AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice: Lawyers and Juries: Juries

**Flowers v. Mississippi**, \_\_\_ U.S. \_\_\_ (2019)

*Curtis Flowers, an African-American male, was tried six times by the same (white) prosecutor for murders committed in 1996 in Winona, Mississippi. At his first trial, the prosecutor used preemptory strikes against the only five black prospective jurors on a panel of 36 (Winona has a population that is 53% African-American). The death sentence given by the all-white jury was overturned by the Mississippi Supreme Court because of independent prosecutorial misconduct. At the second trial, the prosecutor used preemptory strikes against the only five black prospective jurors on a panel of 30, but the trial judge disallowed one of those strikes as based on race. The death sentence given by that jury with one person of color was again reversed because of independent prosecutorial misconduct. At the third trial, the prosecutor used all 15 of his preemptory strikes against black prospective juror, leaving a jury panel of 1 African-American and 11 white persons. The death sentence given by that jury was overruled by the Mississippi Supreme Court because using all 15 preemptive challenges to strike prosecutor jurors violated* Baton v. Kentucky *(1986), which holds that race is not a legitimate reason to exercise a preemptory challenge. At the fourth trial, the prosecutor used all eleven of his preemptory challenges to strike prospective black jurors. The resulting jury of seven white and five black jurors was unable to read a verdict, as was the jury of nine white persons and three black persons in Flowers’s fifth trial (the racial composition of the original jury panel and the use of peremptory challenges is not known). At the sixth trial, the prosecutor used preemptory challenges to strike five of the six black prospective jurors and one of the twenty prospective white jurors. Flowers claimed this pattern of striking prospective black jurors violated his due process right to an impartial jury and the equal protection clause of the Fourteenth Amendment. The Mississippi Supreme Court found no* Batson *violation. Flowers appealed to the Supreme Court of the United States.*

*The Supreme Court by a 7-2 vote overturned the Supreme Court of Mississippi. Justice Brett Kavanaugh’s opinion declared that the combination of the pattern of racial strikes in past cases, racial strikes in the sixth trial, the different questioning of white and black prospective jurors, and the different treatment of particular white and black prospective jurors was sufficient to demonstrate clear* Batson *error*. *Kavanaugh did not claim that any factor warranted reversal on standing alone? Is this right? Why does Justice Clarence Thomas think that none of the factors in combination warrant reversal? Is he right with respect to individual factors? Their combination? Thomas concludes his dissent by hoping that a seventh trial will take place. Is the holding of this case little more than “this prosecutor never should have been allowed to try the sixth case and certainly should not try the seventh? Is there a constitutional problem with trying a person seven times for the same crime when four of the prosecutors are reserved because of constitutional errors by the prosecutor?*

Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I06fa8db3941811e9b22cbaf3cb96eb08) delivered the opinion of the Court.

. . . .

Four critical facts, taken together, require reversal. First, in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck—a statistic that the State acknowledged at oral argument in this Court. Second, in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. Third, at the sixth trial, in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors. Fourth, the State then struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck by the State.

We need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State’s peremptory strike of black prospective juror Carolyn Wright was not “motivated in substantial part by discriminatory intent.”

. . . .

Under [*Batson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000780&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *v. Kentucky* (1986), once a prima facie case of discrimination has been shown by a defendant, the State must provide race-neutral reasons for its peremptory strikes. . . . . [T]he [*Batson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000780&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Court held that a criminal defendant could show “purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial. . . . [T]he Court emphasized that a prosecutor may not rebut a claim of discrimination “by stating merely that he challenged jurors of the defendant’s race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race.” . . . The Court stated that each removal of an individual juror because of his or her race is a constitutional violation. Discrimination against one defendant or juror on account of race is not remedied or cured by discrimination against other defendants or jurors on account of race. . . . [T]he [*Batson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000780&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Court did not accept the argument that race-based peremptories are permissible because both the prosecution and defense could employ them in any individual case and in essence balance things out. Under the Equal Protection Clause, the Court stressed, even a single instance of race discrimination against a prospective juror is impermissible. Moreover, in criminal cases involving black defendants, the both-sides-can-do-it argument overlooks the percentage of the United States population that is black (about 12 percent) and the cold reality of jury selection in most jurisdictions. Because blacks are a minority in most jurisdictions, prosecutors often have more peremptory strikes than there are black prospective jurors on a particular panel. . . .

Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process. Enforcing that constitutional principle, [*Batson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000780&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) ended the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants. . . .

. . . .

. . . [W]hat factors does the trial judge consider in evaluating whether racial discrimination occurred? Our precedents allow criminal defendants . . . [to] present:

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

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

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

• a prosecutor’s misrepresentations of the record when defending the strikes during the [*Batson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000780&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) hearing;

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

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

. . . . [O]ur review of the history of the prosecutor’s peremptory strikes in Flowers’ first four trials strongly supports the conclusion that his use of peremptory strikes in Flowers’ sixth trial was motivated in substantial part by discriminatory intent. . . .m The numbers speak loudly. Over the course of the first four trials, there were 36 black prospective jurors against whom the State could have exercised a peremptory strike. The State tried to strike all 36.

. . . .

The State’s use of peremptory strikes in Flowers’ sixth trial followed the same pattern as the first four trials, with one modest exception: It is true that the State accepted one black juror for Flowers’ sixth trial. But especially given the history of the case, that fact alone cannot insulate the State from a [*Batson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000780&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))challenge. In *Miller-El v. Dretke* (2005), this Court skeptically viewed the State’s decision to accept one black juror, explaining that a prosecutor might do so in an attempt “to obscure the otherwise consistent pattern of opposition to” seating black jurors. The overall record of this case suggests that the same tactic may have been employed here. . . .

. . . . On average, . . . the State asked 29 questions to each struck black prospective juror. The State asked an average of one question to each seated white juror. . . . Dianne [Copper](https://1.next.westlaw.com/Link/Document/FullText?entityType=gdrug&entityId=I0a8c01580ccd11deb055de4196f001f3&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) was a black prospective juror who was struck. The State asked her 18 follow-up questions about her relationships with Flowers’ family and with witnesses in the case. Pamela Chesteen was a white juror whom the State accepted for the jury. Although the State asked questions of Chesteen during group voir dire, the State asked her no individual follow-up questions about her relationships with Flowers’ family, even though the State was aware that Chesteen knew several members of Flowers’ family. . . . The prosecutor’s dramatically disparate questioning of black and white prospective jurors—at least if it rises to a certain level of disparity—can supply a clue that the prosecutor may have been seeking to paper the record and disguise a discriminatory intent.

. . . .

Carolyn Wright was a black prospective juror who said she was strongly in favor of the death penalty as a general matter. And she had a family member who was a prison security guard. Yet the State exercised a peremptory strike against Wright. The State said it struck Wright in part because she knew several defense witnesses and had worked at Wal-Mart where Flowers’ father also worked. Winona is a small town. Wright had some sort of connection to 34 people involved in Flowers’ case, both on the prosecution witness side and the defense witness side. But three white prospective jurors—Pamela Chesteen, Harold Waller, and Bobby Lester—also knew many individuals involved in the case. Chesteen knew 31 people, Waller knew 18 people, and Lester knew 27 people. Yet as we explained above, the State did not ask Chesteen, Waller, and Lester individual follow-up questions about their connections to witnesses. . . . .

. . . . The State also explained that it exercised a peremptory strike against Wright because she had worked with one of Flowers’ sisters. That was incorrect. . . . The State made apparently incorrect statements to justify the strikes of black prospective jurors Tashia Cunningham, Edith Burnside, and Flancie Jones. . . . The State’s pattern of factually inaccurate statements about black prospective jurors suggests that the State intended to keep black prospective jurors off the jury.

. . . . We must examine the Wright strike in light of the history of the State’s use of peremptory strikes in the prior trials, the State’s decision to strike five out of six black prospective jurors at Flowers’ sixth trial, and the State’s vastly disparate questioning of black and white prospective jurors during jury selection at the sixth trial. We cannot just look away. Nor can we focus on the Wright strike in isolation. In light of all the facts and circumstances, we conclude that the trial court clearly erred in ruling that the State’s peremptory strike of Wright was not motivated in substantial part by discriminatory intent.

. . . .

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I06fa8db3941811e9b22cbaf3cb96eb08), concurring.

. . . .

If another prosecutor in another case in a larger jurisdiction gave any of these reasons for exercising a  peremptory challenge and the trial judge credited that explanation, an appellate court would probably have little difficulty affirming that finding. And that result, in all likelihood, would not change based on factors that are exceedingly difficult to assess, such as the number of voir dire questions the prosecutor asked different members of the venire. But this is not an ordinary case, and the jury selection process cannot be analyzed as if it were. In light of all that had gone before, it was risky for the case to be tried once again by the same prosecutor in Montgomery County. Were it not for the unique combinations of circumstances present here, I would have no trouble affirming the decision of the Supreme Court of Mississippi, which conscientiously applied the legal standards applicable in less unusual cases. But viewing the totality of the circumstances present here, I agree with the Court that petitioner’s capital conviction cannot stand.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I06fa8db3941811e9b22cbaf3cb96eb08), with whom Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I06fa8db3941811e9b22cbaf3cb96eb08) joins [with the exception of the attack on *Batson*]

. . . .

. . . . [T]he Court almost entirely ignores—and certainly does not refute—the race-neutral reasons given by the State for striking Wright and four other black prospective jurors. Two of these prospective jurors knew Flowers’ family and had been sued by Tardy Furniture—the family business of one of the victims and also of one of the trial witnesses. One refused to consider the death penalty and apparently lied about working side-by-side with Flowers’ sister. One was related to Flowers and lied about her opinion of the death penalty to try to get out of jury duty. And one said that because she worked with two of Flowers’ family members, she might favor him and would not consider only the evidence presented.

. . . .

The majority focuses its discussion on potential juror Carolyn Wright, but the State offered multiple race-neutral reasons for striking her. To begin, Wright lost a lawsuit to Tardy Furniture soon after the murders, and a garnishment order was issued against her. . . . Neither the trial court nor Flowers suffered from any confusion as to how losing a lawsuit to a trial witness and daughter of a victim might affect a juror. . . .

. . . .

Tashia Cunningham stated repeatedly that she “ ‘d[id]n’t believe in the death penalty’ ” and would “ ‘not even consider’ ” it. . . . Edith Burnside knew Flowers personally. . . . Dianne [Copper](https://1.next.westlaw.com/Link/Document/FullText?entityType=gdrug&entityId=I0a8c01580ccd11deb055de4196f001f3&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) had worked with both Flowers’ father and his sister for “ ‘a year or two’ ” each.  Finally, as to Flancie Jones, Flowers conceded below that he “did not challenge [her] strike” and that “ ‘the State’s bases for striking Jones appear to be race neutral.’ ” In terms of race-neutral validity, these five strikes are not remotely close calls. Each strike was supported by multiple race-neutral reasons articulated by the State. . .

. . . .

The majority points to white jurors Pamela Chesteen and Bobby Lester, who worked at the Bank of Winona and therefore had interacted with several members of Flowers’ family as bank customers. By the majority’s lights, Chesteen’s and Lester’s banker-customer relationship was the same as Wright’s co-worker relationship with Flowers’ father. That comparison is untenable. Lester testified that working at the bank meant he and Chesteen “ ‘s[aw] everyone in town.’” . . .

The more relevant comparator to Chesteen and Lester is Alexander Robinson, a black man who was a customer at a store where Flowers’ brother worked. The State confirmed with Robinson that this relationship was “ ‘just a working relationship’ ”—i.e., an employee-customer relationship—and immediately thereafter clarified with Chesteen and Lester that their relationships with Flowers’ family members was “ ‘like Mr. Robinson, just a working relationship.’ ” The State then tendered Robinson, Chesteen, and Lester as jurors. . . .

Next, the majority contends that white jurors Chesteen, Lester, and Harold Waller, like Wright, “knew many individuals involved in the case.” Yet the majority concedes that Wright knew more individuals than any of them. . . .

. . . . Given that these [white] prospective jurors were favorable for the State, it is hardly surprising that the State would not affirmatively “us[e] individual questioning to ask th[e]se potential white jurors whether they could remain impartial despite their relationships” with victims’ families or prosecution witnesses, for to do so could invite defense strikes. Revealingly, Flowers’ counsel had exhaustively questioned these three white jurors—treating them much differently than Wright. Flowers’ counsel asked Wright only a handful of questions, all of which sought to confirm that she could judge impartially. By contrast, Flowers’ counsel asked Chesteen more than 30 questions, most of which sought to cast doubt on Chesteen’s ability to remain impartial given her relationships with the victims’ families. . . .

The [*Batson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000780&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) hearing was conducted immediately after voir dire, before a transcript was available. In explaining their strikes, counsel relied on handwritten notes taken during a fast-paced, multiday voir dire involving 156 potential jurors. Still, the majority comes up with only a few mistakes, and they are either imagined or utterly trivial. . . . First, the State confused which potential juror worked with Flowers’ sister, and then corrected its mistake. Second, the State referred to that juror, Tashia Cunningham, as “ ‘a close friend’ ” of Flowers’ sister, whereas the testimony established only that they worked together closely. . . .

. . . .

. . . [T]he majority finds that only one juror—Carolyn Wright—was struck on the basis of race, but it neglects to mention that the State asked her only five questions. . . . [B]oth sides asked a similar number of questions to the jurors they peremptorily struck. This is to be expected—a party will often ask more questions of jurors whose answers raise potential problems. . . . Most fundamentally, the majority’s statistics are divorced from the realities of this case. Winona is a very small town, and “ ‘this was the biggest crime that had ever occurred’ .” The state courts appropriately viewed the parties’ questioning in light of these circumstances. The Mississippi Supreme Court, for example, found that the State “asked more questions” of the “jurors who knew more about the case, who had personal relationships with Flowers’s family members, who said they could not be impartial, or who said they could not impose the death penalty,” and that “[t]hose issues are appropriate for follow-up questions penalty.”

. . . . The State’s questions also refute the majority’s suggestion that the State did not “not as[k] white prospective jurors th[e] same questions.” The State asked all potential jurors whether Tardy Furniture sued them, and only Wright and Burnside answered in the affirmative. . . . All potential jurors were asked whether they knew Flowers’ father, and no white jurors had worked with him at Wal-Mart. . . .

. . . .

[Copper](https://1.next.westlaw.com/Link/Document/FullText?entityType=gdrug&entityId=I0a8c01580ccd11deb055de4196f001f3&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) worked with two of Flowers’ family members and testified that she could “ ‘lean toward’ ” Flowers and would not decide the case “ ‘with an open mind.’ ” These answers justified heavier questioning than was needed for Chesteen, the white bank teller who occasionally served Flowers’ family members. Moreover, the State did ask Chesteen and Lester, a white juror who also worked at the bank, “follow-up questions about [their] relationships with Flowers’ family.” . . .

. . . .

. . . . The question before us is not whether we “ ‘would have decided the case differently,’ ” but instead whether the state courts were clearly wrong. And the answer to that question is obviously no. The Court has said many times before that “[t]he trial court has a pivotal role in evaluating [*Batson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000780&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) claims.” The ultimate question in [*Batson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000780&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) cases—whether the prosecutor engaged in purposeful discrimination—“involves an evaluation of the prosecutor’s credibility,” and “ ‘the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.’ ” The question also turns on “a juror’s demeanor,” “making the trial court’s firsthand observations of even greater importance.” “[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.”

. . . .

Under th[e] clear-error standard of review, “[w]here there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” The notion that it is “impermissible” to adopt the view of the evidence that I have outlined above is incredible. Besides being supported by carefully reasoned opinions from both the trial court and the Mississippi Supreme Court—opinions that, unlike the majority’s, consider all relevant facts and circumstances—that view is at a minimum consistent with the factual record. . . .

. . . . The majority repeatedly says that over “the six trials combined,” “the State struck 41 of the 42 black prospective jurors it could have struck.” Yet in the fourth trial, according to Flowers himself, the State did not exercise available peremptory strikes on at least three black jurors. Moreover, the majority does not know the races of the struck jurors in the fifth trial. Given that at least three black jurors were seated and that the State exercised only five strikes, it would appear that the State did not exercise available strikes against at least three black jurors. . . .

. . . .

. . . [T]hat the State previously sought to exercise 36 strikes against black jurors does not “speak loudly” in favor of discrimination here, ante, at 2245, because 35 of those 36 strikes were race neutral. By the majority’s own telling, the trial court may “consider historical evidence of the State’s discriminatory peremptory strikes from past trials.” The bare number of black-juror strikes is relevant only if one eliminates other explanations for the strikes, but prior adjudications (and Flowers’ failure to even object to some strikes) establish that legitimate reasons explained all but one of them. . . . .

. . . .

Much of the Court’s opinion is a paean to [*Batson v. Kentucky*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000780&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(1986), which requires that a duly convicted criminal go free because a juror was arguably deprived of his right to serve on the jury. That rule was suspect when it was announced, and I am even less confident of it today. [*Batson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000780&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) has led the Court to disregard Article III’s limitations on standing by giving a windfall to a convicted criminal who, even under [*Batson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s logic, suffered no injury. It has forced equal protection principles onto a procedure designed to give parties absolute discretion in making individual strikes. And it has blinded the Court to the reality that racial prejudice exists and can affect the fairness of trials.

Today, the Court holds that Carolyn Wright was denied equal protection by being excluded from jury service. But she is not the person challenging Flowers’ convictions (she would lack standing to do so), and I do not understand how Flowers can have standing to assert her claim. Why should a “denial of equal protection to other people” that does “not affect the fairness of that trial” mean that “the defendant must go free”?

. . .

. . . . Peremptory strikes are designed to protect against fears of partiality by giving effect to the parties’ intuitions about jurors’ often-unstated biases. “[E]xercised on grounds normally thought irrelevant to legal proceedings or official action,” like “race, religion, nationality, occupation or affiliations,” they are a form of action that is by nature “arbitrary and capricious,” The strike must “be exercised with full freedom, or it fails of its full purpose.” Because the strike may be exercised on as little as the “sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,” reasoned explanation is often impossible. And where scrutiny of individual strikes is permitted, the strike is “no longer ... peremptory, each and every challenge being open to examination.”

. . . . The racial composition of a jury matters because racial biases, sympathies, and prejudices still exist. This is not a matter of “assumptions,” as [*Batson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000780&originatingDoc=I06fa8db3941811e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) said. It is a matter of reality. The Court knows these prejudices exist. . . . Yet the Court continues to apply a line of cases that prevents, among other things, black defendants from striking potentially hostile white jurors. I remain “certain that black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes.”