UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARK WATSON (TN Kemar Phillips),	
Petitioner,	05 Civ. 7288 (WHP) (JCF)
-against-	REPORT AND RECOMMENDATION
THOMAS RICKS, Superintendent, Upstate Correctional Facility, and ELIOT SPITZER, New York State Attorney General,	
Respondents.	

TO THE HONORABLE WILLIAM H. PAULEY III, U.S.D.J.:

Mark Watson, also known as Kemar Phillips, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction for rape, sodomy, and burglary following a jury trial before the Honorable Barbara F. Newman in New York State Supreme Court, Bronx County. The petitioner contends that the prosecutor's use of peremptory challenges to exclude West Indians from the jury violated the Equal Protection Clause of the Fourteenth Amendment. For the reasons that follow, I recommend that the petition be granted.

Background

A. Batson

The petitioner claims that the trial court incorrectly applied the rule set out in Batson v. Kentucky, 476 U.S. 79 (1986). In Batson, the United States Supreme Court held that although a

prosecutor "ordinarily is entitled to exercise peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried," the Fourteenth Amendment prohibits prosecutors from using peremptory challenges to exclude black jurors solely on account of their race. Id. at 89 (internal quotation marks and citation omitted). Under Batson, courts evaluate claims of discrimination in the selection of the petit jury according to a three-step procedure:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Miller-El v. Cockrell, 537 U.S. 322, 328-29 (2003) (citing Batson, 476 U.S. at 96-98). Although Batson involved the exercise of peremptory challenges on the basis of race, the Court has made it clear that Batson extends to the exercise of peremptory challenges on other prohibited grounds as well. See J.E.B. v. Alabama, 511 U.S. 127, 129 (1994) (gender); Hernandez v. New York, 500 U.S. 352, 355 (1991) (ethnicity). Here, Mr. Watson argues that the state court violated his right to equal protection: (1) by holding that West Indians are not a cognizable group for Batson purposes, and (2) by finding that he failed to make the required prima facie showing of intentional discrimination.

B. Voir Dire

On October 31, 1997, the petitioner was indicted for rape in the first degree, sodomy in the first degree, two counts of burglary in the first degree, three counts of robbery in the first degree, two counts of criminal possession of a weapon in the fourth degree, and endangering the welfare of a child. (Indictment No. 6442/97, attached as Exh. 1 to Affidavit of David S. Weisel dated May 19, 2006 ("Weisel Aff.")).

Jury selection commenced on September 27, 1999 (VD at 1)[1] and lasted five days. During voir dire, the prosecutor used peremptory challenges to exclude from the petit jury four people born in Jamaica and one person born in Trinidad. (Appx. at 681). Defense counsel raised a Batson objection, noting that Mr. Watson is "West Indian Jamaican" and that the prosecutor had "knocked off every juror of West Indian descent." (Appx. at 661). The prosecutor argued that persons of West Indian descent are not a cognizable group for Batson purposes. (Appx. at 662).

After some discussion of this question, the trial court indicated that even if West Indians were a cognizable group, the defense had failed to make out a prima facie case of

[1] "VD" refers to the transcript of the voir dire. Portions of the voir dire are missing from the transcript sent to the Court by the District Attorney's Office. The relevant pages of the transcript are attached as an appendix to the petitioner's Memorandum of Law in Support of Petition ("Pet. Memo."), and are cited as "Appx."

discrimination. (Appx. at 679). Defense counsel pointed out that the prosecutor had exercised peremptory challenges to exclude from the petit jury every prospective juror who indicated that he or she was born in either Jamaica or Trinidad. (Appx. at 661, 683). He also argued that the West Indian jurors who were excluded were otherwise indistinguishable from jurors who were not excluded. (Appx. at 681-82). The court rejected this argument, and held that this showing did not raise an inference of intentional discrimination as required under Batson. (Appx. at 684).

Justice Newman went on to discuss her belief that there is no "anti-West Indian bias" in the United States. (Appx. at 684). Recognizing that there is case law indicating that Italian-Americans are a cognizable group for Batson purposes,[2] Justice Newman stated while "it cannot be denied that there is an [anti-] Italian American bias and bigotry to be found in our country," any bias against persons from the West Indies is based upon their race. (Appx. at 684). The court noted that there were a number of African-Americans on the petit jury, and held that the defense had not shown "that West Indians are a cognizable group that share numerous common threa[d]s of attitudes, ideas, experiences, community interests . . . and values" that would distinguish them

[2] For example, in United States v. Biaggi, 673 F. Supp. 96, 102 (E.D.N.Y. 1987), the court held that Italian-Americans are a "cognizable racial group" under Batson.

from African-Americans.[3] (Appx. at 685). Accordingly, the court refused to require the prosecutor to set forth non-discriminatory reasons for the challenges, and the voir dire continued.

B. Subsequent History

The petitioner was convicted of two counts of burglary in the first degree, one count of sodomy in the first degree, and one count of rape in the first degree. (Weisel Aff., ¶ 4). He was sentenced to an indeterminate term of 25 to 50 years imprisonment. (Weisel Aff., ¶ 4). He appealed to the Appellate Division in November 2002, arguing that the trial court erred (1) by holding that West Indians were not a cognizable group for Batson purposes and (2) by finding that the defense had failed to make the required prima facie showing of intentional discrimination. (Brief for Defendant-Appellant ("App. Memo."), attached as Exh. 2 to Weisel Aff., at 13-31).

On February 17, 2004, the Appellate Division, First Department, unanimously affirmed the judgment of conviction. The court ruled that Mr. Watson had not made out the required prima facie showing of intentional discrimination. The court noted that the defendant's "numerical argument was not so compelling as to be

[3] This language is drawn directly from Biaggi, in which the court found that Italian-Americans, "[l]ike any group recently emigrated from a cohesive nation, . . . share numerous common 'threads' of attitudes, ideas, and experiences, often including largely intertwined family relations in the country of origin." 673 F. Supp. at 101.

conclusive." People v. Watson, 4 A.D.3d 174, 174, 771 N.Y.S.2d 639, 639 (1st Dep't 2004). The court further stated, "We have considered defendant's remaining arguments and find them unavailing." Id. at 174, 771 N.Y.S.2d at 639.

On May 27, 2004, the New York Court of Appeals denied the petitioner's application for leave to appeal. People v. Watson, 2 N.Y.3d 808, 808, 781 N.Y.S.2d 308, 308 (2004). Mr. Watson then filed the instant petition, raising the same claims that he advanced in the state courts.

Discussion

A. Standard of Review

Prior to passage of the Antiterrorism and Effective Death Penalty Act (the "AEDPA"), federal courts were not required to defer to state court determinations of law or of mixed questions of law and fact when considering habeas petitions. See Thompson v. Keohane, 516 U.S. 99, 107-12 (1995); Brown v. Artuz, 283 F.3d 492, 497 (2d Cir. 2002). Under the AEDPA, however,

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d). This deferential standard applies only to claims adjudicated on the merits by the state court. If the state

court did not adjudicate the claim on the merits, federal courts review the claim de novo. The Second Circuit has held that the phrase "adjudicated on the merits" has "a well-settled meaning: a decision finally resolving the parties' claims . . . that is based on the substance of the claim advanced, rather than on a procedural, or other, ground." Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001). A state court need not articulate the reasoning that underlies its rejection of a claim in order for its adjudication to be "on the merits." Id.

The petitioner contends that the Appellate Division did not adjudicate his claim that West Indians are a cognizable group on the merits, and that this Court should therefore review that claim de novo. As noted above, the Appellate Division affirmed the trial court's ruling that Mr. Watson failed to make out a prima facie showing of intentional discrimination, and went on to say, "We have considered defendant's remaining arguments and find them unavailing." Watson, 4 A.D.3d at 174, 771 N.Y.S.2d at 639. Aside from the argument that the trial court erred in finding that he had not made a prima facie showing, the only argument Mr. Watson raised on appeal was the argument that West Indians are a cognizable group under Batson. The petitioner argues that the Appellate Division, having decided his statistical argument was insufficient to make a prima facie showing, found it unnecessary to reach his claim that West Indians are a cognizable group under Batson. However, the

Appellate Division indicated that it had considered that claim when it stated that it had considered Mr. Watson's "remaining arguments." It is therefore clear that the Appellate Division adjudicated that claim on the merits. Cf. Brown, 283 F.3d at 498 (holding that Appellate Division's statement that "defendant's remaining claims are without merit" was adjudication on merits); Sellan, 261 F.3d at 314 (finding "no basis for believing that the Appellate Division rejected [] claim on non-substantive grounds" where it stated only that claim was denied).

Because the state court decided both of the petitioner's claims on the merits, habeas relief with respect to either claim is available only if the state court's decision was contrary to, or involved a unreasonable application of, clearly established federal law, as determined by the United States Supreme Court.

B. National Origin

During jury selection, the prosecutor exercised peremptory challenges to exclude from the petit jury all five prospective jurors who identified themselves as having been born in the West Indies. Defense counsel objected that the prosecutor had excluded those jurors because they were born in the West Indies, but the trial court found that West Indians are not a cognizable group for Batson purposes, and did not require the prosecutor to put forward non-discriminatory reasons for the challenges. The petitioner contends that the exercise of peremptory challenges to exclude

prospective jurors on the basis of their national origin violates the Equal Protection Clause, and that the trial court should therefore have permitted defense counsel to challenge the exclusion of West Indians from the petit jury.

As noted above, a federal court is not required to defer to a state court decision that is "contrary to" clearly established federal law, meaning that it "applies a rule different from the governing law set forth in [the Supreme Court's] cases, or . . . decides a case differently [from the Supreme Court] on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-06 (2000)). A state court decision is also not entitled to AEDPA deference if it is an "unreasonable application of" clearly established federal law, meaning that the state court "correctly identifies the governing legal principle . . . but unreasonably applies it to the facts of the particular case." Id. (citing Williams, 529 U.S. at 407-08). Where a state court applies the correct standard but reaches the wrong conclusion, "[a] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state court applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Hoi Man Yung v. Walker, 468 F.3d 169, 176 (2d Cir. 2006) (citing Williams, 529 U.S. at 411). However, the degree of unreasonableness need not be

great; "'otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence.'" Id. (quoting Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000)).

The state court's decision was not "contrary to" clearly established Supreme Court precedent. The court recognized that Batson governed the petitioner's claim, and did not, "on a question of law, reach a conclusion opposite to [a conclusion previously reached by] the Supreme Court." Overton v. Newton, 295 F.3d 270, 277 (2d Cir. 2002). Furthermore, the Supreme Court has never "decided a case that is on its facts materially indistinguishable from the instant case." Id. Accordingly, this Court may issue the writ only if the state court unreasonably applied governing Supreme Court precedent.

"[T]here has been considerable uncertainty as to how broadly or narrowly lower courts should construe principles defined by the Supreme Court in order to determine whether state courts have applied them reasonably." Id. One could argue that the state court's decision cannot be an unreasonable application of clearly established federal law unless the Supreme Court has specifically held that Batson protects against discrimination on the basis of national origin in the exercise of peremptory challenges. That interpretation of § 2254(d)(1) would require a finding for the respondent in this case, because although the Court held in

Hernandez v. Texas, 347 U.S. 475, 479 (1954), that "[t]he exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment," the Court has never directly addressed the question of whether the use of peremptory challenges on the basis of national origin is prohibited under Batson.[4]

However, the Second Circuit has held that § 2254(d)(1) should not be interpreted so narrowly. "[F]ederal law, as determined by the Supreme Court, may as much be a generalized standard that must be followed, as a bright-line rule designed to effectuate such a standard in a particular context." Overton, 295 F.3d at 278 (citing Kennaugh v. Miller, 289 F.3d 36, 42 (2d Cir. 2002)). A state court decision is therefore not entitled to AEDPA deference if the court "unreasonably failed to extend a clearly established, Supreme Court defined, legal principle to situations in which that principle should have, in reason, governed." Kennaugh, 289 F.3d at 45; see also Ramdass v. Angelone, 530 U.S. 156, 166 (2000) (plurality opinion); Gilchrist v. O'Keefe, 260 F.3d 87, 97 (2d Cir. 2001) ("[T]he lack of Supreme Court precedent specifically addressing forfeiture of the right to counsel does not mean that any determination that such a fundamental right has been forfeited,

[4] The Supreme Court has previously held that the Equal Protection Clause prohibits the exercise of peremptory challenges on the basis of gender, ethnic origin, or race. See United States v. Martinez-Salazar, 528 U.S. 304, 314-15 (2000).

even if based on an utterly trivial ground, would survive habeas review").

Batson must be understood "as not only prohibiting certain specific actions, but also as creating a broad [anti-discrimination principle] that the courts must, in reason, follow." Overton, 295 F.3d at 278. Although Batson dealt only with the exercise of peremptory challenges on the basis of race, the Supreme Court has since made it clear that when dealing with Batson claims involving categories other than race, courts should apply traditional equal protection analysis. See J.E.B., 511 U.S. at 135-37; see also United States v. Harris, 197 F.3d 870, 873 (7th Cir. 1999); Pemberthy v. Beyer, 19 F.3d 857, 870-71 (3d Cir. 1994) (Alito, J.). That analysis requires application of

> different levels of scrutiny to different types of classifications. At a minimum, a [] classification must be rationally related to a legitimate government purpose. Classifications based on race or national origin and classifications affecting fundamental rights are given the most exacting scrutiny. Between these extremes of rational basis scrutiny and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

Clark v. Jeter, 486 U.S. 456, 461 (1988) (citations omitted). It is beyond dispute that state action that classifies persons on the basis of ancestry or national origin must be subjected to strict scrutiny. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985); see also Hernandez, 347 U.S. at 479 (holding that discrimination with regard to jury service on basis of national

origin is forbidden by Fourteenth Amendment); Oyama v. California, 332 U.S. 633, 646 (1948) (holding that "only the most exceptional circumstances" can justify discrimination on the basis of ancestry); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon a doctrine of equality.").

Furthermore, the Supreme Court has found that "the only legitimate interest [the State] could possibly have in the exercise of its peremptory challenges is securing a fair and impartial jury." J.E.B., 511 U.S. at 137 n.8. Exclusion of jurors on the basis of national origin, like exclusion of jurors based on gender or race, see id. at 139-42; Batson, 476 U.S. at 87 (noting that "[a] person's race simply is unrelated to his fitness as a juror") (internal quotation omitted), does not serve that interest. See Pemberthy, 19 F.3d at 871 n.18. The "core guarantee of equal protection, ensuring citizens that their State will not discriminate . . ., would be meaningless were we to approve the exclusion of jurors on the basis of [] assumptions" about their attitudes based solely upon their national origin. J.E.B., 511 U.S. at 146 (quoting Batson, 476 U.S. at 97-98).

Proper application of Batson and J.E.B. requires a finding that the exercise of peremptory challenges on the basis of national

origin is prohibited by the Fourteenth Amendment.[5] See, e.g., Pemberthy, 19 F.3d at 870 (stating, prior to J.E.B., that Batson does not apply to peremptory challenges unless they are based on classifications, such as race or national origin, that are subject to strict scrutiny, or possibly those classifications, such as gender, that are subject to heightened scrutiny); United States v. Greer, 939 F.2d 1076, 1086 (5th Cir. 1991) (referring to "Batson's limitations on race, religion, and national-origin-based peremptory challenges"); Bronshtein v. Horn, No. Civ. A. 99-2186, 2001 WL 936702, at *3 (E.D. Pa 2001) (stating, in post-AEDPA habeas case, that "there is no question" that Batson applies to discrimination on basis of national origin); State v. Rigual, 771 A.2d 939, 945 (Conn. 2001) (holding that Batson applies to use of peremptory challenges on basis of national origin); cf. United States v. Bin Laden, 91 F. Supp. 2d 600, 625 (S.D.N.Y. 2000) (denying a motion to

[5] At least one Circuit has found that Batson does not apply to the exercise of peremptory challenges on the basis of national origin unless the defendant can show that the nationality in question has been subjected to discriminatory treatment. See United States v. Marino, 277 F.3d 11, 23 (1st Cir. 2002). Similarly, in Mr. Watson's case, the trial court found that because, in its view, there is no "anti-West Indian bias" in the United States, West Indians are not a cognizable group under Batson. (Appx. at 684-85). However, the Court in J.E.B. made it clear that Batson claims are to be governed by the same equal protection jurisprudence that governs in other contexts. Indeed, in that case it held that the discriminatory use of peremptory challenges against men -- hardly an historically disadvantaged class -- violated equal protection. 511 U.S. at 129-31. Accordingly, discrimination on the basis of national origin must receive strict scrutiny, regardless of whether there is evidence that the group in question has been subjected to discrimination.

exclude United States citizens from a jury and noting that "it is well settled that equal protection principles forbid discriminatory exclusions from jury service" on basis of national origin). The state court's refusal to apply Batson to the exclusion of West Indians from the petit jury was therefore an unreasonable application of clearly established federal law.

At least one court has come to the opposite conclusion.[6] See Sorto v. Herbert, 364 F. Supp. 2d 240, 242 (E.D.N.Y. 2004). In Sorto, the court held that because "[t]he Supreme Court has not decided whether or when national origin discrimination is a cognizable group [sic] for Batson protection . . . the rejection of petitioner's national origin Batson objection" was not contrary to, or an unreasonable application, of Supreme Court precedent. Id. I respectfully disagree. The court's holding in Sorto is simply not consistent with Overton, which made it clear that the fact that the Supreme Court has not applied Batson to a particular set of facts does not bar a finding that the state court was unreasonable in refusing to do so. Despite the fact that the Supreme Court had never "directly held that statistics, without more, can satisfy a defendant's prima facie Batson burden," the Second Circuit in Overton had "no doubt that statistics, alone and without more, can,

[6] In another case, the Second Circuit noted, but did not reach, the issue of whether the exercise of peremptory challenges on the basis of national origin violates equal protection. Rodriguez v. Schriver, 392 F.3d 505, 511 n.9 (2d Cir. 2004)).

in appropriate circumstances, be sufficient." 295 F.3d at 278. Similarly, in this case, it is clear that Batson and its progeny forbid discrimination on the basis of national origin, and "to hold otherwise would undermine the general antidiscrimination principle established by Batson."[7] Id. at 279.

C. Prima Facie Showing

The next issue to be determined is whether Mr. Watson produced enough evidence in support of his Batson objection to require the trial court to proceed to the next step of the Batson analysis. Under Batson, a defendant must make out a prima facie case of intentional discrimination before the burden shifts to the State to

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[7] It should be noted that this case is distinguishable from Carey v. Musladin, __ U.S. __, 127 S. Ct. 649 (2006), which is the most recent interpretation of § 2254(d)(1) by the Supreme Court. In Musladin, the Court considered the California Court of Appeal's determination that no constitutional violation occurred when the victim's family members wore buttons with the victim's face on them during a defendant's murder trial. Id. at 651-52. The Supreme Court had previously found that the state could not compel a defendant to stand trial in prison clothes or seat uniformed state troopers immediately behind the defendant at trial, because these practices were so "inherently prejudicial" that they denied the defendant his right to a fair trial. Id. at 653 (citing Estelle v. Williams, 425 U.S. 501, 512 (1976), and Holbrook v. Flynn, 475 U.S. 560, 570-71 (1986)). In Musladin, the Court noted that Williams and Flynn involved "government-sponsored practices," rather than the courtroom conduct of private parties. The Court found that it had not clearly established that the legal principle in question -- the "inherent prejudice" test -- applied to the courtroom conduct of spectators. Id. at 653-54. Accordingly, "the state court's decision was not contrary to or an unreasonable application of clearly established federal law." Id. at 654. Here, by contrast, the Supreme Court has made it clear that Batson applies to categories other than race, and that courts should use traditional equal protection analysis to determine whether Batson applies to the category in question.

articulate a legitimate, non-discriminatory reason for the peremptory challenges. In order to make a prima facie showing, the defendant must show "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Batson, 476 U.S. at 93-94. The Batson Court noted that "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." Id. at 97.

In Mr. Watson's case, the trial court ruled that even if the use of peremptory challenges to exclude West Indians from a jury violates equal protection, Mr. Watson failed to make the required prima facie showing of intentional discrimination when he pointed out that the prosecutor had struck every one of the five prospective jurors who were West Indian. On appeal, Mr. Watson pointed out that

> up to the point when counsel made his Batson objection, there had been 44 prospective jurors who were subject to peremptory challenge in the venire [excluding jurors disqualified for cause or excused on consent]. The prosecutor had used 11 of her 15 peremptory challenges during selection of the main jurors and two peremptory challenges during selection of alternate jurors. Of those 13 challenges, the prosecutor used 5 challenges to remove all five prospective jurors of West Indian origin. By contrast, she used [8][8] challenges for the 39 prospective jurors [] who were not West Indian.

(App. Memo. at 29-30). "Thus, at the point of counsel's Batson

[8] The petitioner's brief to the Appellate Division appears to contain a numerical error. It states that the prosecutor used 6, not 8, peremptory challenges against non-West Indian members of the venire. I have referred to the accurate calculations contained in the petitioner's Memorandum of Law in Support of Petition instead.

challenge, the prosecutor had . . . peremptorily challenged 100% . . . of the West Indian prospective jurors in the venire, but only 20.51% (8 out of 39) of the prospective jurors who were not of West Indian origin."[9] (Pet. Memo. at 20). The Appellate Division affirmed the trial court's ruling, stating that Mr. Watson's "numerical argument was not so compelling as to be conclusive."[10] Watson, 4 A.D.3d at 174, 771 N.Y.S.2d at 639.

The defendant's burden in making out a prima facie showing of intentional discrimination under Batson is minimal. Overton, 295

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[9] The respondent contends that defense counsel did not make clear to the trial court what he meant by "West Indian." The respondent claims that the trial court interpreted "West Indian" to mean a person "from the archipelago of nations that sits between North and South America," including Cuba, the Dominican Republic, and Puerto Rico. (Respondent's Memorandum of Law ("Resp. Memo.") at 8). Using that definition, according to the respondent, the prosecutor failed to exercise peremptory challenges against two people born in the West Indies (Filiberto Correa and Carmen Gomez). (Resp. Memo. at 13). This claim lacks merit. Neither the prosecutor nor the court appears to have questioned what defense counsel meant when he referred to the West Indies. Furthermore, the trial court made it clear that it understood defense counsel's meaning when it stated, "Although it is true that all of the people who said they were born in either Jamaica or Trinidad were excused, the number in toto is five out of five." (Appx. at 683). According to the trial court, however, "that is a [de minimis] number." (Appx. at 683).

[10] Mr. Watson's trial counsel, in addition to making a statistical argument, argued that the struck jurors were indistinguishable in terms of background, education, and occupation from the non-West Indian jurors who remained on the petit jury. In addition, one of the West Indian jurors had a law enforcement background, from which it could be inferred that she would favor the prosecution. (Appx. at 681-83). The petitioner also raised that argument on appeal to the Appellate Division. (App. Memo. at 30).

F.3d at 279 n.10; Truesdale v. Sabourin, 427 F. Supp. 2d 451, 458-59 (S.D.N.Y. 2006). "The familiar three-step evidentiary framework that the Supreme Court imported into the Batson context 'is derived from the Supreme Court's equal protection and Title VII jurisprudence.'" Overton, 295 F.3d at 279 n.10 (quoting Evans v. Smith, 220 F.3d 306, 312 (4th Cir. 2000)). Indeed, the Batson Court specifically referred to the Court's Title VII jurisprudence, which had previously "explained the operation of prima facie burden of proof rules." Batson, 476 U.S. at 94 n.18. The Court cited, among other cases, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), a Title VII case, in which it held that "[t]he burden of establishing a prima facie case of discrimination is not onerous." Id. at 253. The Supreme Court has since stated that in establishing Batson's three-step evidentiary framework,

> [w]e did not intend the first step to be so onerous that a defendant would have to persuade the judge . . . that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

Johnson v. California, 545 U.S. 162, 170 (2005).[11]

The language used by the Appellate Division indicates that the

[11] Johnson was not clearly established law at the time of Mr. Watson's conviction. However, "to the extent that Johnson summarizes and confirms the enduring vitality of law that was clearly established at that time, it is a relevant and useful resource." Truesdale, 427 F. Supp. 2d at 459 n.6.

Appellate Division measured Mr. Watson's equal protection challenge against a higher standard than the one set out in Batson.

> The Appellate Division's language . . . reveal[s] a skepticism of arguments based on a pattern of strikes and a requirement that such arguments . . . be sufficiently "compelling as to be conclusive" of discrimination. Batson does not support the differential treatment of claims based upon a pattern of strikes and claims based on other forms of evidence. Indeed, as the Second Circuit has noted, there can be "no doubt that statistics, alone and without more, can, in appropriate circumstances, be sufficient to establish the requisite prima facie showing under Batson." Overton, 295 F.3d at 278. Nor does Batson support a requirement that any argument made at the first step of the Batson inquiry be "compelling" or "conclusive." Such a requirement increases the burden placed on the movant behind a Batson challenge beyond the minimal burden described by the Supreme Court.

Truesdale, 427 F. Supp. 2d at 459-60. Accordingly, the "heightened showing required by the Appellate Division . . . 'is at odds with the prima facie inquiry mandated by Batson." Id. at 460 (quoting Johnson, 545 U.S. at 173).

At the time Mr. Watson made his Batson objection, the prosecutor had used peremptory challenges to strike every prospective juror who stated that he or she was born in either Jamaica or Trinidad. As noted above, the Supreme Court has noted that a "pattern of strikes" can be sufficient to raise an inference of discrimination. Batson, 476 U.S. at 96-97. If striking five out of five West Indian jurors is insufficient to raise an inference of discrimination, it is difficult to imagine what sort of pattern of strikes might do so. "It is beyond cavil that the

use of peremptory challenges to rid a venire of all members of a racial group will support a prima facie Batson violation." Truesdale, 427 F. Supp. 2d at 461; see also Green v. Travis, 414 F.3d 288, 299 (2d Cir. 2005) (holding that defendant made out prima facie case by showing that prosecution used 60% of its peremptory challenges to strike black jurors, and remaining 40% to strike Hispanic jurors); Harris v. Kuhlmann, 346 F.3d 330, 346 (2d Cir. 2003) (holding that use of peremptory strikes to exclude all black jurors established prima facie case); Tankleff v. Senkowski, 135 F.3d 235, 249 (2d Cir. 1998) (holding that prosecution's attempt to strike the only three blacks on the venire was "sufficiently dramatic pattern" to make out prima facie case).

Batson does not require a defendant to make a showing that is so "compelling as to be conclusive" at the first step of the Batson analysis. Mr. Watson established that the prosecutor had struck every one of the five West Indian prospective jurors, a showing that was plainly sufficient to support an inference of intentional discrimination. Accordingly, the Appellate Division's determination that Mr. Watson failed to make out a prima facie showing under Batson is contrary to clearly established federal law, and the petition must be granted.

D. Reconstruction Hearing

The Second Circuit has found that when a district court concludes that the Appellate Division committed error in

adjudicating a Batson claim, it can

> 1) hold a reconstruction hearing and take evidence regarding the circumstances surrounding the prosecutor's use of the peremptory challenges . . .; 2) return the case to the state trial court on a conditional writ of habeas corpus so that the state court [can] conduct the inquiry on its own; or 3) order a new trial.

Harris, 346 F.3d at 347. Although the decision is within the discretion of the trial court, see id. at 348, the latter option is appropriate only where "so many years have elapsed since the time of trial that the court cannot make 'a reasoned determination of the prosecutor's state of mind when the jury was selected.'" Jordan v. Lefevre, 293 F.3d 587, 593 (2d Cir. 2002) (quoting Brown v. Kelly, 973 F.2d 116, 121 (2d Cir. 1992)); see also Harris, 346 F.3d at 348; Truesdale, 427 F. Supp. 2d at 462.

The parties do not dispute that the appropriate course of action for this Court, having determined that the state court committed error in holding that Mr. Watson failed to make a prima facie showing, is to order a reconstruction hearing. (Resp. Memo. at 15 n.8; Petitioner's Reply Memorandum of Law at 35). At that hearing, the prosecutor will be required to present legitimate, non-discriminatory reasons for her exercise of peremptory challenges against the five West Indian prospective jurors, and the court will determine whether the petitioner has carried his burden of showing discriminatory intent. The only question is whether that hearing should be held before this Court or before Justice Newman in New York State Supreme Court.

District courts in this Circuit have held reconstruction hearings regarding Batson claims on a number of occasions. See, e.g., DeBerry v. Portuondo, 403 F.3d 57, 62 (2d Cir. 2005); Jordan, 293 F.3d at 590; Valentine v. State of New York, No. 04 Civ. 1411, 2006 WL 2135779, at *1 (S.D.N.Y. Aug. 1, 2006); Rose v. Spitzer, No. 99-CV-6053, 2006 WL 1720445, at *1 (E.D.N.Y. June 22, 2006). Recently, however, the Second Circuit has emphasized that with regard to such evidentiary hearings, "considerations of comity weigh heavily in favor of the state forum." Hoi Man Yung, 468 F.3d at 178 (holding that state court is appropriate forum for evidentiary hearing to determine whether habeas petitioner was denied public trial in violation of Sixth Amendment). Accordingly, the parties should be given an opportunity to argue the appropriate venue for a reconstruction hearing in this case.

Conclusion

For the reasons set forth above, I recommend that Mr. Watson's petition for a writ of habeas corpus be granted. A reconstruction hearing should be held to determine whether the State can offer a non-discriminatory explanation for its peremptory challenges, and whether Mr. Watson can carry his burden of establishing discriminatory intent. The parties should be given the opportunity to argue the appropriate venue for the hearing.

Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(e) of the Federal Rules of Civil Procedure, the parties shall have ten

(10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable William H. Pauley III, Room 2210, and to the chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,

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JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
January 24, 2007

Copies mailed this date:

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