IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTUAN BRONSHTEIN,	:	**CIVIL ACTION**
	:	**THIS IS A CAPITAL CASE**
Petitioner,	:	
	:	
v.	:	
	:	
MARTIN HORN, Commissioner Designate, Pennsylvania Department of Corrections,	:	
	:	
Respondent.	:	**NO. 99-2186**

Reed, S.J. **August 16, 2001**

M E M O R A N D U M

Now before the Court is the motion of petitioner Antuan Bronshtein to alter or amend the judgment of July 5, 2001 (Document No. 26), and the response of the Commonwealth of Pennsylvania thereto. For the reasons set forth below, the motion will be denied.

This Court issued a memorandum and order on July 5, 2001, in which it considered the petition of Bronshtein for habeas relief under 28 U.S.C. § 2254. See Bronshtein v. Horn, No. 99-2186, 2001 U.S. Dist. LEXIS 9310 (E.D. Pa. July 5, 2001). The Court concluded that petitioner was entitled to relief on three of the grounds set forth in the petition. Despite having substantially prevailed on the petition and having his death sentence vacated, petitioner has filed a motion challenging the July 5 decision. In a footnote to the memorandum, the Court observed, "Petitioner does not argue that his convictions for robbery, theft, and conspiracy were constitutionally flawed." Id. at *80 n.35. Petitioner now argues on the instant motion that that footnote was inaccurate, and that the Court overlooked a number of claims for relief that challenged the robbery, theft, and conspiracy convictions. Petitioner points to Claims IV, V, VI,

and VII.[1]

A review of the arguments submitted by petitioner in support of Claims IV, V, and VI belies his assertion that these claims challenged anything other than the murder conviction. Petitioner's voluminous and carefully crafted submissions on these claims can only be read to challenge the murder conviction. Claim IV asserts that the trial court erred in precluding evidence that someone else committed the murder and focuses its discussion on evidence showing that another individual was the "actual murderer." See Petition, at 22-23. Claim V challenges the admission of petitioner's involvement in another homicide for the purpose of showing identity, and again focused its discussion on the murder conviction . See Petition, at 23. ("the prosecution asked the jury to conclude that Petitioner's admission to that police department regarding the Philadelphia murder meant that Petitioner must be guilty of this one"). Claim VI asks solely that petitioner's death sentence be vacated because of prosecutorial misconduct during the sentencing stage. See Petition, at 24. To read these claims to challenge the robbery, theft, or conspiracy conviction requires an act of creative interpretation that is both unwarranted and impermissible

Claim VII is a constitutional challenge to the Commonwealth's use of a peremptory strike against a potential juror of purported Russian-Jewish ancestry in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986). While petitioner's discussion of that claim includes no mention of the robbery, theft, or conspiracy convictions, of course, the allegation

[1] Under Rule 59(e), a party must rely on one of three grounds to alter or amend a judgment: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [issued the earlier order]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice," Max's Seafood Cafe v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999); see also, e.g., Nissim v. McNeil Consumer Products Co, Inc., 957 F. Supp. 600, 601 (E.D. Pa.), aff'd, 135 F.3d 765 (3d Cir. 1997)(table); Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994).

infects everything the jury did, and thus necessarily encompasses the robbery, theft, and conspiracy convictions the jury handed down. Thus, I must address petitioner's Batson claim in some detail.

A Batson inquiry mimics the burden-shifting framework applied by federal courts in Title VII cases: first, a criminal defendant must set forth a *prima facie* case of discriminatory use of a peremptory challenge; then the burden shifts to the Commonwealth to articulate legitimate, non-discriminatory reasons for the challenge; and finally the court must determine whether the prosecutor's explanation is pretextual and whether the defendant has met his burden of proving purposeful discrimination. See Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859 (1991) (citing Batson, 476 U.S. at 96-98).

A *prima facie* case is established when a defendant shows membership in a cognizable racial group and that the prosecutor has used peremptory challenges to remove individuals of that race from the jury panel. See United States v. Clemons, 843 F.2d 741, 745 (3d Cir. 1988) (citing Batson, 476 U.S. at 94-95). A court may consider all relevant circumstances in assessing the defendant's *prima facie* showing, including (1) the fact that peremptory challenges permit a prosecutor predisposed to discriminate to do so (2) any other pattern of discriminatory conduct; and (3) any prosecutorial statements. See id.

The Commonwealth does not dispute that the petitioner in this case is a Russian-Jew and that the Commonwealth used one of its peremptory strikes to disqualify the only Russian-Jewish juror.[2] When defense counsel objected to the use of the peremptory challenge on Batson

[2] The prosecutor put petitioner's Russian-Jewish heritage on the record during *voir dire*. (Trial Transcript, April 5, 1994, at 168-69.) In fact, the petitioner is Moldavian, not Russian, but the Commonwealth does not argue this point and I find it unnecessary to address it.

grounds, the trial court denied the objection outright:

MR. MCMAHON:	Your Honor, I would make my Batson challenge now.
COURT:	What, on her?
MR. MCMAHON:	She's of Russian-Jewish heritage.
COURT:	You can make it and I'll deny it. That's Commonwealth peremptory 5.

(Trial Transcript, April 5, 1994, at 175-76.) The trial court never provided the Commonwealth an opportunity to explain the use of its peremptory challenge.

While not explicit from the transcript, it appears that the trial court ruled that petitioner's counsel had not made the *prima facie* showing of discriminatory use of a peremptory challenge required by Batson. Clues to the basis of the denial lie in a discussion that took place just prior to the striking of the juror at issue, after petitioner's counsel had asked another juror if she was Jewish.

MR. MCMAHON:	The only inquiry that I'm interested in would be for the possible Batson issues, it's whether the juror was of the same Jewish heritage as Mr. Bronshtein, the Defendant. Beyond that, I'm not particularly interested.
THE COURT:	I don't think that's a Batson issue. ... Nationality as defined, has to do with where you are from and where you live. You're talking in theological terms, to make it a race issue. I understand what you're saying, but it's not a nationality, as you're using that term. ... I think we are far afield, and we are wasting time. I threw out to you this – I can easily handle Batson. It's not a Batson issue, and I'll rule without worrying about being wrong on that.

(Trial Transcript, April 5, 1994, at 151, 154.) While the Supreme Court of the United States has not expressly ruled on this issue to this date, it is likely that the trial judge was wrong on the issue of whether Jews were a cognizable group under Batson. The Supreme Court has held that Jews may be classified as a "race" as a matter of federal statutory and constitutional law. See Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 107 S. Ct. 2019 (1987) (Jews could bring claim of

racial discrimination on claim brought under 42 U.S.C. § 1982). While the Supreme Court has not expressly extended Batson to claims of religious discrimination in jury selection, Batson has been extended beyond its initial "racial" confines to include sex, J.E.B. v. Alabama, 476 U.S. 79, 106 S. Ct. 1712 (1986), and there is support for the contention that Batson does indeed prevent a prosecutor from striking a juror based on her religion. See, e.g., United States v. Somerstien, 959 F. Supp. 592, 595 (E.D. N.Y. 1997) (citing Davis v. Minnesota, 511 U.S. 115, 114 S. Ct. 2120 (1994) (Thomas, J., dissenting) (objection to denial of certiorari)).

Moreover, the trial court's comments in this case implicated only the religion of a Jew, and did not specifically address the question of Russian heritage. There is no question that Batson applies to discrimination on the basis of national origin and ethnicity, see J.E.B., 476 U.S. at 146;Pemberthy v. Beyer , 19 F.3d 857, 859 (3d Cir. 1994), and thus, petitioner's claim could have been based on his Russian heritage alone. While it appears that the trial court may have erred to the extent that it concluded that Russians and / or Jews were not a cognizable group under Batson, it was presented with a confusing explanation of the defense position by defense counsel and thus the record is far from clear as to precisely the basis for the challenge. Whether petitioner was relying on his Russian or Jewish heritage alone, or some amalgam of the two, I will consider his claim under Batson.

While the decision of the Supreme Court of Pennsylvania on the Batson issue is not determinative of the challenge presented to this Court, I believe it is worthy of analysis, lest there by any doubt about its efficacy. On direct appeal, the Supreme Court of Pennsylvania affirmed, avoiding the question of whether Russian-Jews were protected under Batson and instead holding that (1) petitioner had failed to establish a *prima facie* case of discriminatory use

of a peremptory challenge and (2) the "record reveal[ed]" neutral, non-discriminatory reasons for excluding the juror at issue. See Commonwealth v. Bronshtein, 547 Pa. 467, 477, 691 A.2d 907 (1997). The second ground relied upon by the Supreme Court of Pennsylvania in affirming the trial court's Batson decision, I believe, is invalid. It is not precedented jurisprudence for an appellate court to, *ex post facto*, supply possible or likely reasons for the use of a peremptory challenge. Batson requires the prosecutor to reveal her *actual* reasons for striking a juror. Where the prosecutor has not done so, whether on her own initiative or because of the trial court's ruling, an appellate or habeas court should not later divine reasons that might have motivated the prosecutor, however tempting that may be, and regardless of how abundant or logical the possible reasons may seem. See Hardcastle v. Horn, No. 98-3028, 2001 U.S. Dist. LEXIS 8556, at * 31-37 (E.D. Pa. June 27, 2001) ("Given Batson's emphasis on the prosecutor's intent, reliance on apparent or potential reasons is objectively unreasonable because they do not shed any light on the prosecutor's intent or state of mind when making the challenge."); see also Mahaffey v. Page, 162 F.3d 481, 484 (7th Cir. 1998) (where trial judge had prevented prosecutor from articulating neutral reasons at trial, state could not on appeal rely on "apparent" reasons in record to defend against a Batson claim).

Because the trial court in this case stopped the Batson inquiry at the *prima facie* stage, petitioner's Batson claim stands or falls on whether he established a *prima facie* case of discriminatory exclusion. See Mahaffey, 162 F.3d at 484 ("Because the trial judge never reviewed the actual reasons for the challenges ... we are limited on appeal to determining whether the *prima facie* showing was met."). The only record evidence petitioner pointed to at trial, and the only evidence petitioner relies upon now in pressing his Batson claim, is the

undisputed fact that the prosecutor used a peremptory challenge to exclude from the jury the only person in the *venire* who shared petitioner's Russian-Jewish ancestry. Petitioner does not proffer any other relevant evidence to support his Batson claim.

Thus, this Court must decide whether the exclusion of the only member of a defendant's racial or ethnic group from the jury pool is alone sufficient to establish a *prima facie* Batson challenge. The Court of Appeals for the Third Circuit has yet to rule on this issue. However, these are not completely uncharted waters; two courts of appeals have addressed this very question. The Court of Appeals for the Ninth Circuit has held that the fact that an excluded juror was the only member of defendant's group "does not, in itself, raise an inference of discrimination. ... More is required." See Wade v. Terhune, 202 F.3d 1190 (9th Cir. 2000) (quoting United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994)). On the other hand, the Court of Appeals for the Tenth Circuit has concluded that striking the only juror that shares the defendant's race suffices to establish a *prima facie* claim under Batson. See United States v. Joe, 8 F.3d 1488, 1499 (10th Cir. 1993) (citing United States v. Chalan, 812 F.3d 1302, 1313-1314 (10th Cir. 1987)).

I find that the Court of Appeals for the Ninth Circuit has it right, and conclude today that the bare fact that the only Russian Jew was excluded from petitioner's jury in this case does not make out a *prima facie* Batson claim. Something more is required here. I need not and do not suggest a minimum threshold of record evidence required to establish a *prima facie* Batson claim, and there being no binding authority to do so, I conclude that the evidence that petitioner produced here is not enough. The record indicates that it was petitioner's counsel, not the prosecutor, who asked two jurors whether they were Jewish. (Trial Transcript, April 5, 1994, at

148-49, 170-71.) Nothing in the record indicates that the prosecutor was interested in whether the jurors shared a common ethnic heritage with the defendant. The prosecutor suspected the juror at issue on petitioner's Batson claim was Quaker because she attended a Quaker school, and the prosecutor inquired into her religion out of a concern that the juror was morally or religiously opposed to the death penalty. (Id. at 155.) That juror did not identify her religion in response to the prosecutor's question, and only revealed that she was Russian-Jewish in response to a question by petitioner's counsel. (Id. at 168-69.) Such a record leaves a muddy footprint indeed. To find that the petitioner has raised a permissible inference that the prosecutor used a peremptory challenge for proscribed discriminatory reasons would require an exercise in speculation that this Court is neither inclined nor authorized to perform.

Finally, I note my disagreement with the Supreme Court of Pennsylvania's conclusion in this case that Batson requires a defendant must produce evidence of the race of all venirepersons struck by the prosecutor, the race of prospective jurors stricken by the defense, and the racial makeup of the final jury selected. I read Batson to be far less exacting in its evidentiary requirements, and believe that there are many evidentiary avenues a petitioner may travel to bolster his Batson claims. However, I do not believe it necessary to articulate all of them here, and limit my conclusion to this record. Therefore, while not accepting the reasoning of the trial court or the Supreme Court of Pennsylvania, for the reasons stated above, I find no constitutional error in the trial court's denial of petitioner's Batson claim. Therefore, the motion to alter or amend judgment will be denied

An appropriate Order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTUAN BRONSHTEIN,	:	**CIVIL ACTION**
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Petitioner,	:	
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v.	:	
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MARTIN HORN, Commissioner Designate, Pennsylvania Department of Corrections,	:	
	:	
Respondent.	:	**NO. 99-2186**

O R D E R

AND NOW, this 16th day of August, 2001, upon consideration of the motion of petitioner Antuan Bronshtein to alter or amend the judgment of July 5, 2001 under Rule 59 (e) of the Federal Rules of Civil Procedure (Document No. 26), and the response of the Commonwealth of Pennsylvania thereto, and having determined, for the reasons set forth in the foregoing memorandum, that there has been no intervening change in law or newly discovered evidence, and having found no error of law or fact in the result reached by this Court in its July 5, 2001, memorandum and order, and having concluded that petitioner is therefore not entitled to relief under Rule 59 (e), **IT IS HEREBY ORDERED** that the motion of petitioner is **DENIED**.

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LOWELL A. REED, JR., S.J.