

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

MSC No. 159346

COA No: 338733

Lower Case No. 16-010745-01

Wayne County Circuit Court

JACQUES JEAN KABONGO,

Defendant-Appellant.

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**DEFENDANT-APPELLANT'S BRIEF ON APPEAL
FILED UNDER AO 2019-6**

*****ORAL ARGUMENT REQUESTED*****

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STATEMENT OF QUESTION PRESENTED

- I. WHETHER THE TRIAL COURT WAS OBJECTIONABLY UNREASONABLE IN APPLYING *BATSON V KENTUCKY*, 476 US 79 (1986) TO THE CHALLENGES TO USE OF PEREMPTORY STRIKES FOR JUROR NO. 2 AND JUROR NO. 5?

Defendant-Appellant answers "Yes".

- I. WHETHER VIOLATIONS OF SPECIFIC FEDERAL CONSTITUTIONAL RIGHTS REQUIRE AUTOMATIC REVERSAL AS THEY CONSTITUTE STRUCTURAL ERROR AND VIOLATIONS OF STATE LAW RIGHTS THAT DO NOT ALSO INVOLVE FEDERAL CONSTITUTIONAL RIGHTS ARE REVIEWED FOR HARMLESS ERROR?

Defendant-Appellant answers "Yes".

STATEMENT OF JURISDICTION

On March 18, 2020, this Court entered an Order, (19a), Granting Leave to Appeal the February 20, 2019 Order, (18a), denying timely Motion for Reconsideration of the December 27, 2018 Michigan Court of Appeals Opinion and Order, (7a), affirming conviction from Wayne County Circuit Court, limited to Four (4) questions addressed herein. This Brief on Appeal is filed pursuant to MCR 7.305(H) and MCR 7.312(E).

STATEMENT OF CASE

Statement of Proceedings:

Defendant-Appellant, Jacques Jean Kabongo, was convicted, after jury trial of carrying a concealed weapon, (MCL 750.27) and was sentenced on May 10, 2017 to 1 year non-reporting probation and 50 hours of community service. (Sent., 11).

Appeal of Right was taken and the Michigan Court of Appeals affirmed his conviction in an unpublished Opinion and Order issued December 27, 2019. (7a). Timely Motion for Reconsideration was filed and denied by Order entered February 20, 2019. (18a).

Defendant-Appellant sought Leave to Appeal from this Court. On March 18, 2020, this Court entered an Order Granting Leave to Appeal the February 20, 2019 Order denying timely Motion for Reconsideration of the December 27, 2018 Michigan Court of Appeals Opinion and Order affirming conviction from Wayne County Circuit Court, limited to Four (4) questions addressed herein. (19a).

Statement of Facts:

Kurt Hornung, works for Vent Craft heating and Cooling, and has been doing work on Defendant-Appellant Kabongo's properties; the last couple of years at a house on Monte Vista, and also on Defendant-Appellant's personal residence. (T II, 161-162; 78a-79a)¹.

¹ Transcripts designation: T I – March 30, 2017; T II – April 3, 2017; T III – April 4, 2017; Sent.- Sentencing May 10, 2017. The second set of numbers is to the Appellant Appendix.

On October 15, 2016, Mr. Hornung was replacing a furnace that had been stolen from the Monte Vista home. Mr. Hornung was working on the furnace as Defendant-Appellant Kabongo was painting the garage. (T II, 164; 81a). Defendant-Appellant Kabongo "had his gun on his right side and the hand part of it was sticking out of his pants so it was -- I saw it". (T II, 163; 80a).

Mr. Hornung, using a drawing² in the court room, indicated to the jury where the truck was parked, as he had used the truck earlier to run up and buy a needed part for the furnace. (T II, 165; 82a). The only tools in the truck were on the front passenger side floor. (T II, 167; 84a) i.e. no tools were in the driver's side rear section, ergo, no reason for Defendant-Appellant to go into the street.

David Nicholson, is a friend and a coworker of Defendant-Appellant Kabongo; they both work at Blue Cross Blue Shield. (T II, 176; 85a). Mr. Nicholson is a CPL (concealed pistol license) holder and a NRA certified trainer. (T II, 178; 86a). Mr. Nicholson provided habit testimony that he has gone with Kabongo to property to help at least 3-4 times, and because it is a rough neighborhood, Kabongo always open carry's his weapon. (T II, 187; 87a). When at the Monte Vista house, Defendant-Appellant Kabongo would always open carry his weapon. (T II, 189; 88a).

Defendant-Appellant Jacques Kabongo has worked for Blue Cross Blue Shield for 20 years. (T II, 192; 89a). Mr. Kabongo lives in Ann Arbor, owns Detroit properties on

² This drawing was labeled Exhibit C, and a photo taken by the prosecutor given to the jury. However, when counsel requested a copy of the Exhibit for purposes of appeal, the exhibit could not be found and the prosecutor provided some other photos, but counsel cannot attest that it is the same photo provided to the jury.

Monte Vista and Appoline streets, another in Ypsilanti, and he also maintains a second home on Stansbury in Detroit that he uses instead of driving back to Ann Arbor during the week. (T II, 193; 90a).

Mr. Kabongo had obtained a CPL in 2011, for his Glock 19; the purchase was registered and the sales record and gun registration were admitted as Defense Exhibit J. (T II, 194-196; 91a-93a). Since he travels so much of the time, Mr. Kabongo decided not to renew his CPL license in light of the onerous restrictions for CPL holders, and the reality that the only time he needs protection is while on his own property and open carry is permitted. (T II, 197; 94a).

Defendant-Appellant Kabongo explained:

“The thing is, as long as I'm transporting the firearm safely with the ammunition separate from the firearm in a case, which I'm not inclined to carry the firearm in the first place because it just seems to be more of a hassle than anything, but in times that I would need it I knew I could be open carry... only purpose of gun is for safety at that property It's not the safest area. You know, I'm saying that nicely. And that would be the only reason I would need, you know, my firearm on that property.” (T II, 197-198; 94a-95a).

On the day in question, Kabongo went to the truck, on the passenger side, where the tools were on the floor: hacksaw, staple gun, measuring tape, brush and paint tray. (T II, 201-202; 96a-97a). He was walking back to the house when police stopped him: Both his hands were holding tools he had taken. (T II, 202; 97a). Mr. Kabongo was never in the street, and, never covered up as he was exercising his right to open carry. (T II, 203, 208; 98a, 99a).

On that day in question, Royer Hernandez, DPD officer, second precinct was with his partner on patrol. (T II, 28; 50a). Contrary to court order, this Officer told the jury:

“We, basically, we go for known offenders. We deal with drugs, guns, anything that comes with violent crimes.” (T II, 28; 50a). Hernandez was working with his partner, Officer Alexander Collrin. (T II, 31; 51a). Officer Collrin told Hernandez to look at the Defendant-Appellant while driving. (T II, 33; 53a).

According to Hernandez:

“Yes, the defendant was walking toward the street. At that time he had a weapon which was holstered and exposed which is an open carry weapon. I didn't think much of it...He was walking eastbound towards the street of Monte Vista when we first saw him kind of similar to what my weapon is. It's open carry....We continued going northbound at a slow speed. Mr. Kabongo proceeded to walk into the street into a pickup truck that was parked in front of the house it was a four door pickup truck.” (T II, 34-35; 54a-55a).

Officer Hernandez indicated there was nothing illegal about what he had seen; it was the observations made in his mirror that forced Hernandez to arrest Defendant-Appellant:

“The vehicle was a four-door pickup truck. He walked to the driver's passenger side which we all know a four-door pickup truck has the rear passenger side. He opened up the passenger. It appeared he was grabbing tools at that time. I continued to make my observation of Mr. Kabongo using the mirror on the vehicle so I turned it that way....I see Mr. Kabongo he opened up the driver's passenger door. He had a blue shirt on that day. He grabbed his blue shirt and he covered his weapon.” (T II, 37-38; 56a-57a).

Officer Hernandez claimed Kabongo fully concealed the weapon as he was looking through the rear view mirror. (T II, 38; 57a). Hernandez explained:

Based on my observations prior I had observed him open carry and then conceal the weapon. I knew that, in fact, what he had on his hip was a weapon. So I asked him if he had a concealed pistol license to carry the weapon concealed. (T II, 38-39; 57a-58a).

Officer Hernandez asked Defendant-Appellant for his CPL and was told it was expired, had expired 9-12-2015; he gave it to Collrin to run lien on the name. (T II, 41; 59a). He disarmed Mr. Kabongo and advised him that he was under arrest for carrying a concealed weapon. (T II, 42; 60a). There was no other illegal activity, though the officers said Kabongo had 2nd amendment right to carry, but not conceal the weapon. (T II, 43; 61a).

During cross-examination, Officer Hernandez was impeached with his detailed police report in which he indicated that Defendant-Appellant Kabongo never went out into the street and that the alleged offense (CCW) had been committed while Kabongo was retrieving tools from the passenger's side of the truck, not the driver's side. (T II, 51-52; 62a-63a).

Officer Hernandez agreed that had his testimony at trial been consistent with his report, it would have been physically impossible to have seen Defendant-Appellant commit the alleged concealment (the open door would block such view), on the passenger side of the truck. (T II, 53; 64a).

Hernandez claimed he had checked the video system of the cruiser he was driving, and the video was functioning. (T II, 32; 52a). Officer Hernandez was asked about the video, since he claimed it had been functioning that day, but no video was ever produced to be examined: the prosecutor's objection was sustained. (T II, 69; 65a).

Robin Rodgers, DPD officer with the technical services bureau; she tried to locate the video from scout car. (T II, 73; 66a). She looked but was not able to find or extract the video because the video card had been full as of August 19th, 2017 and there were no videos from August 19, 2017 through October 17, 2017. (T II, 74-75, 82; 67a-68a, 69a). It appeared to this Officer that videos had been stopped a month earlier than this incident. (T II, 82; 69a).

DPD Officer Alexander Collrin, has been an officer for over 10 years, and was working with Hernandez on October 15, 2016. He was in front passenger seat. (T II, 88-89; 70a-71a). Collrin told the jury he saw Jacques Kabongo walking down the driveway, eastbound along the driveway approaching towards Monte Vista. (T II, 90; 72a).

Contrary to the order entered, with confirmation by the prosecution, Officer Collrin told the jury: "I advised my partner of my observations and then my intention was to the narcotics location that I had a complaint on." (T II, 96; 73a).

Like his partner, Collrin said the concealment occurred when Defendant-Appellant was returning to the house, after being in the street on the driver's side of the truck. (T II, 104-105; 74a-75a).

When impeached with his own report over critical facts where the report says Defendant-Appellant was at the passenger side, not driver's side of the truck, retrieving

his tools Collrin says his report does not reflect his testimony at trial, because some words in the report are wrong such as the report saying Kabongo was retrieving items from the passenger side. (T II, 120; 76a). Officer Collrin also claimed his report was also wrong because his report does not say Defendant-Appellant ever went out into the street, which is directly contrary to trial testimony. (T II, 121; 77a).

The jury deliberated and then sent out a jury note requesting to see the police reports submitted by Collrin and Hernandez. The trial court, over defense objection, simply told the jury the police reports were not admitted into evidence (T III, 55-56; 101a-102a) and, of course, the jury had been instructed that they may consider only what has been admitted into evidence. Defense counsel objected because the jury was not instructed that the police reports were used for impeaching the witnesses, and, therefore, may be considered by the jury in determining credibility of the officers. (T III, 58; 104a). Within less than 2 hours, Defendant-Appellant was found guilty of carrying a concealed weapon. (T III, 58-59; 104a-105a).

ARGUMENT

I. THE TRIAL COURT WAS OBJECTIONABLY UNREASONABLE IN APPLYING *BATSON V KENTUCKY*, 476 US 79 (1986) TO THE CHALLENGES TO USE OF PEREMPTORY STRIKES FOR JUROR NO. 2 AND JUROR NO. 5.

Standard of Review:

When reviewing a *Batson* challenge under *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), “the proper standard of review depends on which *Batson* step is before us. If the first step is at issue (whether the opponent of the challenge has satisfied his burden of demonstrating a prima facie case of discrimination), we review the trial court’s underlying factual findings for clear error, and we review questions of law de novo. If *Batson’s* second step is implicated (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law), we review the proffered explanation de novo. Finally, if the third step is at issue (the trial court’s determinations whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination), we review the trial court’s ruling for clear error. *People v Knight*, 473 Mich 324, 345; 701 NW2d 715 (2005).

Issue Preservation:

To preserve a *Batson* challenge for appeal, a defendant must object before the jury is sworn in. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 563 (1996), lv den 455 Mich 871; 568 NW2d 84 (1997); *United States v Reid*, 764 F3d 528, 533 (CA 6, 2014);

United States v Tomlinson, 764 F3d 535, 539 (CA 6, 2014). Defense counsel objected before the jury was sworn.

Case Law:

The United States Supreme Court has held that the equal protection clause precludes the removal of a qualified juror on the basis of race. In *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), the United States Supreme Court held that the Equal Protection Clause forbids the use of peremptory challenges to exclude members of a jury venire because of their race.

The Supreme Court of the United States has helped to play a role in rectifying some injustices by interpreting the Equal Protection Clause of the 14th Amendment to guarantee certain fundamental protections to a number of stakeholders in the judicial process, from the parties in a case, to the members of the jury, and even to potential jurors. *Swain v Alabama*, 380 US 202 (1965); *Johnson v. California*, 545 US 162 (2005); *Batson*, supra.

“Encompassed within” the Fourteenth Amendment’s “mandate of fairness and due process is the right of a civil litigant to request, in certain cases, that legal matters be heard by a panel of impartial jurors.” *People v. Bell*, 473 Mich 275, 283; 702 N.W.2d 128 (2005) (citing Michigan Const 1963, art 1, §14). In *Batson v. Kentucky*, the U.S. Supreme Court held that the “[E]qual Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race . . . or the false assumption that members of his race as a group are not qualified to serve as jurors.” *Batson*, 476 US at 86.

In so holding, the Court recognized that the “harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community,” because “selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.” *Batson*, 476 US at 87. Likewise, racial discrimination in jury selection is unacceptable under Michigan law and jurisprudence and prosecutor’s may seek to block a defense peremptory challenge applying the principles of *Batson*. *People v. Knight*, 473 Mich. 324 (2005).

In *People v. Knight*, the Court expressly underscored that in the context of racial discrimination in voir dire, the Equal Protection Clause was not limited to concerns over the rights of defendants and parties, but “the focus is also on the integrity of the judicial system, as well as the rights of the prospective jurors.” *Knight*, 473 Mich at 342.

The Court noted that “ensuring the integrity of the judicial process and maintaining fair jury selection procedures” was of unquestionable importance and paramount concern. *Knight*, 473 Mich at 342. The Court concluded, citing *Batson*, that “the striking of even a single juror on the basis of race violates the constitution.” *Knight*, 473 Mich 337, n.9 (citing *J.E.B. v. Alabama ex rel TB*, 511 US 127, 142 n. 13).

The *Batson* Court created a three-step test to determine if a party improperly used a peremptory challenge to disqualify a venire member on the basis of race that was later clarified under Michigan law in *People v. Bell*, 473 Mich at 282-83. Under this test, the party making the *Batson* challenge must initially present a prima facie showing of discrimination based on race.

“To establish a prima facie case of discrimination based on race, the opponent of the challenge must show that: (1) the defendant is a member of a cognizable racial group; (2) peremptory challenges are being exercised to exclude members of a certain racial group from the jury pool; and (3) the circumstances raise an inference that the exclusion was based on race. (Citation omitted).”
Bell, 473 Mich at 282-283.

After the contesting party makes a prima facie showing of discrimination, the burden shifts to the challenging party exercising its peremptory challenge to present a race-neutral explanation for using the challenge. *Bell*, 473 Mich at 283. “The neutral explanation must be related to the particular case being tried and must provide more than a general assertion in order to rebut the prima facie showing.” *Bell*, 473 Mich at 283.

If the challenging party fails to provide a race-neutral explanation the challenge must be denied based upon the un rebutted inference.

If a race-neutral explanation is presented, “the trial court must decide whether the nonchallenging party has carried the burden of establishing purposeful discrimination.” *Bell*, 473 Mich at 282. This whole framework is “designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.” *Johnson*, 545 US at 172.

Because *Batson* errors are structural in nature, they are not amenable to harmless error review and require automatic reversal. *Arizona v. Fulminante*, 499 U.S. 279, 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), see also *United States v. McFerron*, 163 F.3d 952, 955-956 (C.A.6, 1998).

In this case, the prosecutor used peremptory challenges to remove three African American jurors as to which Defendant-Appellant objected. After consideration, the trial court denied the challenge and the Black jurors were allowed to be removed by the prosecutor.

When Defendant-Appellant exercised a peremptory challenge to Juror Number 5, the prosecution objected, claiming the exclusion was race based as Juror Number 5 was white: the trial court refused to allow a peremptory challenge to be used on that juror, and Juror Number 5 remained on the jury.

Defendant-Appellant moved to renew his Motion to Dismiss at the end of the trial after the alternates were selected, as Juror Number 5 was one of the 12 deliberating jurors: the trial court denied the motion. (T III 54; 100a).

Analysis of removal of Juror No. 2:

Step 1 - Defendant-Appellant who is African American, objected to the prosecutor's use of peremptory challenges excusing 4 people, 3 of whom were African American. (T I, 143; 35a). The circumstances of Defendant-Appellant being African American and that the prosecutor was removing African American's from the jury suggests that racial discrimination motivated the strike. Courts look to the percentage of a particular racial group removed from the venire by the strikes at issue, and the percentage of strikes directed against members of that group. *Aspen v. Bissonette*, 480 F.3d 571, 577 (1st Cir. 2007). Defendant-Appellant had met the first step. "Evidence raising merely an inference of discrimination surmounts the first *Batson* step, creating a prima facie case." *People v Tennille*, 315 Mich App 51; 888 NW2d 278 (2016).

Step 2 - The reason given for excusing Jury No. 2 was essentially that she had a bad short-term memory. (T I, 146; 38a).

MS. POSIGIAN: With regards to juror number two she had what seemed, at least to me, to be a very difficult time with short-term memory. She could not remember the Court's first question when asked what her occupation was and she couldn't remember any of the additional questions after that. She had to ask a few times. Also, she indicated she's having a senior moment here and there. She indicated, when asked about contact with the police, she thought she had been pulled over or she thought she had contact with the police before. She couldn't remember any sort specifics. Same with whether herself or her family were a victim of the crime she thought, yes, maybe robberies or armed robbery or something, I can't remember, I can't remember, I don't remember how long ago, I don't remember anything. So she had a problem with memory and it's the Peoples concern for her that if we're going to hear testimony today and then have a long weekend and come back on Monday. And, so, the likelihood that she would forget testimony seemed fairly probable and the People were concerned about that." TI, 146; 38a).

Regarding this step, the United States Supreme Court in *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) cautioned, "The second step of this process does not demand an explanation that is persuasive, or even plausible." *Purkett*, 514 U.S. at 767-68, 115 S.Ct. 1769. While *Batson* requires that the proponent have "'legitimate reasons'" for exercising the strike (*Batson*, 476 U.S. at 98 n. 20, 106 S.Ct. 1712), this does not mean that the reason proffered must make sense, only that it be a reason that does not deny equal protection. *Purkett*, 514 U.S. at 769, 115 S.Ct. 1769. "'Unless a discriminatory intent is inherent in the ... explanation, the reason offered will be deemed race neutral.'" *Supra*, at 768, 115 S.Ct. 1769 (quoting *Hernandez*, 500 U.S. at

360, 111 S.Ct. 1859). Under these standards, there was at least facial validity of the claim requiring the third step to determine if the proffered reason withstood scrutiny in light of the record.

Step 3- The Sixth Circuit described the nature of Step 3 in *United States v McAllister*, 693 F.3d 572, 582 (6th Cir. 2012):

At the third step of the Batson inquiry, the trial court has a duty to assess whether the opponent of the strike has met its burden to prove purposeful discrimination. *Hernandez*, 500 U.S. at 363. The judge must assess the plausibility of the proponent's race-neutral reason in light of all evidence with a bearing on it. *Miller-El II*, 545 U.S. at 251-52. We have held that the preceding command "places an affirmative duty on the district court to examine relevant evidence that is easily accessible." *Torres-Ramos*, 536 F.3d at 560. The trial judge must consult "all of the circumstances that bear upon the issue of racial animosity." *Snyder*, 552 U.S. at 478. The trial court may neither "short circuit the [Batson analysis] by consolidating any two of the steps," *Kimbrel*, 532 F.3d at 466, nor "simply accept the prosecution's explanation on its face," *Torres-Ramos*, 536 F.3d at 559. Rather, the trial judge has a duty to determine whether purposeful discrimination has been established. *Id.*

The trial court is required to make findings, which are guided by the United States Supreme Court. "Credibility can be measured by, among other factors, the [demeanor of the opposing party]; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy" (*Miller-El v Cockerell*, 537 US 322, 339). Accordingly, this third-step inquiry is a "pure issue of fact," and the trial court's determination whether a proffered race-neutral reason is pretextual is accorded "great deference" on appeal. (*Miller-El*, 537 at 339, 340).

The trial court held it was a valid race-neutral basis for removing Juror No. 2 finding:

“Juror number two did indeed have a difficult time with memory she did discuss senior moments. She had to kind of had to step back and reach back in her memory to recall things such as whether or not she had been the victim of a crime, such as -- there were some other specific ones.” (TI, 148; 40a).

In the case at bar, the trial court findings were not supported by the record and instead only parroted the prosecutor who had claimed “She could not remember the Court's first question when asked what her occupation was and she couldn't remember any of the additional questions after that”. The trial court simply failed to analyze the record and circumstances when making Step-3 rulings.

Review of the actual record of the exchange does not substantiate the prosecutor's alleged race-neutral explanation:

THE COURT: Thank you, juror number one.

Good morning, juror number two.

POTENTIAL JUROR TWO: Good morning.

THE COURT: I'm going to ask you your occupation, your marital status, and if you are married what your spouse does and your highest level of education?

POTENTIAL JUROR TWO: I'm retired.

THE COURT: And what are you retired from?

POTENTIAL JUROR TWO: Counseling.

THE COURT: Okay.

POTENTIAL JUROR TWO: I was a counselor and I retired a year ago.

THE COURT: Are you enjoying your retirement?

POTENTIAL JUROR TWO: Yeah.

I'm divorced. Level of education Bachelors in Criminal Justice Administration.

THE COURT: Thank you, juror number two. (T I, 39; 21a).

When the trial court asked about prior jury service the following exchange occurred:

Okay. Let's start with juror number two. How long ago was that?

POTENTIAL JUROR TWO: Years and years ago but we didn't have to serve because the defendant pled or something and then we left.

THE COURT: Okay. And that was your only time?

POTENTIAL JUROR TWO: Yeah, just the one time. (T I, 43-44; 22a-23a).

Later, the prosecutor asked about association with victims of crimes:

MS. POSIGIAN: Now, has anyone on the panel or a member of your family, or a close friend been the victim of a crime? Anybody in the first row? I usually get a lot of yes's on this one so I'm going to take my time and make sure I cover everybody.

Yes, juror number two?

POTENTIAL JUROR TWO: Yeah, we have been -- our family has been but it was a long time ago. I can't remember the years and stuff. Senior moment. I'm 64 so --

THE COURT: I'm not so far behind you.

POTENTIAL JUROR TWO: We have had, you know, robbery and stuff like that but it was, like, a long time ago nothing recent.

THE COURT: Juror number two, is there anything about that experience, even if it was a long time ago that, would affect your ability to be a fair and impartial juror in this case which is a CCW case?

POTENTIAL JUROR TWO: No, ma'am. (T I, 49-50; 26a-27a).

The prosecutor also asked the jurors about having been pulled over by the police:

MS. POSIGIAN: Okay. Juror number two?

POTENTIAL JUROR TWO: I'm sure I have been pulled over and stuff like that before but I don't remember how long ago that was. (TI, 63; 29a).

The only other prosecutor or court exchange with Juror No. 2 came with a question about television crime shows:

MS. POSIGIAN: Juror number three, TV shows; do you watch CSI, Law & Order, NCIS, any of those shows?

POTENTIAL JUROR THREE: No.

MS. POSIGIAN: Any of those shows.

POTENTIAL JUROR THREE: No.

MS. POSIGIAN: What about you, juror number two?

POTENTIAL JUROR TWO: I wash television. (sic)

MS. POSIGIAN: Now, you know that those shows where they solve the crime in 37 minutes plus commercials that's fantasy, right?

POTENTIAL JUROR TWO: Yes, I do you understand that.

MS. POSIGIAN: Okay. That's not reality.

POTENTIAL JUROR TWO: Yes, I do understand.

MS. POSIGIAN: Okay. We're not going to solve a crime based on DNA from a fly that was found flying around in the room next door are we?

POTENTIAL JUROR TWO: No. (T I, 71-72; 31a-32a).

The record contradicts the trial court's findings and the prosecutor's version of events, and the claim of bad memory and inability to answer questions is a total fabrication. The prosecutor misrepresented the record. The prosecutor claimed Juror No. 2 could not remember if she had ever been pulled over for a traffic ticket, yet the record was clear, she had been pulled over, it was so long ago she could not recall when this occurred. This is hardly evidence of bad memory as counsel would challenge anyone reading this brief to recall the year and reason for when they have been pulled over in their life. Juror No. 2 recalled being pulled over a long time ago and was unable to provide more detail of a traffic encounter.

Similarly the record about being a victim of a crime was misrepresented. Juror No. 2 herself has not been the victim of any crime, but her family has had items stolen years ago and so, in proper answer to the question, she knows someone, her family, that has been a victim of crime years ago. Again, I would challenge any reader of this brief to recall the dates and circumstances of burglary and theft committed against relatives in prior decades. These proffered reasons are manufactured by misrepresenting the available record.

The only apparent reason that remains for striking Juror No. 2 was that she was African American.

The Michigan Court of Appeals affirmed, but curiously acknowledged that the prosecutor was wrong about its claims made against Juror No. 2 in a footnote: "The prosecutor appears to have erred by stating that Juror No. 2 could not remember a question about her occupation, but the gist of the prosecutor's concern about Juror No. 2 was memory, and the trial court did not clearly err by finding that this concern was supported by the record." (Op. 5, fn 1; 11a).

In other words, the prosecutor's claim was erroneous, the record did not support the claim, but no error occurred because the decision was supported by the record. This circular reasoning is an affront to fact finding and constitutes both an abuse of discretion and clear legal error for which relief is required by way of a new trial. The mischaracterization of Juror No. 2's answers is itself proof of a pre-textual improper reason. "The prosecutor's mischaracterization of M.C.'s testimony is evidence of discriminatory pretext." *Ali v. Hickman*, 584 F.3d 1174, 119 (9th Cir. 2009), cert. denied sub nom. *Cate v. Ali*, 559 U.S. 1045 (2010)

In cases where a *Batson* violation was found, the proffered reasons found to be a pre-text involve situations where the evidence do not support the claim or where similar issues are present with other jurors who are not questioned and not removed.

For example, Juror No. 13 was also elderly and retired, however the prosecutor did not ask any questions pertaining to memory concerns. (T I, 93; 34a). The prosecutor did not make any inquiry into the specifics of traffic stops from Jurors No. 4 and No. 8, nor from Juror No. 2, though she had the ability and opportunity to clarify answers given earlier. (TI, 63-64; 29a-30a).

When federal courts, applying *Batson* confront this situation of unequal treatment and questioning of jurors at Step 3, they have found the proffered reason to be pre-textual:

Because the government failed to establish "that any reason given for its exercise of strikes against black jurors had been equally applied to similarly situated white jurors," *Reynolds [v. Benefield]*, 931 F.2d [506,] 512 [(8th Cir.), cert. denied, 501 U.S. 1204, 111 S.Ct. 2795, 115 L.Ed.2d 969 (1991)], we are left with the inescapable conclusion that the prosecutor's rationale for excluding black prospective jurors — "juror burnout" — was pretextual. *Devose v. Norris*, 53 F.3d 201, 205 (8th Cir. 1995).

Without record support, and with disparate treatment of jurors of different races by the prosecutor during voir dire, the removal of Juror No. 2 violated *Batson* and equal protection rights have been infringed creating a structural error mandating automatic reversal of this constitutional structural error. See: *Bell*, supra at 293. ("A *Batson* error occurs when a juror is actually dismissed on the basis of race or gender. It is undisputed that this type of error is of constitutional dimension and is subject to automatic reversal."). Defendant-Appellant is entitled a new trial because of the exclusion of Juror No. 2.

"[T]he existence of an unmitigated *Batson* violation requires that the conviction be vacated. See *Batson*, 476 U.S. at 100 (holding that "[i]f 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"); *United States v. Simon*, No. 09-4194, 2011 WL 1778200, at *3 (citing *United States v. McFerron*, 163 F.3d 952, 955-56 (6th Cir. 1998))." *Rice v. White*, 60 F.3d 242, 253 (6th Cir. 2011).

In *People v [Gary Patrick] Lewis*, 501 Mich 1 (2017), Justice Larsen, writing for the majority stated the position clearly: “An error cannot be both structural and subject to harmless-error review” citing *Neder v United States*, 527 US 1, 8 (1999). *Batson* violations are structural in nature, and therefore are not amenable to harmless error review and require automatic reversal. *Arizona v Fulminante*, 499 US 279, 309-310 (1991), see also *United States v McFerron*, 163 F3d 952, 955-956 (CA 6, 1998).

As gatekeepers of the protections bestowed by the Equal Protection Clause of the 14th Amendment, courts must vigorously defend not just a potential juror’s right to not be racially discriminated against in voir dire, but also a party’s right to a jury selection process free of racial discrimination. A trial court should be ever mindful of the importance of maintaining public confidence in the legal system, confidence that can be eroded by the appearance of discrimination even where none exists. This Court should vacate the conviction and grant a new trial where the jury is representative of the community and not excluded based upon race.

Analysis of failure to remove Juror No. 5:

In the present case, defense counsel established a pro-law enforcement association and uncertainty as to the impact of that association, and sought a peremptory challenge to remove juror No. 5 and the prosecutor objected claiming the only reason juror No. 5 was removed was because she was white and noted that other white jurors had been removed earlier by exercise of peremptory challenge. (T I, 173, 174; 42a-43a). Recognizing the first step of *Batson* had been met, the trial court then asked for an explanation from the defense for Step 2:

MR. HALPERN: Juror number five's father is or was a police officer. Juror number five indicated that she had a felony conviction, although apparently nothing seemed to show up, but I would think the People know what they have a conviction of. There was real closeness...

MR. HALPERN: Father and brother I think were somehow connected with law enforcement. And there were some personal feelings back and forth that I had when I was questioning her that would seemed to me to be negative. (T I, 175-176; 44a-45a).

The trial court then went on to Step 3 found the reason given was not race neutral and allowed juror No. 5 to stay on the panel, where she remained and she deliberated on Defendant-Appellant's fate:

This record lacks any objective indicia of concern -- concerning the impartiality of juror number five or that she is otherwise unfit to serve as a juror in this case. So I'm going to find -- I'm sorry, let me just double check. I'm going to find that the reason offered is insufficient and I am going to find that the challenger has established purposeful discrimination. So I'm going to keep juror number five on the jury. (T I, 179; 48a).

The Michigan Court of Appeals affirmed, holding:

In sum, although defense counsel articulated reasons for wanting to excuse Juror No. 5 that were race-neutral, the trial court did not clearly err by finding that counsel's attempt to excuse Juror No. 5 by peremptory challenge was motivated by race. We acknowledge that a different court might have reached a different result, but we are to give deference to the trial court's factual findings. We cannot find clear error on the existing record, given the implausibility of so much of defense counsel's proffered explanations. (Op., 7; 13a).

The description of implausibility is patently unfair where the actual record demonstrated an out of the ordinary association with law enforcement by juror No. 5, and

serious doubt of ability to be fair and impartial by her answers to questions. In addition, removing jurors with close association with law enforcement is an accepted trial strategy that is race neutral. It was clear error and an abuse of discretion to put an unwanted juror back on the panel to decide Defendant-Appellant's fate. Juror No. 5 deliberated for the verdict, over the objection of the defense. (T III 54; 100a).

It was clearly erroneous and objectively unreasonable determination of facts where there was ample record support for the race-neutral reason provided. When asking the array if anyone had ever been called for jury service, No. 5 said she had, four or five years earlier, and she had been excused. (T I, 44; 23a). Later the prosecutor asked if No. 5 actually sat for any of the trial in her prior jury service experience and No. 5 said she "was dismissed from the original panel". (T I, 62; 28a).

When asking the array if anyone was associated with law enforcement, No. 5 said she did: "My father, my brother, stepmother, all deputy sheriffs, and military police in my family, nephew and brother." (T I, 46; 25a).

Defense counsel asked juror No. 5 if she would accept an all African-American jury to sit in judgment over her and she responded:

POTENTIAL JUROR FIVE: I hope that I'm a person that looks beyond that. I work for the Dearborn School District and there's a lot of different culture. ... I said I work for the Dearborn School District and I enjoy meeting other cultures and working with people getting to know people. I hope I don't look at people's skin color. I don't believe I do. It's their actions. (T I, 84; 33a).

The record demonstrates both the law enforcement association and some uncertainty in being fair. Juror No. 5 did not affirmatively state she would be fair, only

that she had “hope” she could be fair, and that she did not believe she did. She was unable to affirmatively state she would be fair.

In addition to the inability to secure a commitment of impartiality, trial counsel also established Juror No. 5 had a very close association with law enforcement. Association with police has been held to be a valid reason for the defense to remove a prospective juror. See *United States v Atkins*, supra, (“Moreover, Mr. Dandridge’s nephew was a police officer—a fact that often leads defendants to strike prospective jurors out of fear that jurors with close ties to police officers are more likely to uncritically believe police witnesses on the stand. See, e.g., *United States v. Thompson*, 528 F.3d 110, 116 (2d Cir. 2008); *Coombs v. Diguglielmo*, 616 F.3d 225, 257–58 (3d Cir. 2010).”).

A potential juror’s association with law enforcement and public defender’s offices has been considered a valid race-neutral reason for exercise of a peremptory challenge in Michigan. In *People v Diallo*, No. 342800, unpublished, (July 23, 2019), finding association with defenders office was race neutral explanation for peremptory: “The prosecution explained that KS was a social worker, and she had worked for the public defender’s office, which supported her dismissal... th[is] explanation[] [is] race-neutral. (Opinion 9-10).

Such association is not only a race-neutral basis for peremptory removal of a juror, case law demonstrates that law enforcement association combined with uncertain answers as to impact on weighing evidence has been found to be a valid reason for removing a juror for **cause**.

Consider *United States v Ochoa-Vasquez*, 428 F3d 1015, 1032 (CA 11, 2005) "To expose any pro-law-enforcement bias, the district court asked the venire whether they had any family or friends in law enforcement. It then questioned those who responded to determine the nature of the law-enforcement connection and what effect it would have on their ability to perform fairly and impartially. The district court struck for cause those venire members whose answers suggested that they might be affected by a law-enforcement tie."

In *People v Tennille*, the Michigan Court of Appeals was aware that juror JG was removed for cause because of close association with police officers and some uncertainty expressed in being fair during voir dire.

The trial court's finding of a racial discriminatory intent to remove juror No. 5, was outside the realm of reasonable outcomes where race-neutral reasons, based upon response given and part of the record were advanced that would have supported a removal for cause. The decision to strike Juror No. 5 cannot be construed to be rooted in "racial animosity" (*Snyder*, 552 US at 478) but rather a "rationale [with] some basis in accepted trial strategy" (*Miller-El*, 537 US at 339). Indeed the rationale was at a minimum, accepted defense strategy, and an effort by counsel to secure an impartial jury for the defendant.

In Mr. Kabongo's case, the error of allowing Juror No. 5 to remain on the jury violated specific constitutional rights other than that provided by the Equal Protection Clause.

Since the above calculus demonstrated misapplication of *Batson*, that error did not result in the juror being excluded, but the process was violated resulting in a harm that cannot be assessed and relief is warranted.

Defendant-Appellant contends that the trial court's action in allowing Juror No. 5 to remain on the jury deprived Defendant-Appellant of his right to an impartial jury.

As noted above, the reasons advanced by counsel were legitimate, based on the record and would have supported removal of the juror for cause. Defense counsel made a motion to dismiss before jury deliberations based on the lack of impartiality of Juror No. 5. While not an Equal Protection Clause structural error, this error violated Defendant-Appellant's 6th Amendment right to an "impartial jury" and 14th Amendment Due Process rights. The failure of the empaneled jury to be impartial is a structural error not subject to harmless error analysis as developed in the next issue.

II. VIOLATIONS OF SPECIFIC FEDERAL CONSTITUTIONAL RIGHTS REQUIRE AUTOMATIC REVERSAL AS THEY CONSTITUTE STRUCTURAL ERROR AND VIOLATIONS OF STATE LAW RIGHTS THAT DO NOT ALSO INVOLVE FEDERAL CONSTITUTIONAL RIGHTS ARE REVIEWED FOR HARMLESS ERROR.

Standard of Review:

"We review de novo issues regarding a trial court's proper application of the law. *People v. Goldston*, 470 Mich 523, 528; 682 NW2d 479 (2004).

Law and Analysis

Before any consideration of the applicable law and constitutional provisions, it is imperative to recognize that peremptory challenges are provided by state law and are a device used to enforce a defendant's right to be tried by an impartial jury. The denial of an impartial trial is the constitutional violation. Similarly where a peremptory challenge is used with a discriminatory intent to exclude a properly qualified juror from sitting, a defendant and the juror in question have been denied equal protection of the law.

The right to exercise a peremptory challenge is provided by the State of Michigan by way of court rule and statute. MCR 6.412(E)(1), entitles a defendant to peremptory challenges. MCL 768.13 provides that "[a]ny person who is put on trial for an offense punishable by death or imprisonment for life, shall be allowed to challenge peremptorily twenty of the persons drawn to serve as jurors, and no more. . . ."

The state provided right to peremptory challenges is designed to ensure a fair trial when empaneling an impartial jury. The United States Supreme Court in *United*

States v Martinez-Salazar, 528 U.S. 304 (2000) explored the reasons for peremptory challenges:

The peremptory challenge is part of our common-law heritage. Its use in felony trials was already venerable in Blackstone's time. See 4 W. Blackstone, Commentaries 346— 348 (1769). We have long recognized the role of the peremptory challenge in reinforcing a defendant's right to trial by an impartial jury. See, e. g., *Swain v. Alabama*, 380 U.S. 202, 212-213, 218-219 (1965); *Pointer v. United States*, 151 U.S. 396, 408 (1894). But we have long recognized, as well, that such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension (Supra at 311)

While there is no federal constitutional right to peremptory challenges in state criminal prosecutions, the right to an impartial jury is absolute, and denial of that right is a structural error requiring reversal. The Court in *Martinez-Salazar*, supra, noted that had the district court's ruling resulted in the seating of a juror who should have been removed for cause, the proper remedy would be reversal. Supra, at 316, 120 S.Ct. 774.

This Court in *People v Bell* 473 Mich. 275 (2005) also acknowledged this distinction:

We arrive at this conclusion by recognizing the distinction between a Batson error and a denial of a peremptory challenge. A Batson error occurs when a juror is actually dismissed on the basis of race or gender. It is undisputed that this type of error is of constitutional dimension and is subject to automatic reversal. (See *Johnson v. United States*, 520 US 461, 468-469; 117 S Ct 1544; 137 L Ed 2d 718 (1997); *J E B v. Alabama ex rel T B*, 511 US 127, 142 n 13; 114 S Ct 1419; 128 L Ed 2d 89 (1994).). In contrast, a denial of a peremptory challenge on other grounds amounts to the denial of a statutory or court-rule-based right to exclude a certain

number of jurors. An improper denial of such a peremptory challenge is not of constitutional dimension. (*United States v. Martinez-Salazar*, 528 US 304, 311; 120 S Ct 774; 145 L Ed 2d 792 (2000); *Ross v. Oklahoma*, 487 US 81, 88; 108 S Ct 2273; 101 L Ed 2d 80 (1988) (the United States Supreme Court recognized that peremptory challenges are not of constitutional dimension and are merely a means to achieve the end of an impartial jury).)

In the process, this Court recognizes there are separate constitutional rights implicated and to be honored by jury selection, equal protection and trial by impartial jury that remain relevant regardless of the state rules and law put into place for jury selection.

The United States Supreme Court in *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) noted that “the impartiality of the adjudicator goes to the very integrity of the legal system”). The impartial jury right applies to the states through the Fourteenth Amendment’s Due Process Clause. *Duncan v. Louisiana*, 391 U.S. 145 (1968); See also *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (“[I]f a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment.”).

The United States Supreme Court made the point succinctly in *Irvin v. Dowd*, 366 U.S. 717 (1961):

In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257 (1948); *Tumey v. Ohio*, 273 U.S. 510 (1927). ‘A fair trial in a fair tribunal is a basic requirement of due process.’ *In re Murchison*, 349 U.S. 133, 136 (1955). In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as ‘indifferent as he stands unsworne.’ Co.

Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson v. City of Louisville*, 362 U.S. 199 (1960). This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender, or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 *Burr's Trial* 416 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds v. United States*, 98 U.S. 145, 155 [(1879)]." *Irvin v. Dowd*, supra, at 721-722 (footnote omitted).

Consistent with this absolute right, in *Ross v. Oklahoma*, 487 U.S. 81 (1988) the United States Supreme Court held the trial court's failure to remove a juror for cause was constitutional error requiring reversal. The point was again made in *United States v Martinez-Salazar*, 528 U.S. 304 (2000):

In *Ross v. Oklahoma*, 487 U.S. 81 (1988), this Court reaffirmed that "peremptory challenges [to prospective jurors] are not of constitutional dimension," id., at 88; rather, they are one means to achieve the constitutionally required end of an impartial jury. We address in this case a problem in federal jury selection left open in *Ross*. See id., at 91, n. 4. We focus on this sequence of events: the erroneous refusal of a trial judge to dismiss a potential juror for cause, followed by the defendant's exercise of a peremptory challenge to remove that juror. Confronting that order of events, the United States Court of Appeals for the Ninth Circuit ruled that the Due Process Clause of the Fifth Amendment requires automatic reversal of a conviction whenever the defendant goes on to exhaust his peremptory challenges during jury selection. 146 F.3d 653 (1998).

We reverse the Ninth Circuit's judgment. We reject the Government's contention that under federal law, a defendant is obliged to use a peremptory challenge to cure the judge's error. We hold, however, that if the defendant elects to cure such an error by exercising a peremptory challenge, and is subsequently

convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right. *Supra*, 307

The United States Supreme Court in dicta commented on the situation that Kabongo presents with respect to Juror No. 5:

In choosing to remove Gilbert rather than taking his chances on appeal, Martinez-Salazar did not lose a peremptory challenge. Rather, he used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury. See, e. g., *J. E. B.*, 511 U. S., at 137, n. 8 (purpose of peremptory challenges "is to permit litigants to assist the government in the selection of an impartial trier of fact") (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991)); *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) (peremptory challenges are "one state-created means to the constitutional end of an impartial jury and a fair trial"); *Frazier v. United States*, 335 U.S. 497, 505 (1948) ("the right [to peremptory challenges] is given in aid of the party's interest to secure a fair and impartial jury")....

In conclusion, we note what this case does not involve. It is not asserted that the trial court deliberately misapplied the law in order to force the defendants to use a peremptory challenge to correct the court's error. See *Ross*, 487 U. S., at 91, n. 5. Accordingly, no question is presented here whether such an error would warrant reversal. Nor did the District Court's ruling result in the seating of any juror who should have been dismissed for cause. As we have recognized, that circumstance would require reversal. See *id.*, at 85 ("Had [the biased juror] sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove [the juror] for cause, the sentence would have to be overturned."); see also *Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) (a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors") (*Supra*, 315-317).

The enactment of state provided law and rules pertaining to jury selection is designed to assure that a defendant is tried by 12 impartial and unprejudiced jurors. While these state rules are not of any constitutional dimension, they are the means by which a state has chosen to assure an impartial jury. When a violation of state law implicates an established and protected constitutional right, the state law violation is secondary as the analysis to be applied is provided by United States Supreme Court case law.

This Court has requested consideration be given to the United States Supreme Court holding from *Rivera v Illinois*, 556 US 148, 162 (2009) (holding that a trial court's erroneous denial of a defendant's peremptory challenge, standing alone, is not a structural error under the federal constitution requiring automatic reversal, but that "[s]tates are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error per se") and compare, e.g., *People v Bell*, 473 Mich 275, 292-295 (2005) (stating in arguable dictum that harmless error review applies to such errors) with *Hardison v State*, 94 So 3d 1092, 1101 & n 37 (Miss, 2012) (plurality opinion) (citing "[a]t least five states" that have adopted an automatic reversal rule as a matter of state law and following those states).

Defendant-Appellant submits the answer is clear by examining two passages from the unanimous decision in *Rivera v Illinois*, supra:

Because peremptory challenges are within the States' province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution. "[A] mere error of state law," we have noted, "is not a denial of due process." *Engle v. Isaac*, 456 U. S. 107, 121, n. 21 (1982) (internal quotation marks omitted). See also *Estelle v. McGuire*, 502 U. S. 62, 67, 72-73 (1991). The Due Process Clause,

our decisions instruct, safeguards not the meticulous observance of state procedural prescriptions, but “the fundamental elements of fairness in a criminal trial.” *Spencer v. Texas*, 385 U. S. 554, 563–564 (1967).

* * * *

In *Batson*, for example, we held that the unlawful exclusion of jurors based on race requires reversal because it “violates a defendant’s right to equal protection,” “unconstitutionally discriminate[s] against the excluded juror,” and “undermine[s] public confidence in the fairness of our system of justice.” 476 U. S., at 86, 87. Similarly, dismissal of a juror in violation of *Witherspoon v. Illinois*, 391 U. S. 510 (1968), we have held, is constitutional error that requires vacation of a death sentence. See *Gray v. Mississippi*, 481 U. S. 648 (1987). See also *Gomez v. United States*, 490 U. S. 858, 876 (1989) (“Among those basic fair trial rights that can never be treated as harmless is a defendant’s right to an impartial adjudicator, be it judge or jury.” (internal quotation marks omitted)).

The United States Supreme Court cases of *Neder*, supra discussed the types of federal constitutional rights violations that are incapable of being viewed through the lens of harmless error as the violation has rendered the entire proceeding unfair:

Those cases, we have explained, contain a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Fulminante*, supra, at 310. Such errors “infect the entire trial process,” *Brecht v. Abrahamson*, 507 U. S. 619, 630 (1993), and “necessarily render a trial fundamentally unfair,” *Rose*, 478 U. S., at 577. Put another way, these errors 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 577-578.

In *Neder*, the court listed the types of constitutional errors that are structural:

We have recognized that "most constitutional errors can be harmless." *Fulminante*, supra, at 306. "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Rose v. Clark*, 478 U. S. 570, 579 (1986). Indeed, we have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." *Johnson v. United States*, 520 U. S. 461, 468 (1997) (citing *Gideon v. Wainwright*, 372 U. S. 335 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U. S. 510 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U. S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U. S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U. S. 39 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U. S. 275 (1993) (defective reasonable-doubt instruction)).

This is consistent with the approach taken by other states. The Mississippi Supreme Court in *Hardison v. State* 94 So. 3d 1092 (Miss. 2012) faced a factually similar case where defense counsel, when confronted for exercising a peremptory challenge, provided the reason to remove the prospective juror for having expressed disappointment in not being able to reach a verdict in prior jury duty. The trial court found the offered rationale lacking and denied the exercise of the peremptory as being racially motivated. The relevant issues before that court focused on whether the trial court erred in not requiring the prosecutor to make a prima facie case of discriminatory intent and further erred when sustaining the *Batson* challenge.

The Court in *Hardison*, supra, held the trial court clearly erred by finding the counsel's distrust of the potential juror not to be race-neutral, and also committed clear

error by not applying the third *Batson* step. The Mississippi Supreme Court found automatic reversal was required where the trial clearly erred when applying *Batson*:

Iowa, Massachusetts, Minnesota, New York, and Washington—in their own reverse—*Batson* cases—all held that a trial judge's erroneous denial of a defendant's peremptory strike requires automatic reversal.³⁷ We follow their lead and hold that a trial court cannot deprive defendants of their right to a peremptory strike unless the trial judge properly conducts the analysis outlined in *Batson*. Here, under our Uniform Circuit and County Court Rules, Hardison had a right to twelve peremptory strikes.³⁸ The judge, having erroneously denied him that right, erred.

A juror's right to equal protection, of course, is crucial. But as Iowa's Supreme Court noted, “[a]dherence to the proper, three-step *Batson* analysis is sufficient to ensure that all parties are allowed to use their peremptory challenges while complying with the Constitution's equal protection requirements.”³⁹ And as another court noted, the question “is whether the erroneous denial of a peremptory challenge can ever be harmless when the objectionable juror actually sits on the panel that convicts the defendant.”⁴⁰ We hold that it cannot. Therefore, when a trial judge erroneously denies a defendant a peremptory strike by failing to conduct the proper *Batson* analysis, prejudice is automatically presumed, and we will find reversible error.

³⁷ *State v. Mootz*, 808 N.W.2d 207, 225–26 (Iowa 2012); *Commonwealth v. Hampton*, 457 Mass. 152, 928 N.E.2d 917, 926–27 (2010); *Angus v. State*, 695 N.W.2d 109, 118 (Minn.2005); *People v. Hecker*, 15 N.Y.3d 625, 917 N.Y.S.2d 39, 942 N.E.2d 248, 272–73 (2010); *State v. Vreen*, 143 Wash.2d 923, 26 P.3d 236, 238–40 (2001).

³⁸ URCCC 10.01.

³⁹ *Mootz*, 808 N.W.2d at 226.

⁴⁰ *Vreen*, 26 P.3d at 240.

Hardison, supra at 1101-1102

At the heart of this decision is the notion that the equal protection clause can only be honored by a thorough Batson analysis and when that analysis is wrongfully applied or lacking, then the equal protection clause is infringed. Mississippi reached its decision noting the impossibility of applying harmless error analysis to determine if a juror challenged, sought to be removed and allowed to remain and sit in judgment, resulted in prejudice. The state rule in Mississippi is corrective and prophylactic to assure a fair trial and violations therefore require automatic reversal.

Hardison relied on *Mootz*, supra from Iowa, and that case is instructive. *Mootz* is factually identical to Kabongo's circumstances. During voir dire, Mootz sought to use a peremptory challenge to remove a Hispanic juror. The district court found Mootz was using his strikes in a racially discriminatory manner, denied the strike, and seated the juror. Mootz was convicted and appealed. The Iowa court explained the basis for an automatic reversal rule for this circumstance:

In support of an automatic reversal rule, Mootz argues that the erroneous denial of a peremptory strike is not amenable to harmless error analysis because of the difficulty in showing actual prejudice. See, e.g., *State v. McLean*, 815 A.2d 799, 805 (Me.2002); *Angus v. State*, 695 N.W.2d 109, 118 (Minn.2005); *State v. Vreen*, 143 Wn.2d 923, 26 P.3d 236, 238-40 (2001). But see *People v. Rivera*, 227 Ill.2d 1, 316 Ill.Dec. 488, 879 N.E.2d 876, 888 (2007); *Bell*, 702 N.W.2d at 138-41. This argument has merit. The State has not provided, nor can we conceive of, any situation in which a defendant could ever show prejudice arising out of the wrongful denial of a peremptory challenge where, as is the case here, the juror was not also removable by a challenge for cause. A defendant could only show prejudice by showing that the juror he sought to remove was biased. However, if the juror were biased,

then the juror would be removable for cause, and the question regarding the peremptory challenge would become moot.

The Supreme Court's holding in *Rivera* does not dispute this point. Rather, it merely states that an erroneous ruling on a reverse-Batson challenge is not a structural error of a constitutional dimension requiring automatic reversal and leaves to the states to decide whether the "mistaken denial of a peremptory challenge is reversible error per se." *Rivera*, 556 U.S. at 162, 129 S.Ct. at 1455-56, 173 L.Ed.2d at 331. Following *Rivera*, states have continued to apply an automatic reversal rule grounded in state law, not the Federal Constitution. See *People v. Hecker*, 15 N.Y.3d 625, 917 N.Y.S.2d 39, 942 N.E.2d 248, 271-72 (2010), cert. denied, ___ U.S. ___, 131 S.Ct. 2117, 179 L.Ed.2d 911 (2011); *Hampton*, 928 N.E.2d at 927.

Denying the free exercise of peremptory challenges does not violate the Constitution, but it forces the defendant to be judged by a jury that includes a juror that is objectionable to him. When this occurs, and the defendant properly objected to the juror by attempting to use a peremptory challenge, and that objection is wrongly overruled, we will presume the error is prejudicial. Any other conclusion would leave the defendant without a remedy. We do not think this is the result intended when rule 2.18(9) was drafted.

Rule 2.18(9) requires automatic reversal of a defendant's conviction when the trial court's erroneous ruling on a reverse-Batson challenge leads to the denial of one of the defendant's peremptory challenges. We do not believe that an automatic reversal rule will result in trial courts and prosecutors being less zealous in their attempts to stop purposeful racial discrimination by defendants. Adherence to the proper, three-step Batson analysis is sufficient to ensure that all parties are allowed to use their peremptory challenges while complying with the Constitution's equal protection requirements. Accord *Hecker*, 917 N.Y.S.2d 39, 942 N.E.2d at 272-73. An automatic reversal rule will help ensure a district court will

not deprive criminal defendants of their right to peremptory challenges in an effort to safeguard the equal protection rights of jurors, without first undertaking a thorough *Batson* analysis.

Iowa reached the conclusion of an automatic reversal for this type of violation holding that denial of a peremptory challenge requires a defendant to be tried by jurors who are objectionable to the defense denying a trial before impartial jurors based upon unfounded claims of racial discrimination fails to protect the right to impartial jurors and to equal protection. As the Court in *Mootz* observed, without such an automatic reversal rule, defendants would be without a remedy where improper allegations of racial discrimination forces jurors who may reasonably hold a grudge against the defendant to sit in judgment during trial.

The Minnesota Supreme Court in *Angus v. State*, 695 N.W.2d 109 (Minn.2005) found such a reverse-Batson violation required automatic reversal finding such a violation constitutes a structural error:

Issue raised was whether the district court erred in its application of the *Batson* test by denying Angus' peremptory challenge of an African American veniremember. Angus argues that the state did not establish a prima facie case of racial discrimination and that the court incorrectly bypassed the first step of the *Batson* analysis. Angus also argues that he met his burden of showing a race-neutral reason for the peremptory challenge and that the court incorrectly determined that the reason was a pretext for racial discrimination.

We conclude that the district court clearly erred when it sustained the state's *Batson* objection to the peremptory challenge of veniremember # 38. Where a district court erroneously sustains a *Batson* objection to a peremptory challenge and refuses to

dismiss the stricken veniremember, the error undermines the basic "structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review." *Reiners*, 664 N.W.2d at 835 (quoting from *State v. Logan*, 535 N.W.2d 320, 324 (Minn.1995)). Accordingly, we reverse Angus' conviction and remand to the district court for a new trial.

There are additional considerations for automatic reversal for errors of this specific type including that any investigation to determine prejudice would violate the sanctity of the deliberative process. To show prejudice would mean having to engage in determining the scope and influence of the challenged, but not removed juror, on the deliberative process. "[L]ong-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Tanner v. United States*, 483 U.S. 107, 127 (1987). These are circumstances which do not render this type of error to harmless error review. In addition, errors of this type, leaving a juror on the panel implicates the denial of the right to an impartial jury.

In *United States v Martinez-Salazar*, 528 U.S. 304 (2000), Justice Ginsburg explained:

In *Ross v. Oklahoma*, 487 U.S. 81 (1988), this Court reaffirmed that "peremptory challenges [to prospective jurors] are not of constitutional dimension," *id.*, at 88; rather, they are one means to achieve the constitutionally required end of an impartial jury.

The peremptory challenge is part of our common-law heritage. Its use in felony trials was already venerable in Blackstone's time. See 4 W. Blackstone, Commentaries 346-348 (1769). We have long recognized the role of the peremptory challenge in reinforcing a defendant's right to trial by an impartial

jury. See, e.g., *Swain v. Alabama*, 380 U.S. 202, 212-213, 218-219 (1965); *Pointer v. United States*, 151 U.S. 396, 408 (1894). But we have long recognized, as well, that such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension. *Ross*, 487 U.S., at 88; see *Stilson v. United States*, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges.").

In addition to recognizing 6th Amendment right to trial by an impartial jury violations occurring from sitting a juror whose partiality is questionable, the United States Supreme Court in *Martinez-Salazar*, *supra*, also recognized a separate constitutional violation from discrimination based use of peremptory challenge to remove a qualified juror.

Under the Equal Protection Clause, a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race. See, e.g., *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994) (gender); *Hernandez v. New York*, 500 U.S. 352 (1991) (ethnic origin); *Batson v. Kentucky*, 476 U.S. 79 (1986) (race). *Martinez-Salazar*, *supra* at 315.

The United States Supreme Court made the holding of *Martinez-Salazar* the basis for its ruling in *Rivera v Illinois*, 556 US 148, 162 (2009):

The right to exercise peremptory challenges in state court is determined by state law. This Court has "long recognized" that "peremptory challenges are not of federal constitutional dimension." *United States v. Martinez-Salazar*, 528 U. S. 304, 311 (2000). States may withhold peremptory challenges "altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." *Georgia v. McCollum*, 505 U. S. 42, 57 (1992). Just

as state law controls the existence and exercise of peremptory challenges, so state law determines the consequences of an erroneous denial of such a challenge. Accordingly, we have no cause to disturb the Illinois Supreme Court's determination that, in the circumstances Rivera's case presents, the trial court's error did not warrant reversal of his conviction.

The holdings of the Illinois Supreme Court were:

... the denial of Rivera's peremptory challenge did not qualify as a structural error requiring automatic reversal. See 227 Ill. 2d, at 19–20, 879 N. E. 2d, at 887 (citing *Washington v. Recuenco*, 548 U. S. 212, 218–219 (2006)). The court saw no indication that Rivera had been "tried before a biased jury, or even one biased juror." 227 Ill. 2d, at 20, 879 N. E. 2d, at 887. In that regard, the court stressed, Rivera did "not suggest that Gomez was subject to excusal for cause." *Ibid.*

In *People v Bell* 473 Mich 275, 286 (2005), this Court defined the contours of the Equal Protection Clause when a jury is being constituted:

Batson and its progeny make clear that a trial court has the authority to raise sua sponte such an issue to ensure the equal protection rights of individual jurors. See *Batson*, supra at 99 ("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."); *Georgia v. McCollum*, 505 US 42, 49–50; 112 S Ct 2348; 120 L Ed 2d 33 (1992), quoting *State v. Alvarado*, 221 NJ Super 324, 328; 534 A2d 440 (1987) ("`Be it at the hands of the State or the defense,' 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.'").

However, the analysis in *Bell* does not attend to the present case, and does not address the 14th amendment application of the 6th Amendment right to be tried by an impartial juror which constitutes a structural error that denies a defendant his "right to an impartial adjudicator, be it judge or jury." *Gomez v. United States*, 490 U.S. 858, 876, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989), quoting *Gray v. Mississippi*, 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987).

The connection between peremptory challenges and the constitutional guarantee of an impartial jury has been made by the United States Supreme Court stating that "that device occupies `an important position in our trial procedures,' ... and has indeed been considered `a necessary part of trial by jury....' Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of `eliminat[ing] extremes of partiality on both sides,' ... thereby `assuring the selection of a qualified and unbiased jury.'" *Holland v. Illinois*, 493 U.S. 474, 484, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990), quoting *Batson v. Kentucky*, supra at 91, 98, 106 S.Ct. 1712, and *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

Because the denial of peremptory challenge of Juror No. 5 was erroneous, the process designed to assure impartiality was defective, and the goal of impartial jury denied. Automatic reversal is required where a challenged juror remains on the panel because this error is not amenable to harmless analysis without violating the sanctity of the deliberative process, and because this type of error precludes the ability of a defendant to be tried before an impartial jury.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellant requests this Court find equal protection and impartial jury constitutional rights have been denied, each constituting structural error, the sentence and conviction must be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Administrative Order 2019-6, the undersigned does certify that the word count for this Defendant-Appellant's Brief on Appeal, including footnotes, is 12,083 words, which is within the 16,000 word limit provided for briefs on appeal.

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