

EXAMINERS' ANALYSIS OF QUESTION NO. 9

Counsel's Argument:

More specifically articulated, counsel's argument is that Dwight is being denied his right to equal protection under the 14th Amendment because the prosecutor used peremptory challenges to remove African American jurors solely based on their race. In *Batson v Kentucky*, 476 US 79 (1986), the Supreme Court held that the equal protection clause forbids a prosecutor to peremptorily challenge potential jurors solely on account of their race. See *People v Bell*, 473 Mich 275, 278 (2005) and *People v Knight*, 473 Mich 324, 335 (2005). Rather than counsel's generalized argument, it should be anchored to 14th Amendment principles of equal protection and should seek reseating of the challenged jurors.

Procedure the Court Should Follow:

Batson delineated a three-part process by which the Court must resolve a so-called "Batson challenge." *Batson*, at 87-88; accord *Bell* and *Knight*. Employment of this process is mandatory. First, there must be a *prima facie* showing of discrimination based on race. To establish a *prima facie* showing 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, and (3) the circumstances raise an inference that the exclusion was based on race. All relevant circumstances are to be considered.

Second, the peremptory-challenge maker must, in response to a *prima facie* showing, come forward with a race neutral explanation for the challenge(s). The neutral explanation must be related to the particular case being tried and must provide more than a general assertion to rebut the *prima facie* showing. Failing to do so will invalidate the peremptory challenge.

Third, the court must decide whether the defendant in this matter has met the burden of establishing purposeful discrimination. Stated differently, are the race-neutral explanations credible? If the race neutral explanation, based on consideration of various factors related to credibility, is simply a pretext for discrimination, the peremptory challenge(s) should be vacated.

Prosecutor's Argument:

Although other arguments are possible, the prosecutor should focus on the race-neutral explanations contained in the facts of the *voir dire*. Removed juror Alice White had been the lone hold-out in a previous deadlocked murder case. That she endured an acrimonious deliberations process and stuck to her position may be noble, but wishing to challenge her for these reasons seems disconnected to her race, the only real test in a *Batson* challenge. Similarly, the prosecutor should note that juror Ellen Scott's preoccupation with her children's situation might make her less attentive. Given the burden of proof is on the People, an advocate who questions whether a juror will have the ability to concentrate on the courtroom presentation evinces a legitimate concern about retaining the juror. Finally, juror Frank Field's comment, while arguably nebulous, could be argued as an indication that more would be demanded of the prosecutor (better bring your A-game) than proving the case beyond a reasonable doubt. Moreover, calling the defendant "my man" arguably suggests a curious connection between Field and Dwight, maybe based on their similar ages.

As stated in *Batson*, "the second step does not demand an explanation that is persuasive, or even plausible." Rather, the focus is whether it is facially valid and based on something other than race. *Knight*, at 337.