IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-30,077-01

EX PARTE MARK ROBERTSON, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. W89-85961-NL-(A)
IN THE CRIMINAL DISTRICT COURT NO. 5
FROM DALLAS COUNTY

NEWELL, J., filed a concurring opinion.

Racially-motivated peremptory strikes during jury selection not only affect a defendant's rights, they also deprive a community of its voice in a criminal trial.[1] At the core of the United States Supreme Court decision in *Batson v. Kentucky* prohibiting such practices is the holding that "one

[1] *See Batiste v. State*, 888 S.W.2d 9, 11 (Tex. Crim. App. 1994) ("The Court observed in *Batson* that use of peremptory challenges to exclude black veniremen solely on account of their race injured not only the defendant on trial, but also the veniremen themselves, and indeed, the 'entire community.'"); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.").

racially discriminatory peremptory strike is one too many."[2] In this case, both the defendant and the prosecution appear to have colluded to exclude thirty-three African-Americans from the jury pool, six of whom were excluded without questioning. Given the stakes, I agree with the Court's decision to reconsider its previous holding on this issue and remand the case to the habeas court for more development. But I write separately because I am not convinced that the United States Supreme Court will regard the law in this area as clear cut, even if this claim is regarded as an ineffective assistance of counsel claim rather than a stand-alone *Batson* claim.

Even though *Batson* is often thought of as a case that merely prevents the prosecution from exercising peremptory challenges in a racially discriminatory manner, its holding was also concerned with ending racial discrimination in the jury selection process as a matter of equal protection.[3] The Supreme Court has made clear that it does not matter if the defendant is of a different race than the excluded juror.[4]

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[2] *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019) (explaining *Batson*, 476 U.S. 79).

[3] *Batson*, 476 U.S. at 86 ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.").

[4] *Powers v. Ohio*, 499 U.S. 400, 409 (1991); *Flowers*, 139 S. Ct. at 2241.

The use of race to prevent someone from serving on a jury is so abhorrent that the Supreme Court has recognized that the prosecution may raise a *Batson* challenge against a defendant who tries to exclude a potential juror based upon race.[5] I question whether the Supreme Court would hold, even in this case, that the interests served by *Batson* must give way to the rights of the criminal defendant.[6]

As the Supreme Court recently explained, the core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless if the Court were to approve the exclusion of jurors on the basis of race.[7] Further, the Court emphasized that discrimination against one defendant or juror on account of race is not remedied or cured by discrimination against other defendants or other jurors on account of race.[8] As the Court has explained, "Selection procedures that purposefully exclude [African-American] persons from juries undermine public confidence in the fairness

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[5] *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

[6] *Id.* at 58 (considering whether the prohibition against the exercise of discriminatory peremptory challenges violates a defendant's Sixth Amendment right to effective assistance of counsel).

[7] *Flowers*, 139 S. Ct. at 2241.

[8] *Id.* at 2242.

of our system of justice."[9] Holding that the collusion in this case was neither harmful nor prejudicial would seem to undermine the Supreme Court's understanding of *Batson* and it progeny.

Further, I am not convinced that the Supreme Court would resolve the tension between "structural error" and the prejudice prong of an ineffective assistance analysis in the same way that it did in *Weaver v. Massachusetts*.[10] Though the Supreme Court seems to have drawn the same distinction regarding structural error on direct appeal and ineffective assistance of counsel claims we drew in our own precedent *Batiste v. State*,[11] the right at issue in *Weaver* was qualitatively different. It's possible, in a situation like the one presented in *Weaver*, to determine that a defendant was not prejudiced by the failure to raise a denial of a

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[9] *Batson*, 476 U.S. at 87.

[10] *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) (holding that when a defendant raises a violation of the right to a public trial via a claim of ineffective assistance of counsel, prejudice on the ineffective-assistance claim is not shown automatically; rather, the burden is on the defendant to show a reasonable probability of a different outcome in his or her case).

[11] *Id.*; see *Batiste v. State*, 888 S.W.2d 9, 14–15 (Tex. Crim. App. 1994) (holding that failure to preserve *Batson* error does not so invariably detract from the fairness of trial as to justify exempting ineffective counsel claims for lack of a *Batson* objection from *Strickland*'s "prejudice" prong). Under the rationale announced in *Batiste*, I do not see how any defendant could demonstrate prejudice in an ineffective assistance claim based upon the failure to raise a *Batson* challenge.

public trial claim when the violation occurred during two days of voir dire and only involved the exclusion of two spectators.[12]

But *Batson* claims involve the denial of the rights of the jurors to participate in civic life. According to the Supreme Court, structural error is either an error that defies a harm analysis, or possibly, an error of such magnitude that it causes fundamental unfairness, either to the defendant in a specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process.[13] Excluding the defendant's mother and her minister from two days of voir dire certainly doesn't seem to fit in the latter category.[14] Collusion with a prosecutor to exclude thirty-three African-American jurors based upon their race sure does.

Of late, the United States Supreme Court has issued opinions focused upon removing considerations of race in criminal prosecution. The Court has held race is an impermissible consideration by jurors during jury deliberations.[15] The Court upheld an ineffective-assistance

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[12] *Weaver*, 137 S. Ct. at 1913.

[13] *Id.* at 1907–08.

[14] *Id.* at 1913.

[15] *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (holding that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to

claim when it was the defendant himself who relied upon an expert who based his opinions on racial considerations.[16] And the Court has very recently reiterated that race should play no part in the selection of the jury.[17] Just this term, the Court noted the roots of racism behind permitting non-unanimous jury verdicts in criminal cases as part of the justification for overruling precedent that allowed such verdicts.[18] Though these cases are not directly on point with this one, they convince me that the answer to this issue is not so clear that we can be comfortable with our previous resolution of it in this case. That is why I join the Court's order reopening the case on our own initiative and remanding to the habeas court for further development.

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convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee").

[16] *Buck v. Davis*, 137 S. Ct. 759, 776–78 (2017).

[17] *Flowers*, 139 S. Ct. at 2239, 2241.

[18] *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1393–94 (2020).