

IN THE COURT OF APPEALS OF MARYLAND

No. 111

September Term, 1993

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GARY GILCHRIST

v.

STATE OF MARYLAND

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Murphy, C.J.  
Eldridge  
Rodowsky  
Chasanow  
Karwacki  
Raker  
Bell

JJ.

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Concurring Opinion by Chasanow, J.  
in which Judge Bell joins

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Filed: November 28, 1995



I concur in the result and with part III of the majority opinion, but am dubious about the Court's analysis in part IV. Based on a recent Supreme Court decision, we should clarify the trial judge's role in ruling on claims of race or gender motivated peremptory challenges. It is also unclear to me why the majority devotes page after page to discussing whether the defendant waived or abandoned his objections to the trial judge's rulings in the first aborted jury selection, and then in a footnote acknowledges that any error in the first aborted jury selection was harmless. Waiver is not a "threshold" inquiry; the defendant was not asked and should not be asked whether he waived any possible errors in his prior aborted jury selection. The defendant was entitled to a properly selected jury. After the first aborted jury selection, he got a properly selected jury with which he was satisfied. The majority's discussion of waiver in part II is, at best, unnecessary since any errors in the prior aborted jury selection are rendered moot by the second, error-free jury selection or, as the majority concedes in a footnote, are harmless. My primary concern, however, is the majority's discussion in part IV and the Court's failure to analyze the recent case decided by the Supreme Court after oral arguments before this Court in the instant case.

*PURKETT V. ELEM AND PART IV OF THE MAJORITY OPINION*

Part IV of the Court's opinion is potentially confusing because it cites, seemingly with approval, several of this Court's

prior cases which need to be reevaluated, if not overruled, in light of the Supreme Court's recent opinion in *Purkett v. Elem*, \_\_\_ U.S. \_\_\_, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). The majority may be perpetuating errors based on too literal a reading of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The same errors were made by several other courts, including the Eighth Circuit, as was pointed out by the Supreme Court in *Purkett, supra*. That case was cited by the majority but needs to be further analyzed.

In *Purkett*, the defendant was on trial for robbery in a Missouri court. During jury selection the prosecutor used two peremptory challenges to strike two African-American potential jurors. The defense objected based on *Batson, supra*, and the prosecutor explained the reasons for the strikes as follows:

"`I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. Those are the only two people on the jury ... with facial hair.... And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.'"

*Purkett*, \_\_\_ U.S. at \_\_\_, 115 S.Ct. at 1770, 131 L.Ed.2d at 838 (quoting App. to pet. for Cert. A-41).

The trial judge overruled the defendant's *Batson* objection

and, after the defendant was convicted and appealed, that ruling was affirmed by the Missouri Court of Appeals. The defendant then filed a petition for federal habeas corpus. The district court concluded that the Missouri courts' determination that there had been no purposeful discrimination was a factual finding entitled to a presumption of correctness under 28 U.S.C. § 2254(d), and since that finding was supported in the record, the writ of habeas corpus was denied.

The Court of Appeals for the Eighth Circuit reversed and remanded with instructions to grant the writ. That court held that "the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror." *Elem v. Purkett*, 25 F.3d 679, 683 (8th Cir. 1994). The Eighth Circuit concluded that the "prosecution's explanation for striking juror 22 ... was pretextual" and that the trial judge had erred in not finding intentional discrimination. *Elem*, 25 F.3d at 684.

The Supreme Court reversed the Eighth Circuit in a per curiam opinion apparently joined by seven Justices.<sup>1</sup> In that opinion the Supreme Court gave guidance to trial judges ruling on *Batson* challenges and for courts reviewing those rulings. The mistake made by the Eighth Circuit was explained by the Supreme Court as

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<sup>1</sup>Justice Stevens filed a dissenting opinion in which Justice Breyer joined.

follows:

"The Court of Appeals erred by combining *Batson's* second and third steps into one, requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, i.e., a 'plausible' basis for believing that 'the person's ability to perform his or her duties as a juror' will be affected. It is not until the *third* step that the persuasiveness of the justification becomes relevant -- the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step 3 is quite different from saying that a trial judge *must terminate* the inquiry at step 2 when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

The Court of Appeals appears to have seized on our admonition in *Batson* that to rebut a prima facie case, the proponent of a strike 'must give a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges,' and that the reason must be 'related to the particular case to be tried.' This warning was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith. What it means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." (Citations omitted).

*Purkett*, \_\_\_ U.S. at \_\_\_, 115 S. Ct. at 1771, 131 L.Ed.2d at 839-

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#### THE THREE STEP PROCESS

There is a three-step process to be used by trial courts in determining whether peremptory challenges have been exercised in an impermissible discriminatory manner. In *Purkett*, the Supreme Court described the three-step process as follows:

"Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination."

*Purkett*, \_\_\_ U.S. at \_\_\_, 115 S.Ct. at 1770-71, 131 L.Ed.2d at 839.

In some of the majority's language in the instant case, as well as in several of our prior cases, this Court may be making the same mistake as the Eighth Circuit by following a somewhat different three-step test.

*Purkett* held that a race and gender-neutral reason tendered following the finding of a prima facie case of discrimination in the exercise of peremptory challenges need not be persuasive or even plausible; it need only be truthful. Any proffered race and gender-neutral explanation should be accepted by the trial judge unless it is established by the objecting party that race or gender

was a motivating factor for the challenge.

STEP ONE -- A PRIMA FACIE CASE

If a prima facie case of racial or gender discrimination is found in step one, then the Supreme Court indicates that the burden of production shifts to the proponent of the strike. It is unclear whether the majority in the instant case has a different interpretation of the effect of this prima facie case.

In *Ferguson Trenching v. Kiehne*, 329 Md. 169, 182, 618 A.2d 735, 741 (1993), we recognized that the precise meaning of "prima facie evidence" is the subject of considerable disagreement. There are two competing views of the effect of a prima facie case. The competing views were described by one commentator as follows:

"The term `prima facie evidence' is sometimes used to mean `compelling evidence,' i.e., evidence which shifts the burden of production to the opposing party, and thus to signify a true evidentiary rebuttable presumption. It is also used to mean `sufficient evidence' to get to the jury, i.e., merely that the party with the burden of persuasion has met the burden of production and created an issue for the trier of fact by giving rise to a permissible inference." (Footnotes omitted).

LYNN MCLAIN, MARYLAND EVIDENCE § 301.4, at 230-31 (1987); see also *Grier v. Rosenberg*, 213 Md. 248, 252-55, 131 A.2d 737, 739-40 (1957).

The effect of a prima facie case of racial or gender discrimination is to shift the burden of production to the party exercising the strike to offer a race or gender-neutral

explanation. Once an explanation is offered, the prima facie case dissipates, and although it may still remain in the case as the basis for an inference, it should not create a presumption that must be rebutted and should not shift the ultimate burden of proof (or ultimate burden of persuasion) to the party exercising the strike. The Supreme Court told us in *Purkett* that the ultimate burden of proving racial motive never shifts from the party objecting to a peremptory challenge. We should not cast the ultimate burden of proof (as opposed to the burden of articulating a race and gender-neutral reason) on the party exercising the strike. This subtle distinction is important for two reasons as we shall see in step three. It will be dispositive of the judge's decision if the judge is in equipoise in this most difficult fact-finding, and it may also subtly influence the determination of whether a prima facie case of discrimination exists. Does the finding of a prima facie case merely require the striking party to articulate a race and gender-neutral reason in step two, or does it raise a presumption that in effect changes the burden of proof in step three? The Supreme Court in *Purkett* indicates the former, but our prior cases seem to indicate the latter.

*Purkett* holds that the finding of a prima facie case only shifts the burden to the striking party to produce a race and gender-neutral explanation and creates, at most, a permissible inference; it does not create a rebuttable presumption which has

the effect of shifting the burden of proof or the ultimate burden of persuasion to the striking party.<sup>2</sup> This was, at least, implicit when the Supreme Court said:

"Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination.... If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination.

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[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from the opponent of the strike. Cf. *St. Mary's Honor Center v. Hicks*, 509 U.S. \_\_\_, \_\_\_, 113 S. Ct. 2742, 2748-2749, 125 L.Ed.2d 407[, 416] (1993)." (Emphasis added).

*Purkett*, \_\_\_ U.S. at \_\_\_, 115 S.Ct. at 1770-71, 131 L.Ed.2d at 839. This is made even more clear by the case cited immediately after that quotation. In *St. Mary's Honor Center*, *supra*, petitioner, a halfway house, employed respondent Hicks as a correctional officer. After Hicks was demoted and then fired, Hicks filed suit under Title VII of the Civil Rights Act of 1964 claiming these actions were taken because of his race. The procedure in Title VII cases is similar to a *Batson* challenge. The United States District Court

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<sup>2</sup>This incidently is similar to Maryland Rule of Evidence 5-301 (a). See LYNN MCLAIN MARYLAND RULES OF EVIDENCE § 2.301.1 at 85 (1994) stating: "Section (a) provides that in *civil cases, rebuttable evidentiary presumptions* ... will have the effect of shifting the burden of production of the evidence (but not the ultimate burden of persuasion) to the opposing party, to offer evidence tending to disprove the presumed fact."

found that Hicks established a prima facie case of discrimination, but the halfway house offered two nondiscriminatory reasons for the firing. The district court found the reasons given by the halfway house were pretextual. The judge, nevertheless, ruled that Hicks failed to carry his ultimate burden of proof that the firing was racially motivated. Hicks appealed and the Court of Appeals for the Eighth Circuit reversed. *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (8th Cir. 1992). The Eighth Circuit reasoned that, after proving a prima facie case, Hicks was entitled to judgment, as a matter of law, once he proved, and the judge found, that all of the halfway house's reasons were pretextual. The Supreme Court reversed the Eighth Circuit and held that the judge's rejection of the halfway house's reasons did not entitle Hicks to judgment as a matter of law. The Court reasoned that the finding of a prima facie case of discrimination raised a presumption of unlawful discrimination, but this presumption only placed the burden of production on the halfway house to produce nondiscriminatory reasons which, if believed, would support a finding that unlawful discrimination did not cause their actions. The prima facie case did not shift the ultimate burden of proof that remained on Hicks. Even if the reasons in step two were pretextual, Hicks still might not have met his burden of affirmatively proving discrimination in step three. The Court said:

"Respondent does not challenge the District Court's finding that petitioners

sustained their burden of production by introducing evidence of two legitimate, nondiscriminatory reasons for their actions: the severity and the accumulation of rules violations committed by respondent. Our cases make clear that at that point the shifted burden of production became irrelevant: 'If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted,' and 'drops from the case.' The plaintiff then has 'the full and fair opportunity to demonstrate,' through presentation of his own case and through cross-examination of the defendant's witnesses, 'that the proffered reason was not the true reason for the employment decision,' and that race was. He retains that 'ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination.'

\* \* \*

The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. The defendant's 'production' (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him]' because of his race. The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is *required*.' But the Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental

principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'" (Emphasis added and in original)(footnote omitted)(citations omitted).

*Hicks*, 509 U.S. at \_\_\_, 113 S.Ct. at 2747-49, 125 L.Ed.2d at 416-19.

This Court has previously stated that prima facie evidence in the *Batson* context means "the establishment of a legally mandatory, rebuttable presumption." *Stanley v. State*, 313 Md. 50, 60, 542 A.2d 1267, 1272 (1988)(quoting *Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.7, 101 S.Ct. 1089, 1094 n.7., 67 L.Ed.2d 207, 216 n.7. (1981)). In *Gray v. State*, 317 Md. 250, 254, 562 A.2d 1278, 1280 (1989), we indicated "the trial judge [must] determine whether the defendant had made out a prima facie case of racial discrimination and, if so, whether the State had satisfactorily rebutted the presumption." (Emphasis added). In *Chew v. State*, 317 Md. 233, 562 A.2d 1270 (1989), the Court elucidated that the burden of proof (or the burden of persuasion) shifts to the State to explain a prima facie discriminatory strike. We said:

"The State has the burden of showing that 1) a reason other than the race of the juror did exist, and 2) the reason has some reasonable nexus to the case and was in fact the motivating factor in the exercise of the challenge." (Emphasis added).

*Chew*, 317 Md. at 247, 562 A.2d at 1277. The shift of the burden of

proof emanates from our statement in *Stanley, supra*, that:

"Although the phrase `prima facie case' `may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue,' in the Title VII context (and by implication, the *Batson* context), the phrase denotes `the establishment of a legally mandatory rebuttable presumption.' *Burdine*, 450 U.S. at 254 n.7, 101 S.Ct. at 1094 n.7, 67 L.Ed.2d at 216 n.7. Also see B. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 434 (1987)(citing *Burdine* for `prima facie case')."

313 Md. at 60, 542 A.2d at 1272. In *Stanley*, the Court went on to explain the prosecution's burden on remand, since there was a prima facie case of discrimination in the use of peremptory challenges:

"If the State can honestly come forth with neutral, nonracial reasons for each of its challenges to a black juror, and if the trial court, after examining the State's explanations within the entire context of the voir dire proceedings finds all eight challenges have been satisfactorily justified and there was no evidence of a discriminatory purpose, then *Stanley's* convictions and sentences will stand affirmed." (Emphasis added)(footnote omitted).

313 Md. at 80, 542 A.2d at 1281.

In a more recent case, *Tolbert v. State*, 315 Md. 13, 553 A.2d 228 (1989), we affirmed the procedure set out in *Stanley, supra*, after the trial judge finds a prima facie case and made clear that the ultimate burden of persuasion is on the State:

"`[T]he State is to present, if it can, honest, neutral, nonracial reasons for the challenges of each black potential juror who was stricken. Any reasons presented must be legitimate, clear and reasonably specific, as

general assertions of assumed group bias or broad denials of discriminatory motives will be insufficient to overcome the defendants' prima facie cases. The reasons must be tailored to the particular facts of the case that was tried and related to the individual traits of the jurors. The defendant will be afforded the opportunity to rebut any explanations put forth by the prosecutor and to expose any justification that on its face may appear racially neutral, but is in reality a sham or pretext. The trial court must then articulate a clear ruling detailing the basis on which it was made, and explaining whether the established prima facie case of purposeful discrimination has been overcome by the State." (Emphasis added).

315 Md. at 19, 553 A.2d at 230 (quoting *Stanley*, 313 Md. at 92-93, 542 A.2d at 1287-88).

It is time for us to clarify that a prima facie case of discrimination under *Batson* merely shifts the burden to the striking party to offer a race and gender-neutral reason for the peremptory challenge; it does not create a rebuttable presumption that, in effect, shifts the ultimate burden of proof. The step one determination of a prima facie case is not a high threshold. Its obvious rationale is that if a party gives the outward appearance of discriminating in the exercise of peremptory challenges then an explanation for the seemingly discriminatory strikes ought to be required. Parties should be cautious about exercising peremptory challenges in a way that conveys the impression that they are discriminating on the basis of race or gender. Whenever they convey that impression, the price they pay is that they will be

required to give a race and gender-neutral reason for all such strikes.

STEP TWO -- A RACE AND GENDER-NEUTRAL EXPLANATION

In step two, the Supreme Court has merely required the articulation of a race and gender-neutral reason for the strike even if "implausible or fantastic" and even if it is "silly or superstitious." Once that explanation is given, any presumption raised by the *prima facie* case dissipates to a mere permissible inference, and we move to step three. In the instant case, the majority characterizes the second step of the trial court's analysis as follows:

"[O]nce the trial court has determined that the party complaining about the use of the peremptory challenges has established a *prima facie* case, the burden shifts to the party exercising the peremptory challenges to rebut the *prima facie* case by offering race-neutral explanations for challenging the excluded jurors. The 'explanation must be neutral, related to the case to be tried, clear and reasonably specific, and legitimate.' The reason offered need not rise to the level of a challenge for cause. 'At this step of the inquiry, the issue is the facial validity of the ... explanation.'" (Citations omitted).

\_\_\_ Md. at \_\_\_, \_\_\_ A.2d at \_\_\_ (Majority Op. at 19-20). The majority's second step analysis is taken from several of our prior cases including *Chew, supra; Tolbert, supra; Stanley, supra*. For example in *Tolbert*, we reversed a trial judge because "[t]he State did not produce satisfactory nondiscriminatory reasons for every

peremptory challenge exercised to exclude a black juror. The reasons given by the State were not satisfactorily neutral." 315 Md. at 24, 553 A.2d at 233 (emphasis added). In that case, we also quoted with approval from *Stanley* as follows:

"`A new trial will be required if the State cannot produce satisfactory nondiscriminatory reasons for every peremptory challenge exercised to exclude a black juror. A new trial will be ordered if any reasons given by the State are perceived by the trial court as only pretext and thus not satisfactorily racially neutral. A new trial will be mandated if any one of the peremptory challenges to black jurors was exercised with a discriminatory purpose, as the State will not be allowed "one free discriminatory strike." Any violation requires a new trial.'"`

*Tolbert*, 315 Md. at 19, 553 A.2d at 230 (quoting *Stanley*, 313 Md. at 92-93, 542 A.2d at 1288).

Step three is the only step where the persuasiveness of the reasons becomes relevant. This distinction is very important because, as will be explained, step three involves a fact finding by the trial judge and is subject to only limited appellate review. The error in mixing up step two and step three is evidenced in *Chew, supra*, where the reason given by a prosecutor for striking a black juror was that the juror appeared "`stone faced,' and unsmiling," and "it appeared to the prosecutors that [the juror] preferred to be anywhere else but on that jury." 317 Md. at 247, 562 A.2d 1277. This Court held that "the trial judge's ruling on the acceptability of the prosecutors' reason for the strike cannot

be accepted." *Chew*, 317 Md. at 246, 562 A.2d at 1276 (emphasis added). *Tolbert, supra*, also reversed the trial judge because:

"The explanation advanced by the prosecutor simply does not present neutral, nonracial reasons for striking either of these two individuals. In relation to the individual traits of those two prospective jurors, the reasons lack the legitimacy, clarity, and reasonable specificity called for by *Batson*. The reasons simply do not hold water in the circumstances."

315 Md. at 23-24, 553 A.2d at 232.

This analysis is similar to what the Supreme Court condemned in *Purkett, supra*. There is no legal or factual issue in step two except whether any reasons for the strike are proffered and whether the proffered reasons are race and gender neutral. There is no need to mandate "satisfactory" or "clear and reasonably specific, and legitimate" reasons, or any preapproved, appropriate, or politically correct reasons. As long as the reasons given do not on their face deny the juror equal protection, this step is satisfied even if the reasons are implausible or unpersuasive. In *Purkett*, the Supreme Court stated:

"The second step of this process does not demand an explanation that is persuasive, or even plausible. `At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'"

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The prosecutor's proffered explanation in

this case -- that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard -- is race-neutral and satisfies the prosecution's step 2 burden of articulating a nondiscriminatory reason for the strike. 'The wearing of beards is not a characteristic that is peculiar to any race.' And neither is the growing of long, unkempt hair." (Emphasis added)(citations omitted).

\_\_\_ U.S. at \_\_\_, 115 S.Ct. at 1771, 131 L.Ed.2d at 839 (quoting *Hernandez v. New York*, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395, 406 (1991) and *Equal Employment Opportunity v. Greyhound Lines*, 635 F.2d 188, 190 n.3 (3rd Cir. 1980)). See also *Jones v. Plaster*, 57 F.3d 417 (4th Cir. 1995).

"Once a prima facie case of discrimination is established, the burden shifts to the party whose conduct is challenged to come forward with a nondiscriminatory explanation for the use of the challenge. To satisfy this burden, the party need offer only a legitimate reason for exercising the strike, i.e., one that does not deny equal protection; the reason need not be worthy of belief or related to the issues to be tried or to the prospective juror's ability to provide acceptable jury service." (Citations omitted).

*Jones*, 57 F.3d at 420. The Supreme Court was emphatic that "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible," *Purkett*, \_\_\_ U.S. at \_\_\_, 115 S.Ct. at 1771, 131 L.Ed.2d at 839. This Court should make it clear that we will no longer interpose any minimum legal sufficiency requirement for race and gender-neutral explanations. The majority should no longer question the legal sufficiency of the reasons to overcome the step one prima facie case. Any race and gender-

neutral reason proffered, even if it is "silly" or "superstitious" or even if it is an explanation that is not "persuasive, or even plausible," should be sufficient. *Purkett*, \_\_\_ U.S. at \_\_\_, 115 S.Ct. at 1771, 131 L.Ed.2d at 839. Step two is satisfied if the explanation is race and gender neutral no matter how far fetched.

STEP THREE -- FACT FINDING AND APPELLATE REVIEW

Step three involves fact finding, *i.e.*, "whether the opponent of the strike has proved purposeful racial discrimination." *Purkett*, \_\_\_ U.S. at \_\_\_, 115 S.Ct. at 1771, 131 L.Ed.2d at 839. Appellate review of this step is the same as appellate review of any other fact finding by a trial judge and, under Maryland Rule 8-131(c), should not be set aside unless clearly erroneous. For the reasons indicated in the discussion in step one, *supra*, it seems clear from *Purkett* that although the step one prima facie finding still remains in step three as a permissible inference, it does not shift the burden of proof to the striking party by creating a presumption that must be rebutted. In other words, if the judge is in equipoise, the objection to the strike must be overruled.

In step three the judge is asked by the objecting party to deprive a litigant of the right to peremptorily challenge a juror. This is a very important right conferred by the legislature and this Court's rules. The importance of peremptory challenges is well recognized, and the impairment of the right to exercise

allotted peremptory challenges is reversible error. In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the Supreme Court stated:

"The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. See *Lewis v. United States*, 146 U.S. 370, 376[, 13 S.Ct. 136, 138, 36 L.Ed. 1011, 1014 (1892)]. ... The denial or impairment of the right is reversible error without a showing of prejudice.... [citations omitted] ... '[F]or it is, as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose.' *Lewis v. United States*[, 146 U.S. at 378, 13 S.Ct. at 139, 36 L.Ed. at 1014]."

380 U.S. at 219, 85 S.Ct. at 835, 13 L.Ed.2d at 771. The only limitation of the free exercise of the allotted number of peremptory challenges is that they can not be used to discriminate on the basis of race or gender. Depriving a party of the right to exercise a peremptory challenge should require that discrimination be established, not merely inferred or assumed, solely because of what may be a purely accidental and random disproportionate striking of one race or gender.

A finding of a prima facie case in step one requires the striking party to give a race and gender-neutral explanation for the strike in step two. That prima facie finding should not be expanded to any assumption in step three that the striking party was untruthful in its step two race and gender-neutral explanation. The burden of proof remains on the objecting party. Disallowing a

peremptory challenge should require an affirmative finding of discrimination, not simply a default finding where the judge is in equipoise. Every trial lawyer knows there are many cases where a proper jury selection process can, on occasion, disproportionately eliminate one race or gender in a jury pool. Properly exercised peremptory challenges may also, on occasion, disproportionately exclude one race or gender. Judges should require an explanation when there is disproportionate exclusion of a race or gender but they should not presume the explanation is untruthful if they are unable to make a decision one way or the other.

*Purkett* tells us that judges should only deprive a party of the right to freely exercise a peremptory challenge when it is proven that the challenge was used to improperly discriminate. Disallowing a peremptory challenge and calling back a stricken juror, or aborting a jury selection proceeding, is an extreme remedy that requires an affirmative showing of discrimination. Disproportionately exercising peremptory challenges against a race or gender creates the need for an explanation; it does not shift the ultimate burden of proof to the striking party.

#### THE RULINGS IN THE INSTANT CASE

The jury selection in the instant case occurred prior to the *Purkett* decision. It is apparent from her rulings that Judge Heller very carefully read and painstakingly applied prior holdings

of this Court. These holdings were superseded by *Purkett*. Although the issue is moot in the instant case, if we follow *Purkett*, it is questionable whether Judge Heller was correct in ruling that the defendant had improperly exercised some of his peremptory challenges. After finding a prima facie case of discrimination, Judge Heller seemed to focus on the legal sufficiency of defense counsel's explanations, rather than their truthfulness. She disallowed strikes on the basis that they were not "satisfactory explanation[s]" or "acceptable reason[s]." Based on our prior cases, the trial judge also seemed to place the ultimate burden of proof on the defendant to show that he properly exercised his peremptory challenges. She told defense counsel "you're going to have to come up with a satisfactory explanation that persuades me that your reason for striking him was not racial. I mean, that's what the case law is saying." (Emphasis added). Defense counsel then pointed out that there were several whites that were not struck, and also that "the majority of the jurors that were presented to me were, in fact, white. There have been very few black jurors that have been called up." In explaining why she was finding against the defendant, the judge, in accord with our prior cases, seemed to combine step two and step three, and focused only on the adequacy of the reasons, not their truthfulness. The trial judge also placed the ultimate burden of persuasion on the striking party when she concluded that:

"They're not adequate reasons. I'm not saying that I'm finding that the public defender has struck these individuals for race or race alone. She did give satisfactory explanations for Juror Number 9 and Juror Number 137 who are victims.

On the other hand, the other people she's struck, all of them are white, none of them have particular profiles. She hasn't seemed to come up with adequate answers." (Emphasis added).

If the trial judge was not finding or saying "that the public defender has struck these individuals for race or race alone" then she should not disallow the strikes. *Purkett* tells us that it is the truthfulness of the explanation, not the legal sufficiency of the explanation, that is relevant. In reviewing the trial judge's findings, the majority neither questions the trial judge's apparent focus on the reasons for the strike rather than the truthfulness of those reasons, nor questions her apparent placing of the ultimate burden on the striking party. The mistake the trial judge and this Court seem to make is the same mistake the Supreme Court criticized the Eighth Circuit for making when it said:

"[I]ts whole focus was upon the *reasonableness* of the asserted nonracial motive (which it thought required by step 2) rather than the *genuineness* of the motive. It gave no proper basis for overturning the state court's finding of no racial motive, a finding which turned primarily on an assessment of credibility." (Citations omitted).

*Purkett*, \_\_\_ U.S. at \_\_\_, 115 S.Ct. at 1771-72, 131 L.Ed.2d at 840.

The majority further confuses these issues when it states:

"the trial court's findings, that the defendant's reasons for exercising his peremptory challenges were insufficient to overcome the prima facie case of racial discrimination, were not clearly erroneous." \_\_\_ Md. at \_\_\_, \_\_\_ A.2d at \_\_\_ (Majority Op. at 23). As was also discussed in step one, that statement is derived from several of our prior cases that held that a prima facie case of discrimination raises a presumption which, in effect, shifts the ultimate burden of persuasion to the striking party to overcome that presumption. These cases should be disavowed in light of *Purkett*.<sup>3</sup>

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<sup>3</sup>The majority does *sub-silentio* overrule some of our prior holdings where we indicated an erroneous standard of review for rulings on allegedly discriminatory peremptory challenges. For example in *Chew v. State*, 317 Md. 233, 562 A.2d 1270 (1989), we said:

"[A]n appellate court will give great deference to the first level findings of fact made by a trial judge, but having done so, will make an independent constitutional appraisal concerning the existence of neutral, non-racial reasons for the striking of a juror."

317 Md. at 245, 562 A.2d at 1276. In the instant case, the majority quite properly acknowledges that the standard of review is much more limited and states:

"These determinations made by the trial court are essentially factual, and therefore are "accorded great deference on appeal," *Hernandez v. New York*, *supra*, 500 U.S. at 364, 111 S.Ct at 1868-1869, 114 L.Ed.2d at 408-409; *Batson v. Kentucky*, *supra*, 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21, 90 L.Ed.2d at 89 n. 21; *Chew v. State*, *supra*, 317 Md. at 245, 562 A.2d at 1276. An appellate court will not

CONCLUSION

A party claiming that a peremptory challenge discriminates against a potential juror because of race or gender has the burden of proof, but may raise a permissible inference by making out a prima facie case of discrimination in step one. If the judge finds a prima facie case of discrimination, then in step two the party exercising the strike must offer a race and gender-neutral explanation. In step three, the trial judge must weigh the step two explanation against any indications of discrimination including the step one prima facie case, but the burden of proof remains on the party objecting to the strike. The relevant considerations include such factors as any racial implications in the case and the motive to discriminate in jury selection, the strength of the prima facie case of discriminatory strikes, the number of prima facie discriminatory strikes, the persuasiveness of the explanation offered for other prima facie discriminatory strikes. In addition, the judge should consider any other factors relevant to the factual determination of whether the proffered race and gender-neutral explanation is genuine and truthful or whether the explanation is

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reverse a trial judge's determination as to the sufficiency of the reasons offered unless it is clearly erroneous. *Stanley v. State, supra*, 313 Md. at 84, 542 A.2d at 1283. See also *Purkett v. Elem, supra*, 115 S.Ct. at 1771, 131 L.Ed.2d at 840."

\_\_\_ Md. \_\_\_, \_\_\_, \_\_\_ A.2d \_\_\_, \_\_\_ (1995)(Majority Op. at 21).

merely the articulated excuse for a strike that is motivated by improper race or gender considerations. Any nondiscriminatory motive, even if only a hunch based on appearance, may be adequate if believed by the trial judge to be the genuine nondiscriminatory reason and not just an excuse.

Trial judges are going to be hesitant to disbelieve race and gender-neutral explanations offered by attorneys under an ethical obligation to be candid with the court. Where, however, there emerges a pattern of race or gender strikes, particularly in a case where there could be racial or gender considerations, judges should not be gullible and must not permit the violation of the equal protection rights of prospective jurors. They must carefully and conscientiously weigh whether race or gender was even a partial conscious or subconscious motive for a peremptory challenge. If a judge believes race or gender is even a partial motive, the prospective juror is denied equal protection. When the decision is made and the judge provides reasons for the decision, those fact findings and reasons should be given great deference by appellate courts and reversed only if clearly erroneous.

Judge Bell has authorized me to state that he joins in the views expressed in this concurring opinion.