2010

The State of Utah v. Antoine Darnell Harris : Reply Brief

Utah Supreme Court

IN THE UTAH SUPREME COURT

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
ANTOINE DARNELL HARRIS,	:	Case No. 20100080-SC
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for simple assault, a class B misdemeanor under Utah Code § 76-5-102 (2008), entered in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Terry Christiansen, presiding.

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INTRODUCTION

A new trial is required in this case where the prosecutor used a peremptory challenge in violation of Equal Protection. A prima facie showing of discrimination was made and the State waived any challenge to that showing. The prosecutor's failure to state a race neutral reason to rebut that prima showing requires reversal, and even if the explanation were race neutral, the record demonstrates that the peremptory was exercised in a discriminatory fashion. This issue can be reviewed because it was preserved during a sidebar held prior to the jury being sworn or the venire dismissed, but it can also be reviewed for plain error or ineffective assistance of counsel.

POINT I. THE STATE'S PEREMPTORY CHALLENGE VIOLATED EQUAL PROTECTION.

Harris's *Batson*[1] objection was meritorious. The first step, which requires a prima facie showing of discrimination, was met where the State used a peremptory to challenge

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986)

the only member of a racial minority in this racially charged case, the State did not challenge the sufficiency of Harris's prima facie case, and the judge required the State to justify its reason for striking the juror. *See* Appellant's Brief (A.B.):11–13. Additionally, the facts show an Equal Protection violation since the State's rationale for the strike was inherently discriminatory and did not satisfy the test for a racially neutral explanation under the second step. *See* A.B.:13–25. The third step of the *Batson* inquiry also shows that the peremptory challenge violated Equal Protection since the State's explanation for the demeanor-based strike was not convincing and the circumstances, establish discriminatory use of a peremptory challenge.

A. The State agrees that Harris met the prima facie showing requirement.

The State agrees that Harris met step 1 because the trial court required it to explain its strike and the State offered an explanation without challenging the prima facie case. State's brief (S.B.):30–31. Despite the fact that the State recognized below that a prima facie showing was made and waived any challenge to that showing, the State now attempts to dilute its concession by arguing, without any analysis or support, that the prima facie showing was weak. S.B.:30–31. Contrary to this claim, Harris made a strong prima facie showing where the State used its peremptory to challenge "the only minority on the jury [panel]" in this case involving racial slurs and claims by a white woman against an African-American man. R224:32 (*See* Addendum A to this reply brief[2]); *see Batson*, 476 U.S. at 96 (stating standards for establishing prima facie showing); *State v.*

[2] Addendum A contains the transcript of the voir dire (R224:1-22), the article the judge read to the jury (R224:22-28), the sidebar (R224:28-29), the subsequent on the record discussion (R224:30-31) and the juror sheet from the pleadings file (R158-59).

Alverez, 872 P.2d 450, 457 (Utah 1994) (same); *State v. Colwell,* 2000 UT 8, ¶18, 994 P.2d 177 (same). The State's decision below to not challenge Harris's prima facie showing is consistent with case law and demonstrates the strength of that showing since the State struck the only member of a minority group when it knew very little about him in a case that involved racial slurs by a key state witness.

Additionally, the State's argument that despite its concession below, "weakness in prima facie showing may [now] be considered in evaluating the trial court's ultimate denial of the *Batson* objection" is not supported by the cases it cites. *See* S.B.:31. *Hernandez v. New York* lists several considerations, none of which are a weak prima facie showing, as factors that supported the trial court's ruling that the government had not engaged in discrimination. 500 U.S. 352, 369–70 (1991). *Colwell* also does not stand for the State's proposition, but instead merely recognizes that striking a minority member alone is not enough to establish a prima facie case, indicating that "the issue of whether a prima facie case was established" was waived when the prosecutor failed to challenge the sufficiency of the prima facie case." *Colwell*, 2000 UT 8, ¶18. Hence, neither of the State's cases support its argument, and the record, case law, and State's concession establish that step 1 was met, requiring a race neutral explanation from the prosecutor.

B. <u>The prosecutor's explanation was not race neutral since discriminatory intent was inherent in the stated reason</u>.

The second step requires more than a superficial consideration of the words chosen by the prosecutor, and instead requires an assessment of whether the reason given for the strike is inherently discriminatory in nature. *See id.* at ¶19; *State v. Chatwin*, 2002

UT App 363, ¶7, 58 P.3d 867. The reason for exercising the strike must be (1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate. *Colwell*, 2000 UT 8, ¶22 (quotations and citations omitted); *see also State v. Cantu*, 778 P.2d 517, 518–19 (Utah 1989) (*Cantu II*) (adopting factors to be considered at step 2); *State v. Span*, 819 P.2d 329, 342 (Utah 1991) (reiterating factors outlined in *Cantu II* for assessing whether strike was race neutral); *Coulter v. Gilmore*, 155 F.3d 912, 921 (7th Cir 1998) (indicating government's explanation must include legitimate reasons that are clear, specific, and related to the case). And, the explanation cannot be "peculiar to any race." *State v. Merrill*, 928 P.2d 401, 403 (Utah Ct. App. 1996) (quotations and citations omitted). If the explanation does not meet all of these requirements, it is not considered race neutral, and a new trial is required. *Cantu II*, 778 P.2d at 518.

In *Cantu II*, the prosecutor's reason for his strike of a Hispanic juror was not racially neutral. There, the prosecutor struck a Hispanic juror because he was "angry at defense counsel" for insisting that the juror be included on the panel. *Id.* at 519. This Court emphasized that to be facially neutral, the explanation for the strike must relate to the case or the juror and be specific and legitimate. *Id.* "The prosecutor's desultory voir dire, uninvolved demeanor, and failure to pursue a studied or deliberate course of questioning regarding specific bias, together with his stated reasons that the challenge was made in anger," showed that the reason was not related to the case. *Id.* Nor was the reason legitimate. *Id.* This Court held that the explanation was not racially neutral and violated Equal Protection, requiring a new trial. *Id.*

Demeanor-based reasons are not always *legitimate* and "may well mask a race-based strike." *Davis v. Fisk Elect. Co.*, 268 S.W.3d 508, 518 (Tex. 2008); *see* A.B.:13-15. Because of this, such challenges must be "sufficiently specific to provide a basis upon which to evaluate their legitimacy." *Brown v. Kelly*, 973 F.2d 116, 121 (2nd Cir. 1992). Given the potential for abuse and use of demeanor-based challenges as a pretext for race based strikes, demeanor-based explanations "deserve[] particularly careful scrutiny." *Brown*, 973 F.2d at 121; *see Hill v. State*, 827 S.W.2d 860, 869 (Tex. Crim. App. 1992) (holding demeanor-based explanation was not race neutral).

Disinterest, inattentiveness, or failure to listen are all demeanor-based, subjective assessments that require close scrutiny "because such perceptions may easily be used as a pretext for discrimination." *Mack v. Anderson*, 861 N.E.2d 280, 296 (Ill. Ct. App. 2006) (citations omitted). Unless the record otherwise supports the explanation and the proponent of the strike gives clear, specific, and legitimate details to back up the claims of inattentiveness, these types of demeanor-based explanations fail to withstand scrutiny and are rejected as failing to establish a race neutral reason for the strike. *Id.* at 296-97.

The prosecutor's demeanor-based explanation here was not neutral, related to the case, clear and reasonably specific, or legitimate. *See Colwell*, 2000 UT 8, ¶22. First, the explanation was speculative, subjective, and tied to race. The prosecutor claimed that she struck Juror 3 because he looked down and appeared inattentive, but looking away or down has different meanings in different cultures, and this type of explanation can easily be used as a pretext, demonstrating that the explanation is not reasonably specific or legitimate so as to be racially neutral. *See* A.B.:15–19.

Additionally, the prosecutor's explanation did not contain the type of specificity and details necessary to demonstrate that the challenge was racially neutral. The prosecutor said repeatedly during her brief explanation that the juror was not paying attention, not listening, and "kept looking at her funny" as the judge read an article to the jury. R224:33. The only detail the prosecutor offered in support of this claim was the fact that he put his head down. R224:33. But putting one's head down is just as consistent with trying to concentrate and listen closely to the words. Additionally, some of the words were inaudible to even the court reporter, and putting one's head down is often done when a person is having trouble hearing or trying to focus on what is being said. While additional details – such as looking around the room, repeatedly checking one's watch, pulling out a phone and checking emails – might help support a strike of this nature, the one detail offered by the prosecutor was not sufficiently clear, detailed, convincing, or legitimate to withstand the scrutiny given this type of demeanor-based strike. *See Mack*, 861 N.E.2d at 297 (distinguishing between demeanor-based strike backed up by specific details and general claims of inattentiveness that can be used as a pretext).

Further, the prosecutor indicated Juror 3 put his head down and "kept looking at [her] funny" while the judge was reading an excerpt suggesting that lawyers exercise their peremptory challenges based on improper factors such as how a person looks or his race or religion. R224:28. The article indicated that prosecutors prefer "the little old Lutheran lady in pearls" while defense lawyers prefer "an Irishman or a Jew." R224:28. Referring to jury selection, the article stated in part:

> How do we choose among strangers not necessarily wise but merely registered to vote? Once the blatantly prejudice[d] have been sent packing, both sides take up the peremptory challenge of turning down jurors for the way they look, dress, or comb their hair. The differing agendas of the prosecution and the defense complicate matters.
>
> Prosecution lawyer, Jeffrey Tubin says that when he first came to the bar he was told to avoid men with beards, too independent and teachers and social workers, too sympathetic, and aim for the little old Lutheran lady in pearls, quick to judge and slow to forgive.
>
> For the defense, Clarence Darrow advised not to take a German, they are bull-headed; rarely take a Swede, they are stubborn. Always take an Irishman or a Jew, they are easiest to move to emotional sympathy. He preferred old men for their tolerance, but Samuel Lee Woods liked them young for their still fresh sense of brotherhood and avoided self-made men businessmen with close set eyes, writers, professors and former policemen.

R224:28. The judge stopped reading at this point without ever clarifying that such stereotyping based on race, religion, or how a person looks is considered unfair and in violation of Equal Protection in today's world. The lawyers were only "half done" with their peremptory challenges at this point, and the next challenge entered by the prosecutor, strike three of four, struck Juror 3. R224:28; 158.

Juror 3, the only minority on the panel and perhaps the only minority in the courtroom, was likely offended by this passage and wondering how he would be stereotyped. This is especially so since the lawyers knew very little about him and sought very little information from him or the other jurors. R224:1–28. While lawyers and judges may find a passage like this interesting and understand that basing jury selection on race, religion, or gender is now improper and unconstitutional, the jurors did not know that and reading a passage suggesting that such discrimination is acceptable was inappropriate. Looking down and looking at the prosecutor "funny" while this was being

read is an appropriate and thoughtful reaction to such a piece and further demonstrates the race based underpinnings to this strike. The excerpt injected race and other improper factors into the proceeding, and to the extent Juror 3 was reacting to what the judge was reading, those reactions are inextricably tied to race. Given the theme of the excerpt, the prosecutor's did not offer "a neutral explanation related to the particular case to be tried." *Batson*, 476 U.S. at 98.[3]

In assessing whether an explanation is race neutral, courts also consider the voir dire of stricken jurors as well as other members of the panel and any other relevant factors found in the record. *See Cantu II*, 778 P.2d at 519 (reviewing record of voir dire, among other things, in assessing whether strike was race-neutral); *Hill*, 827 S.W.2d at 869 (reviewing voir dire of stricken juror in assessing whether strike was race neutral); *Colwell*, 2000 UT 8, ¶18 n.3 (noting that record supported prosecutor's explanation).

Here, the voir dire further demonstrates that the State's demeanor-based explanation was not race neutral. Juror 3 spoke only once and there were no follow-up questions. His statement indicated that he was 27 years old and a student at the University. R224:4. He was single and had no children and was born and raised in Salt

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[3] The prosecutor's strike, exercised while the judge was reading a potentially offensive passage, impacted on the rights of Juror 3 and the community as well as Harris's Equal Protection rights. *See* S.B.:14; *State v. Valdez*, 2006 UT 39, ¶17, 140 P.3d 1219 (recognizing that *Batson* protects litigants, jurors, and the community – that all are guaranteed Equal Protection in jury selection). Aside from Harris's and society's interests, Juror 3's rights were violated here. He was informed that lawyers struck jurors based on how they looked or their race, then was stricken. This left the impression that he was stricken on racial grounds, especially where the lawyers knew very little about him.

Lake City. R224:4. Nothing about this would suggest that he would be an inattentive juror – in fact, his answers suggest the opposite because he was intelligent, educated, in the prime of life, and did not have the distractions that some of the others had.

The voir dire, like that in *Cantu II*, was "desultory;" few questions were asked, and the prosecutor did not pursue a course of questioning that would aid her in assessing which jurors might be attentive. *See Cantu II*, 778 P.2d at 519. She kept jurors whose answers suggested that they might have more difficulty paying attention than a 27-year-old college student. For example, Juror 22 was 81 years old and retired, with a large extended family. R224:8. The prosecutor did not ask any questions delving into whether he would have difficulty paying attention based on age or distractions. Nor did she ask any questions indicating that inattentiveness was a concern in assessing Juror 3 or any of the other jurors. The prosecutor's approach to voir dire, her stated reason for the strike, the tone of the excerpt, and factors outlined above and contained in the record demonstrate that the strike was not race neutral and fail to rebut the prima facie showing of discrimination. *See* A.B.:13-25. The peremptory challenge of Juror 3 violated Equal Protection and requires a new trial.

C. Step 3 also requires reversal.

Where a prosecutor offers a race neutral reason for the strike, step 3 requires reversal when the opponent to the strike establishes purposeful discrimination. *See Colwell*, 2000 UT 8, ¶17. Courts consider "the plausibility of the reason in light of all evidence with a bearing on it." *Miller-El v. Dretke*, 545 U.S. 231, 151–52 (2005) (citation omitted). Even when a trial court has made a credibility determination in favor of the

prosecutor and upheld the strike, step 3 requires reversal where "the stated reason does not hold up" in light of the record. *Id.*; *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008).

"[A]ll of the circumstances that bear upon the issue of racial animosity" are considered in assessing whether the plausibility of the explanation for the strike. *Id.* at 478. A trial court's observations are important to this determination, but when a court "simply allow[s] the challenge without explanation," it cannot be "presume[d] that the trial judge credited the prosecutor's assertion." *Id.* at 479. Instead, "[i]t is possible that the judge did not have any impression one way or the other . . . ." *Id.*; *see* A.B.:28-29.

Like the cases cited in A.B.:30-31, the circumstances of this case show discriminatory intent. First, the "trial court did not sufficiently question and evaluate the prosecutor's exercise of his peremptory challenges," *People v. Gonzales*, 81 Cal. Rptr. 3d 205, 214 (Cal. Ct. App. 2008), and it cannot be presumed that the court gave them any credit. *See Snyder*, 552 U.S. at 479. Second, the record establishes that even if the explanation is considered race neutral, it is not plausible. This is so because the record shows that Juror 3 was intelligent and educated and did not have the distractions of work or a family. The prosecutor did not pursue any line of questioning with him suggesting that she was concerned about his attentiveness, nor did she suggest that he was not paying attention or looking at her funny during voir dire. And she did not question other jurors about attentiveness, particularly Juror 22 who was 81-years-old.

Additionally, the reasons why the explanation was not racially neutral also demonstrate discriminatory intent if the third step is reached. *See supra* at p. 6–8. The prosecutor's claim that Juror 3 was inattentive and looking at her funny while the trial

judge was reading a potentially offensive article was not a plausible, case related, or legitimate reason for dismissing the juror. *See supra* at 6-8. It is not clear from the record that the juror was not paying attention or that he gave the prosecutor funny looks, but even if that were the case, the nature of the article being read could easily have been the source of that behavior, not inattentiveness or dislike for the prosecutor. Moreover, the "desultory voir dire," nature of the case, failure to pursue questioning regarding attentiveness, voir dire answers, and stated reasons for the challenge work together to show discriminatory intent.

For all of the reasons set forth herein and in A.B., the record demonstrates that the prosecutor's explanation was racially discriminatory and the trial court erred in allowing it. A new trial is required based the Equal Protection violation that occurred in this case.

POINT II. THIS COURT CAN REVIEW THIS ISSUE.

Harris's *Batson* objection was preserved where his lawyer objected at a sidebar and the judge required the prosecutor to explain her strike before the jury was sworn. Although this objection was preserved, it can also be reviewed for plain error or ineffective assistance of counsel. The State's claim that this Court should disregard the Equal Protection violation that occurred here because Harris's attorney did not obtain an explicit ruling on the *Batson* challenge and passed the jury *for cause* is not supported by the facts, case law, Equal Protection, or fairness.

A. The *Batson* challenge is preserved.

Defense counsel raised the *Batson* challenge in a sidebar *before* the jury was sworn and venire dismissed. The judge and prosecutor understood that counsel was

making a *Batson* challenge as evidenced by the later discussion where the judge specifically referred to *Batson*, stating, "[defense counsel] did ask to approach the bench on a Bastan [sic] challenge. I'll let you make your record now, [defense counsel]." R224:32. Although it was at time inaudible, the recording of the sidebar also shows that the prosecutor and judge understood that defense counsel was making a *Batson* challenge at that time, that the judge was requiring the prosecutor to explain her strike, and that she offered an explanation. R224:29–30. That explanation was inaudible during the sidebar, but the court told the prosecutor, "[w]hy don't we put that on the record after the break." R224:29–30. And when the record was ultimately made, the judge let the parties "make your record now," then just listened and did not rule, thereby indicating that he had already rejected the challenge. R224:34. Contrary to the State's argument, the record shows that defense counsel "approach[ed] the bench on a [*Batson*] challenge" and that the challenge was heard and ruled on before the venire was dismissed. R224:29–30, 32.

Despite the fact that the trial court heard and ruled on the objection before the jury was sworn, the State claims that Harris waived the *Batson* claim because "he passed the jury for cause," S.B.:16, "did not allege that the prosecutor intentionally discriminated when she struck [Juror 3]" S.B.:17, and did not obtain a ruling. S.B. at 15–18. None of these arguments for waiver withstand scrutiny, and to accept the State's waiver argument would erect a hyper-technical and often insurmountable preservation rule that would serve no purpose.

An issue is preserved when it is presented in a way that gives the trial court the opportunity to rule on it. *Patterson v. Patterson*, 2011 UT 68, ¶12, ---P.3d --- (citations

omitted). It is a self-imposed rule and "therefore one of prudence rather than jurisdiction." *Id.* at ¶13. Requiring that an issue be preserved in the trial court serves "two primary considerations . . . judicial economy and fairness." *Id.* at ¶15. First, the preservation rule serves judicial economy because it gives the trial court an opportunity to correct error and avoid retrials and appeals. *Id.* Second, fairness is served because the trial court has an opportunity to rule, both parties have an opportunity to address the issue without waiting for an appeal, and a party is precluded from lying in the weeds and "avoiding the issue at trial for strategic reasons only to raise the issue on appeal if the strategy fails.'" *Id.* at ¶16 (citation omitted). Both considerations were served in this case since the trial court had the opportunity to rule before the jury was sworn and could have corrected the error then, both parties had the opportunity to address the issue, and defense counsel did not avoid the issue and instead actively sought resolution at the sidebar.

"[T]he *Batson* test is meant to 'encourage[ ] prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." *State v. Valdez*, 2006 UT 39, ¶19, 140 P.3d 1219 (citation omitted). While the high court has left states to fashion timeliness rules for *Batson* challenges, it has nevertheless recognized that requiring *Batson* claims to be raised "'in the period between selection of jurors and administration of their oaths, is a sensible rule.'" *Id.* at ¶19 (quoting *Ford v. Georgia*, 498 U.S. 411, 422-23 (1991)). And, a state's timeliness rule for *Batson* challenges must be "'firmly established and regularly followed'" in order to preclude review of a federal Equal Protection claim under *Batson*. *Id.* (quoting *Ford*, 498 U.S. at 423–24).

This Court articulated a timeliness rule in *Valdez*, requiring that a *Batson*

challenge be raised before the jury is sworn and the venire dismissed in order to be timely. *Id.* at ¶¶38, 46. The rationale for requiring the challenge at this time is that promptness will allow the opponent to "be better able to make out a prima facie case," allow the proponent of the strike to be more capable of rebutting the challenge while information is fresh, and allow the trial judge to more readily assess the claim and fashion a remedy. *Id.* at ¶¶43-44. This requirement that the challenge be raised before the jury is sworn and venire is dismissed furthers both considerations behind the preservation rule – judicial economy by allowing the trial judge to decide the claim and fashion a remedy and fairness since it precludes "sandbagging," allows the parties to address the issue while information is fresh, and gives the trial court the opportunity to fix the problem. *Id.* at ¶44.

Following *Valdez*, this Court further discussed the preservation rule in *State v. Rosa-Re*, 2008 UT 53, 190 P.3d 1259. In *Rosa-Re*, during a side bar held before the jury was sworn or the venire dismissed, the defendant "referenced *Batson* in the context of jury selection and noted that male jurors had been stricken." *Id.* at ¶8. Although the State argued, like it does in this case, that Rosa-Re did not make a "clear and concise allegation of an equal protection violation because he did not allege that the prosecutor had intentionally discriminated," this Court rejected that rigid approach to raising *Batson* challenges. *Id.* at ¶¶9–12. Instead, this Court found it "simply inconceivable that the trial court was unaware that defense counsel was raising a *Batson* challenge," *id.* at ¶10, and reiterated that "referencing *Batson* in the context of jury selection prior to the swearing of the jury and the dismissal of the venire was sufficient to satisfy the timeliness rule and

put the trial court on notice of the objection . . . ." *Id.* at ¶12.

While the *Batson* challenge in *Rosa-Re* was considered sufficient and timely under existing rules, this Court took the opportunity in dictum to suggest a future timeliness rule for *Batson* challenges. *Id.* at ¶13. That future timeliness rule mandates that trial courts "have an obligation to resolve *Batson* objections before the jury is sworn and the venire dismissed," and where trial court fails to follow this mandate, requires trial counsel to request resolution. *Id.*

> We clarify that in the future, however, trial courts have an obligation to resolve *Batson* objections before the jury is sworn and the venire is dismissed. Given that the express purpose of *Batson* is to correct a constitutionally deficient jury composition before the jury is actually seated and sworn, postponing the resolution is inappropriate.
>
> Moreover, in the event that the trial court fails to timely resolve a *Batson* objection, defense counsel has an absolute obligation to notify the court that resolution is needed before the jury is sworn and the venire is dismissed. Failure to do so, or acquiescing in the court's inaction [fn], will in the future constitute a waiver of the original objection.
>
> [fn] In this case, the trial court asked, "Is this the jury you selected?" Defense counsel replied, "Yes, Your Honor." In the future, such acquiescence in the jury selection will be deemed a waiver of a *Batson* objection."

Id. at ¶¶13–14. The State's reliance on this latter passage and footnote to support its claim that Harris waived his *Batson* claim is not supported by the record or the considerations behind the preservation rule. Moreover, precluding review under these circumstances would thwart the Equal Protection guarantees and allow the discriminatory use of peremptory challenges without serving any of the preservations rule's purposes.

As a starting point, this case is different from *Rosa-Re* because defense counsel not only articulated a clear *Batson* challenge, as was done in *Rosa-Re*, but the court found

a prima facie case and required the State to supply its explanation while memories were fresh. R224:29–30. Although the explanation is not evident in the record of the sidebar, it is evident that when asked "do you have a reason for that?" the prosecutor responded with something more than "yeah." R224:29. The prosecutor's inaudible portion after "yeah" in context was the purported reason for the strike. The court's immediate followup, "[w]hy don't we put that on the record during the break?" refers to the reason. And, when the prosecutor later stated her reason on the record, there was no further discussion or a ruling, signaling that the discussion and ruling had already occurred during the sidebar. In fact, the record relating to the sidebar shows that Harris did not waive this issue.

The court:	And for the record, [defense counsel], you did pass the jury for cause?
Defense counsel:	I think we need to approach for a minute.
The court:	Okay, would you approach the bench?
Defense counsel	Oh, we do pass for cause, yes.
The court:	And [Prosecutor], you did pass the jury for cause?
Prosecutor:	Yes.
The Court:	Approach the bench.
Defense counsel:	The concern [inaudible] is Juror No. 3 is struck by the State [inaudible] ability [inaudible] she needs to justify [inaudible].
The Court:	All right, do you have a reason for that?
Prosecutor:	Yeah, [inaudible].

The court: Why don't we put that on the record during the break?

Defense counsel: Okay, I just wanted to inform you (inaudible).

R224:29–30. Like *Rosa-Re*, it is inconceivable that the trial court did not understand that counsel was making a *Batson* challenge, and the record later leaves no question of this since the court referred to counsel's earlier *Batson* challenge. R224:29–30, 32–33. Additionally, the trial court had the opportunity to remedy the problem but chose not to reinstate Juror 3, thereby denying the *Batson* challenge.

Counsel's statement that he passed the jury for cause also did not waive the *Batson* challenge. Defense counsel initially asked to approach when the judge asked whether he had passed the jury for cause. As he approached, he realized that the question referred to whether he had any for cause challenges, not whether he accepted the jury as selected. Passing the jury for cause usually occurs *before* peremptories are exercised, as is apparent from the judge's use of the past tense, and an affirmative response refers to and waives only challenges for cause. *See* Utah R. Crim. P. 18. Passing the jurors for cause is different from the statement in *Rosa-Re* where this Court cautioned that if counsel agrees that the jury is the one he selected, a *Batson* challenge would be waived. *Rosa-Re*, 2008 UT 53, ¶14 n.5. Further, in the context of what occurred, it is evident that while counsel passed the jury for cause in that he did not plan to challenge any of the jurors for cause, he nevertheless believed that there was a problem with the jury as selected due to the prosecutor's strike of Juror 3.

Moreover, while the record indicates that counsel preserved the *Batson* claim

before the jury was empaneled, even if there were a technical mistake in not obtaining an explicit ruling, precluding review based on that mistake does not fit within accepted notions of preservation. Although *Rosa-Re*'s dictum cautions lawyers to obtain a ruling, *Batson* mandates that trial courts "have the duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98. The judge here had an opportunity to rule and counsel was seeking a ruling before the jury was empaneled, and there is no concern that defense counsel was sandbagging since he brought the matter to the judge's attention and challenged the prosecutor's explanation. R224:29–30, 34. In the end, though arguably not perfect, defense counsel brought this claim to the trial court's attention, received an implicit ruling, and otherwise preserved this issue for review. Adopting the State's rigid view of waiver or dictum in *Rosa-Re* to prevent review in these circumstances would not serve either the purposes behind the preservation rule or the important interests of jurors, the community, and the defendant that are protected by *Batson*. Indeed, the Equal Protection interests of the community and jurors would not be served at all by adopting such a rigid preservation rule, and defendants likewise would lose their right to Equal Protection in jury selection unless their lawyers were able to jump through all the unnecessary hoops the State erects.

B. The issue can also be reviewed under the plain error doctrine.

The State's argument that Harris's *Batson* claim cannot be reviewed for plain error based on invited error fails because (1) these circumstances do not demonstrate that defense counsel invited the error, and (2) the doctrine of invited error should not apply to *Batson* claims since the importance of the Equal Protection guarantee would be

undermined and the purpose of protecting the community and jurors from discrimination in jury selection would not be met. Additionally, courts routinely address *Batson* claims under plain error, and to the extent the trial court failed to rule, that error was obvious and prejudiced Harris since he had a meritorious *Batson* claim, requiring reversal.

i. Harris did not invite the error.

The doctrine of invited error does not preclude plain error review in this case because defense counsel did not "engage[ ] in a conscious and affirmative act that led the trial court to commit the [ ] error." *State v. Geukgeuzian*, 2004 UT 16, ¶8, 86 P.3d 742. "[T]he invited error doctrine is crafted to '"discourage [ ] parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal,"' [and] it is also intended to give the trial court the first opportunity to address the claim of error." *Id.* at ¶12 (citations omitted).

The invited error doctrine applies only in circumstances where the defendant "affirmatively endorsed" a trial court action by specifically indicating that the trial court's approach was proper. *See id.* at ¶11; *State v. Winfield*, 2006 UT 4, ¶13, 128 P.3d 1171. A defendant invites an error only where he leads the court into committing an error by affirmatively indicating that the court's decision is proper and not in these circumstances where Harris objected to the procedure. *Winfield*, 2006 UT 4, ¶14 (citation omitted).

Utah appellate courts have used the doctrine of invited error to avoid review in circumstances where the defendant has affirmatively indicated that a specific procedure is proper. For example, in the context of jury instructions, a defendant invites an error where defense counsel states she has no objection to the instruction, *State v. Medina*, 738

P.2d 1021, 1023 (Utah 1987), where counsel does not object when specifically asked or proposed the same instruction, *Geukgeuzian*, 2004 UT 16, ¶¶10, 12 (citation omitted), or where counsel objected to the correct instruction, *State v. Chaney*, 1999 UT App 309, ¶55, 989 P.2d 1091. In each of these cases, defense counsel acted affirmatively in endorsing the instruction at issue, thereby giving rise to the invited error doctrine when the defendant later complained of the instruction on appeal.

By contrast, the invited error doctrine does not apply "where counsel for the party complaining on appeal merely remained silent at trial." *Medina*, 738 P.2d at 1023 (citing *State v. Lesley*, 672 P.2d 79, 81 (Utah 1983); *State v. Smith*, 62 P.2d 1110 (Utah 1936)). Invited error is based on "the principle that a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error." *Winfield*, 2006 UT 4, ¶15 (quotations and citations omitted). "By precluding appellate review, the doctrine furthers this principle by 'discourag[ing] parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal.'" *Id.* (citations omitted). The doctrine applies to "[a]ffirmative representations that a party has no objection to the proceedings" because such affirmative representations regarding a specific action by the court "reassure the trial court and encourage it to proceed without further consideration of the issues." *Id.* at ¶16.

This case is different from *Winfield* where the defendant invited the error by affirmatively representing that he had no objection to the jury panel. *Id.* at ¶13. When the defendant in *Winfield* later argued on appeal that the judge had failed to adequately probe the jurors who were empaneled, this Court concluded that his affirmative representation

below that he had no objection to the jurors invited the error and precluded review. *Id.* at ¶16. This case is also different from *Rosa-Re* where defense counsel answered affirmatively when asked, "Is this the jury you selected?" *Rosa-Re*, 2008 UT 53, ¶14 n. 5; *see supra* p.17. In both *Winfield* and *Rosa-Re*, defendant affirmatively stated that he had no objection to the jury that was empaneled. By contrast, in this case, defense counsel indicated only that he did not challenge the jurors for cause while at the same time making it clear that he had an Equal Protection challenge to the jury that was selected. Because counsel did not say that he had no objection to the jury that was selected, he neither waived nor invited this error.

Defense counsel timely brought the *Batson* issue to the trial court's attention, obtained an implicit denial of his claim, and even after the judge told him that he could make his record later, spoke up. R224:30. Moreover, the judge's behavior at the later discussion that appeared on the record indicates that the judge had already denied the *Batson* challenge since the judge simply listened as counsel made their record, and nothing about defense counsel's statements can be construed as an affirmative act that led the court into this error. In fact, the record shows that counsel was attempting to obtain a timely ruling on his *Batson* challenge and reasonably believed that he had done so. Hence, the error was not invited.

Additionally, using invited error to preclude review of valid *Batson* claims would undermine the *Batson* protection and disregard the fact that discriminatory peremptory challenges violate the Equal Protection rights of not only the defendant but also of the affected juror and the community as a whole. *See People v. Tapia*, 30 Cal. Rptr 2d 851,

877 (Cal. App. 5 Dist 1994) (refusing to apply invited error doctrine to *Batson* claims). Using the doctrine of invited error to preclude review of *Batson* claims

> would leave unremedied the harm caused to the excluded jurors and the community. . . . [T]he invited-error doctrine would nullify the high court's very rationale for elevating the racially neutral jury right to its lofty position in the hierarchy of federal constitutional rights. Because we live in a multi-racial society, deliberate racial discrimination by the government will not be condoned.

Id. Hence, the doctrine of invited error should not be used to save a prosecutor's discriminatory challenge from review.[4]

The trial court had "the duty to apply the correct law." *Id.* at 878; *see also Batson*, 476 U.S. at 98 (trial judge had duty to rule after prosecutor stated race neutral explanation). Because the right to Equal Protection in jury selection protects not only defendants, but also jurors and the community as a whole, courts are required to "ensure that the jury selection procedures are fair and nondiscriminatory[.]" *Valdez*, 2006 UT 39, ¶17. In this case, where counsel did not affirmatively cause the error and where application of the invited error doctrine would annihilate the more important Equal protection guarantee, the State is incorrect that invited error precludes plain error review.

ii. Using plain error review to reach Batson claims serves the important Equal Protection interests that gave rise to these claims.

Courts use plain error to reach *Batson* claims even when defense counsel said nothing in the trial court regarding the government's use of a peremptory. For example,

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[4] The State's argument that this Court should refuse to review *Batson* claims for plain error or ineffective assistance when a defendant waives the issue confuses waiver with invited error, is without support, and would eviscerate both doctrines as well as the importance of the Equal protection guarantee outlined in *Batson* and its progeny.

the court of appeals recognized in *State v. Harrison*, that the gravity of an Equal Protection claim in this context allowed a *Batson* claim to be reviewed for plain error even when the objection was not raised below. 805 P.2d 769, 779 (Utah Ct. App. 1991); *see also Cruse v. State*, 67 P.3d 920, 921 (Okla. Ct Crim. App. 2003); *McMillan v. State*, ---So.3d---, 2010 WL 4380259, *12-13 (Ala. Crim. App. 2010). Even though *Batson* claims can be more complicated on appeal where the government has not been asked to state the reason for the strike, courts nevertheless review such claims even when they are raised in their entirety for the first time on appeal. *See Harrison*, 805 P.2d at 779; *United States v. Gooch*, ---F.3d---, 2012 WL 29191, *5 (D.C. Cir. Jan. 6, 2012); see *also Lackey v. State*, ---So.3d---, 2010 WL 4380219, *1-2 (Ala. Crim. App. Nov. 5, 2010) (plain error review requires remand for government to explain strikes).

In this case, where defense counsel objected to the strike, the trial court ordered the prosecutor to give a reason for the strike, and the judge subsequently proceeded without granting the strike, to the extent the issue was not preserved, it can readily be reviewed for plain error. As outlined in A.B.:38–41 and *supra* p. 1–11, the trial court committed obvious error to the extent it failed to grant the *Batson* challenge either by determining that the explanation was not race neutral or proceeding to the next step and not finding discriminatory intent.

Moreover, the error was prejudicial since the record shows that the State used its peremptory in a discriminatory fashion. As set forth in A.B. and *supra* p. 1–11, the State's strike violated Equal Protection where there was a prima facie showing of discrimination, followed by a strike that was not race neutral. Additionally, even if the

strike was race neutral, the circumstances showed discriminatory intent. Equal Protection was violated in this case, requiring reversal since *Batson* errors are structural and do not require a showing of harm.

iii. The error can also be reviewed for ineffective assistance.

As set forth in A.B.:42–45, to the extent *Rosa-Re* mandates that defense counsel insist on a ruling or counsel otherwise failed to preserve this issue, counsel performed deficiently. Additionally, because *Batson* error occurred either because the explanation was not race neutral or, even if it was, because the record establishes discriminatory intent, the error was prejudicial since the prosecutor's strike violated Equal Protection. Since *Batson* error is structural, any error attributed to counsel in failing to prevail on and preserve the meritorious *Batson* challenge is prejudicial and requires a new trial.

Courts routinely employ ineffective assistance analyses in circumstances where defense counsel failed to raise a *Batson* claim below. *See e.g. Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir. 1991); *Stokes v. State*, 715 S.E.2d 81, 83-84 (Ga. 2011); *State v. Robertson*, 630 N.E.2d 422, 429 (Ohio Ct. App. 1993) (court reviews untimely *Batson* claim for ineffective assistance, recognizing that no legitimate tactical reason existed for delaying until after jury was sworn).

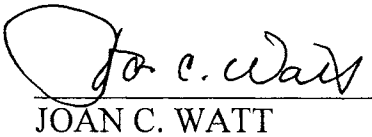
The Sixth Amendment right to effective assistance of counsel applies to *Batson* claims, and the State's attempt to remove these claims from Sixth Amendment protection undermines the important function of the *Batson* protection. In a case like this, where counsel made an objection and the State was asked to provide an explanation, if counsel was required to insist on a ruling, his failure to do so violated Harris's right to Equal

Protection, as well as the Equal Protection rights of Juror 3 and the community. The stringent waiver rule advocated by the State would allow prosecutors to discriminate in the use of peremptory challenges unless defense counsel were able to jump through all the technical hoops and would deprive criminal defendants of the right to effective assistance at a critical stage. Not allowing ineffective assistance claims for *Batson* violations would frustrate the purpose of *Batson* and leave jurors who are discriminated against and the community at large without a remedy in circumstances where defense counsel fails to adequately preserve the claim of discriminatory behavior for review. In this case, to the extent counsel did not preserve the claim, he provided ineffective assistance since the prosecutor violated Equal Protection in striking Juror 3.

CONCLUSION

Appellant/Defendant Antoine Harris respectfully requests that this Court overturn his conviction and remand the case for a new trial.

SUBMITTED this 6 day of February, 2012.



JOAN C. WATT
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, certify that I have caused to be hand-delivered the original and nine copies of the foregoing brief to the Utah Supreme Court, 450 South State, 5th Floor, P.O. Box 140210, Salt Lake City, Utah 84114-0210, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 6 day of February, 2012.

Joan C. Watt

JOAN C. WATT

DELIVERED this 7 day of February, 2012.

Tab A

IN THE THIRD JUDICIAL DISTRICT COURT, WEST JORDAN

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	: Case No. 081400099 FS
Plaintiff,	:
	: Appellate Case No. 20100080
vs.	:
ANTOINE DARNELL HARRIS,	:
Defendant.	: With Keyword Index

JURY TRIAL OCTOBER 28, 2009

BEFORE

JUDGE TERRY CHRISTIANSEN

20100080-CA

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

ORIGINAL

WEST JORDAN, UTAH; OCTOBER 28, 2009

JUDGE TERRY CHRISTIANSEN

(Transcriber's note: speaker identification may not be accurate with audio recordings.)

P R O C E E D I N G S

THE COURT: Good morning. Welcome to Third District Court. My name is Terry Christiansen, I'll be the judge presiding in this case. I'm sorry to get such a slow start. Normally we have 90 plus percent of jurors that appear but today we had nine out of 30 that didn't show up so we've been waiting hoping we'd have enough jurors to proceed and hopefully we will.

This is the matter of State of Utah vs. Antoine Darnell Harris. It is a criminal case. The case number is 081400099.

Is the State ready to proceed, Ms. Serassio?

MS. SERASSIO: Yes, Your Honor.

THE COURT: Is the defense ready to proceed, Mr. McCaughey?

MR. MCCAUGHEY: I am.

THE COURT: What I'm going to do is have each of you stand, raise your right hand, I'll have my clerk swear you in as prospective jurors.

(Prospective jurors sworn)

THE COURT: Be seated. I'm going to ask just a few

general questions to make sure you all qualify as jurors. Are each of you citizens of the United States and over the age of 18? If you are not, please raise your hand. The record will reflect that no hands are raised.

Do each of you read, speak, and understand the English language? If you do not again, please raise your hand. The record will reflect that no hands are raised.

Are each of you residents of Salt Lake County at the present time? If you are not, please raise you hand. The record will reflect that no hands are raised.

Do each of you consider yourself to be of sound mind, body and discretion? If you have any concerns in those areas, again, please raise your hand. The record will reflect that no hands are raised.

Have any of you been convicted of a felony or malfeasance in office? If so, please raise your hand. The record will reflect that no hands are raised.

And finally, are any of you in the active military service at the present time? If so, please raise your hand. The record will reflect that no hands are raised.

Both counsel stipulate as to the general qualifications and competence of the panel? Ms. Serassio?

MS. SERASSIO: Yes, sir.

THE COURT: Mr. McCaughey?

MR. MCCAUGHEY: We do, Your Honor.

THE COURT: All right. We're going to start with Mr. Johnson. I'm going to have you stand. I think you should - yeah, just go through that list and tell us a little bit about yourself.

MR. JOHNSON: Okay, my name is Ralph Johnson. My age is 54 and I've gone through high school, graduated high school. My occupation is (inaudible) technician. I am married. My spouse's name is Brenda and her occupation is a house - homemaker. I live in Sandy and I've lived in Salt Lake County all my life and number of children, I have two. My son is 26 and my daughter is 35.

THE COURT: Thank you, sir.

Next is Ms. Ritter.

MS. RITTER: My name is Jane Ritter. My age is 80. I have been educated in Ohio, high school, attended Ohio State University. I'm a retired travel agent. I am a widow. Spouse name and occupation doesn't seen particularly relevant. However, my spouse was a member of the military. I am a resident of the area. I've lived in Salt Lake County probably 30 years. I have five children, one is dead. Their ages start at 58 and decrease from there to 50. Is that close enough?

THE COURT: That's close enough. Thank you.

MS. RITTER: And also, would you turn up the microphone. I don't hear real well.

THE COURT: I don't know that we can turn it up but we'll do the best we can.

MS. RITTER: Thank you.

THE COURT: All right. Mr. Chow.

MR. CHOW: My name is (inaudible) Chow. I'm 27. I graduated high school. I'm still going to school up at the U. Occupation is still student. I'm single. I live in the Salt Lake area. I was actually born and raised in Salt Lake so I've lived here all my life and I have no kids.

THE COURT: Thank you.

Ms. Bunting.

MS. BUNTING: My name is Lamoy Bunting. I'm 78 years old. I graduated from high school and one year of college I am a homemaker. I am married. My husband retired. Robert is my husband's name and he worked for US West. I live in Midvale and have lived in the county a good portion of my life. I have four daughters, oldest one 55 on down to the youngest at 42.

THE COURT: Thank you, ma'am.

Next is Ms. Price.

MS. PRICE: My name is Heather Price. I'm 28 years old. I have some college. I work for an insurance company. I am married to Thomas Price. He works up as the University of Utah in the kitchen. I live in Murray and have lived there my entire life. I have one son and he's 12.

THE COURT: Thank you.

Next is Mr. Merkley.

MR. MERKLEY: My name is Robert Merkley. I'm 50 years old. I have some college education. I'm a business owner of an engineering, structural engineering company. I am married. My spouse's name is Jennifer Merkley. She is a homemaker. I live in Holladay. I have resided in Salt Lake County for 29 years. We have four children ranging from 28 years of age to 14.

THE COURT: Thank you.

Next is Mr. Fulmer.

MR. FULLMER: My name is Jason Fullmer. I'm 33. I have a bachelor's degree. My occupation is software engineer. I'm married to Andrea and she stays at home. I live in West Jordan and I've been in Salt Lake County my whole life and I have three children, ages nine, seven and five.

THE COURT: Thank you.

Let's go to the top row. We'll start with Mr. Ludlow.

MR. LUDLOW: My name is Jason Ludlow. I'm 40 years old. I work in construction. I have a little bit of college education. I'm single. I've lived in Salt Lake County my whole life and I have no kids.

THE COURT: Thank you.

Next is Mr. Maylen.

MR. MAYLEN: My name is Kent Maylen. I'm age 56. I've attended UTC and the University of Utah. I'm a custom frame builder. I'm single. I've lived in Salt Lake County most of my life and I have a daughter aged 35.

THE COURT: Thank you.

Next is Ms. Van Rosendahl.

MS. VAN ROSENDAHL: My name is Kathryn Van Rosendahl. I'm 25. I have my associates, I'm working on my bachelor's. I'm a legal assistant and a waitress, single. I live in Sugarhouse and I've lived there all 25 years and I have no kids.

THE COURT: Ma'am, where do you work as a legal assistant?

MS. VANROSENDAHL: Vancott, Bagley, Cornwall, McCarthy.

THE COURT: Thank you.

Next is Mr. Norman.

MR. NORMAN: I'm - go by Bret Norman. I'm 54. I had a year of technical college but I'm a Wonder Bread salesman and have been for about 30 years; married to a wonderful girl named Tina and she's a secretary. I live in Glendale and I've been in Utah for about 40 years. I have one son whose 36.

THE COURT: Thank you, sir.

Next is Mr. Carpenter.

MR. CARPENTER: My name is David Carpenter. I am 70. I have a graduate degree. I am retired customer service agent from Delta Airlines. I am single. I have been living in Salt Lake County for 23 years. I have no children.

THE COURT: Thank you.

Next is Mr. Perry.

MR. PERRY: My name is Jeff Perry. I am 33 years old. I have roughly three years of college. I am in sales for a snowboarding shop. I am married to a girl named Breanna. Her occupation is flight attendant for Sky West Airlines. I live kind of in that Millcreek/Murray/South Salt Lake area. I've been in Utah for about 13 years in Salt Lake off and on for that time, no children.

THE COURT: Thank you. Next is Mr. Smith.

MR. SMITH: My name is Sean Smith - sorry my voice is giving out.

THE COURT: You're fine.

MR. SMITH: I'm 22. I graduated high school and attended college. I'm an employee, I'm single. I live in Sugarhouse. I've lived here for three years. I have no children.

THE COURT: Thank you, sir.

All right. Let's so to the back of the courtroom and we'll start with Mr. Berg.

MR. BERG: My name is Steven Berg, I'm 47. I have a bachelor's in (inaudible) technology. I am married. My wife's name is Stacey and she's a medical assistant. I reside in Riverton area, lived in Salt Lake County 20 years. I have two children, a 23 year old daughter and 19 year old son.

THE COURT: Thank you. Next is Mr. Campbell.

MR. CAMPBELL: My name is David Campbell. My age is 81, four years of college. I have a manufacturing firm from which I'm retired. My son is now running that. I'm married. My wife's name is Mary Elizabeth. I've been in the area for 40 some odd years. I have seven children, 24 grandchildren, and 14 great grandchildren.

THE COURT: Good for you. Thank you.

Next is Mr. Stevenson.

MR. STEVENSON: I'm Justin Stevenson. I am 29 years old. I graduated from the University of Utah. I manage bank owned properties right now. I am single and I've lived in Sugarhouse for about three years now and I have no kids.

THE COURT: Thank you.

Next Mr. Brown.

MR. BROWN: My name is Richard Brown. I'm 55 years old. I have a 4-year degree. I'm a registered nurse. I'm divorced. I'm a registered nurse. I've been in the area for

18 years. I have one child, 24 years old.

THE COURT: Thank you, sir.

Next is Mr. Cressor.

MR. CRESSOR: My name is Chad Cressor. I'm 31. I have a high school diploma. I work for a manufacturing company. I'm married to Misha Cressor. She works for a title company. I'm a resident of Sandy for nine years. I have two children 11 and 4.

THE COURT: Thank you.

Mr. Day?

MR. DAY: My name is James Day. I am 60 years of age. I hold a bachelor's and master's degree from the University of Utah. I'm a registered architect in the State of Utah. I'm married to Kathryn Day. She is a homemaker. We live in Sandy and we've lived in Salt Lake County for the last 18 years. Prior to that we were in Pasadena, California. I have four children and one grandchild.

THE COURT: Thank you, sir.

And finally, Mr. Nielsen?

MR. NIELSEN: Yeah, my name is Pete Nielsen. I'm 49 years old. I graduated from the University of Utah with a BS degree. Currently I own a residential housecleaning business. I'm not married. Currently I live in Riverton. Lived in Salt Lake County most of my life. No kids.

THE COURT: Thank you.

All right. I've going to read the salient part of the information which is the charging document in this case. It read as follows:

"State of Utah vs. Antoine Darnell Harris. The undersigned, Detective Ann Valencia, Taylorsville City Police Department upon written affidavit states on information and belief that the defendant committed the crimes of Count 1, Aggravated Assault, a third degree felony at 125 West Clubhouse Drive in Salt Lake County, State of Utah on or about December 18, 2007 in violation of Title 76, Chapter 5, Section 103, Utah Code, in that the defendant, Antoine Darnell Harris, a party to the offense, did assault Sarah Michel as defined in Utah Code 76-5-102 and used other means or force likely to produce death or serious bodily injury."

Count 2 is Assault, Domestic Violence, a Class B Misdemeanor Felony, at 1275 West Clubhouse Drive in Salt Lake County, State of Utah on or about December 18, 2007 in violation of Title 76, Chapter 5, Section 102 and Title 77, Chapter 37, Section 1 of the Utah Code, in that the defendant, Antoine Darnell Harris, a party to the offense did assault another with unlawful force or violence to do bodily injury, then threatened accompanied by a show of immediate show force or violence to do bodily injury or did commit an act with unlawful force or violence that caused bodily injury and furthermore, the defendant and the victim were co-

habitants."

To those two counts the defendant has entered pleas of not guilty.

This case should be completed today. I would anticipate that the evidence should be finished sometime mid-afternoon and we would read the jury instructions, do closing arguments and hopefully you'd have it by mid to late afternoon for your deliberations. Are there any of you because of pressing family or business matters cannot devote your full time and attention to this case if you were selected to serve on the jury? If any of you could not devote your full time and attention, please raise your hand. The record will reflect that no hands are raised.

I know that Mr. Ritter indicated that she hearing issues. Are there any others that have any physical ailments that would prevent you from serving on the jury? These could be things such as a recent surgery, back problems, eye problems, hearing problems. Anyone other that Ms. Ritter? If so, please raise your hand. The record will reflect that no hands are raised.

Ms. Ritter have you been able to hear me okay?

MS. RITTER: I can hear you pretty well.

THE COURT: If you were selected on the jury in this case and I had you sit in the seat closest to the witness box, do you think you'd be able to hear okay?

MS. RITTER: Yes.

THE COURT: All right. And ma'am, if you are selected and you have a problem hearing, just raise your hand and don't be bashful, just say can you speak up and we'll have them speak up. Okay? Thank you ma'am.

MS. RITTER: Thank you for your consideration.

THE COURT: No problem.

All right. If you are selected to be on the jury, you need to understand that the Court is to preside and see that the rules of law and the evidence are complied with and to instruct you on the law applicable to this case. Are there any of you who would not be willing to accept the law as given to you by the Court regardless of what you believe the law is or ought to be? If you could not accept the statements of law given to you by the Court, please raise your hand. The record will reflect that no hands are raised.

Do you any of you know anything about this case other than having simply listened to the information being read? If so, please raise your hand. The record will reflect that no hands are raised.

Ms. Serassio, if you'd stand, identify yourself and any witnesses you anticipate calling today.

MS. SERASSIO: Thank you, Your Honor.

My name is Melanie Serassio. I am a Deputy District Attorney with the Salt Lake County District

Attorney's Office. Witnesses that I have present today are Officer Valencia from Taylorsville Police Department, Officer Cooper from Taylorsville Police Department, Sarah Michel is a witness in this case. I also have Dr. Lori Frasier coming to testify today. She works with the Primary Children's Medical Center. There are two other people involved in this case who will not be present to testify today but I want to identify them so that you know them, Michael Eckhart and Amber Wardle.

THE COURT: Do any of you know Ms. Serassio or the witnesses she has identified? If so, please raise your hand? The record will reflect that no hands are raised.

Mr. McCaughey, if you'd stand and identify yourself, your client, and any witnesses you anticipate calling today.

MR. MCCAUGHEY: Your Honor, I am Steve McCaughey and I practice law here in Salt Lake. Antoine Harris is my client and he will be the only witness we anticipate.

THE COURT: All right. Do any of you know Mr. Mcaughey or Mr. Harris? If so, please raise your hand. Again the record will reflect that no hands are raised.

Have any of you served on a jury before? If so, please raise your hand. All right, let's start on the first row with Mr. Johnson.

Mr. Johnson, how long ago and what type of case?

MR. JOHNSON: It was probably about 15 years ago

and it was a drug related (inaudible).

THE COURT: Do you remember what the verdict was in the case, guilty or not guilty?

MR. JOHNSON: It was not guilty.

MR. MCCAUGHEY: What kind of case was it?

THE COURT: It was a drug case.

Anyone else in the first row? All right, the back row, Mr. Ludlow.

MR. LUDLOW: It was probably about 15 years ago. It was a child abuse case.

THE COURT: And do you remember the verdict in the case?

MR. LUDLOW: Guilty.

THE COURT: Any else in the top row? All right. And then the back, I know we had Mr. Brown.

MR. BROWN: Yes, it was a DUI case about five years ago.

THE COURT: And do you remember the verdict in the case?

MR. BROWN: It was guilty.

THE COURT: Anyone else in the back row? It's Mr. Day - I'm sorry, Mr. Cressor.

MR. DAY: Mr. Day.

THE COURT: Oh, Day, okay.

MR. DAY: It was a case in this court about two or

three years ago. I do not recall the charges or anything. I recollect I believe the verdict was guilty.

THE COURT: Anyone else that has served on a jury? Those of you that have answered in the affirmative, do you believe that you could be fair and impartial in this case and simply base the evidence - or base your decision on the evidence presented in this case and this case alone? If any of you would have difficulty being fair and impartial based on prior jury service, please raise your hand. The record will reflect that no hands are raised.

It is the duty of the Judge, not the jury to determine punishment in the event the defendant is found guilty beyond a reasonable doubt. Are there any of you who could not set aside the issue of punishment in your deliberations and base your decision of guilt or innocense solely on the facts presented? If any of your would let the issue of punishment affect your deliberation, please raise your hand. Again, the record will reflect that no hands are raised.

Have any of you formed an opinion as to the guilt or innocense of Mr. Harris or which party should prevail in this case? If so, please raise your hand. The record will reflect that no hands are raised.

Have any of you been charged with the crime of assault, either simple assault or aggravated assault? If so,

please raise your hand. The record will reflect that no hands are raised.

Do any of you have any close family members that have been charged with a crime of assault or aggravated assault? If so, please raise your hand. We've got a couple. Ms. Price, and who is it that was charged?

MS. PRICE: My father was.

THE COURT: And how long ago was that?

MS. PRICE: It was a number of years ago. I don't know how long. He's deceased. He died a couple of months ago.

THE COURT: The fact that your father was charged with a similar offense, would that cause you any concern about your ability to be fair and impartial in this case?

MS. PRICE: No.

THE COURT: Okay. I saw some other hands. Over here? Anyone else? Mr. Day.

MR. DAY: I have a daughter that was charged with domestic violence approximately two years ago.

THE COURT: And would that fact have any bearing on your ability to be fair and impartial in this case?

MR. DAY: No, sir.

THE COURT: All right. Anyone else who has had a close family member that was charged with assault or aggravated assault? The record will reflect that no hands

are raised.

Have any of you been the victim of an assault, either domestic violence related or non-domestic violence? If so, please raise your hand.

All right. Ms. Price, we'll start with you. How long ago?

MS. PRICE: My ex-husband, five years ago. It was (inaudible) and get a restraining order against him but I never did.

THE COURT: All right. The fact that you have been the victim of an assault and this case does involve issues of assault, would that give you some concern about your ability to be fair and impartial?

MS. PRICE: It kind of would, yeah.

THE COURT: Okay, and that's why we ask the question. So I appreciate your candor. Thank you, Ms. Price.

All right. We also have another hand I believe in the jury box. That's Mr. Perry.

MR. PERRY: I was car-jacked and assaulted in Minneapolis about 15 years, no, it would been 15 years ago.

THE COURT: All right. This case will be a lot different than that. This involves a domestic situation. Would the fact that were a victim however of assault, would that give you any concern about your ability to be fair and

impartial?

MR. PERRY: No.

THE COURT: Anyone else in the jury box? All right, let's go to the back of the room. Anyone that's been the victim of assault? The record will reflect that no hands are raised.

Do any of you have any close family members that have been the victim of an assault? If so, please raise your hand. All right, that's Ms. Ritter.

MS. RITTER: My daughter.

THE COURT: And how long ago was that?

MS. RITTER: Three days ago.

THE COURT: Would that you concern about your ability to be fair and impartial?

MS. RITTER: I hope not.

THE COURT: I know these are hard things to look into your mind and try to anticipate what the evidence would be. The purpose of this voir dire selection process is to get jurors that can be completely fair and impartial. I know that it's difficult to kind of separate what happens in your private life when you come into court and sit on a jury but if you have any concern that, for example, your daughter's situation, you might relate that to this situation and somehow it would affect your decision then it's better that you not serve on this case and serve on another one. With

that in mind, do you have any concerns about your ability to be fair and impartial?

MS. RITTER: I think I could be fair.

THE COURT: Any question in your mind?

MS. RITTER: Yeah, there is, there has to be.

THE COURT: And that's why we ask the question and I appreciate your candor.

Anyone else? All right. That's Mr. Berg.

MR. BERG: My daughter while she was in high school (inaudible) assault from (inaudible).

THE COURT: And how long ago was that?

MR. BERG: (Inaudible).

THE COURT: Would that situation have any bearing on your ability to be fair and impartial in this case?

MR. BERG: No.

THE COURT: Anyone else whose had a family member that's been the victim of an assault situation.

Mr. Day?

MR. DAY: Same one.

THE COURT: And that would have no bearing?

MR. DAY: No.

THE COURT: All right. Obviously Ms. Serassio has identified to police officers who will testify. The law and direction from the Court is that you should consider the testimony of a law enforcement the same as you would consider

the testimony of any other witness. In other words, you should give the testimony of a peace officer no greater or lesser weight simply because of the position that they hold. You should consider their testimony the same as you would the testimony of any other witness. It could be a housewife, a teacher, a doctor, a salesman. It just simply doesn't matter. You have to judge their testimony as you would any other witness.

Obviously sometimes in people's experiences they have had either negative or positive experience with law enforcement officers to the point that they would give either greater or lesser weight to their testimony. Do any of you feel that because of your experiences you would give either greater or lesser weight to the testimony of a witness simply because they hold the position of a peace officer? If so, please raise your hand. The record will reflect that no hands are raised.

A couple of general questions. If you were a party, either the State of Utah or Mr. Harris, would you be fully satisfied to have your case tried by a person of your present attitude and frame of mind toward the case and that can be for any reason, you don't need to say it in front of everyone else. But is there anyone that has concerns in that area about if you were the State or the defendant about having your case tried by someone of your present attitude

and frame of mind? If you would have those concerns, please raise your hand. The record will reflect that no hands are raised.

Do any of you have any personal considerations or concerns that may interfere with your ability to objectively sit and hear the evidence to be presented or to fairly and impartially consider the evidence, deliberate and render a verdict in this case? If you have any personal considerations or concerns, again, we can discuss those at the bench, but if you have those, please raise your hand. The record will reflect that no hands are raised.

If you are selected to serve on this jury you will be called to sit in judgment of Mr. Harris. There is an old adage in Christian Law and Christianity and in the Bible that says something to the effect, judge not that ye be not judged. In this case you will take an oath to sit in judgment if you are selected on the jury. Are there any of your who would be uncomfortable and feel that you simply could not sit in judgment if called to serve on this jury? If so, please raise your hand. The record will reflect that no hands are raised.

Counsel, please approach.

(Whereupon a sidebar was held as follows:

THE COURT: Any questions I need to ask (inaudible)?

MR. (?): (Inaudible).

THE COURT: Obviously Ms. Price and Ms. Ritter. Anybody else?

MR. (?): Mr. Berg (inaudible) ask him questions [inaudible].

THE COURT: He said it was when she was in high school and it was just a boyfriend/girlfriend (inaudible).

MR. (?): (Inaudible).

THE COURT: I'll strike Ritter and Price. Let me do that right now and (inaudible).

MR. (?): (Inaudible).

(End of sidebar)

THE COURT: All right. That concludes the voir dire. I'm going to have the attorneys exercise their peremptory challenges.

While they're doing so, rather than just simply have you do nothing, I came across an article many, many years ago. It's by Barbara Holland, Do Your Swear that you Will Well and Truly Try. I'll read you excerpts from that article while we're waiting for the attorneys to exercise their challenges.

It read as follows: "When law and order began, the only court was the head of the family and father knew best. His word was the law and there was no appeal. If papa was a bully, maybe momma could pack up the kids and move to a

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It read as follows: "When law and order began, the only court was the head of the family and father knew best. His word was the law and there was no appeal. If papa was a bully, maybe momma could pack up the kids and move to a

different family or spike his soup with leaves and berries her mother had told her about. In any case, what happened in the family was nobody's business but the family's. Presently people developed agricultural and settled down, clustering together in groups of families. We acquired garden plots and portable private property and controversy as we now know it was born. Old (inaudible) still decided family matters but coping with inner familiar strife called for group arbitration to prevent a homicidal free-for-all. Controversy gave birth to law. Rome refined the system and separated the law from the facts. A magistrate to find the dispute, cited the law and referred the problem to citizen (inaudible), a fellow of some standing who called in a few associates to help. They listened to the speeches, weighed the evidence and pronounced sentence. This was more orderly than a Tribunal. The Romans were passionately fond of order and wrote down all their laws in books. They were also fond of a good public spectacle and a convicted criminal could opt for the arena and entertain citizens by duking it out with other criminals or prisoners of war. A talented gladiator only got to live but he could wind up as a popular sports hero surrounded by pretty ladies. The Romans loved a winner regardless of his criminal record.

After Rome fell apart it's orderly laws deteriorated to gibberish and threatened the possible

legendary King Arthur had to send his possible legendary knights out to ride around righting wrongs and rescuing maidens from sexual harassment, a far from comprehensive judicial system. There were still trials though with an ordeal serving as jury. Great faith has been placed in trial by ordeal all the way from the Old Testament to the Australian Outback. The idea is that something out there knows whose guilty and will point to him if given the chance. The chance usually involves fire or water or poison. Poison is written in the Bible and was popular in Africa and India for trials by ordeal. Those who survived it all, though likely to be ill were considered to be innocent.

The Saxons developed a variation called (inaudible), a morsel of something that would show if you're guilty, perhaps their throats were dry with apprehension and Godwin, Earl of Kent is said to have choked on his. Under Saxon law if you could carry several pounds of glowing, red, hot iron in your bare hands for nine steps or walk barefoot over nine red hot plowshares without getting any blisters, you were not guilty.

Similar proof was accepted in Hindu and Scandinavia law. In Britain, Africa and parts of Asia plunging your arm into boiling water, oil, or lead without the usual results proved your innocense. Water was also knowledgeable stuff. The innocent sank, the guilty floated and could be fished out

and dealt with. This was the customary method of identifying witches who were cross tied, thumb to toe before being thrown in. True witches refused to drown and were dried off and burned at the stake. Alongside this unidentified jurist prudence, the Saxons were actually working with the human jury system but it was available only to the honest. If your neighbors knew you for a liar or you had perjured yourself in the past or presumably if you were a stranger just passing through, you weren't oath worthy and went directly to the red, hot iron or the drowning pond. But if you were a person of honesty in your district and were accused of a crime you swore by the Lord "I am guiltless in both deed and counsel, of the charge of which 'x' accuses me," and that was that. However, if you were accused by a group, you had to parry with a group of your own called compergators. You asked 11 thanes, freeholders to join you and swear your honesty in the matter. If you couldn't round up 11 who believed you, you took off your shoes for the hot plowshares.

In those days, honesty was the best policy. Honesty and a loyal group of bribable drinking buddies. (Inaudible) noticed this flaw provided for a group of 12 senior thanes to investigate an act as an accusatory jury. Eight votes could convict. Justice was still a neighborhood matter. Everyone was suppose to know everyone else and have some firsthand knowledge of what happened.

Rather recently we've turned this concept on its head and juries are suppose to know nothing at all before they sit down in the box, to be but empty vessels into which the liquor of admissible evidence is poured. In inflammatory cases a trial even gets moved to another area to insure jury indifference.

When William the Conqueror took over England in 1066 he left the Saxon system in place and added some Norman forces like trial by combat. Combat was a judicial entertainment similar to the gladiatorial in which right was thought to make might. Whoever was right would win. The accuser had to do battle with the accused causing the small and frail to think twice before complaining. But if you were no good at fighting you could hire someone to fight for you. The man with the fiercest hired help won rather like hiring the most expensive lawyer today.

Ordeals fell into disuse in the 13th century but the right to trial by combat stayed on the books until Ashford vs. Thornton in 1819. By Norman times, laws were more complicated. So professionals called justice seers were sent around to keep an eye on the courts and rules of evidence rather like judges. They knew more about the law and less about what happened than the jurors did.

We were told in school that jury trials sprang newborn from the Magna Carta, but juries were around before

1215. The Magna Carta just guaranteed them as a right not to be ignored by capricious powers like Bad King John. But some kings went right on being capricious anyway.

In these enlightened times we merely torch the neighborhood if we don't like the verdict. But back then, juries got punished if the authorities didn't like it. Since juries were considered witnesses, a wrong vote was considered perjury. Acquitting unpopular or possibly treasonous people got jurors hauled into the star chamber where a group of the King's dear friends dealt severely with them. They lost their goods and chattels and were sent to jail for at least a year. Sometimes their wife and children were thrown out of their house, the house demolished, the meadows destroyed and even the trees chopped down. A prudent jury weighed factors other than evidence. It was also the custom for the lawyer to pay each jurors several guineas or to take them all out to dinner.

As we limped toward the 21st century, the world community of nosy neighbors has faded into history and the problem now is who are these jurors? Prince Morgan called them wise men. Under Edward I, they were to be 12 of the better men of the bailiwick, under George IV, good and lawful men. Except for adulteresses, witches and common scolds, history doesn't mention women. Perhaps they're a recent invention. It seems to have been so simple then naming our

good, wise, lawful peers. How do we choose among strangers not necessarily wise but merely registered to vote? Once the blatantly prejudice have been sent packing, both sides take up the peremptory challenge of turning down jurors for the way they look, dress, or comb their hair. The differing agendas of the prosecution and the defense complicate matters.

Prosecution lawyer, Jeffrey Tubin says that when he first came to the bar he was told to avoid men with beards, too independent and teachers and social workers, too sympathetic, and aim for the little old Lutheran lady in pearls, quick to judge and slow to forgive.

For the defense, Clarence Darrow advised not to take a German, they are bull-headed; rarely take a Swede, they are stubborn. Always take an Irishman or a Jew, they are the easiest to move to emotional sympathy. He preferred old men for their tolerance, but Samuel Lee Woods liked them young for their still fresh sense of brotherhood and avoided self-made men, businessmen with close set eyes, writers, professors and former policemen.

How are we doing?

MS. SERASSIO: We're half done.

THE COURT: Half done? Usually this is about when they get done. You'll just have to wait for a few minutes.

Does anyone have any questions? I would tell you

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that in a felony case, eight of you are called to serve on the jury. If this were a capital case involving the death penalty, it would be 12 of you. For a Class A Misdemeanor, six jurors and if it was a Class B Misdemeanor there would be four. So since this is a felony case, eight of you will be selected to serve on the jury and each attorney gets four peremptory challenges. So there will be eight of you that will be stricken.

And for the record, Mr. McCaughey, you did pass the jury for cause?

MR. MCCAUGHEY: I think we need to approach for a minute.

THE COURT: Okay, would you approach the bench?

MR. MCCAUGHEY: Oh, we do pass for cause, yes.

THE COURT: And Ms. Serassio, you did pass the jury for cause?

MS. SERASSIO: Yes.

THE COURT: Approach the bench.

(Whereupon a sidebar was held as follows:

MR. MCCAUGHEY: The concern (inaudible) is Juror No. 3 is struck by the State (inaudible) ability [inaudible] she needs to justify [inaudible].

THE COURT: All right, do you have a reason for that?

MS. SERASSIO: Yeah, (inaudible).

THE COURT: Why don't we put that on the record during the break?

MR. MCCAUGHEY: Okay, I just wanted to inform you (inaudible).

(End of sidebar)

THE COURT: All right. I'm going to read the eight of you who have been selected to serve on the jury. As I read your name if you would please stand. Robert Lewis Merkley, Jason Howard Fullmer, Kathryn Ashley Van Roosendahl, Delvin Brent Norman, Jeffrey Eugene Perry, Sean Christopher Smith, David Randall Campbell, and Richard Allen Brown.

Ms. Serassio, is that the jury you have selected?

MS. SERASSIO: It is, Your Honor.

THE COURT: Mr. McCaughey?

MR. MCCAUGHEY: It is, Your Honor.

THE COURT: Those of you that are standing, stay where you are. Those of you that are not standing, thank you for your appearance today. I am going to release you from jury service. You're welcome to remain as a spectator if you so choose. Otherwise, have the rest of a good day.

(Prospective jurors not selected excused)

THE COURT: All right. Mr. Murphy, if I can get you to move down a few spaces. Mr. Fullmer, you're next to him, Ms. VanRoosendahl, I'll have you sit next to Mr. Fullmer and then Mr. Norman next to Ms. Van Roosendahl.

And then the back row, Mr. Perry will be at the far end. Next to Mr. Perry will be Mr. Smith and then Mr. Campbell and then Mr. Brown.

All right. Before you get too comfortable, I'll have you stand and I'll have my clerk swear you in as jurors in this case.

(Whereupon the jury members were sworn)

THE COURT: All right. Let me just talk to you for a few minutes. Just sit down. It's important that you sit in the same order. It's probably best if you kind of move closer to the witness box so if you just kind of slide down. You don't need to do it now, just when you come back and I'm kind of tall so I like to spread out. You don't need to have every seat filled. If you want to put a seat between you, that's fine. Just be as comfortable as you can. We'll usually take at least one morning recess which we'll do now, at least one or two afternoon recesses. Sometimes it's based upon witness situations. If for any reason you feel like you need a recess, maybe you're just getting a little tired, maybe there's a telephone call that you need to make, maybe need to use the restroom facilities, all you have to do is just raise your hand and say, you know, Judge, can we take a recess? I won't ask you why but I want you alert and fresh. So don't feel at all embarrassed about asking for a recess. Sometimes I have a tendency to just kind of plow through and

HONORABLE TERRY L CHRISTIA[illegible]N

10/28/2009

SEAT	JUROR ID	NAME	APPEARED YES	APPEARED NO	EXCUSED	SELECTED
1	~~65927930~~	~~ZAFLLOW, JULIAN~~ FTA	☐	☐	☐	☐
2	~~21373750~~	~~JOHNSON, RALPH J~~ State #1	☑	☐	☐	☐
3	~~62940217~~	~~RITTER, JANE G~~ Challenge for cause TK	☐	☐	☐	☐
4	~~66072320~~	~~AZENON, JONATHAN RENE~~ FTA	☐	☐	☐	☐
5	~~63240477~~	~~CHAU, JONATHAN~~ State #3	☑	☐	☐	☐
6	~~65187817~~	~~GOLESIS, KIRIAKOS~~ FTA	☐	☐	☐	☐
7	~~18537099~~	~~BUNTING, LAMOYNE A~~ D #4 SR	☒	☐	☐	☐
8	~~62945328~~	~~PRICE, HEATHER L~~ Challenge for Cause TK	☑	☐	☐	☐
9 (1)	63143841	MERKLEY, ROBERT LEWIS	☑	☐	☐	☐
10 (2)	63335754	FULLMER, JASON HOWARD	☑	☐	☐	☐
11	63251751	~~LUDLOW, JASON PAUL~~ D #3	☑	☐	☐	☐
12	~~65951889~~	~~MALIN, KENT B~~ State #2	☑	☐	☐	☐
13 (3)	63020985	VAN ROOSENDAAL, KATHERINE ASHLEY	☑	☐	☐	☐
14 (4)	63036638	NORMAN, DELVIN BRETT	☑	☐	☐	☐
~~15~~	64267777	CARPENTER, DAVID L D #1 SRM	☑	☐	☐	☐
16 (5)	64638588	PERRY, JEFFREY EUGENE	☑	☐	☐	☐
17	~~18352116~~	~~PARK, TODD ANDREW~~ FTA	☐	☐	☐	☐
18 (6)	65410955	SMITH, SHAWN CHRISTOPHER	☒	☐	☐	☐
~~19~~	~~63799714~~	~~BERG, STEVEN B~~ A #2 SR	☑	☐	☐	☐
20	~~18387291~~	~~MCCOMAS, EVELO J~~ FTA	☐	☐	☐	☐
21	~~16119052~~	~~WINEGAR, RONALD REID~~ FTA	☐	☐	☐	☐
22 (7)	63421367	CAMPBELL, DAVID RANDALL	☑	☐	☐	☐
23	~~66089363~~	~~ELTON, BRIAN DAVID~~ FTA	☐	☐	☐	☐
24	~~19787066~~	~~ITOW, TERA KIYO~~ FTA	☐	☐	☐	☐
25	64635886	STEVENSON, JUSTIN STEWART State #4	☑	☐	☐	☐

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HONORABLE TERRY L CHRISTIA[illegible]EN

10/28/2009

SEAT	JUROR ID	NAME	APPEARED YES	APPEARED NO	EXCUSED	SELECTED
26	18754769	BROWN, RICHARD ALAN	☑	☐	☐	☐
27	63273767	KRESSER, CHAD A	☑	☐	☐	☐
28	~~66189009~~	~~CLARY, BRIAN KEVIN~~ FTA	☐	☐	☐	☐
29	18272467	DAY, JAMES H	☑	☐	☐	☐
30	62963700	NIELSON, PETER C	☑	☐	☐	☐

I CERTIFY THAT THE FOLLOWING LIST OF JURORS WAS RANDOMIZED BY COMPUTER ON THE DATE SHOWN.
I CERTIFY THAT THE ABOVE INDICATED JURORS REPORTED FOR SERVICE ON THE DATES(S) SHOWN:

DATE(S) 10/28/09

CASE NO. 081400099

CLERK SIGNATURE [signature]