voir dire, the prosecutor asked the venire for their opinions about alcohol use and its impact on domestic violence. A couple of jurors said that, although alcohol can change what a person does and how they act, they didn't believe that the involvement of alcohol in a domestic violence situation relieved the accused of responsibility. The prosecutor then asked Juror M what she thought. Juror M said she agreed with the other jurors and added: "[Y]ou know, if domestic violence is still happening sober, and it just worsens when there is alcohol involved, they are both still responsible. Like, if it doesn't happen, and then there is alcohol involved now, that might—I don't know—trigger the domestic violence or whatever."

¶25 The prosecutor then asked Juror M if she would have difficulty looking only "at what happened right here" without knowing anything about the past; she said, "Yeah, definitely." The prosecutor validated that response, saying, "we all want to know everything about the whole context," but then explained that in criminal

trials, "you get to hear about what happened on this day." The prosecutor then again asked Juror M if she would "be able to look at something in isolation and not wonder or speculate about things that happened before if [she was] given the law that told [her] that [she] had to do that?" Juror M said, "I mean, I will definitely wonder, but I'll try to think of the present."

¶26 Later, the prosecutor used her third peremptory strike to excuse Juror M. Defense counsel raised a *Batson* challenge, alleging "racial prejudice and racial bias" because Juror M was the only prospective juror who appeared to be Black. The prosecutor justified the strike by saying:

> I think it is clear, based on her questionnaire alone—[Juror M] talked about how law enforcement was disrespectful. She talked about how people of different races were treated differently in her experience with law enforcement. She also talked a lot about how she would want to know about the past, and it's a matter of wondering, and how the past is relevant in terms of talking about domestic violence. I think because of her answers in her questionnaire, there is more than enough reason for the People to have dismissed her.

¶27 Defense counsel responded:

> It's clear, based on her questionnaire, that she's experienced racism in the past. I believe she's experiencing racism as a juror by taking her off this panel for Mr. Johnson, who is an African-American male.
>
> I saw nothing she said to the District Attorney or to me during our jury selection that would indicate that she would not be fair to the Prosecution. It's quite the opposite. She actually mentioned things that would perhaps be prejudicial to Mr. Johnson, and that she understood why people would make things up in a domestic violence case.

> She was agreeing with the woman who was sitting next to her, saying the same things, and that person just happens to be not African-American, so I am alleging a case of purposeful discrimination.

¶28 After further discussion and a brief recess, the trial court said that under *Batson*'s first step, it was "unable" to find "that the totality of the facts presented in this jury selection process give rise to an inference of a discriminatory purpose from the Prosecution." It nonetheless proceeded to *Batson*'s second step.

¶29 The court noted that Juror M's statement about having experienced "many cases where cops are disrespectful due to certain racial identities," "cut[] both ways." On the one hand, it showed that Juror M had "experienced racial discrimination herself." On the other hand, "the nature of her response [was] that those were bad experiences, and the People [were] construing that—or inferring from that that she would have her own bias against law enforcement, based on her experiences." The court noted that Juror M "did not come out and say that," but the court nonetheless believed it was "an inference that the People ha[d] drawn." The court then found that the prosecutor had offered a race-neutral reason for the strike by "point[ing] to the juror's answer on her questionnaire, specifically that she has had bad experiences with law enforcement who have exercised their own racial discrimination."

¶30 Moving to *Batson*'s third and final step, the trial court simply said that it must "decide whether the opponent of the strike has proved purposeful racial

discrimination, and, in that case, I cannot find that the Defense has met that burden." It then denied Johnson's *Batson* challenge and excused Juror M.

¶31 On appeal, the division concluded that the prosecutor's reliance on Juror M's past experiences with law enforcement as the basis for the peremptory strike was a race-based reason under step two of *Batson*. *Johnson*, ¶ 27, 523 P.3d at 1002–03.

E. Application

1. Step One

¶32 The division initially concluded that although the trial court erred by finding that Johnson had failed to make a prima facie showing of racial discrimination at step one, the error was moot because the trial court continued to step two. *Id.* at ¶ 26, 523 P.3d at 1002; *see DePriest v. People*, 2021 CO 40, ¶ 8, 487 P.3d 658, 662 ("[A]n issue becomes moot because any relief granted by the court would have no practical effect."). We agree and proceed to *Batson*'s second step.

2. Step Two

¶33 At step two, the division concluded that the prosecutor's reliance on Juror M's questionnaire response—explaining that she, a family member, or a close friend had been disrespected by the police "due to certain racial identities"—was not "an adequate race neutral reason" for the peremptory strike because "a

Black juror's personal experience with law enforcement that is race based is not, on its face, a race-neutral explanation and, instead, constitutes a race-based explanation." *Johnson*, ¶ 27, 523 P.3d at 1002. The division noted that no one asked Juror M whether those experiences would cause her to "evaluate law enforcement officers' credibility any differently than that of non-law enforcement witnesses" or whether she could be fair to the prosecution. *Id.*, 523 P.3d at 1002–03. Lastly, the division concluded that the prosecutor's rationale was "impermissible because race-based 'discriminatory intent is inherent in the prosecutor's explanation' and in the court's ruling." *Id.* (quoting *Hernandez*, 500 U.S. at 360).

¶34 We disagree with the division that the prosecutor's reliance on Juror M's past experiences with law enforcement was a race-based reason for exercising a peremptory strike.

¶35 Remember that *Batson* serves "to limit reliance on stereotypes about certain groups in exercising peremptory challenges." *People v. Lewis & Oliver*, 140 P.3d 775, 813 (Cal. 2006), *as modified on denial of reh'g* (Nov. 1, 2006). Once the objecting party clears step one's low bar with a prima facie showing of discrimination, the striking party must offer a facially race-neutral reason for the strike.

¶36 At step two, courts therefore consider only whether the striking party has provided a reason to excuse the juror "based on something other than the race of the juror." *Owens*, ¶ 77, 544 P.3d at 1222 (quoting *Hernandez*, 500 U.S. at 360). The

focus of this inquiry is on the striking party's stated reason for the strike: "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez*, 500 U.S. at 360; *see also* Lynn Noesner, Batson – *Aging Well or in Need of Revision?*, Colo. Law., Apr. 2022, at 22, 24, 24 n.28.

¶37 Here, the prosecutor gave two reasons for striking Juror M: (1) her past experiences with the police and (2) her concern with being able to assess the evidence without knowing more about preceding events. Like the division, we focus our analysis on the first reason.

¶38 As mentioned above, neither Juror M nor the prosecutor expressly said anything about distrusting law enforcement. But the trial court and the division inferred that the prosecutor's statement that "[Juror M] talked about how law enforcement was disrespectful," was a strike based on Juror M's perceived distrust of or bias against law enforcement. *Johnson*, ¶¶ 11, 27, 523 P.3d at 998, 1002–03; *see also id.* at ¶ 64, 523 P.3d at 1008 (Berger, J., concurring in part and dissenting in part). We draw the same inference.

¶39 However prevalent the distrust of law enforcement might be in some communities, the fact remains that it is not an inherent characteristic of any race. Assuming otherwise is simply another form of inappropriate stereotyping. *See Lewis & Oliver*, 140 P.3d at 812–13 ("[A] party cannot *assume* . . . that because a

prospective juror belongs to a cognizable minority group, that person holds biased views common to that group, and therefore is undesirable as a juror," but a party "may excuse prospective jurors, including members of cognizable groups, based on personal, individual biases those individuals *actually express*."). Potential jurors of any race may distrust law enforcement, and a potential juror who is a person of color may hold no such bias at all. *See, e.g.*, *State v. Sanders*, 933 N.W.2d 670, 677–79 (Wis. Ct. App. 2019); *see also* Drew DeSilver et al., *10 things we know about race and policing in the U.S.*, Pew Rsch. Ctr., June 3, 2020, https://www.pewresearch.org/short-reads/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/ [https://perma.cc/MB6V-9HWH].

¶40 So, a peremptory strike based on a potential juror's distrust of law enforcement (whether implied or expressly stated) is not inherently race-based. *See Hernandez*, 500 U.S. at 360–61 (explaining that a striking party's reason will pass step two as long as a discriminatory intent isn't inherent in the prosecutor's explanation), 362 ("Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality."); *cf. Marko*, ¶ 21, 432 P.3d at 613 ("If the trial court ultimately concludes that the prospective juror's state of mind evinces 'enmity or bias' toward the defendant or the state, the trial court must exclude the juror." (quoting § 16-10-103(1)(j))).

¶41 We are hardly alone in reaching this conclusion. On the contrary, most courts around the country have found "distrust of law enforcement" to be a race-neutral justification for a peremptory strike under *Batson*. *See, e.g.*, *United States v. Crawford*, 413 F.3d 873, 875 (8th Cir. 2005) (per curiam) ("A juror's bias or dissatisfaction with law enforcement is a race-neutral reason for striking the juror."); *United States v. Rudas*, 905 F.2d 38, 41 (2d Cir. 1990) (same); *State v. Jose A. B.*, 270 A.3d 656, 678–80 (Conn. 2022) (noting that with the exception of two cases—one from New Jersey and one from Washington—state courts had uniformly concluded "that a negative perception of law enforcement or the criminal justice system" was a race-neutral justification for a peremptory strike); *State v. Holmes*, 221 A.3d 407, 426 n.17, 426–27 (Conn. 2019) (collecting cases that have found distrust of law enforcement to be race-neutral); *People v. Winbush*, 387 P.3d 1187, 1217 (Cal. 2017), *as modified on denial of reh'g* (Mar. 29, 2017) ("A prospective juror's distrust of the criminal justice system is a race-neutral basis for excusal."); *People v. Avila*, 133 P.3d 1076, 1115 (Cal. 2006), *as modified on denial of reh'g* (Aug. 2, 2006) (concluding the prosecutor's reason wasn't pretextual and was race-neutral because it was based on the juror's "*personal experience* that police officers lied, not on a theoretical perception that she, a member of a minority group, might view the police with distrust").

¶42 In evaluating the facial neutrality of a striking party's reason, we must resist the urge to shift the focus of the step-two inquiry away from the striking party's stated reasons for the strike and onto the source of the juror's potential bias. Although a juror's bias may derive from her experiences as a person of color—that is, a juror's experiences and biases may be closely linked to (or because of) her race or gender—that doesn't convert the striking party's reason for excusing her into a race- or gender-based reason. *See People v. Calvin*, 72 Cal. Rptr. 3d 300, 308 (Cal. Ct. App. 2008) (noting that skepticism of the criminal justice system, "regardless of its prevalence among African–Americans, is not exclusively associated with their race and . . . there is nothing 'inherent' in the criterion that suggests *intentional* racial discrimination").

¶43 Here, the prosecutor didn't tie Juror M's perceived distrust of law enforcement to Juror M's or Johnson's race, nor did she base Juror M's removal on broader concerns that, because Juror M and Johnson are of the same race, Juror M might be more sympathetic to him. *See Hernandez*, 500 U.S. at 362 ("Nothing in the prosecutor's explanation shows that he chose to exclude jurors who hesitated in answering questions about following the interpreter *because* he wanted to prevent bilingual Latinos from serving on the jury."); *cf. Ojeda II*, ¶¶ 8, 45–48, 503 P.3d at 859–60, 865–66. Such reasons have consistently been held to be race-based. *See, e.g.*, *United States v. Bishop*, 959 F.2d 820, 825–26 (9th Cir. 1992) ("[The prosecutor's]

invocation of residence both reflected and conveyed deeply ingrained and pernicious stereotypes. Government acts based on such prejudice and stereotypical thinking are precisely the type of acts prohibited by the equal protection clause of the Constitution." (citation omitted)), *overruled on other grounds by United States v. Nevils*, 598 F.3d 1158 (9th Cir. 2010); *Ojeda II*, ¶¶ 45–49; 503 P.3d at 865–66 (concluding that, by tying the juror's "'anti-establishment' views" to the juror's and the defendant's race, the prosecutor failed to meet its step-two burden).

¶44 The prosecutor's stated reasons for the strike implied that she thought Juror M would be biased against police officers (who would be testifying) because of past, negative experiences with law enforcement. The prosecutor's explanation was based on Juror M's personal experiences (either direct or vicarious) and how they might affect Juror M's willingness to receive evidence impartially. This type of individualized reason is facially race-neutral. *See People v. Hamilton*, 200 P.3d 898, 932 (Cal. 2009) ("[A] challenge based solely on the prospective juror's race is different from a challenge 'which may find its roots in part [in] the juror's attitude about the justice system and about society which may be race related.'" (alteration in original)).

¶45 This is not to say that a court should ignore the plausibility of the striking party's explanation or the disparate impact it may produce, but such considerations are reserved for *Batson*'s third step. *See Hernandez*, 500 U.S. at 361

(concluding that although "the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor's actions into a *per se* violation of the Equal Protection Clause"); *Washington*, 426 U.S. at 242 (noting that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution"). At step two, the striking party need only provide a facially race-neutral explanation. *See Purkett*, 514 U.S. at 769 (concluding the prosecution had passed step two's low bar because the reason given for the strike "is not a characteristic that is peculiar to any race" (quoting *Equal Emp. Opportunity Comm'n v. Greyhound Lines, Inc.*, 635 F.2d 188, 190 n.3 (3d Cir. 1980))). Whether that reason is mere pretext for race and whether a strike premised on that reason is ultimately found to have been made with a discriminatory purpose under step three is a separate inquiry. We must be mindful not to blend our analysis of the two steps. *See Purkett*, 514 U.S. at 768 (warning about the danger of combining *Batson*'s second and third steps).

¶46 Accordingly, we conclude that the prosecutor met the low, step-two burden of providing a facially race-neutral reason to strike Juror M. But simply providing a race-neutral reason doesn't end the *Batson* analysis. The reason must survive any rebuttal evidence offered by the objecting party and the court's scrutiny under step three. *See Miller-El*, 545 U.S. at 251–52; *see also People v. Cerrone*, 854 P.2d 178,

191 (Colo. 1993) (explaining that offering a race-neutral reason doesn't end the *Batson* inquiry; it merely means that the objecting party hasn't prevailed in proving purposeful discrimination as a matter of law, so the trial court must proceed to step three).

3. Step Three

¶47 The trial court's step-three determination regarding whether the objecting party has established purposeful discrimination "is a pure issue of fact." *Cerrone*, 854 P.2d at 191. Accordingly, a reviewing court should "give deference to the findings made by the trial court" at step three. *Id.*; *see also Foster v. Chatman*, 578 U.S. 488, 500 (2016) (explaining that, "'in the absence of exceptional circumstances,'" a reviewing court should "defer to state court factual findings unless [it] conclude[s] that they are clearly erroneous" (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008))). And although the trial court "need not make express findings" about which circumstances it considered or how they contributed to the court's ultimate ruling, the record must clearly "reflect[] that the trial court weighed all of the pertinent circumstances" "bearing upon the plausibility of a non-discriminatory reason and the possibility of discriminatory animus." *Beauvais*, ¶ 32, 393 P.3d at 519.

¶48 A strike is made with a discriminatory purpose when it is made "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable

group."[2] *Hernandez*, 500 U.S. at 360 (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). Accordingly, a strike made because of a juror's race, whether motivated by animus or zealous advocacy, violates equal protection. *See Wilson*, ¶ 29 n.1, 351 P.3d at 1135 n.1 (Márquez, J., concurring in part and dissenting in part) ("[A] strike is 'racially motivated' where it is based on the juror's race—for example, striking a black veniremember in the hopes of increasing the likelihood of a favorable verdict.").

¶49 In determining whether a strike was made with a discriminatory purpose, the court may consider the striking party's demeanor, the lack of questioning about the reason given, whether the striking party struck similarly situated jurors of a different race or gender, and any disparate impact caused by the category of jurors created by the striking party's reason. *See Flowers*, 588 U.S. at 301–02 (providing a list of factors courts may consider); *Miller-El*, 545 U.S. at 241 (explaining that a failure to strike a similarly situated non-Black juror may be

[2] "Discriminatory purpose is not the same as discriminatory animus." *Ojeda I*, ¶ 72, 487 P.3d at 1132 (Harris, J., specially concurring); *accord Madrid*, ¶ 35 n.3, 526 P.3d at 194 n.3. A court's conclusion that a strike was made for a discriminatory purpose shouldn't be interpreted as a finding that the striking party necessarily harbors "ill will or animosity toward a racial minority." *Wilson*, ¶ 29 n.1, 351 P.3d at 1135 n.1 (Márquez, J., concurring in part and dissenting in part). Doing so "undermines the goals of *Batson*" and "allows more, not fewer, race-based strikes to go unchecked." *Ojeda I*, ¶¶ 75–76, 487 P.3d at 1132–33 (Harris, J., specially concurring).

considered at *Batson's* third step as "evidence tending to prove purposeful discrimination"), 250 n.8 (reasoning that a lack of questioning "undermine[d] the persuasiveness of the claimed concern").

¶50 Here, before ruling on the *Batson* challenge, the trial court observed:

- Juror M "appears to be the only person in the top [twenty-five] jurors of African-American [descent]."
- Juror M wrote on her questionnaire that she was familiar with "many cases where cops are disrespectful due to certain racial identities."
- The prosecutor was construing Juror M's experiences with law enforcement to mean that she "would have her own bias against law enforcement, based on her experiences. . . . That is . . . an inference that the People have drawn."
- Juror M also said, in response to questionnaire question ten, that she could be fair.

¶51 The court then concluded that "this case clearly involves Mr. Johnson, an African-American man and law enforcement, and the fact that credibility of witnesses is always an issue, and you have law enforcement dealing with African-American citizens, raises the question for the Prosecution of whether she can be fair." With no further analysis, the court denied the *Batson* challenge and excused Juror M.

¶52 The objecting party bears the burden of proving a *Batson* violation, *Cerrone*, 854 P.2d at 191, and, under clear error review, we "should defer to the trial court's step-three ruling 'so long as the record reflects that the trial court weighed all of

the pertinent circumstances and supports the court's conclusion' regarding purposeful discrimination," *Ojeda II*, ¶ 42, 503 P.3d at 865 (quoting *Beauvais*, ¶ 32, 393 P.3d at 519). But when the trial court's step-three determination is devoid of any findings, the remedy isn't blanket affirmance but, rather, a remand for further findings. *See Rodriguez*, ¶¶ 2, 20, 351 P.3d at 426, 431; *Beauvais*, ¶ 66, 393 P.3d at 525–26 (Márquez, J., dissenting).

¶53 Here, the trial court did much that is commendable. First, it accurately summarized the *Batson* test. Second, it made findings to resolve the dispute between the parties regarding step two. Despite its misgivings about whether Johnson had satisfied his step-one burden to make a prima facie showing of purposeful discrimination, the court labored on. The court astutely chose to address step two, explaining why it found the prosecutor's basis for the peremptory strike of Juror M facially race-neutral.

¶54 But there the explanations ceased. In the end, the court made no step-three findings. It just said that Johnson hadn't met his burden to prove purposeful discrimination and denied the challenge. The record doesn't reveal, for example, whether the court considered the lack of questioning about Juror M's questionnaire; the experiences she referenced; how those experiences may have affected her views of law enforcement; or any other "pertinent circumstances," as our precedent urges. In making this observation, we don't mean to prescribe a

litany. We simply underscore the dearth of information impeding appellate review.

¶55 Although the question at step three is whether Johnson proved that the *prosecutor* engaged in purposeful discrimination, not whether the prosecutor proved that *Juror M* harbored bias against law enforcement, it is difficult for us to assess whether the trial court committed clear error at step three (in concluding that the prosecutor's explanation wasn't pretextual) without a more fulsome record as to Juror M. Recall that the questionnaire asked whether "you, a member of your family, or a close friend had a particularly good or bad experience with a police officer," to which Juror M answered, "Yes[,] many cases where cops are disrespectful due to certain racial identities." While we can understand why the prosecutor chose to leave its assumption of bias untested (fearing perhaps that it might invite a diatribe by Juror M that could poison the well of other prospective jurors), the prosecutor's choice has consequences. By not probing these admittedly difficult issues with Juror M (perhaps with a request to the trial court to do so in camera; meaning, outside the presence of other jurors), it is hard to discern *why* the trial court concluded that Johnson had failed to meet his step-three burden. This becomes especially challenging on the facts before us here, considering Juror M's seemingly unequivocal written assertion that she would have been fair and impartial despite the experiences with law enforcement she shared.

¶56 Under these circumstances, there are no step-three findings to which we can defer, and the record is insufficient for appellate review of the trial court's determination that the prosecutor's strike of Juror M wasn't purposefully discriminatory. *See Rodriguez*, ¶ 2, 351 P.3d at 426; *cf. Beauvais*, ¶ 44, 393 P.3d at 521 (concluding that "the trial court's careful *Batson* analysis indicates that it accounted for all of the prosecution's step-two reasons in concluding that Beauvais had failed to prove by a preponderance of the evidence that these reasons were pretextual").

F. The Proper Test Under Step Three

¶57 The prosecution asserts that, in resolving the question of purposeful discrimination at step three, the trial court should use a substantial-motivating-factor approach. Johnson advocates for a per se approach. The division sided with Johnson. We agree with the prosecution.

¶58 Under the per se approach, a court must sustain a *Batson* challenge when the striking party gives both race-based and race-neutral reasons to support the strike. *Ojeda I*, ¶ 18, 487 P.3d at 1122; *see also State v. King*, 572 N.W.2d 530, 535 (Wis. Ct. App. 1997). Courts applying this approach reason that "where the challenged party *admits* reliance on a prohibited, discriminatory characteristic, . . . a response that other factors were also used is [in]sufficient rebuttal under the second *Batson* prong." *State v. Jagodinsky*, 563 N.W.2d 188, 191 (Wis. Ct. App. 1997).

¶59 Under the substantial-motivating-factor approach, a court will sustain a *Batson* challenge where the striking party was "motivated in substantial part by discriminatory intent." *Flowers*, 588 U.S. at 303 (quoting *Foster*, 578 U.S. at 513). This approach recognizes litigants' prerogative to conduct trial according to their chosen strategy. *Beauvais*, ¶ 23, 393 P.3d at 517; *accord Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003). It also allows for imprecise justifications and sometimes inarticulable gut instincts, which courts have recognized are essential tools for choosing an impartial jury. *See, e.g.*, *J.E.B.*, 511 U.S. at 147–48 (O'Connor, J., concurring). After all, a striking party must stand or fall on the reasons stated at step two. *Miller-El*, 545 U.S. at 252.

¶60 In adopting the per se approach, the division acknowledged its departure from a prior division's adoption of the substantial-motivating-factor approach. *Johnson*, ¶ 7, 523 P.3d at 997 (disagreeing with *Ojeda I*). It concluded that the per se approach was "the 'most faithful to the principles outlined in *Batson*,'" *id.* at ¶ 23, 523 P.3d at 1001 (quoting *Ojeda I*, ¶ 21, 487 P.3d at 1122), and that it was "easier to apply consistently than the substantial-motivating-factor approach" because "the task of determining which of several offered reasons is the 'substantial motivating one' is dubious and fraught with inconsistency," *id.* at ¶ 24, 523 P.3d at 1002.

¶61 Regardless, the Supreme Court has adopted the substantial-motivating-factor approach. *E.g.*, *Flowers*, 588 U.S. at 303. And we followed suit in *Ojeda II*. ¶¶ 27–28, 503 P.3d at 863; *see also Madrid*, ¶ 35, 526 P.3d at 194; *Owens*, ¶ 78, 544 P.3d at 1222. We see no compelling reason to depart from our prior decisions and Supreme Court precedent. *See People v. Smith*, 2023 CO 40, ¶ 33, 531 P.3d 1051, 1057 ("[C]ourts are reluctant to undo settled law, . . . [and] we will depart from our existing law when we are clearly convinced that '(1) the rule was originally erroneous or is no longer sound because of changing conditions and (2) more good than harm will come from departing from precedent.'" (quoting *Love v. Klosky*, 2018 CO 20, ¶ 15, 413 P.3d 1267, 1270)).

¶62 Accordingly, "if the objecting party proves by a preponderance of the evidence that the strike was substantially motivated by discriminatory intent," "the court may conclude that the strike was purposefully discriminatory under *Batson*" and sustain the challenge. *Madrid*, ¶ 35, 526 P.3d at 194.

III. Conclusion

¶63 We reverse the judgment of the court of appeals and remand the case to the court of appeals to determine whether the domestic-violence explanation or the bias-against-law-enforcement explanation was the prosecutor's substantial motivating factor for striking Juror M and whether a remand to the trial court for

further step-three findings is necessary. The division should also determine whether it needs to address any remaining issues.

JUSTICE MÁRQUEZ, joined by **JUSTICE HART** and **JUSTICE SAMOUR**, specially concurred in the judgment.

JUSTICE MÁRQUEZ, joined by JUSTICE HART and JUSTICE SAMOUR, specially concurring.

¶64 I fully join the majority's analysis in this difficult case. I note, however, that several states, including Colorado, have begun to reconsider the efficacy of the framework under *Batson v. Kentucky*, 476 U.S. 79 (1986). Some states have reconsidered the use of peremptory strikes altogether. In light of these ongoing developments, I write separately to offer a few general observations, recognizing that this is a complex issue, and my perspective is but one among many.

¶65 When *Batson* was decided in 1986, Justice Thurgood Marshall observed that the decision represented "a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries." *Id.* at 102 (Marshall, J., concurring). Yet he also predicted that *Batson* "[would] not end the racial discrimination that peremptories inject into the jury-selection process." *Id.* at 102–03. Nearly forty years later, it appears Justice Marshall was correct.

¶66 Peremptory challenges continue to be used to strike people of color from juries at disparate rates. *See Miller-El v. Dretke*, 545 U.S. 231, 268 (2005) (Breyer, J., concurring) (collecting research) ("I am not surprised to find studies and anecdotal reports suggesting that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem."). As many judges and academics have noted, *Batson* has proven largely ineffective at curbing this injustice. *See, e.g.*, Willamette

Univ. Coll. of L. Racial Just. Task Force, *Remedying* Batson*'s Failure to Address Unconscious Juror Bias in Oregon*, 57 Willamette L. Rev. 85, 99–100 n.85 (2021) (collecting articles); Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1077 (2011) (collecting articles) ("[V]irtually every commentator (and numerous judges) who have studied the issue have concluded that race-based juror strikes continue to plague American trials.").

¶67 Part of the problem stems from inherent flaws in the *Batson* framework. One such flaw is *Batson*'s assumption that trial judges can reliably detect race-based motivations for a peremptory strike. *See Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari). But such an assumption is dubious. As a threshold matter, a prospective juror's race or ethnicity may be difficult to discern (and surnames are not necessarily a reliable indicator). This means that counsel and the court may engage in guesswork that can lead to mistakes or even itself be a form of stereotyping. And even where the juror's race or ethnicity is not in doubt, *Batson* requires a trial judge to have a nearly impossible degree of insight into the intent of the striking attorney. Worse, *Batson* forces the trial judge to make this critical decision on the spot, based on little more than the court's observations of voir dire and (possibly) the striking party's demeanor. Moreover, as Justice Marshall once observed, even "[a]ssuming good faith on the

part of all involved, *Batson*'s mandate requires the parties 'to confront and overcome their own racism on all levels,' a most difficult challenge to meet." *Id.* (quoting *Batson*, 476 U.S. at 106 (Marshall, J., concurring)); *see also Miller-El*, 545 U.S. at 267–68 (Breyer, J., concurring) ("*Batson* asks judges to engage in the awkward, sometime[s] hopeless, task of second guessing a prosecutor's instinctive judgment—the underlying basis for which may be invisible even to the prosecutor exercising the challenge.").

¶68 A second, related flaw in the *Batson* framework concerns the intrinsic disincentives to sustaining a *Batson* challenge. As I have noted before, to find a *Batson* violation, a trial judge is placed in the unenviable position of ruling that the attorney standing before the court not only struck a prospective juror on the basis of race (or gender) but also provided a pretextual reason for doing so. *See People v. Beauvais*, 2017 CO 34, ¶ 102, 393 P.3d 509, 532 (Márquez, J., dissenting). Thankfully, this court's opinion in *People v. Ojeda*, 2022 CO 7, ¶ 50, 503 P.3d 856, 866, clarified that a finding of discriminatory purpose under step three of the *Batson* analysis does not equate to a finding that the proponent of the strike is racist. Nevertheless, judges understandably may still hesitate to sustain a *Batson* challenge, especially when forced to do so on the fly and based on limited evidence.

¶69 Adding to these difficulties, appellate scrutiny of these decisions is constrained by the (necessary) deference given to trial judges' assessments when reviewing *Batson* challenges on appeal. *See Beauvais*, ¶ 21, 393 P.3d at 516 ("The trial court's finding at step three as to whether the objecting party has shown purposeful discrimination is a 'determination[] of credibility and demeanor' that lies 'peculiarly within a trial judge's province.'" (alteration in original) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008))); *see also id.* at ¶ 22, 393 P.3d at 517 (noting that reviewing courts are "deferential" to trial courts' *Batson* determinations and that "reversal is only proper under 'exceptional circumstances'" (quoting *Snyder*, 552 U.S. at 477)).

¶70 Perhaps the more fundamental problem with the *Batson* framework, however, stems from the nature of peremptory challenges themselves.

¶71 In theory, peremptory strikes allow "both the prosecution and the defense to secure a more fair and impartial jury by enabling them to remove jurors whom they perceive as biased." *People v. Abu-Nantambu-El*, 2019 CO 106, ¶ 18, 454 P.3d 1044, 1048 (quoting *Vigil v. People*, 2019 CO 105, ¶ 19, 455 P.3d 332, 337); *see also Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) (discussing the relationship between the use of a peremptory challenge and achieving an impartial jury). Peremptory challenges can often be based on perfectly valid concerns about a prospective juror's views about a case and can even serve as an important tool to address a

prospective juror's overt or unconscious racial bias that may be difficult to elicit in voir dire.

¶72 But peremptory challenges also allow a party to remove prospective jurors who have been "passed for cause" (that is, jurors who meet the statutory qualifications and are deemed adequately fair and impartial) based solely on counsel's "seat-of-the-pants instincts" or hunches. *Batson*, 476 U.S. at 106–07 (Marshall, J., concurring). Too often, this aspect of peremptory challenges can facilitate racial discrimination in the jury selection process, and in ways that are difficult to detect.

¶73 Peremptory challenges can often be based on nothing more than "sudden impressions and unaccountable prejudices" in response to "bare looks and gestures," gut feelings about a juror's indifference, or even imagined bias stemming from a juror's group affiliations. *Swain v. Alabama*, 380 U.S. 202, 220–21 (1965) (quoting *Lewis v. United States*, 146 U.S. 370, 376 (1892)), *overruled on other grounds by Batson*, 476 U.S. 79. The problem is that on-the-fly decisions based on an instinct or hunch are susceptible to unconscious bias and racial stereotypes. Justice Marshall flagged this tendency, noting that "[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." *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

¶74 In other words, counsel's "seat-of-the-pants instincts" may, in some cases, reflect nothing more than "seat-of-the-pants" racial bias or stereotyping. *See id.*; *see also Miller-El*, 545 U.S. at 268 (Breyer, J., concurring) (noting that "it may be impossible for trial courts to discern if a 'seat-of-the-pants' peremptory challenge reflects a 'seat-of-the-pants' racial stereotype" (quoting *Batson*, 476 U.S. at 106 (Marshall, J., concurring))). In sum, absent unusual candor from counsel, it can be difficult, if not virtually impossible, for a trial judge to discern whether a strike was motivated by race, particularly if unconscious bias is at work.

¶75 Several states, including Colorado, have begun to explore how to address *Batson*'s shortcomings. *See* John Dailey, Chair, Colo. Rules of Crim. Proc. Comm., *Proposed Crim. P. 24 Majority, Minority, and Rule* (Oct. 4, 2022), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Criminal_Rules_Committee/Crim%20P%2024d%20submission%20documents.pdf [https://perma.cc/J9MZ-5TF5]; SB22-128, *Implicit Bias in Jury Selection*, https://leg.colorado.gov/bills/sb22-128 [https:/perma.cc/Q2WC-EY9D] (indicating that on March 10, 2022, the Senate Committee on Judiciary voted to postpone the bill indefinitely); N.Y. S.B. 21-S6066, 244th Gen. Assemb., Reg. Sess. (Apr. 2, 2021) (repealing sections of the criminal procedure law "relating

to peremptory challenges of jurors"), https://www.nysenate.gov/legislation/bills/2021/S6066 [https://perma.cc/2JYR-TAHS]; Mass. S.B. 918, 192nd Gen. Ct. (Jan. 29, 2021) (limiting grounds for which a peremptory challenge may be used), https://malegislature.gov/Bills/192/S918 [https://perma.cc/Y25D-GT83]; Governor's Comm'n on Racial Equity & Just., *Initial Report: Policing and Law Enforcement in Kansas*, at 49 (Dec. 2020), https://governor.kansas.gov/wp-content/uploads/2020/12/CREJ-Report-December-1-2020_FINAL-1.pdf [https://perma.cc/PY6F-K7DJ] (noting that a law is needed to prevent jurors from being struck for pretextual reasons); *see also State v. Aziakanou*, 498 P.3d 391, 406–07 (Utah 2021) (directing advisory committee on the rules of criminal procedure to address "the impact of implicit bias on jury selection" and the "disproportionate removal of racial minorities from juries"); Utah Sup. Ct. Rules of Crim. Proc. Comm., *Meeting Minutes* (Sept. 19, 2023), https://legacy.utcourts.gov/utc/crimproc/wp-content/uploads/sites/36/2023/10/September-19-2023-URCrP-Meeting-Minutes.pdf [https://perma.cc/JZK4-YD92] (discussing language of new proposed peremptory challenge rule and agreeing to form a subcommittee to further develop the proposed rule); *State v. Veal*, 930 N.W.2d 319, 340 (Iowa 2019) (Wiggins, J., concurring in part and dissenting in part) ("The only way to stop the misuse of peremptory challenges is to abolish them in Iowa and require judges to enforce rigorously challenges for cause.").

¶76 In 2018, Washington promulgated Rule 37 to "eliminate the unfair exclusion of potential jurors based on race or ethnicity." Wash. Rules of Gen. Application, Gen. Rules, WA GR 37(a). Rule 37 expands the *Batson* framework to prohibit any strike where an "objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." WA GR 37(e). It also makes certain reasons for peremptory strikes "presumptively invalid" because they have been historically associated with discrimination in jury selection, such as "having prior contact with law enforcement" and "expressing a distrust of law enforcement." WA GR 37(h)(i), (ii).

¶77 Several states have followed Washington's lead. In 2020, California enacted Assembly Bill No. 3070 ("AB 3070"), which operates similarly to Washington's rule. Cal. State Assemb., AB 3070, https://renapply.web.unc.edu/wp-content/uploads/sites/14120/2020/12/Assembly-Bill-3070.pdf [https://perma.cc/LED8-SG3P]. Finding that "peremptory challenges are frequently used in criminal cases to exclude potential jurors from serving based on their race," AB 3070, § 1(b), the California Legislature expanded the rule in *Batson* to prohibit striking a juror where a "court determines there is a substantial likelihood that an objectively reasonable person would view race . . . as a factor in the use of the peremptory challenge." *Id.* at § 2(d)(1). It also rendered presumptively "invalid" certain reasons for strikes historically associated with juror discrimination. *Id.* at § 2(e)

(prohibiting strikes based on, for example, "having a negative experience with law enforcement" and "[d]ress, attire, or personal appearance").

¶78 Connecticut has also followed Washington's lead. In *State v. Holmes*, 221 A.3d 407, 434 (Conn. 2019), the Supreme Court of Connecticut noted *Batson*'s "serious shortcoming with respect to addressing the effects of disparate impact and unconscious bias." In response, the court announced the appointment of a Jury Selection Task Force. *Id.* at 436. In December 2020, the task force submitted a final report with recommendations for systemic jury reform in Connecticut, including that the state adopt a new rule limiting the use of peremptory challenges. Jury Selection Task Force, *Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson*, at 16–18 (Dec. 31, 2020), https://jud.ct.gov/committees/jury_taskforce/reportjuryselectiontaskforce.pdf [https://perma.cc/BH5U-3WAZ]. Following a rules committee process and a public hearing, *see* Rules Comm. of the Superior Ct., *Minutes of the Meeting*, at 2 (Dec. 13, 2021), https://www.jud.ct.gov/committees/rules/rules_minutes_121321.pdf [https://perma.cc/NX6P-SRRQ], Connecticut adopted Section 5-12 to its court rules in 2022. Section 5-12 eliminates *Batson* step one, eliminates the requirement that the challenge was purposefully discriminatory, and makes presumptively invalid certain reasons for a peremptory challenge, including, "having prior contact with law enforcement officers" and "expressing a distrust of law enforcement or a belief

that law enforcement officers engage in racial profiling." Ct. R. Super. Ct. § 5-12 (2023).

¶79 Like Connecticut, efforts in New Jersey resulted in a similar change to its court rules. *See generally* N.J. Ct. R. 1:8-3A. For example, the comments to Rule 1:8-3A make clear that certain reasons for a peremptory challenge are presumptively invalid, including prior contact with law enforcement and distrust of law enforcement. N.J. R. Gen. Application R. 1:8-3A, cmt. 3.

¶80 Although the approach taken by these states may have intuitive appeal, Justice Marshall opined that "only by banning peremptories entirely can [juror] discrimination be ended." *Batson*, 476 U.S. at 108 (Marshall, J., concurring). He had a point.

¶81 The U.S. Supreme Court has made it clear that the right to peremptory challenges does not stem from the Constitution. *Id.* at 98 (majority opinion) (noting "the Constitution does not guarantee a right to peremptory challenges"). Rather, "[t]he right [to peremptory challenges] is in the nature of a statutory privilege." *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948). This means that "[s]tates may withhold peremptory challenges 'altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.'" *Rivera v. Illinois*, 556 U.S. 148, 152 (2009) (quoting *Georgia v. McCollum*, 505 U.S. 42, 57 (1992)).

¶82 In Colorado, peremptory challenges exist through section 16-10-104, C.R.S. (2023). Rule 24(d) of the Rules of Criminal Procedure (promulgated by this court) merely sets forth the procedure for exercising that statutory right. *See* Crim. P. 24(d); *see also* § 16-10-104(2) ("Peremptory challenges shall be exercised as provided by applicable rule of criminal procedure."). Doing away with Rule 24(d) would not extinguish the statutory right to peremptory challenges; only the General Assembly has that prerogative. Thus, to be clear, eliminating peremptory challenges in Colorado would require legislative action.

¶83 Although that perhaps sounds like a radical move, the idea of a world without peremptory challenges is hardly new; Justice Breyer pointed out nearly two decades ago that "a jury system without peremptories is no longer unthinkable. Members of the legal profession have begun serious consideration of that possibility." *Miller-El*, 545 U.S. at 272 (Breyer, J., concurring) (collecting articles). As Justice Breyer noted, "the right to a jury free of discriminatory taint is constitutionally protected—the right to use peremptory challenges is not." *Id.* at 273; *see also Swain*, 380 U.S. at 244 (Goldberg, J., dissenting) ("Were it necessary to make an absolute choice between 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.").

¶84 As the majority points out, Arizona has already taken this step. Maj. op. ¶ 15. In 2021, the Supreme Court of Arizona issued a rule eliminating peremptory challenges from both civil and criminal jury trials. *Id.* (citing Sup. Ct. of Ariz., No. R-21-0020, Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure (Aug. 30, 2021), https://aboutblaw.com/ZpS [https://perma.cc/742M-J6DN]). It is too soon to fully evaluate the impact of this rule change on the composition of juries and trial court procedures. Nancy S. Marder, *Race, Peremptory Challenges, and State Courts: A Blueprint for Change*, 98 Chi.-Kent L. Rev. 65, 101 (2023). However, Arizona's effort seeks to advance the objectives that *Batson* has tried (and failed) to achieve, including reducing reliance on impermissible stereotypes and racial bias while also assuring that jury verdicts are fair and impartial. Statewide Jury Selection Workgroup: A Workgroup of the Task Force on Jury Data Collection, Practices, & Procedures, *Report and Recommendations*, at 2–3 (Nov. 1, 2021), https://www.azcourts.gov/Portals/74/Jury%20TF/SJS%20Workgroup/SJSW_Final%20Report%20and%20Recommendations_11_01_21.pdf [https://perma.cc/J57B-CL99].

¶85 Notably, counsel for both parties in our companion case, *People v. Austin*, 2024 CO 36, ___ P.3d ___, expressed support during oral argument for eliminating peremptory challenges altogether. Colo. Sup. Ct., *22SC852, 23SC75*, YouTube

(Feb. 13, 2024), https://www.youtube.com/watch?v=DtcT5845WjM&t=2398s [https://perma.cc/Z7XG-F8HZ]. In addition, during the public hearing regarding Colorado Rule of Criminal Procedure 24, some commentors likewise expressed support for the elimination of peremptory challenges. *See* Colo. Sup. Ct., *Public Hearing Crim. P. 24*, YouTube (Feb. 7, 2023), https://www.youtube.com/watch?v=1Z5XOvKjkOA&t=5249s [https://perma.cc/T4DP-3ULU]. However, because peremptory challenges exist in Colorado by statute, their elimination is wholly within the purview of the legislature.

¶86 Eliminating the statutory right to peremptory challenges altogether would help ensure that defendants are tried by juries that have been selected without the taint of impermissible discrimination. Parties would remain free, of course, to challenge jurors for cause and to remove those who cannot be fair and impartial because of actual bias. And redirecting the focus in voir dire to challenges for cause would force deeper (and more open) exploration of jurors' actual biases. But attorneys would no longer be allowed to remove prospective jurors who have otherwise been deemed fair and impartial—"citizens poised to embark on the most serious of civic endeavors," Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. Chi. L. Rev. 809, 853 (1997)—based solely on instinct, hunch, or prejudice (conscious or unconscious).

¶87 Exercising a peremptory challenge to remove an otherwise qualified juror on the basis of race harms defendants, as well as the excluded jurors, and erodes public trust in the integrity of the criminal justice system. Given the inherent flaws with the *Batson* framework and the continued use of peremptory strikes to disproportionately remove people of color from juries, it may be time to consider new solutions. Perhaps, as Justice Marshall opined in his concurrence in *Batson*, the only way to end racial discrimination in the jury-selection process is "by eliminating peremptory challenges entirely." 476 U.S. at 107 (Marshall, J., concurring).

¶88 I respectfully concur.