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SUPREME COURT, STATE OF COLORADO 2 East 14th Ave. Denver, Colorado 80203	
On Certiorari to the Colorado Court of Appeals, 19CA1355 District Court, Arapahoe County, 17CR118	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. **STERLING DWAYNE AUSTIN**, Defendant-Appellant.	σ COURT USE ONLY σ
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ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with the applicable word limit set forth in C.A.R. 28(g). It contains 5276 words.

2. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A). For each issue raised, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

The undersigned acknowledges that the brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Joseph Chase

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[Reframed] Whether citing a non-white juror's participation in reform efforts designed to deter racial profiling by a police department constitutes a race-neutral justification for the purposes of *Batson*'s second step when witnesses from that police department might testify at trial.

INTRODUCTION

This is not a case about general bias against police or the separation of powers. It is a case about one woman's lived experience and the scope of *Batson* Step Two. To survive *Batson* Step Two, a prosecutor must offer clear and reasonably specific reasons for striking an individual juror, and those reasons must be related to the case being tried and based on the individual juror's statements and demeanor. Even accepting it as true, the prosecution's rationale for striking Juror 32 was untethered from her actual statements during voir dire. What she said on record is inextricably linked to her race and her lived experience as a woman of color. There is no way to separate her race from her story, so there is no way to separate her race from the reason for the strike. Thus, the prosecution's stated rationale for striking Juror 32 was not race-neutral.

Defining the scope of *Batson* Step Two and affirming the division below would not immunize any juror of color that mentions their race or a racist interaction with police. If that juror's bias against the police rises to a level that prevents them from following the law, that juror can be challenged for cause. The prosecution can use a peremptory strike against a juror of color so long as they proffer a reason that is not entwined with the juror's race. Holding that bias against police is facially race-neutral, beyond being an issue not properly before this Court, would strangle any meaningful analysis at *Batson* Step Two. Further, such a rule would further discriminate against jurors of color who have experienced racist policing: They can either keep quiet about their lived experience or risk being excluded from a jury because of their race.

The Colorado legislature has indefinitely postponed consideration of a recent bill enumerating invalid reasons for peremptory challenges. This Court has stated publicly it plans to rule on this case and others before deciding on the proposed changes to Crim. P. 24. The *Batson* analysis is specifically designed for states to tailor and improve upon.

Therefore, there is no need to wait to clarify the scope of analysis at *Batson* Step Two and affirm the judgment of the division below.

STATEMENT OF THE CASE AND FACTS

Through his two trials and to this day, Austin maintains that his fiancé A.C. died of a drug overdose. His first trial ended in a mistrial because the jury could not reach a unanimous verdict. He was convicted in his second trial after an eyewitness identified him in response to a juror question. That witness did not identify him in the first trial because the prosecution conceded that her identification was not reliable. (TR 2/4/19 Jury Trial, p 4:8-12.)

Austin otherwise agrees with the State's Statement of the Case and Facts. Opening Br., pp 4-11.

GRANTING THE WRIT WAS IMPROVIDENT

This Court granted the State's petition for certiorari review but reframed the issue: Whether citing a non-white juror's participation in reform efforts designed to deter racial profiling by a police department constitutes a race-neutral justification for the purposes of Batson's

second step when witnesses from that police department might testify at trial. Viewed through the lens of the reframed issue, it is even more apparent the division below faithfully applied this Court's precedent to combat racial animus in jury selection. The division accepted the prosecution's reason for the strike as true, then analyzed the connection between Juror 32's statements and the reason for the strike. That examination made clear that Juror 32's race was inseparable for the reason for the strike, so the strike was facially race-based. This was a proper analysis at *Batson* Step Two.

The potential for harm to jurors of color is even greater now, because the State has asked this Court to hold that bias against police is facially race-neutral as a matter of law. Given how the Court reframed the issue on review, the issue of general bias against police being facially race-neutral is not properly before the Court. Nor do the facts of this case raise the issue because Juror 32 never expressed a general bias against police. Adopting such a rule would essentially double down on the discrimination faced by prospective jurors who have experienced racist

policing: first, they are directly or indirectly affected by racist policing, and second, they are not allowed to serve on a jury for no other reason than speaking about their lived experience inseparable from their race.

Because the division below properly applied the law in its analysis at *Batson* Step Two, and the State's position—on an issue not properly before this Court—would likely increase racial discrimination in jury selection, this Court should find that granting the writ was improvident. C.A.R. 49; *Bovard v. People*, 99 P.3d 585, 593 (Colo. 2004).

SUMMARY OF THE ARGUMENT

The division below conducted a proper analysis at Step Two of *Batson* because it accepted the prosecution's rationale for the strike as true and then compared the reason for the strike to the statements of the juror in question to determine whether the stated rationale was inherently race-based. Because Juror 32's race and lived experience as a woman of color were inseparable from her statements forming the basis

of the prosecution's strike, the division was correct in finding the stated rationale was facially race-based.

The issue of whether bias against police is race-neutral at *Batson* Step Two as a matter of law is not before this Court, and stating such a rule would strangle any Step Two analysis where the stated reason for the strike is bias against police. The constitutional rights of jurors and defendants must control the State's right to exercise peremptory challenges. Courts should have the power to determine whether there is a connection between the juror's race and the reason for the strike. Such a rule also has potential for further discrimination against jurors of color by forcing a choice between not sharing their lived experiences or being legally prevented from participating in civic life.

This Court has the power to interpret constitutional law and craft appropriate remedies. *Batson* is designed for states to tailor and improve upon. Thus, it is within this Court's power to clarify, for all Colorado courts, the scope of analysis at *Batson* Step Two.

STANDARD OF REVIEW

At *Batson* Step Two the issue is the facial validity of the reason for the strike, a question of law reviewed de novo. *People v. Ojeda*, 2022 CO 7, ¶ 30. On de novo review, an appellate court owes no deference to the ruling below. *Markwell v. Cooke*, 2021 CO 17, ¶ 22.

ARGUMENT

I. The strike against Juror 32 was not race-neutral because her race was inherent to the prosecution's reason for the strike.

A. The division below conducted a proper analysis at *Batson* Step Two.

It is true that any race-neutral explanation is enough to clear Step Two of *Batson*. *Ojeda*, ¶ 24. But that does not mean the analysis at Step Two is superficial. The Step Two analysis "turns on the facial validity of the proponent's explanation." *Id.* The prosecution's reason for the strike must be clear, reasonably specific, and related to the case being tried. *Batson v. Kentucky*, 476 U.S. 79, 98 (1986); *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005). That reason must be based on the juror's individual statements and demeanor. *Hernandez v. New York*, 500 U.S. 352, 360

(1991). The job of a reviewing court, whether trial or appellate, is to determine whether the reason for the strike is based on something other than the race of the juror. *Id.*; *see also People v. Madrid*, 2023 CO 12, ¶ 33. This means analyzing all circumstances relevant to the stated reason: its language, its clarity and specificity, and its bases in the juror's statements and demeanor. *See Miller-El*, 545 U.S. at 246-47 (reason for strike "cannot be accepted" considering struck juror's entire testimony); *Hernandez*, 500 U.S. at 360-61 (jurors' individual responses and demeanor indicated inability to defer to official translation, a race-neutral reason to strike).

Several factors guide the Step Two analysis. First, the reviewing court must accept the proffered reason for the strike as true; determining its credibility or plausibility is reserved for Step Three of *Batson*. *Madrid*, ¶¶ 33-34. Second, racial bias does not need to be "motivated by the proponent's ill will or animosity" to rise to the level of purposeful discrimination. *Ojeda*, ¶ 50. Requiring overt racism "improperly ignores less blatant race-based strikes and raises the burden for the objecting

party." *Id.* Relatedly, 'inherent' does not mean 'explicit.' The prosecution does not need to explicitly mention race for the strike to be race-based. *Id.*; *see also Snyder v. Louisiana*, 552 U.S. 472, 478-82 (2008) (juror looking nervous or attempting to fulfill student-teaching obligation were insufficient to qualify as race-neutral reasons for strike); *Clayton v. State*, 797 S.E.2d 639, 644-45 (Ga. 2017) (stating a cultural proxy or racial stereotype as reason for strike is not race-neutral). At Step Two, the essential question is whether the prosecution's reason for the strike is based in part on the juror's race. *Ojeda*, ¶ 46. Requiring explicit mention of race would ignore implicit bias and undercut the need for any analysis at *Batson* Step Two. *Id.*, ¶ 50.

With this framework in mind, the record makes clear the prosecution's reason for striking Juror 32 was based on her race. Her race and lived experience as a woman of color are essential to, inseparable from, the statements she made during voir dire, the same statements the prosecution used to justify striking her.

The prosecution's reason for the strike was Juror 32's alleged bias against the Denver Police Department (DPD). Yet all Juror 32 said about DPD was that many years ago she had worked to reform the department's practice of misreporting the race of people receiving traffic tickets. She said nothing about a general bias towards DPD or police in general. In fact, she said the opposite: She would judge the individual credibility of any police officer that testified, just like she would any other witness. This disconnect—between Juror 32's actual statements and the prosecution's interpretation of her statements—shows the prosecution's reason for the strike was not based on Juror 32's individual statements or demeanor. While not dispositive at Step Two, the prosecution cannot misattribute statements and views to a potential juror to argue she might not consider the prosecution's case fairly. *Ojeda*, ¶ 48. An important note: Pointing out this disconnect is *not* a credibility determination. The disconnect is obvious only when you accept the reason for the strike as true and then examine its bases.

Further, there is no way to arrive at the reason for the strike without implicating Juror 32's race and lived experience. She told her story about DPD after speaking about her experience with an Arapahoe County sheriff who issued her a ticket for expired tags. After asking the sheriff to mark her race correctly on the ticket, he detained her for another thirty minutes, making her late to her daughter's performance. And she told these stories after being asked if she'd ever been the victim of racial prejudice, not in response to any questions about bias. In response to questions about bias, she unequivocally stated that she could and would be fair.

Without the question about racial prejudice, there is no story about the Arapahoe County sheriff. Without that story, there is no story about DPD. Without the DPD story, there is no basis for the strike against her. More importantly, without her personal lived experience as a woman of color, there is no story about the Arapahoe County sheriff, and there is no story about her reform work against DPD. To unearth her alleged bias against DPD, the prosecution skipped the Arapahoe County story

and misconstrued the DPD story, all the while ignoring the racial element essential to both stories and to the question that prompted them. The prosecution cannot cherry-pick pieces of a juror's testimony to craft an acceptable reason for striking her. *See Miller-El*, 545 U.S. at 246-47 (reason for strike "cannot be accepted" when it ignored Black juror's willingness to impose the death penalty).

Like this Court in *Ojeda*, the division below connected the thread between Juror 32's statements and the prosecution's reason for the strike. *Ojeda,* ¶ 46; *People v. Austin*, Case No. 19CA1355 (Colo. App. Dec. 22, 2022), ¶¶ 29-31. And like this Court in *Ojeda*, the division below found that because Juror 32's race was inherent to her statements, striking her because of those statements was inherently race-based. The analysis below is a perfect example of the proper scope of analysis at *Batson* Step Two: accepting the reason for the strike as true, then examining how that reason is connected to the juror's individual statements and demeanor. The less specific the reason for the strike, the more likely it is to be facially invalid. And when the juror's race is

essential to the statements forming the reason for the strike, that reason is inherently race-based.

B. The State's argument against the holding below ignores the connection between Juror 32's race and the reason for the strike.

The State argues there are several problems with the division's Step Two analysis, Opening Br., pp 20-26, but these arguments are based on a crooked view of the opinion below. First, the division did not conflate Steps Two and Three of *Batson* because the division made *no* credibility determinations, nor did it superimpose its own rationale to find the reason for the strike was race-based. The division did not make up the fact that all of Juror 32's relevant testimony emerged from a discussion about her race and her lived experience as a woman of color. The division did not rely on Juror 32's claim she would be fair and judge the credibility of individual police; the opinion mentions that statement *after* holding that the strike against Juror 32 was race-based. *Austin*, ¶¶ 31, 34. The analysis below started with the premise that the reason for the strike was true, then examined the bases for that reason to determine whether

it was race-based. *Id.*, ¶¶ 25-31. Again, this is the proper scope of analysis at Step Two. And it is disingenuous to say the division usurped the role of the trial court when the preserved *Batson* issue was properly presented and subject to de novo review. The division owed no deference to the trial court's ruling because the trial court concluded its analysis at Step Two.

Purkett v. Elem, 514 U.S. 765 (1995), is helpful to demonstrate the inherent connection between Juror 32's race and the reason for the strike. The *Purkett* Court held that "long, unkempt hair, a mustache, and a beard" is a race-neutral reason for a strike because the "wearing of beards is not a characteristic that is peculiar to any race. And neither is the growing of long, unkempt hair." 514 U.S. at 769 (citation omitted). In contrast, Juror 32's alleged bias against DPD was peculiar to her lived experience as a woman of color and her lived experience with racist policing. It is impossible to arrive at the reason for the strike without starting from Juror 32's race and lived experience. This direct connection to the juror's race was absent in *Purkett*.

Nor did the division below misconstrue *Ojeda*. Again, the division began its Step Two analysis with the prosecutor's actual words, construing the proffered reason for the strike as true. The division did not scour the record for a race-based explanation "irrespective of the prosecution's actual reason" for the strike. The prosecution picked the starting point, and the division connected the dots. *Austin*, ¶ 35 ("[I]t is the 'prosecutor's proffered reason for the strike that determines the existence of discriminatory intent and whether the strike violates *Batson*.'"). The prosecution chose to give a succinct reason for the strike, a reason that ignored the bulk of Juror 32's statements and excavated a tidbit that was misconstrued into a reason to strike her. Simply because the *Ojeda* Court had more to chew on does not mean the division here made a faulty analysis.

Similarly, the division below did not improperly focus on Juror 32's experience with racial discrimination rather than the prosecutor's motive. It does not matter whether the prosecutor intended to be racist; it matters if the proffered reason for the strike was based on the juror's

race. *Ojeda*, ¶ 50. Finding a strike race-based only when the prosecution explicitly mentions race would ignore less blatant or implicit bias and prohibit any meaningful analysis at Step Two. *Id.*; *see also State v. Andujar*, 254 A.3d 606, 630 (N.J 2021) (purposeful discrimination and implicit bias have the same discriminatory effect and thus the same constitutional significance.) At Step Two, we find discrimination when there is a connection between the juror's race and the reason for the strike, no matter who brings race into the equation. *See People v. Toro-Ospina*, 2023 COA 45, ¶ 21 (finding strike not race-based when neither juror nor prosecutor linked race to alleged bias against police).

Once again, we only arrive at Juror 32's statements about racial discrimination when we start from the prosecution's assertion that she was biased against DPD. Unlike the juror in *Toro-Ospina*, Juror 32 linked her race to her experiences with law enforcement. The prosecution based its reason to strike her on those experiences. Thus, the division below started with, and properly focused on, the prosecution's reason for the strike.

II. Experiencing racist policing is not race-neutral, nor is working to reform it.

The State spends a significant amount of the Opening Brief arguing that because members of any race can work for police reform, striking a potential juror for doing that work must be facially race-neutral. Opening Br., pp 27-39. In particular, the State argues that bias against law enforcement, whether potential or based on person's lived experience, is facially race-neutral as a matter of law. *Id.*, pp 32-39.

Before proceeding, it is important to reiterate that Juror 32 *never* expressed a general bias against police. To the contrary, she specifically stated that she could judge the credibility of a police officer as she would any other witness in the case. She *never* stated that her reform work with DPD was a negative experience or that it led to a general bias against DPD. According to her, the reform work *worked*. Based on those facts, this Court reframed the issue before it as: whether a non-white juror's efforts to reform racial profiling practices by a particular department were race-neutral when officers from that department would testify at trial. What is not before this Court is whether potential bias

against law enforcement is race-neutral under *Batson* Step Two as a matter of law.

A. Protecting the constitutional rights of potential jurors requires case-by-case analysis at *Batson* Step Two.

Arguing that a person of color's experience working to reform racist policing is the same as a white person's ignores the fact that racial discrimination exists in the first place. That work by a person of color is not based only on abstract theory or an expression of political belief. Doing that work is likely based upon a lived experience, direct or indirect, that we expect our jurors to bring to their deliberations. *See Ojeda*, ¶ 10 (trial court ruled jurors "certainly entitled to believe that people of color are not well-served in our criminal justice or medical system"); *People v. Newman*, 2020 COA 108, ¶ 1 ("Jurors are generally permitted, even expected, to lean on their own experience and background… during deliberations."); *People v. Holt*, 266 P.3d 442, 445 (Colo. App. 2011) (jurors' personal experience with criminal system cannot be offered to impeach a verdict). There is constitutional value in diverse juries, to

ensure that all citizens can participate in civic life and because, "compared to diverse juries, all-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives." *State v. Saintcalle*, 309 P.3d 326, 337 (2013) (citing Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, pp 6, 40-41 (Aug. 2010)).

If a person's lived experience prevents them from following the law and rendering a fair and impartial verdict based on the court's instructions and the evidence presented at trial, that person can be challenged for cause. *People v. Samson*, 2012 COA 167, ¶ 12. Even jurors who display bias or partiality are fit to serve so long as they express their ability to be fair and follow the law. *Id.*, ¶¶ 13-14 (collecting cases). Jurors who experience racist policing are not automatically unfit to serve on a jury. That racist experience does not equate to a general bias against police. Assuming it does, as the prosecutor did here, makes bias against police a proxy for the juror's race: If they experienced racist policing because of their race or worked to reform racist policing as part of their

lived experience, and their experience means they are necessarily biased against police, that alleged bias is inextricably linked to their race. Allowing prosecutors to rely on that assumption as a matter of law does nothing but add another layer of systemic discrimination. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994) (proponent of peremptory strike cannot use potential juror's race or gender as proxy for her actual views or bias). We should trust jurors of color who share their experiences to serve faithfully unless they make it clear, on record, they cannot be fair or impartial. To do otherwise would rob them of agency and their ability to participate in civic life, all because of their race and lived experience.

Striking a juror for reform work against racist policing also raises First Amendment considerations. "The Equal Protection Clause prohibits discriminatory treatment based not only upon membership in a cognizable group but also upon an individual's exercise of a fundamental right. The rights to associate and speak freely are fundamental rights guaranteed by the First Amendment. A litigant's

peremptory exclusion of a potential juror from service on the basis of either the juror's group affiliations or expressions of speech directly conflicts with the potential juror's First Amendment rights." Cheryl G. Bader, Batson *Meets the First Amendment: Prohibiting Peremptory Challenges That Violate A Prospective Juror's Speech and Association Rights*, 24 Hofstra L. Rev. 567, 570 (1996). The *Batson* framework has not been extended to cover peremptory challenges based on conduct protected by the First Amendment. But the facts here do implicate Juror 32's First Amendment rights because the prosecution's reason for striking her implies she is biased because she exercised her right to freely associate and petition the government. "When a state actor exercises a peremptory challenge to exclude a potential juror because of her protected association, the actor is essentially telling the potential juror that her mere association makes her unfit to exercise one of the 'basic rights of citizenship.'" Ashlyn Shultz, *Ending A Forced Dichotomy: Batson's Logical Expansion to the Freedom of Association*, 70 U. Kan. L. Rev. 361, 380 (2021) (quoting *Lockhart v. McCree*, 476 U.S. 162, 176

(1986)). Most relevant here, however, is that Juror 32's exercise of her First Amendment rights is inextricably entwined with her race and lived experience as a woman of color.

Tying back to *Batson*, potential jurors have a constitutional right to not be excluded from jury service based on their race. *Powers v. Ohio*, 499 U.S. 400, 409 (1991). Further, an issue cannot survive equal protection review based only on the fact it applies to all races. *Cf. id.* at 410 ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree."). So, simply because jurors of all races can be biased against police and work to reform racist policing does not mean striking a juror who does that work will never implicate their race. The whole point of *Batson* Step Two is to determine whether the reason for the strike does implicate race, based on an examination of the reason for the strike and its bases. Holding that bias against police is race-neutral as a matter of law would prevent any meaningful analysis at Step Two when the reason for the strike relates to bias against police. This is a step too far. Both trial and

appellate courts should have the power to determine whether there is a connection between the juror's race and the reason for the strike.

B. The constitutional rights of jurors and defendants must control the prosecution's ability to exercise peremptory challenges.

The State also claims the holding below immunizes jurors from peremptory challenge when they explain how race shapes their beliefs. Opening Br., pp 38-39. This presumes that (1) jurors who have expressed beliefs tied to their race are biased, and (2) the State, the jurors, and the defendant have equal rights relating to peremptory challenges.

As stated above, it is discriminatory to assume that a juror's experience with racist policing means they are automatically biased against law enforcement. If a juror's views amount to serious bias and an inability to follow the law, that juror can be challenged for cause regardless of their race. True, showing that level of bias is not necessary with peremptory challenges. But while the State may have a legal right to exercise peremptory challenges, that right cannot trump the constitutional right of a defendant to a fair trial and the constitutional

right of a juror to not be excluded from jury service because of her race. *Georgia v. McCollum*, 505 U.S. 42, 57, 112 S. Ct. 2348, 2358, 120 L. Ed. 2d 33 (1992) ("[I]t is important to recall that peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial."). The prosecution's burden at Step Two is not high: any race-neutral justification for the strike is enough to proceed to Step Three. *Ojeda*, ¶ 24. But if the prosecutor cannot articulate a clear and reasonably specific reason to strike the juror regardless of the connection to the defendant's race or her lived experiences, the strike must fail at Step Two of *Batson*. *Cf. Hernandez*, 500 U.S. at 360-61 (even when connected to jurors' race, inability to defer to official translation was race-neutral reason to strike); *Batson*, 476 U.S. at 98 (prosecution "must articulate a neutral explanation related to the particular case to be tried.") The only jurors immune from a peremptory challenge will be those struck for facially invalid reasons. The prosecution should be held

to its low burden and articulate a reason for the strike that does not misconstrue what the juror said and does not implicate the juror's race.

If we want to remove racial discrimination from our jury process, we cannot assume every prosecutor exercising a peremptory challenge against a juror of color is doing so because the juror has actual bias. If this were the case, challenges for cause would suffice. When a peremptory challenge implicates race, we *must* ask whether race is the basis for the strike. In this context, we *must* ask whether the alleged bias against police is in fact a proxy for race. Far better to let challenges for cause deal with a juror's actual biases around law enforcement rather than institute a broad rule limiting our ability to examine peremptory strikes for racial discrimination. Far better to ask whether a juror is unable to render a fair verdict than assume she is biased against police because she spoke about her lived experience as a woman of color.

The State did a thorough job analyzing out of state and federal cases to state its proposition that bias against police is facially race-neutral. That issue is not before the Court, and such a rule would strangle any

meaningful analysis at *Batson* Step Two. It would also have the potential to further discriminate against jurors of color, who would first experience racist policing and then be forced to keep quiet about their lived experience to qualify for jury service. Challenges for cause are a better mechanism to determine whether a juror's bias against police prevents them from rendering a fair verdict. The State has a legal right to exercise peremptory challenges, but courts must strictly enforce *Batson* to ensure that right does not violate the constitutional rights of defendants and potential jurors. To that end, and to resolve the issue properly before it, this Court should clarify the scope of analysis at Step Two of *Batson* and affirm the division below.

III. This Court can and should clarify the scope of analysis at Step Two of *Batson*.

The State asks this Court to defer to the legislature or its own rulemaking process rather than address "*Batson's* alleged shortcomings." Opening Br., p 54. Yet in March of 2022, the legislature's Judiciary Committee indefinitely postponed consideration of SB 22-128, a bill enumerating invalid reasons for peremptory challenges, stating it would

ask this Court's Rules Committee to make recommendations.[1] And since then, this Court has stated publicly that it plans to rule on several cases, including this one, before ruling on the proposed changes to Crim. P. 24.[2]

It is axiomatic that this Court can interpret constitutional law and craft appropriate remedies, even remedies more protective than required by federal precedent. *See, e.g., Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 37 ("[E]ven parallel text [in federal and state constitutions] does not mandate parallel interpretation."); *People v. Young*, 814 P.2d 834, 842 (Colo. 1991) (collecting cases where "the Colorado Constitution provides more protection for our citizens than do similarly or identically worded provisions of the United States Constitution."). More directly on point: *Batson* is designed for state courts to tailor and improve upon.

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[1] Colo. Senate Committee on Judiciary, Bill Summary for SB22-128 (March 10, 2022). Available at https://leg.colorado.gov/content/43472aff03e9a03d8725880100726e71-hearing-summary

[2] Michael Karlik, *Colorado Supreme Court to Decide Fate of Racial Bias Rule After Hearing Cases,* Colorado Politics, updated Sept. 8, 2023. Available at: https://www.coloradopolitics.com/courts/colorado-supreme-court-to-decide-fate-of-racial-bias-rule-after-hearing-cases/article_8d64fa56-48f2-11ee-bf0c-1fd7ef5fdc16.html

Johnson v. California, 545 U.S. 162, 168 (2005) (states have flexibility in formulating appropriate procedures to comply with *Batson*); *Powers*, 499 U.S. 400 at 416 ("It remains for the trial courts to develop rules… to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice.").

Thus, it is entirely in this Court's power to clarify, for all Colorado courts, the scope of analysis at *Batson* Step Two: accept the stated reason as true, then analyze its language, its clarity and specificity, and its bases in the juror's statements and demeanor. The less specific the reason and the less connected it is to juror's actual statements, the more likely it is to be facially invalid. And when the juror's race is inseparable from the statements the reason is based on, the reason is inherently race-based.

CONCLUSION

The division below conducted a proper analysis at *Batson* Step Two and found Juror 32's race was inseparable from the prosecution's reason for striking her. Any other holding runs the risk of further discriminating against potential jurors of color and would

unconstitutionally restrict the case-by-case analysis required at *Batson* Step Two. Thus, Austin respectfully asks this Court rescind its granting of the writ as improvident, and if not, to affirm the judgment below.

Respectfully submitted,

s/ Joseph Chase
Joseph Chase
Attorney for Sterling Austin,
Defendant-Appellant

CERTIFICATE OF SERVICE

I certify that on November 6, 2023, this **ANSWER BRIEF** was served on all parties via Colorado Courts E-Filing.

s/ Joseph Chase