COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO: NOT YET ASSIGNED
APPEALS COURT No. 2019-P-0146

COMMONWEALTH OF MASSACHUSETTS,

v.

DAGOBERTO SANCHEZ,

Appellee's Late Application For Leave To Obtain Direct Appellate Review and Request to Allowed to Late-file

COMES NOW Dagoberto Sanchez, age seventeen when accused and almost fourteen years after his second degree murder conviction, and eight months since the trial court reduced the verdict against him to manslaughter, and applies for direct appellate review of the Commonwealth's appeal of the trial court's reduction of verdict and release of this defendant on a sentence of time served. Sanchez prays the Court to accept this application late; it is filed within twenty-two (22) days of receipt of the Commonwealth's blue brief and necessitated by the arguments raised by the Commonwealth.

I. Request for Direct Review.

Sanchez requests leave to obtain direct review of questions raised by the Commonwealth's appeal, these questions being of importance to the administration of justice and also questions which the Commonwealth claims are matters of first impression in Massachusetts and federally.

II. Statement of Prior Proceedings

The Commonwealth's brief in this matter, after several continuances over Mr. Sanchez's objection, was filed on June 21, 2019. A copy of that brief and accompanying record appendix and addendum are included with this application and contain, indexed, all documents and opinions necessary for this Court's review.

Mr. Sanchez was freed by the trial court, his sentence having been completed, on December 10, 2018. His 2005 conviction of murder in the second degree was reduced to manslaughter on October 10, 2018, by self-executing order of August 30, 2018; the trial court on that day ordered the Commonwealth to elect, by October 10, 2018, to retry the defendant for murder, and if not, the verdict would then be reduced to

manslaughter and the defendant resentenced accordingly. The Commonwealth did not move to stay this order vacating Sanchez's murder conviction, nor to challenge any illegal sentence pursuant to Rule 29, as this Court has dictated necessary in Commonwealth v. Selavka, 469 Mass. 502 (2014). Neither did the Commonwealth abide by the judge's order to elect a remedy by October 10, 2018, despite Mr. Sanchez's request for the Commonwealth to so elect. Instead, the Commonwealth merely filed a notice of appeal, without moving for stay. The Commonwealth having failed to elect to retry the defendant or move for stay of the trial court's self-executing order, the order remained in force. Mr. Sanchez was freed after a manslaughter sentencing hearing on December 10, 2018, with his new sentence, fifteen years to fifteen years and a day, executed in entirety. A notice of appeal was filed, but no motion challenging an illegal sentence pursuant to Rule 29 was filed within the allowed sixty days. Nor did the Commonwealth ask the Single Justice for relief.

III. Statement Of Facts, Questions Of Law, And Incorporated Argument (All In Less Than 2000 Words)

The first question Mr. Sanchez raises for direct review is this important threshold question:

May the Commonwealth merely appeal a trial court order reducing a verdict and resentencing a defendant, or must the Commonwealth also move to stay that order pending appeal, and may the Commonwealth, if aggrieved by a purportedly illegal sentence, nonetheless neglect to move pursuant to Rule 29 within sixty (60) days as this Court has dictated it must in Selavka and also neglect to ask relief from the Single Justice, or do principles of finality and constitutional considerations of double jeopardy, both state and federal, allow Mr. Sanchez to continue now to enjoy the freedom the trial court allowed him, since the Commonwealth did not adequately preserve any right it had to remedy? Selavka and cases cited therein say that a defendant who has completed even an illegal sentence cannot be sentenced again and punished

more for the same offense. The Commonwealth can appeal a reduction in verdict but absent motion under Rule 29 and a granted request for stay, Mr. Sanchez can be punished no more.

The second question raised by the Commonwealth that Mr. Sanchez asserts compels direct review is whether, as the Commonwealth asserts, a trial court is indeed without authority under Rule 25 (b)2 to reduce a verdict unless the reason for the reduction relates only to the weight of evidence adduced at trial or to instructional error; according to the Commonwealth a Rule 25 reduction of verdict cannot be predicated on any other manifest injustice no matter how clear and how grave.

Sanchez says, citing the laundry list Commonwealth v. Woodward, 427 Mass. 659 (1998), that the Commonwealth is plainly wrong:

"The judge's power under Rule 25 (b)2 may be used to ameliorate injustice caused by the Commonwealth, defense counsel, the jury, the judge's own error, or, as may have occurred in this case, the interaction of several causes."

Sanchez says this rule is clear, yet the Commonwealth says the rule is the opposite of what Sanchez, and the trial court, say it is; a ruling from this Court on the question is thus required despite Woodward's clear instruction. This Court's elicitation of the equitable powers of the trial court to fashion relief from injustice found in Commonwealth v. Charles, 466 Mass. 63 (2013) supports Sanchez's and the trial Court's view.

The Commonwealth's final claim, that Sanchez is entitled to no relief at all, requires recitation of the complex procedural history of this case through both state and federal courts since 2005, all accurately documented in the Commonwealth's lately filed MAC brief, appended. Suffice to say that that at trial in 2006 Mr. Sanchez asked for a Stage One Batson/Soares hearing, and the trial court, (Connolly, J.) refused to inquire. The prosecutor stood on his perceived right to refuse explanation for a series of questionable peremptory challenges which succeeded in removing all young black men from Sanchez's jury. Sanchez asserted

Batson/Soares error on direct appeal to the MAC and was denied relief in 2011. FAR was denied. A federal district court (Saylor, J.) denied habeas relief in 2013. The First Circuit, in 2014, at long last, validated Sanchez's claim of error, holding that the trial court, the SJC, and the District Court had all not only erred, but unreasonably erred, error great enough to overcome AEDPA deference, and that Mr. Sanchez, as he had always claimed, had quite obviously been entitled at trial to the Stage One Batson hearing he had requested. As to Sanchez's Soares claim, the Circuit was of course silent, except to remind Massachusetts that Soares could provide greater guarantee but not less. Mr. Sanchez throughout had assiduously pressed his clear and cognizable and correct claim, yet nine years had passed before he received relief.

Had the MAC granted Mr. Sanchez the relief to which he had been entitled under state and federal law in 2011, he would automatically have been entitled to be retried. This is because Massachusetts recognizes that the erroneous refusal to allow a Stage One Soares hearing is

structural error. Commonwealth v. Robertson, 480 Mass. 383 (2018), Commonwealth v. Jones, 477 Mass. 307 (2017), Commonwealth v. Ortega, 480 Mass. 603 (2018), all citing Sanchez v. Roden, 753 F.3d 279 (1st Cir. 2014): the First Circuit's decision in this case. While Massachusetts recognizes that other jurisdictions remand for evidentiary hearing following a determination of Stage One Batson/Soares error, in NO published Massachusetts case has this Court done anything other than find the denial of Batson/Soares inquiry to be structural error, and order a new trial, repeated objections and requests for reconsideration, all recent, from Suffolk County notwithstanding.

But because the error of the Massachusetts state courts in refusing state-mandated relief in this particular case was not corrected until the Circuit's 2014 decision, Mr. Sanchez was denied his state court's Batson/Soares remedy. Instead, a greater burden was placed upon him than would have been had Massachusetts recognized error as Massachusetts should have done. Because the First Circuit applied its own remedy, remand for

belated evidentiary hearing, rather than the Massachusetts remedy, grant of a new trial, Sanchez was perforce required to rebut the trial prosecutor's testimony, ten years after jury selection, that the challenges which looked so much like racial discrimination and which resulted in the exclusion of every single young black man from the jury pool, as well as the prosecutor's refusal to give explanation therefore, were in fact race-neutral. Sanchez's federally imposed burden of rebuttal, a burden the state court would never have imposed upon him, was too great for Sanchez to overcome.

Had the MAC and the SJC correctly applied Batson/Soares in 2011, Sanchez would have been granted a new trial. Solely because the MAC and the SJC erred in 2011, and not due to any error of his own, Sanchez was denied relief. In fact, the opposite: Sanchez's sedulous prosecution of his appeal was the very reason he was denied relief. Relief was later granted to identically situated defendants and not to him, because his federal litigation was the litigation which clarified Massachusetts law. Mr. Robertson, Mr.

Jones, and Mr. Ortega all relied on Sanchez's federal litigation, as did Quincy Butler and his co-defendant Mr. Woods, for the automatic grant of new trial. Only Sanchez, being first, did not get the benefit of the "Sanchez Rule".

Mr. Sanchez brought this unfairness to the trial court's attention, asserting, pursuant to Rule 30, that justice was not done, and that he had never been heard on his Soares claim but only on his Batson claim. Sanchez offered in compromise his willingness to accept a Rule 25 verdict reduction as remedy for Soares/Batson error, hoping to assuage any concerns the Commonwealth had about retrying this case. The trial court agreed with Sanchez that justice had not yet been done, and offered the Commonwealth the same opportunity to retry Sanchez that should have been ordered in 2011; if the Commonwealth did not so elect or move for stay by date certain, the verdict would be reduced to manslaughter and Sanchez resentenced, given his consent. The Commonwealth argues Judge Wilkins abused his discretion in finding justice was not done.

The Commonwealth argues that the decision of the First Circuit finding Stage One Batson/Soares error in Sanchez's jury selection is not binding on Massachusetts in Mr. Sanchez's case.

This stunning assertion alone, given that the Circuit found Massachusetts unreasonably wrong on this issue IN Mr. Sanchez's case, requires correction from this Court. The Commonwealth further argues that the federal district court's finding of no Batson error at Stage Three precludes any finding by Judge Wilkins that there was Soares, as well as Batson error at Stage One, and that justice required Sanchez be given Massachusetts's Soares /Batson Stage One violation remedy, because he was blameless, and the error was the prosecutor's, the trial court's, the Appeals Court's, and SJC's in affirming error below. The question is sui generis and this Court should resolve it.

Sanchez is satisfied by either new trial or reduction in verdict. He is confident that at a second trial he would be acquitted, exonerated if he were judged by a jury of his peers, a jury not

cleansed by prosecutorial challenge of all young men of color.

IV. Statement Of The Issues Of Law And Whether The Issues Are Preserved

All issues which are recited in entirety in Part I. are fully preserved, except for the threshold question of whether double jeopardy considerations compel a ruling that because the Commonwealth did not move for stay and did not timely object under Rule 29 and the defendant's sentence is fully executed, his sentence may now be increased.

V. Argument

Sanchez's argument is incorporated in Part I., ante, and is less than ten pages and fewer than 2000 words.

Reasons For Direct Review

There appears to be necessity for this Court to again specifically hold that a trial judge may reduce a verdict for injustice unrelated to trial evidence and instructional error. This question arises in multiple contexts. In illustration, prior to the decision of the Supreme Court in Lafler v. Cooper, 566 U.S. 156 (2012), a

defendant aggrieved by injustice in the plea-bargaining process had no remedy so long as he received a fair trial. Following Lafler, a defendant can now complain about constitutional violation in the plea-bargaining process, even when his trial was fair. A defendant could, for instance, claim injustice in the constitutional error which resulted in the lack of opportunity to plead to a lesser included offense. The remedy for that error, if shown, could quite obviously be a reduction in verdict correcting the error in the plea process, pursuant to Rule 25, not a grant of new trial under Rule 30; the hypothetically defendant has already been fairly tried. This is only one example of why Rule 25 must be, and has been, read broadly as a tool by which injustice can be corrected at the trial level. There are many injustices, not Stage One Batson/Soares error alone, not related to trial evidence or instructional error, and this Court needs to affirm the equitable and rule-based power of the trial court to afford relief through Rule 25. The power to afford relief of course

must be exercised sparingly, but sparingly is not the same as never.

Second, this Court needs to hold that just as a defendant must seek a stay if aggrieved by a trial court's sentence, so too must the Commonwealth. The Court should also hold that if the Commonwealth does not seek a stay when claiming an illegal sentence is imposed, double jeopardy principles bar taking away a defendant's freedom later, even if that freedom was granted in error, so long as the imposed sentence is fully executed.

Finally, this Court should not penalize defendants for assiduously pursuing appeal. A jurisprudence which incentivizes defendants to delay litigation so that other defendants go first and later defendants get the benefit of the first defendant's litigation while the first defendant does not, is a jurisprudence which incentivizes appellate delay. Identically situated defendants should be treated identically. Sanchez should not get less, have a greater burden, because he filed briefs faster than the others. Otherwise both actual injustice

and the appearance of injustice results, and encourages disrespect for the rule of law.

Respectfully submitted,

Dated: July 5, 2019

/s/ Ruth Greenberg

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Certificate of Service

I, Ruth Greenberg, certify that two copies have been sent first-class mail on this day to:

Suffolk County District Attorney's Office
One Bulfinch Place
Boston, MA 02114

Dated: July 5, 2019

/s/ Ruth Greenberg
Ruth Greenberg

Certificate of Compliance

I, Ruth Greenberg, certify that this Request for Leave to Obtain Direct Appellate Review complies with the Rules of Appellate Procedure as to page length and word count; I counted the pages and the words. This application is late-filed and incorporated within the application is a request to file late and reason therefore; it is filed in response to the Commonwealth's blue brief.

Dated: July 5, 2019

/s/ Ruth Greenberg

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COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2019-P-0146

COMMONWEALTH OF MASSACHUSETTS,
Appellant

v.

DAGOBERTO SANCHEZ,
Defendant-Appellee

BRIEF FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY

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STATEMENT OF THE ISSUES

I. Whether the motion judge erred in determining the defendant was entitled to relief pursuant to Mass. R. Crim. P. 30(b) because of a federal court's determination that this Court had erred in applying federal law regarding the exercise of peremptory challenges where (a) the defendant was estopped from litigating the issues of error and prejudice because of the prior state and federal adjudications; (b) the motion judge was bound to follow this Court's holding that there was no error and not that of the federal court; (c) the motion judge ignored that the federal court had made a factual determination after an evidentiary hearing that the defendant had not suffered prejudice from any purported error; and (d) the motion judge reduced the verdict rather than grant a new trial.

II. Whether the motion judge erred in reducing the jury's verdict from second degree murder to manslaughter pursuant to Mass. R. Crim. P. 25(b)(2) where that reduction had nothing to do with the weight of the trial evidence but instead was based on the "conflict" the motion judge perceived between the decision of this Court and that of the First Circuit.

STATEMENT OF THE CASE

This is the Commonwealth's appeal from an order of a justice of the Suffolk Superior Court (Wilkins, J.) reducing the verdict, from second-degree murder to manslaughter, of the defendant, Dagoberto Sanchez.

A. The Trial Court: Indictment, Trial, & Conviction

On August 5, 2005, a Suffolk County grand jury returned indictments charging the defendant with: second degree murder, in violation of G.L. c. 265, § 1; and illegal possession of a firearm, in violation of G.L. c. 269, § 10(h) (CA.3-4, 7).[1]

On September 25, 2006, the defendant's trial began before the Honorable Thomas E. Connolly ("the trial judge") and a jury (CA.9-10). On October 6, 2006, the jury returned guilty verdicts on murder in the second degree and illegal possession of a firearm (CA.10). On October 21, 2006, the trial judge sentenced the defendant to a term of life with

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[1] References to the Commonwealth's appendix will be cited as (CA.[page]). References to the transcript of the July 11, 2018, non-evidentiary hearing on the defendant's post-conviction motion will be cited as (Tr.MNT:[page]). References to the transcript of the November 30, 2018, bail hearing will be cited as (Tr.Bail:[page]). References to the transcript of the December 10, 2018, sentencing hearing will be cited as (Tr.Sent:[page]).

the possibility of parole after fifteen years on the second-degree murder indictment, and a concurrent two-year house of correction term on the firearm indictment (CA.11).

B. The Massachusetts Appellate Courts.

On October 12, 2006, the defendant filed a notice of appeal from his convictions (CA.11). On August 25, 2008, his direct appeal entered in this Court. On April 1, 2011, this Court affirmed his convictions. *Commonwealth v. Sanchez* (*Sanchez I*), 79 Mass. App. Ct. 189, 190 (2011) (reproduced *infra* at pp. 68-72). On June 29, 2011, the Supreme Judicial Court denied the defendant's petition for further appellate review. *Commonwealth v. Sanchez* (*Sanchez II*), 460 Mass. 1106 (2011). On October 11, 2011, the United States Supreme Court denied the defendant's petition for a writ certiorari. *Sanchez v. Massachusetts* (*Sanchez III*), 565 U.S. 948 (2011).

C. The Federal Courts.

On May 23, 2012, the defendant petitioned for a writ of habeas corpus from the United States District Court for the District of Massachusetts. *Sanchez v. Roden* (*Sanchez IV*), No. 12-10931-FDS, 2013 U.S. Dist. LEXIS 19914, at *6 (D. Mass. 2013) (reproduced *infra* at

pp. 73-79). On February 14, 2013, the district court denied the petition. *Sanchez IV*, No. 12-10931-FDS, 2013 U.S. Dist. LEXIS 19914, at *18.

On May 28, 2014, following the defendant's appeal of the denial of his habeas petition, the Court of Appeals for the First Circuit vacated that denial and remanded the case to the district court for an evidentiary hearing. *Sanchez v. Roden* (*Sanchez V*), 753 F.3d 279, 309 (1st Cir. 2014) (reproduced *infra* at pp. 80-102).

On February 4, 2015, following an evidentiary hearing at which the trial prosecutor testified, a judge of the district court denied the petition for habeas corpus. *Sanchez v. Roden* (*Sanchez VI*), No. 12-10931-FDS, 2015 U.S. Dist. LEXIS 13207, at *43 (D. Mass. 2015) (reproduced *infra* at pp. 103-117).

On December 7, 2015, following the defendant's appeal from the district court's second denial of the habeas petition, the First Circuit affirmed that second denial. *Sanchez v. Roden* (*Sanchez VII*), 808 F.3d 85, 86 (2015) (reproduced *infra* at pp. 118-128).

D. The Trial Court: Post-Conviction Proceedings.

On January 10, 2018, the defendant filed a "Motion For New Trial/Reduction In Verdict, And/Or Relief From Unlawful Sentence" ("the

defendant's motion") (CA.12, 16-134). On May 24, 2018, the Commonwealth filed an opposition to the defendant's motion (CA.12, 135-173). On July 11, 2018, a non-evidentiary hearing was held on the defendant's motion before the Honorable Douglas H. Wilkins ("the motion judge") (CA.12).

On August 30, 2018, the motion judge issued a written order and memorandum of decision (*infra* at pp. 53-67; CA.12). The motion judge's order ("the order") was that "the court grants the defendant's Motion for a New Trial. The court reduces the sentence to manslaughter, unless, by October 10, 2018, the Commonwealth files a notice of intention and request to retry the murder indictment." (*infra* at p. 67).

On September 17, 2018, the Commonwealth filed a notice of appeal from the order (CA.13, 177). On November 7, 2018, that appeal entered in this Court (as No. 2018-P-1541). On November 13, 2018, the defendant filed a motion to stay his appeal pending the outcome of further proceedings in the trial court. On November 14, 2019, this Court allowed that motion.

On November 30, 2018, a bail hearing was held before the motion judge (CA.13). On that same date, the motion judge scheduled a sentencing hearing for December 10, 2018 (CA.13).

On December 10, 2018, a sentencing hearing was held before the motion judge (CA.14). On that date, the motion judge reduced the defendant's verdict from murder in the second degree to manslaughter, and resentenced the defendant on that indictment to a state prison term of fifteen years to fifteen years and one day, over the Commonwealth's objection (CA.14).

On December 21, 2018, the Commonwealth filed a notice of appeal from the motion judge's reduction of the verdict and resentencing (CA.14, 178). On January 25, 2018, that appeal entered in this Court (as No. 2019-P-0146).

On February 13, 2019, the Commonwealth filed a motion to consolidate its two appeals (Nos. 2018-P-1541 and 2019-P-0146). On February 15, 2019, this Court allowed the motion to consolidate. The consolidated appeals are now before this Court for resolution.

STATEMENT OF FACTS

A. The Trial Court: Trial Proceedings.

In September 2006, during jury empanelment on his trial, the defendant objected to the Commonwealth's exercise of its twelfth peremptory challenge as constituting a pattern of excluding young black men. *Sanchez I*, 79 Mass. App. Ct. at 191. The trial judge explicitly finding that the defendant had not made a sufficient showing of a solely race-based pattern of exclusion, and therefore did not require the prosecutor to provide an explanation for the twelfth challenge. *Id.* at 191-192.

At trial, the defendant's approach was to admit that he had shot the victim during a fight, but to assert that he had done so in defense of himself and a relative. *Id.* at 189-190. The jury convicted the defendant of second degree murder and possession of a firearm. *Id.*

B. The Massachusetts Appellate Courts.

On direct appeal, the defendant, *inter alia*, claimed that the prosecutor had exercised peremptory challenges in a racially discriminatory way. *Sanchez I*, 79 Mass. App. Ct. at 190. Specifically, he claimed that the trial judge's failure to find a pattern of improper race-based challenges and his consequent failure to require an explanation from the prosecutor for his twelfth peremptory challenge was error under both

the State and Federal Constitutions. *Id.* at 191. Analyzing the claim under article 12, this Court held that there was adequate record support for the trial judge's determination that the defendant had not established a pattern of discrimination, and therefore that there was no error in the failure to request an explanation for the challenge.[2] *Id.* at 191 n.8, 191-193. The Supreme Judicial Court and United States Supreme Court denied any further appellate review. *Sanchez II*, 460 Mass. at 1106; *Sanchez III*, 565 U.S. at 948.

C. The Federal Courts.

1. District court: denial of habeas relief.

The defendant's federal habeas petition[3] was based on his claim that the prosecutor's exercise of peremptory challenges was in violation of the equal protection clause. *Sanchez IV*, 2015 U.S. Dist. LEXIS 13207 at *1, *6-*7. The district court denied the petition on February 14, 2013, finding that the Appeals Court "reached a conclusion that was consistent with federal law." *Id.* at *18.

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[2] The defendant also challenged the trial judge's jury instructions. *Sanchez I*, 79 Mass. App. Ct. at 190. The Appeals Court found no error in those instructions, *id.* at 194-196. The jury instructions are not at issue in the instant proceedings.

[3] See 28 U.S.C. § 2254.

2. First Circuit: remand for evidentiary hearing.

After reviewing the defendant's appeal from the denial of his habeas petition, the First Circuit Court of Appeals held that this Court had "unreasonably applied clearly established federal law" by "fail[ing] to consider all of the circumstances" in analyzing whether the defendant had raised an inference that the prosecutor had used peremptory challenges to exclude jurors based on race. *Sanchez V*, 753 F.3d at 290, 291, 299, 298-300. Put differently, the First Circuit reasoned that this Court had unreasonably applied the so-called "first *Batson* prong." *Id.* at 300; *Batson v. Kentucky*, 476 U.S. 79 (1986) The First Circuit ultimately concluded that the record on appeal was "sufficient to permit an inference" that the Commonwealth's twelfth peremptory challenge had been motivated by race, that the first prong of *Batson* had been satisfied, and that "the prosecutor should have been required to articulate a race-neutral reason" for that challenge. *Id.* at 307.

The First Circuit noted, however, that the record before it was insufficient to determine whether, in fact, the challenge was racially motivated. *Id.* Because only a racially motivated challenge violates *Batson*, and because the record was insufficient to determine anything

more than that the first prong of *Batson* had been satisfied, the First Circuit remanded the case to the district court for an evidentiary hearing "to complete the *Batson* inquiry." *Id.* at 308. The First Circuit explained that only when all three prongs of *Batson* have been satisfied is there presumptive prejudice because only then has a peremptory challenge been shown to have been racially motivated in fact. *Id.* at 307.

3. District court redux: the evidentiary hearing.

On remand, in 2014, the district court conducted an evidentiary hearing at which the trial prosecutor testified. *Sanchez VI*, No. 12-10931-FDS, 2013 U.S. Dist. LEXIS 19914 at *3. Based upon that testimony, the district court judge found that the Commonwealth had satisfied its burden under the second prong of *Batson* to provide a facially valid race-neutral explanation (age) for the twelfth peremptory challenge. *Id.* at *21-*23. The district court judge found credible that age, not race, was in fact the reason for the challenge, and thus held that the defendant had failed to meet his burden of persuasion under the third prong of *Batson* to show that the twelfth peremptory challenge had been exercised discriminatorily. *Id.* at *23-*24, *43. The defendant's habeas petition was denied. *Id.* at *43.

4. First Circuit redux: habeas denial affirmed.

On appeal, the First Circuit affirmed the denial of the habeas petition. *Sanchez VII*, 808 F.3d at 86. In so doing, the First Circuit concluded that "the district court did not abuse its broad discretion as fact-finder on matters of credibility in concluding that [the defendant] has not proven that there was racial discrimination" in the exercise of the peremptory challenge. *Id.* at 93.

D. The Trial Court: Post-Conviction Proceedings.

1. The defendant's motion.

The defendant's post-conviction filing in the trial court was styled as a "Motion for New Trial/Reduction in Verdict, and/or Relief From Unlawful Sentence" ("the defendant's motion") (CA.16). The defendant's motion requested "that he either be granted a new trial or reduction in verdict" because of the inconsistency between (a) the Massachusetts Appeals Court conclusion that there was no first-step *Batson* error and (b) the First Circuit's conclusion that there was a first-step *Batson* error but no *Batson* violation (CA.18-22). The defendant's claim amounted to this: if this Court had "correctly" (CA.19) determined in the first instance that a first-step *Batson* error had occurred (as the First Circuit subsequently did), then the defendant would have been entitled to "the

automatic grant of a new trial" because he purported a new trial to be "*the* post-appeal remedy" in Massachusetts (CA.18) (emphasis added).

2. The Commonwealth's opposition.

The Commonwealth's opposition argued that there was nothing "inextricably contradictory" about the different results reached by this Court and the First Circuit (CA.140,). "That the federal court concluded that there was a first-step *Batson* error does not permit the defendant to revisit the state court appellate process which, after exhaustion, concluded that there was no error." (CA.140). The Commonwealth pointed out that, in Massachusetts, an evidentiary hearing is a permissible method of addressing a first-step *Batson* error, the defendant received that evidentiary hearing, and the conclusion was that the challenge at issue was not in fact discriminatorily motivated and therefore the defendant was not prejudiced (CA.141). Finally, the Commonwealth noted that both the state and federal courts had reviewed the jury selection process and reached the same conclusion: that there had been no discriminatory exercise of a peremptory challenge (CA.142).

3. The motion judge's rulings.

In his written memorandum of decision and order, the motion judge concluded that despite the prior proceedings in this Court and federal court, "[n]o court has adjudicated [the defendant's] remedial rights under the state constitution" (*infra* at p. 55). The motion judge reasoned that the First Circuit's conclusion that, as a matter of federal law, the trial judge erred in applying the first step of the *Batson* analysis, necessarily meant that this Court had also erred in failing to identify such error under the state constitution because the analysis is the same under state and federal law (*infra* at p. 56). Thus, the motion judge reasoned, while the defendant had received a "federal remedy" (*infra* at p. 54) for that error, he had not received a state remedy (*infra* at p. 55). The motion judge then ruled that, pursuant to pursuant to *Commonwealth v. Jones*, 477 Mass. 307 (2017), the state remedy for the first-step error was a new trial, and therefore that the defendant was entitled to a new trial pursuant to Mass. R. Crim. P. 30(b) (*infra* at pp. 55-58).

Notwithstanding his conclusion that Rule 30(b) required the defendant receive a new trial, the motion judge then relied upon Mass. R.

Crim. P. 25(b)(2) to "extend[] to the Commonwealth the opportunity to choose" (*infra* at p. 66) between retrying the defendant for murder or having the verdict reduced to manslaughter and the defendant resentenced (*infra* at p. 67). The Commonwealth elected to accept neither option proffered by the motion judge, and instead filed a notice of appeal (CA.13).

The motion judge then reduced the verdict from second degree murder to manslaughter under Rule 25(b)(2) and resentenced the defendant (CA.14). The Commonwealth objected in a written memorandum in which it reiterated to the motion judge the inapplicability of *Jones*, the conclusive effect of the federal court's determination that there was no prejudice, and the inapplicability of Rule 25(b)(2) (CA.174-176).

SUMMARY OF ARGUMENT

Peremptory challenges may not be used to exclude a potential juror based upon that juror's membership in a discrete group.[4] *Batson*, 476 U.S. at 84-88 (impermissible under the equal protection clause);

[4] Under Massachusetts law, the "discrete groups" protected are those defined by sex, race, color, creed or national origin. *Soares*, 377 Mass. at 488-489 & 488 n.33.

Commonwealth v. Soares, 377 Mass. 461, 486-488 (1979) (impermissible under art. 12). The prohibited and unconstitutional act, for which prejudice is presumed, is the actual discriminatory exercise of a peremptory strike. *E.g.*, *Batson*, 476 U.S. at 95, 98; *Soares*, 377 Mass. at 486, 488.

Under both federal and state law there is a three-step inquiry to determine whether a peremptory challenge was exercised discriminatorily. The first step requires the challenging party to overcome the presumption that a peremptory strike is proper by making a prima facie case that the strike may have an improper motive.[5] *E.g.*, *Batson*, 476

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[5] Massachusetts appears to align with federal law in viewing the prima facie showing as not an onerous one. *Compare Jones*, 477 Mass. at 321 (first-step burden is not "terribly weighty"), *with Aspen v. Bissonnette*, 480 F.3d 571, 574-575 (1st Cir. 2007) (first-step burden is not of persuasion, but to produce evidence sufficient for an inference of discrimination).

Notwithstanding, the Supreme Judicial Court's recent jurisprudence has repeatedly articulated that the challenger's first-step burden to rebut the presumption that a peremptory is proper requires a showing that "it is likely that individuals are being excluded" for an impermissible purpose. *Commonwealth v. Ortega*, 480 Mass. 603, 606 (2018); *accord Commonwealth v. Robertson*, 480 Mass. 383, 391 (2018); *Commonwealth v. Lopes*, 478 Mass. 593, 598 (2018); *Commonwealth v. Oberle*, 476 Mass. 539, 545 (2017); *Commonwealth v. Issa*, 466 Mass. 1, 8-9 (2013).

The use of the word "likely" is potentially problematic, as the United States Supreme Court has held unconstitutional a requirement

U.S. at 97-98; *Soares*, 377 Mass. at 489-490. If that prima facie showing is made, the burden shifts to the striking party to justify the peremptory challenge with a non-discriminatory reason for the challenge. *E.g.*, *Batson*, 476 U.S. at 97-98; *Soares*, 377 Mass. at 491. At the third step, the judge must evaluate the proffered non-discriminatory reason to determine whether it is an adequate and genuine, or whether the strike was in fact exercised discriminatorily. *E.g.*, *Batson*, 476 U.S. at 97-98; *Soares*, 377 Mass. at 491.

The motion judge erred first in concluding that the "conflicting" decisions in this Court in *Sanchez I* and the First Circuit in *Sanchez V* justified Rule 30(b) relief. Those decisions were not conflicting, but rather preclusive. This Court determined that there was no first-step error, which bound the judge, and the defendant was estopped from relitigating the issue of prejudice as the federal court had already determined that he was not prejudiced by whatever error occurred.

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that a party challenging a peremptory strike show (at the first step of the analytical framework) that the strike was "more likely than not" based on an impermissible ground. *Johnson v. California*, 54 U.S. 162, 168 (2005); *see also Aspen*, 480 F.3d at 575-576 (error to equate "inference" of discrimination required by first step of analysis with discrimination as the "likely" reason for the challenge); *cf. Jones*, 477 Mass. at 322 (recognizing holdings in *Johnson* and *Aspen*, but failing to address the Court's own case law that employs "likely").

The motion judge compounded that error by privileging the First Circuit interpretation of federal law over this Court's, yet ignoring its conclusion that there was not an actual discriminatory exercise of a peremptory challenge. Without an improper exercise of a peremptory challenge by the prosecutor, the defendant could not have suffered prejudice. And, unlike in *Jones*, there is no need to speculate about the potential for prejudice from any error allegedly made by the trial judge. An evidentiary hearing took place, a judge assessed the credibility of witnesses, and that judge found that any prima facie inference of impropriety had been superseded or rebutted, and therefore that the peremptory challenge was not exercised discriminatorily and the defendant was not prejudiced. Moreover, under Rule 30(b), the only remedy the motion judge could employ was a new trial; the motion judge could not reduce the jury's verdict.

The motion judge further erred by attempting to justify his reduction of the verdict under Rule 25(b)(2). Any reduction pursuant to Rule 25(b)(2) required a weighing of and connection to the trial evidence. The motion judge undertook no such weighing, and indeed explicitly

based his reduction on factors entirely unconnected to the trial evidence, and therefore his use of Rule 25(b)(2) was illegal.

ARGUMENT

I. THE MOTION JUDGE ERRED BY DETERMINING THAT RULE 30(B) JUSTIFIED RELIEF BECAUSE THE ISSUES OF ERROR AND PREJUDICE HAD BEEN CONCLUSIVELY LITIGATED, THE MOTION JUDGE WAS BOUND BY THIS COURT'S DETERMINATION THAT NO FIRST-STEP *BATSON* ERROR HAD OCCURRED, THE FIRST CIRCUIT'S CONTRARY DETERMINATION WAS NOT CONTROLLING, BECAYSE THERE WAS NO IMPROPER PEREMPTORY CHALLENGE, AND THE DEFENDANT HAD NOT SUFFERED ANY PREJUDICE.

The motion judge's first error was determining that Rule 30(b) provided the defendant with some entitlement to relief because the "conflict" between *Sanchez I*, 79 Mass. App. Ct. at 192-194, and *Sanchez V*, 753 F.3d at 298-300, meant that "justice may not have been done" (*infra* at pp. 55-61). This determination was erroneous because the defendant's claim of error during jury selection had been fully and finally adjudicated in both state court (through direct appeal) and federal court (through habeas review), and therefore any relitigation of that jury-selection error was estopped. The motion judge compounded his erroneous understanding of estoppel by incorrectly claiming that the federal determination of a first-step *Batson* error was binding on this Court,

but yet ignoring that the federal court had also determined as a factual matter that there was neither misconduct in jury selection nor prejudice to the defendant.

In deciding whether to allow a motion for new trial under Mass. R. Crim. P. 30 (b), "a rigorous standard must be applied and a judge may only allow such a motion 'if it appears that justice may not have been done.'" *Commonwealth v. Berrios*, 447 Mass. 701, 708 (2006) (quoting *Commonwealth v. DeMarco*, 387 Mass. 481, 482 (1982)); *Commonwealth v. Desrosier*, 56 Mass. App. Ct. 348, 354 (2002); *see also Commonwealth v. Comita*, 441 Mass. 86, 93 (2004) (motion for new trial should be granted only in extraordinary circumstances). When the Commonwealth appeals the allowance of a motion for new trial, an appellate court "consider[s] whether the judge committed a significant error of law or abuse of discretion in allowing the defendant's motion." *Commonwealth v. Kolenovic*, 471 Mass. 664, 672 (2015).

Here, the motion judge concluded that Rule 30(b) relief was appropriate because the First Circuit determined (in 2014 in *Sanchez V*) that the trial judge had erred by failing to find that the defendant had made an adequate first-step showing as a matter of Federal Constitu-

tional law (*infra* at pp. 55-58). The motion judge treated the First Circuit's interpretation of federal law as controlling, and therefore he reasoned the Appeals Court had erred as matter of Federal Constitutional law (in 2011 in *Sanchez I*) in failing to identify the error (*infra* at pp. 55-56). Because the motion judge viewed the state and federal approach to the first step of the *Batson* framework as identical,[6] even though the defendant had received a federal remedy (in the form of the evidentiary hearing in *Sanchez VI*), "[n]o court has adjudicated [the defendant's] remedial rights under the state constitution" (*infra* at p. 55). Finally, according to the motion judge, under *Commonwealth v. Jones*, 477 Mass. 307 (2017), the state remedy he would have received (had the Appeals Court identified the error in 2011) would have been a new trial (*infra* at p. 55).

A. The Motion Judge Erred By Ignoring That The State And Federal Litigation Fully Adjudicated The Defendant's Claims Of Error And Prejudice And Therefore Estoppel Applied To Any Attempt To Relitigate Those Issues.

The motion judge's first error was failing to recognize that the defendant was estopped from raising a challenge to his jury selection pro-

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[6] See note 5, *infra*.

cess or claiming that a jury-selection error was prejudicial because the defendant had fully and finally adjudicated those claims in both state and federal forums.

The resolution of the defendant's direct appeal (*Sanchez I*), the denial of further appellate review (*Sanchez II*), and denial of certiorari (*Sanchez III*) was a final adjudication of the issues raised in that direct appeal, including the claim of a first-step *Batson* error. This Court's rejection of the defendant's jury-selection claim was a binding determination that the motion judge, an associate justice of the Superior Court, was obligated to follow. The motion judge had no authority to not only ignore, but effectively overrule, this Court ("Sanchez should have prevailed on his initial appeal – to the Massachusetts Appeals Court." (*infra* at p. 55); ""[T]here is no question that the Massachusetts Appeals Court's decision in [*Sanchez I*] was legally erroneous under the law at the time." (*infra* at p. 55)).

Indeed, to the extent that the defendant believed that there was an error in this Court's application of federal law to his jury-selection claim, his avenue of complaint and relief was a writ of habeas corpus.

> "The whole history of the writ – its unique development – refutes a construction of the federal courts' habeas corpus

> powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations. . . . The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew."

Kaufman v. United States, 394 U.S. 217, 223-224 (1969) (quoting *Townsend v. Sain*, 372 U.S. 293, 311-312 (1963)). "The power of the federal courts on habeas corpus is not a grant of appellate review of state court decisions by federal district courts, but rather provides a mechanism for incarcerated offenders to challenge their incarcerations as violative of federal law." *State v. Gillispie*, 65 N.E.3d 791, 800 (Ohio Ct. App. 2016).

Here, after the defendant pursued (unsuccessfully) "the normal channels of review," *Kaufman*, 394 U.S. at 224, he utilized the habeas corpus process for the precise reason for which it exists. He then received precisely what he was entitled to via that process: the opportunity to "allege[] facts which, if proved, would entitle him to relief." *Id.* After alleging those facts, the First Circuit provided him the opportunity to present evidence. The defendant may disagree with the ultimate de-

nial of his petition, but he cannot complain that he did not receive from the federal courts all to which he was entitled.

Therefore at the conclusion of the habeas process, the Appeals Court had conclusively determined that there was no first-step *Batson* error, and the First Circuit affirmed that even if there had been an error, there was no prejudice because the peremptory challenge at issue was not in fact exercised discriminatorily. The defendant was thus estopped from relitigating the issue of prejudice in Superior Court. *See, e.g.*, *Fidler v. E.M. Parker Co.*, 394 Mass. 534, 540-547 (1985) (full and fair hearing in federal court precludes relitigation of same issue in state court).

Collateral estoppel, or issue preclusion, "guarantees that 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated by the same parties in any future lawsuit.'" *Commonwealth v. Cabrera*, 449 Mass. 825, 829 (2007) (quoting *Commonwealth v. Lopez*, 383 Mass. 497, 499 (1981)). As a factual issue, the district court determined that the defendant was not prejudiced by any *Batson* error, and that determination was affirmed by the First Circuit. While the party to the habeas proceeding was nomi-

nally different (Gary Roden, the Superintendent of the correctional institution in which the defendant was held), it is the Commonwealth of Massachusetts that is acting by operating that correctional institution and appointing that Superintendent. Accordingly, in both the state and federal proceedings the same parties are in interest: the defendant and the Commonwealth. *See State v. Williams*, 667 N.E.2d 932, 936 (Ohio 1996); *cf. Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 402-403 (1940) ("There is privity between officers of the same government in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government."). Collateral estoppel barred the defendant from relitigating of the issues determined in his habeas proceeding. *See, e.g.*, *Cabrera*, 449 Mass. at 829; *People v. Tenner*, 794 N.E.2d 238, 247-249 (Ill. 2002) (applying collateral estoppel to state-court relitigation of issue decided on habeas review); *Gillispie*, 65 N.E.3d at 802 ("Collateral estoppel can be invoked to preclude relitigation, in state court, of issues addressed in a federal district court in a habeas proceeding.").

B. The Motion Judge Erred By Claiming That The Federal Court Determination Was Binding As To The First-Step *Batson* Error While Simultaneously Ignoring That The Federal Court Also Determined That There Was No Prejudice, Which Precluded Any Relief.

After overlooking the preclusive effect of the full and final adjudication of the issues of error and prejudice in the state and federal courts, the motion judge erred further by selectively prioritizing the federal court's determination that there was a first-step *Batson* error, ignoring the corresponding federal determination that there was no prejudice from that error, and determining that this Court erred and the defendant was entitled to a remedy.

The motion judge's logic crumbles because it rests on the faulty premise that the federal determination in *Sanchez V*—that the trial judge had erred in the first step of the *Batson* analysis as a matter of federal law, and that this Court had therefore also erred in its application of federal law in *Sanchez I*—was somehow binding or controlling on this Court. It was neither: it was a federal court disagreeing with a state court in the appropriate application of federal law. "Though we always treat their decisions with deference, we are not bound by decisions of Federal courts except the decisions of the United States Su-

preme Court on questions of Federal law." *Commonwealth v. Montanez*, 388 Mass. 603, 604 (1983) (citing *Commonwealth v. Masskow*, 362 Mass. 662, 667 (1972)), *quoted with approval in Commonwealth v. Pon*, 469 Mass. 296, 308 (2014), *and Commonwealth v. McGowan*, 464 Mass. 232, 239 n.6 (2013); *accord Commonwealth v. Murphy*, 448 Mass. 452, 462 (2007) (citing *Commonwealth v. Hill*, 377 Mass. 59, 61 (1979)); *see also Gillispie*, 65 N.E.3d at 800 (habeas corpus power is not the power of appellate review of a state court decision).

Thus, the motion judge was wrong to treat the First Circuit's determination of a first-step *Batson* error as a binding, final determination that this Court had erred when it determined there had not been a first-step error. Surely, the First Circuit believed that this Court had erred, and indeed the First Circuit held that this Court's holding was "objectively unreasonable." *Sanchez V*, 753 F.3d at 300. But that holding does not mean that in fact this Court's decision in *Sanchez I* was incorrect (and by implication that the Supreme Judicial Court erred in failing to grant further appellate review). Unless and until the Supreme Court of the United States determines that this Court erred in applying federal law to the facts of the defendant's case, the controlling

law of this case in the Massachusetts courts is *Sanchez I*, where this Court held that there was no error in the jury selection process. *Sanchez I*, 79 Mass. App. Ct. at 191-193. The motion judge was bound by this determination that there was no error, and so he was without any authority to justify Rule 30(b) relief on an "error" that this Court had already determined was not an error.

But even assuming, *arguendo*, that there was some error, the defendant is only entitled to a remedy insofar as the defendant was prejudiced by that error (as opposed to being entitled to a remedy because of the error itself). Theoretically speaking, the Supreme Judicial Court has held that one approach to a first-step *Batson* error is that prejudice is "unlikely to be harmless" and therefore a new trial is justified. *Commonwealth v. Issa*, 466 Mass. 1, 11 n.14 (2013).[7] Alternatively, the

[7] The breadth of the "unlikely to be harmless" language is worth considering. In *Issa*, the Supreme Judicial Court cited to two cases to support the proposition that the prejudice from a first-step *Batson* error is "unlikely to be harmless." *Issa*, 466 Mass. at 11 n.14. In the first cited case, the first-step *Batson* error occurred after the prosecutor had struck two Hispanic jurors who were the only "minorities" in the entire venire. *Commonwealth v. Long*, 419 Mass. 798, 805 & n.8 (1995). In the second cited case, the first-step *Batson* error occurred after the prosecutor had struck "slightly over sixty-six percent of the black persons *in the venire*." *Commonwealth v. Futch*, 38 Mass. App. Ct. 174, 176 (1995) (emphasis added).

Court has also repeatedly "acknowledge[d] the constitutionally permissible option of remanding for an evidentiary hearing at which the Commonwealth would bear the burden of establishing a race-neutral justification for the challenge which would render the judge's error harmless." *Jones*, 477 Mass. at 326 n.1, *quoted with approval in Commonwealth v. Ortega*, 480 Mass. 603, 608 n.10 (2018). Indeed, "there might be circumstances in which remand is appropriate," notwithstanding that it may be the "disfavored" approach. *Ortega*, 480 Mass. at 608 n.10.

So, it is immediately apparent that the motion judge erred as a matter of law in concluding that the defendant would have certainly received a new trial from this Court had it determined, in *Sanchez I*, that

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Based upon the specific extent of the exclusion of particular jurors in those two cases, it might be reasonable to conclude that the first-step errors in those specific circumstances were unlikely to be harmless. But it seems dubious to extract from *Johnson* and *Futch* the general principle that *any* first-step *Batson* error is unlikely to be harmless. More dubious still is an appellate court's reliance on *Johnson* and *Futch* without, at the very least, an adequate record that permits the appellate court to determine with certainty the composition of the entire venire as compared to those individuals struck.

there had been a first-step *Batson* error.[8] The defendant might have, under a hypothetical approach to prejudice that the error was "unlikely to be harmless." *Issa*, 466 Mass. at 11 n.14. But he also might not have, and instead the Appeals Court could have hypothetically remanded for an evidentiary to resolve the issue of prejudice.

But this theoretical exercise is entirely unnecessary here because the constitutionally permissible evidentiary hearing took place, and the questions of whether there was a discriminatory exercise of a peremptory challenge and whether there was prejudice have been determined, with no need to speculate about what harm the defendant might have suffered. At that hearing, the prosecutor testified and was cross-examined, and his credibility was assessed by a judge. *Sanchez VI*, No. 12-10931-FDS, 2015 U.S. Dist. LEXIS 13207, at *3, *19. That judge ultimately found that whatever inference of discrimination had been raised regarding the peremptory challenge had been conclusively rebutted, and that the challenge was not, as a factual matter, exercised dis-

[8] The motion judge implicitly recognized this later in his memorandum, when he wrote that, had the Appeals Court recognized the first-step error, the defendant "*almost certainly* would have received a new trial" (*infra* at p. 56) (emphasis added).

criminatorily.[9] *Id.* at *43. Those conclusions were then affirmed by the First Circuit. *Sanchez VII*, 808 F.3d at 86.

Jones and *Issa* therefore have no application here: there is no need to speculate whether the trial judge's purported error was "unlikely to be harmless" because the District Court judge made a factual determination that there was no actual discriminatory exercise of the peremptory challenge and no prejudice. Indeed, the state and federal constitution prohibit the same act: the discriminatory exercise of a peremptory challenge. It is nonsensical, not to mention outside the range of reasonable alternatives, for the motion judge to grant the defendant a remedy on the bases of inferred misconduct that did not actually occur, and prejudice that the defendant did not, as a factual or legal matter, suffer.

Finally, after incorrectly determining that the defendant was entitled to Rule 30(b) relief, the judge compounded that error by ignoring the nature of the relief prescribed by that rule. Rule 30(b), by its plain

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[9] The motion judge displayed no deference to the fact-finding ability and conclusions of the District Court (*infra* at pp. 59-61). The motion judge's opinion that "the task of recreating the facts present during empanelment is daunting, if not impossible as a practical matter'" (infra at p. 59), is irrelevant. That "daunting task" was not only permissible, but it occurred.

language, only authorizes a judge to "grant a new trial." Instead, the motion judge reduced the verdict. The order must be reversed.

II. THE MOTION JUDGE HAD NO AUTHORITY TO EMPLOY RULE 25(b)(2) TO REDUCE THE JURY'S VERDICT FOR REASONS HAVING NOTHING TO DO WITH THE WEIGHT OF THE TRIAL EVIDENCE.

Having incorrectly concluded that Rule 30(b) provided the basis for some relief for the defendant, and then ignoring that Rule 30(b) relief is limited to the granting of a new trial, the motion judge went on to illegally reduce the jury's verdict from second degree murder to manslaughter under Mass. R. Crim. P. 25(b)(2) (*infra* at pp. 61-67). That reduction was impermissible because Rule 25(b)(2) only permits a judge to reduce a verdict based upon the trial evidence supporting the conviction, and not because of factors unconnected to the weight of the evidence.

A. Rule 25(b)(2) Provides Discretion To Reduce A Verdict, But Only Where That Reduction Is Grounded In The Trial Evidence, And Not For Unrelated Non-Evidentiary Concerns.

After the discharge of the jury following a guilty verdict, "the judge may on motion set aside the verdict and order a new trial, or order the entry of a finding of not guilty, or order the entry of a finding of

guilty of any offense included in the offense charged in the indictment or complaint." Mass. R. Crim. P. 25(b)(2). Review of a Rule 25(b)(2) reduction is "for abuse of discretion or other error of law." *Commonwealth v. Almeida*, 452 Mass. 601, 613 (2008) (citing *Commonwealth v. Millyan*, 399 Mass. 171, 188 (1987)). Discretion is abused when a "judge made a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives." *L.L. v. Commonwealth*, 470 Mass. 169, 185 n.27 (2014) (internal quotation and citation omitted).

The Rule 25(b)(2) touchstone is "'to ensure that the result in every criminal case is consonant with justice.'" *Commonwealth v. Almeida*, 452 Mass. 601, 613 (2008) (quoting *Commonwealth v. Woodward*, 427 Mass. 659, 666, 667 (1998)). The power, however, is circumscribed, both in the intended frequency of its application ("sparingly", *e.g.*, *Commonwealth v. Grassie*, 482 Mass. 1017, 1018 (2019)), and the scenarios to which that sparing application is appropriate.

"'A judge's discretion to reduce a verdict pursuant to rule 25(b)(2) is appropriately exercised where the weight of the evidence in the case, although technically sufficient to support the jury's verdict, points to a

lesser crime.'" *Commonwealth v. Grassie*, 476 Mass. 202, 214 (2017) (quoting *Commonwealth v. Rolon*, 438 Mass. 808, 821 (2003)); *accord Commonwealth v. Chhim*, 447 Mass. 370, 381 (2006); *Commonwealth v. Lyons*, 444 Mass. 289, 291-292 (2005); *Woodward*, 427 Mass. at 668-671. It may be used where the trial evidence on a particular element is minimal or absent, or where there was both trial error and evidentiary weakness. *See Almeida*, 452 Mass. at 613-614. But, as a fundamental matter, the prerequisite to any legal, legitimate exercise of Rule 25(b)(2) authority is an examination of the trial evidence.[10] *See, e.g.*, *Lyons*, 444 Mass. at 292 (identifying appropriate use of Rule 25(b)(2) discretion, all of which involve weight of trial evidence); *see also Woodward*, 427 Mass. at 668-669 (deference to *trial* judge who exercises Rule 25(b)(2) power

[10] A judge's exercise of Rule 25(b)(2) power should be guided by the same principles that guide the Supreme Judicial Court in deciding whether to exercise its power to reduce a first degree murder verdict pursuant to G.L. c. 278, § 33E. *E.g.*, *Commonwealth v. Keough*, 385 Mass. 314, 319 (1982). The factors that Court considers include the circumstances leading up to the murder, the specifics of the fatal altercation, the relationship of the parties, the involvement of drugs and alcohol, and the personal characteristics of the defendant. *Commonwealth v. Vargas*, 475 Mass. 338, 364-365 (2016) (citing *Commonwealth v. Colleran*, 452 Mass. 417, 431-432 (2008)). What is evident is that the inquiry focuses on the particular facts of the trial and the weight of that trial evidence.

because of *trial* judge's opportunity to have evaluated witnesses and trial evidence).

Consistent with the circumscription of Rule 25(b)(2) power, the case law is clear about the situations for which it is not available. If "the weight of the evidence is entirely consistent with [the jury's verdict], it is an abuse of discretion to reduce the verdict solely on factors unrelated to the weight of the evidence." *Rolon*, 438 Mass. at 822; *accord Lyons*, 444 Mass. at 292. A judge "is not justified" to reduce a verdict "based solely on factors irrelevant to the level of offense proved." *Rolon*, 438 Mass. at 822 (citing *Commonwealth v. Sabetti*, 411 Mass. 770, 780-781 (1992), and *Commonwealth v. Burr*, 33 Mass. App. Ct. 637, 640-644 (1992)), *quoted with approval in Lyons*, 444 Mass. at 292, *and Almeida*, 452 Mass. at 614. "In deciding a motion under [Rule 25(b)(2)], however, a judge is not to second guess the determination of the jury, nor to reduce a verdict, based on extraneous factors, where such a verdict would be inconsistent with the weight of the evidence." *Commonwealth v. Reavis*, 465 Mass. 875, 893 (2013); *accord Lyons*, 444 Mass. at 292.

B. The Motion Judge Abused His Discretion By Using Rule 25(b)(2) To Reduce The Verdict For Reasons Utterly Unconnected To The Trial Evidence.

Here, the motion judge abused his discretion by applying Rule 25(b)(2) to reduce the verdict for extraneous reasons wholly unrelated to the weight of the trial evidence: that the First Circuit had identified an error in jury selection that the Appeals Court had not.

The motion judge plainly stated that "the basis for the [reduction to manslaughter] is not that evidence did not support a Murder 2 conviction," but because the trial judge had failed to require the prosecutor to provide a reason for a peremptory challenge. (Tr.Sent.18). Thus, Rule 25(b)(2) is plainly inapplicable.

Indeed, the motion judge recognized that inapplicability, noting that the defendant's case "does not involve an error in jury instructions or disproportionality between the evidence and the second degree murder conviction," and that "the record likely rebuts any contention that the evidence does not support a second degree murder conviction" [11] (*infra* at pp. 63, 64).

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[11] At the sentencing, the motion judge reiterated that "the facts did warrant a jury verdict of Murder 2 as determined by our appeals court" (Tr.Sent:19).

Despite acknowledging that the law did not permit him to apply Rule 25(b)(2) in the instant situation, the motion judge emphasized language (*infra* at p. 64) from a footnote[12] in *Commonwealth v. Gilbert*, 447 Mass. 161 (2006):

> The rule [Rule 25(b)(2) accords judges three options, see Commonwealth v. Keough, 385 Mass. 314, 317-318 (1982), including the discretion to reduce a verdict to a conviction of a lesser offense, even where the evidence supports the verdict returned by the jury. See Commonwealth v. Gaulden, 383 Mass. 543, 552 (1981).

Gilbert, 447 Mass. at 169 n.9. According to the motion judge, this language provided him with the "authority to reduce the verdict in this case to manslaughter," and "certainly rebuts any notion that the court can do so only if the evidence fails to support the second degree murder conviction." (*infra* at p. 64).

The language neither provided the motion judge with the authority to do what he did, nor overcame the mandated connection between the weight of the trial and evidence and Rule 25(b)(2) relief.

First, the quoted language from *Gilbert* does nothing beyond restate the general principle that Rule 25(b)(2) can be applied notwith-

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[12] The motion judge's memorandum mistakenly cites footnote 7 in *Gilbert*. The language from which he quoted appears in footnote 9.

standing that the trial evidence is technically sufficient to support a conviction. Second, in *Gilbert* the trial judge reduced the verdict pursuant to Rule 25(b)(2) because of erroneous jury instructions that "d[id] not affect the lesser included offense that [wa]s supported by the evidence." *Gilbert*, 447 Mass. at 165, 169. That is, the verdict reduction was specifically calibrated against the prejudicial reach of the error and weight of the evidence. Here there was no such calibration because the motion judge reduced the verdict without any reference whatsoever to the weight of the evidence or the specific prejudicial reach of the error.

Third, the case to which *Gilbert* cited, *Commonwealth v. Gaulden*, 383 Mass. 543 (1981), involved a reported question asking whether a judge had authority under Rule 25(b)(2) "to reduce a conviction warranted by the evidence . . . even if the weight of the evidence (in the opinion of the trial judge) should have led to conviction of the lesser included offense." *Id.* at 545 n.1. So *Gaulden* is entirely unlike the defendant's case (where the motion judge attempted to reduce the verdict without any familiarity with, and for reasons unconnected to, the weight of the evidence) and *Gaulden* is entirely consistent with legal

precedent prohibiting a judge from using factors irrelevant to the level of offense proven in order to justify Rule 25(b)(2) relief.

Finally, by the motion judge's logic, Rule 25(b)(2) could be used to reduce a verdict for any reason that the judge deemed consonant with justice. Rule 25(b)(2)'s application is simply not so broad.

The motion judge's employment of Rule 25(b)(2) here to correct a perceived "injustice" between the outcomes of the defendant's state and federal post-conviction litigation contravened the bedrock principle that reduction of a verdict must be related to the weight of the evidence or the level of offense proved. It was, by definition, an abuse of discretion and error of law and the reduction must be reversed.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court reverse the motion judge's order insofar as it purported to grant the defendant a new trial, and to reverse the motion judge's order reducing the verdict from second degree murder to manslaughter.

Respectfully submitted
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ADDENDUM

28 U.S.C. § 2254. State custody; remedies in federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

* * * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

* * * *

G.L. c. 265, § 1. Murder defined

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

G.L. c. 269, § 10. Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device; punishment

* * * *

(h)(1) Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 shall be punished by imprisonment in a jail or house of correction for not more than 2 years or by a fine of not more than $500. Whoever commits a second or subsequent violation of this paragraph shall be punished by imprisonment in a house of correction for not more than 2 years or by a fine of not more than $1,000, or both. Any officer authorized to make arrests may arrest without a warrant any person whom the officer has probable cause to believe has violated this paragraph.

* * * *

G.L. c. 278, § 33E. Capital cases; review by supreme judicial court

In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence. For the purpose of such review a capital case shall mean: (i) a case in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder in the first degree; or (ii) the third conviction of a habitual offender under subsection (b) of section 25 of chapter 279.

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Mass. R. Crim. P. 25. Motion for required finding of not guilty

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(b) Jury Trials.

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(2) Motion After Discharge of Jury. If the motion is denied and the case is submitted to the jury, the motion may be renewed within five days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned, the judge may on motion set aside the verdict and order a new trial, or order the entry of a finding of not guilty, or order the entry of a finding of guilty of any offense included in the offense charged in the indictment or complaint.

* * * *

Mass. R. Crim. P. 30. Post conviction relief

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(b) New Trial. The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CRIMINAL ACTION
NO. 2005-10545

COMMONWEALTH

vs.

DAGOBERTO SANCHEZ

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL

On August 5, 2005, the defendant, Dagoberto Sanchez ("Sanchez"), was arraigned on one count of murder (G.L. c. 265, § 1) and one count of possession of a firearm without a FID card (G.L. c. 269, § 10(h)). He was convicted of second degree murder and unlawful firearm possession on October 6, 2006 and sentenced to life in prison on count I, with a concurrent two-year term on count II. He was unsuccessful on direct appeal. His federal habeas corpus proceedings are described below. The original trial judge has retired.

On January 10, 2018, Sanchez filed "Defendant's Motion for New Trial/Reduction in Verdict, and/or Relief from Unlawful Sentence" ("Motion"), which the Commonwealth opposed in writing on May 24, 2018. The Court heard argument on July 11, 2018. After consideration of the written and oral arguments, the Motion is **ALLOWED**.

BACKGROUND

Sanchez raised a challenge during empanelment under Batson v. Kentucky, 476 U.S. 79, 106 (1986) and Commonwealth v. Soares, 377 Mass. 461 (1979). The trial judge denied the Soares - Batson challenge on the ground that there was no prima facie evidence that the prosecution had exercised a racially-based peremptory challenge. The facts surrounding the Soares - Batson challenge and the trial court's treatment of it are fully set forth in Sanchez v. Roden, 753 F.3d 279,

284-288 (1st Cir. 2014). The court incorporates those facts by reference.

Sanchez raised the denial of his Soares – Batson challenge on direct appeal, but was unsuccessful in the Appeals Court and was not able to obtain further appellate review or certiorari. Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 191, rev. denied 460 Mass. 1106, cert denied, 132 S.Ct. 408 (2011). He then prevailed on the same issue in his habeas corpus petition in the First Circuit. Sanchez, 753 F.3d at 290. Sanchez met the high threshold for habeas corpus relief, the First Circuit said, because "[t]he MAC's treatment of Sanchez's Batson claim was more than clearly erroneous: it was objectively unreasonable in light of clearly established federal law. [citation omitted]. No fairminded jurist could come to any other conclusion based on the state of clearly established federal law at the time of the MAC's opinion." Id. at 300.[1] Applying the federal remedy for a Batson violation, the First Circuit remanded to the United States District Court for findings on stages 2 and 3 of the analysis, namely whether the prosecutor articulated a genuine and adequate race-neutral explanation for the peremptory challenge and whether the peremptory challenge in question was in fact racially motivated. On remand, the U.S. District Court ruled as a matter of fact that there was an adequate and genuine non-racial ground for the peremptory challenge and therefore denied habeas corpus relief. The First Circuit affirmed. Sanchez v. Roden, 808 F.3d 85 (1st Cir. 2015).

Soon afterwards, the SJC decided Commonwealth v. Jones, 477 Mass. 307, 319 (2017). In that case, acting under both the state and federal constitutions, the SJC recognized and restated the legal rules applied by the First Circuit in the Sanchez case. These principles had always been the law during the pendency of this case, including the trial in 2006. Johnson v. California, 545 U.S.

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[1] Sanchez, 753 F.3d at 299, was applying the following standard under federal habeas corpus law:

> [G]iven the level of deference required by the habeas statute, we may not grant habeas relief simply because we disagree with a state court's reasoning or feel that it reached an incorrect result. '[A]n unreasonable application of federal law is different from an incorrect application of federal law.' ... For us to find that a state court unreasonably applied federal law, its application 'must be "objectively unreasonable," not merely wrong; even "clear error" will not suffice.' ...

162, 168 (2005). Thus, under clear, preexisting law, Sanchez should have prevailed on his initial appeal - to the Massachusetts Appeals Court.

DISCUSSION

Under Mass. R. Crim. P. 30, this court may grant a new trial "at any time if it appears that justice may not have been done." Because the facts are adequately set forth in the written record, the court decided not to hold a full evidentiary hearing. See Commonwealth v. Bowen, 63 Mass. App. Ct. 579, 584 (2005). The parties did not object.

I.

The first question here is procedural: May Sanchez raise an issue under Mass. R. Civ. P. 30 that has been fully adjudicated not only in the federal courts, but also in the state system, albeit erroneously? Cf. Commonwealth v. Cabrera, 449 Mass. 825, 829-831 (2007) (application of issue preclusion in criminal context). Clearly, he cannot relitigate his federal claim, but the federal courts lack jurisdiction over state law questions arising under the Massachusetts constitution when asserted against state officials. Cf. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 97-103, 117-121 (1984). No court has adjudicated Sanchez's remedial rights under the state constitution.

Given controlling United States Supreme Court precedent since at least 2005, there is no question that the Massachusetts Appeals Court's decision in Sanchez's case was legally erroneous under the law at the time. Indeed, the First Circuit held that the decision was not only erroneous but "objectively unreasonable in light of clearly established federal law." Sanchez, 753 F.3d at 300. Relying in part on Sanchez, the Supreme Judicial Court in Jones, 477 Mass. at 319, now expressly recognizes the principles definitively articulated in Sanchez. Nothing in Jones suggests that the SJC was adopting a new rule. Had the Appeals Court applied clear, existing law correctly on Sanchez's appeal, he would have been entitled not just to a remand for findings by the trial judge, but to a new jury trial, as Jones holds.

The current Motion therefore does not, as the Commonwealth contends (Mem. at 6) arise out of "the legitimate byproduct of different judicial decisionmakers arriving at different results." Nor can the Commonwealth argue that "it was the federal court who 'messed up' and the Massachusetts court who got it right . ..." Sanchez has unquestionably shown that he should have prevailed in the Massachusetts Appeals Court on the first step of Soares - Batson analysis under clearly established federal law – and by extension, under the state constitution as well, which tracks the federal constitution on Soares - Batson challenges. Jones, 477 Mass. at 319.

Events after the initial appeal – including subsequent federal case law – may demonstrate that the defendant did not have a genuine opportunity on direct appeal to raise the issue he presses under Rule 30. Commonwealth v. Burkett, 396 Mass. 509, 512 (1986). Cf. Commonwealth v. Marley, 396 Mass. 433, 437 (1985) (case which merely clarified the meaning of a statute did not announce new legal principles and is applied retroactively). Burkett, 396 Mass. at 512, held:

> Because the defendant's trial and direct appeal both occurred prior to the Sandstrom [v. Montana, 442 U.S. 510 (1979)] decision, he did not have a 'genuine opportunity' to raise his constitutional claim on those occasions. ... The defendant is thus entitled to raise this issue for the first time in a motion for new trial under Mass. R. Crim. P. 30.

This approach applies with particular force here, where the defendant pressed the Soares - Batson issue at every opportunity and was, himself, the party who first prevailed in a decision holding unconstitutional the Commonwealth's "it is likely" test for a Batson stage 1 analysis. Sanchez, 753 F.3d at 300.

Had the Massachusetts courts decided Sanchez's appeal correctly in the first instance under settled federal law, Sanchez would have been in the position of the defendant in Commonwealth v. Jones and almost certainly would have received a new trial. The SJC itself drew the parallel between the two cases. Jones, 477 Mass. at 322-323 ("In many respects, this case is similar to Sanchez, in which the First Circuit concluded that the judge abused his discretion in failing to find

that the defendant had made a prima facie showing of impropriety in a peremptory strike."). Because his state appeals were improperly rejected, he had to rely on federal habeas corpus, placing himself within the federal remedial scheme. His bad luck in not getting the same relief in the Massachusetts appellate courts that Jones received is, of course, part of his Rule 30 Motion, along with the argument that luck should not control in important matters like this. Because the Rule 30(b) Motion is the defendant's first "genuine opportunity" to press his Soares challenge under the correct legal rule, justice may not have been done in the first appeal; he is entitled to the benefit of Jones.

The court has considered other approaches. Under Rule 30, the effect of subsequent precedent upon a final conviction typically turns upon two rules:

> Two sets of rules, relevant to the cases before us, address those circumstances where a new trial will be granted and express the balance we have struck between the needs of finality and the claims of substantial justice. One set of rules concerns those instances in which a newly enunciated doctrine will be applied retroactively so as to reopen adjudications that may have been entirely regular at the time they were made. The other set concerns those instances in which a defendant is foreclosed from raising an objection because, while he might have raised it earlier and thus had it resolved during the normal course of adjudication, he does not raise it until after the regular process has already run its course. This is the doctrine of waiver. Both sets of rules invoke a similar notion: How new and surprising is the doctrine whose benefit the defendant now seeks when he asks for a new trial?

Commonwealth v. Amirault, 424 Mass. 618, 637-638 (1997). This formulation does not address the unusual situation in this case. Perhaps Jones set forth "a newly enunciated doctrine" for Rule 30 purposes, but it applied settled law and so would not appear to fall within the first rule. To be sure, the Appeals Court's adjudication was not "entirely regular" in the sense that is unreasonably departed from clearly established federal precedent to the point where habeas corpus relief was granted. There may be some leeway to apply the first rule here, but "entirely regular" may not encompass a duly issued decision that was incorrect when made.

By its terms, the second rule does not apply either. Sanchez most certainly did raise the

Soares - Batson issue at every opportunity earlier. In fact, he did everything within his power to obtain an initial adjudication that would warrant finality. Without doubt, he did not waive this issue.

The "notion" cited in Amirault is key: "How new and surprising is the doctrine whose benefit the defendant now seeks when he asks for a new trial?" At the time of Sanchez's initial state appeal, the key doctrine was at odds with at least the language of the controlling Massachusetts cases.[2] For that reason, the Massachusetts Appeals Court easily found SJC precedent supporting its decision to affirm Sanchez's conviction. The SJC did not view the matter as warranting further appellate review. Yet, as the First Circuit viewed it and as Jones now views it, the doctrine should not be new or surprising at all; it has been controlling law since at least the Johnson decision in 2005.

The court believes that it must look only to the Massachusetts precedent that, in fact, governed Sanchez's first appeal. From that perspective, Jones was "new" and "surprising." That is also the fairest and most sensible conclusion. This alternative analysis leads to the same conclusion as Burkett. Sanchez may claim the benefit of Jones in his Rule 30(b) Motion.

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[2] In 2016, a pre-Jones publication expressly cautioned the bench and the bar about the conflict between controlling federal law and the articulation of Soares, step one, in the Massachusetts case law:

> A word of caution: it is doubtful that the traditional Massachusetts formulation of this rule (race-based exclusion of jurors "is likely") conforms to the Johnson test (exclusion "may have been motivated" by race). Sanchez v. Roden, 753 F.3d 279 (1st Cir. 2014). Compare Commonwealth v. Issa, 466 Mass. 1, 9 (2013), quoting Commonwealth v. Curtiss, 424 Mass. 78, 80 (1997) (prima facie case requires "a showing that '[1] there is a pattern of excluding members of a discrete group and [2] it is likely that individuals are being excluded solely on the basis of their membership within this group'" (emphasis added)), with Johnson v. California, 545 U.S. at 168, 173 ("California's 'more likely than not' standard is at odds with the prima facie inquiry mandated by Batson.").

Lauriat and Wilkins, JJ., Massachusetts Jury Trial Benchbook (Flaschner Judicial Institute, 3rd Ed. 2016), § 3.3.3.6(b), p. 129.

The Massachusetts Guide to Evidence (Flaschner Judicial Institute) did not address this issue until the 2017 edition, when it added § 1116. While its text speaks in terms of "some evidence that the challenge is based" on a juror's group characteristics (§ 1116(b)(1)), the comments still refer to "whether it was 'likely' that peremptory challenges were used to exclude members of a protected class." Massachusetts Guide to Evidence, § 1116(b)(1) NOTE Subsection (b)(1), quoting Commonwealth v. Garrey, 436 Mass. 422, 428 (2002).

II.

In the unusual circumstances of this case, Jones leaves no doubt that the trial judge erred in rejecting Sanchez's Soares – Batson challenge without conducting further inquiry, under both the state and federal constitutions. Whether that entitles Sanchez to a new trial raises more difficult questions, even putting aside for the moment the equitable considerations discussed in part III, below.

While the Massachusetts and the federal constitutions "each have a different focus, they lead to the same conclusion" that race-based peremptories are unlawful. Jones, 477 Mass. at 319, and cases cited. The federal and state courts do, however, have different approaches to remedy. The federal courts try to look back to the empanelment and decide whether the peremptory challenge would have been disallowed as a matter of fact. Sanchez, 753 F.3d at 307. The First Circuit thus granted Sanchez a remedy in the form of remand to the United States District Court for determination under steps two and three of Soares - Batson. By contrast, Massachusetts has presumed prejudice from a first-step Soares violation and has reversed the conviction, remanding for a new trial, "on the ground that 'the conditions of the empanelment . . . cannot be easily recreated.' Soares, 377 Mass. at 492 n.37." Jones, 477 Mass. at 326 and n.31 ("a Soares - Batson error constitutes structural error for which prejudice is presumed.").

There are many reasons why, particularly in this case, the task of recreating the facts present during empanelment is daunting, if not impossible as a practical matter. The First Circuit "acknowledge[d] . . . the difficulties in making a Batson determination on a cold record many years following the original jury selection." Sanchez, 808 F.3d. at 93. Judge Thompson's concurrence expressed even greater concern: "I am left with a queasy confidence in the decision we reach today" and "The facts in this record certainly raise the judicial antennae. But given the standard of review, I can do no more than register my discomfort at having to affirm the denial of habeas relief even

though the best evidence as to whether or not a Batson violation occurred – the prosecutor's contemporaneous explanation – has been irretrievably lost to us." Id. at 93, 97. The evidentiary hearing in the U.S. District Court occurred nearly eight years after the empanelment. The memory of the prosecutor, as a witness, was therefore subject to the normal frailties of human memory, including the steep loss of actual memory soon after the events, the possibility of influence by statements by others (such as the judge), and the influence of his belief and perspective upon his subsequent memory. Cf. *Statement of the Supreme Judicial Court: Model Jury Instructions on Eyewitness Identification*, 473 Mass. 1051, 1055 (2015).[3] These influences are not even conscious. The fact that the District Court judge found the prosecutor's "demeanor" to be "professional and credible throughout" goes only to the honesty of that testimony (which is not doubted by anyone involved in this case), but not to accuracy of memory. Cf. id. at 1053 ("A witness may honestly believe he or she saw a person, but perceive or remember the event inaccurately. You must decide whether the witness's identification is not only truthful, but accurate."). Some of these vulnerabilities are exacerbated by the District Court's findings that the prosecutor's testimony "was based in part on memory and in part on his routine empanelment practices, and he endeavored to distinguish between the two as he testified." As this passage suggests, it required a witness's effort

[3] Though designed to address eyewitness identification testimony, the SJC Model instructions make a general point about the susceptibility of memory to suggestion:

> 6. Exposure to outside information. You should consider that the accuracy of identification testimony may be affected by information that the witness received between the event and the identification, or received after the identification. Such information may include identifications made by other witnesses, physical descriptions given by other witnesses, photographs or media accounts, or any other information that may affect the independence or accuracy of a witness's identification. Exposure to such information not only may affect the accuracy of an identification, but also may affect the witness's certainty in the identification and the witness's memory about the quality of his or her opportunity to view the event. The witness may not realize that his or her memory has been affected by this information.
>
> An identification made after suggestive conduct by the police or others should be scrutinized with great care. Suggestive conduct may include anything that a person says or does that might influence the witness to identify a particular individual. Suggestive conduct need not be intentional, and the person doing the 'suggesting' may not realize that he or she is doing anything suggestive. [Footnotes omitted].
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> 8

("endeavored") to distinguish an eight-year-old memory from current views of what "must have happened."

Another complication here arises from the fact that, during empanelment, the trial judge was the first to suggest the reason later articulated by the prosecution. See Sanchez, 79 Mass. App. Ct. at 191 n.7. "When a defendant who has made a prima facie showing of impropriety requests that the prosecutor articulate his race-neutral reason for the challenge, that reason must come from the prosecutor, and not the judge." Commonwealth v. Fryar, 414 Mass. 732, 739 (1993). A trial judge who offers up his own reason for a prosecutor's peremptory strike "risks assuming the role of the prosecutor." Id., quoted in Sanchez, 808 F.3d at 93-94 (Thompson, J., concurring).

The court does not recite these potential difficulties with a prosecutor's testimony about eight-year-old events to establish the applicable state law rule – which is already fixed by Jones – or to second-guess the U.S. District Court's findings – which are committed to that court on questions arising under the U.S. Constitution. Rather, this court does so only (1) to confirm that the concerns expressed in Jones are prominent here and (2) to explain why, if Jones leaves any discretion in the matter, this court exercises that discretion in favor of granting the Motion because the empanelment violated state constitutional law. It follows that, in the absence of countervailing equitable considerations under Rule 30(b), Sanchez is entitled to a new trial.

III.

There are significant equities at issue. The court must consider the undeniable "prejudice to the Commonwealth," see Commonwealth v. Wheeler, 52 Mass. App. Ct. 631, 635 (2001), if the prosecution had to prove the case all over again at this late date. Even the defendant candidly recognizes the significant "difficulties to which the Commonwealth would be put in retrying his case after this passage of time." Motion at 7.

Moreover, under Rule 30, the court must seriously consider Massachusetts's strong interest

in the finality of criminal convictions:

> [O]nce the process has run its course -- through pretrial motions, trial, posttrial motions and one or two levels of appeal -- the community's interest in finality comes to the fore. The regular course of justice may be long, but it must not be endless. See Commonwealth v. Deeran, 397 Mass. 136, 142 (1986). When a serious crime has been committed, the victims and survivors, witnesses, and the public have an interest that the guilty not only be punished but that the community express its condemnation with firmness and confidence. Moreover, a decision to reopen a matter long since adjudicated will often in effect resolve the dispute in favor of the accused because witnesses will have died, disappeared, their memories faded, or they may simply be unwilling once again to undergo the ordeal of testimony. Commonwealth v. Curtis, 417 Mass. 619, 623 (1994). On the other hand, we cannot rid ourselves by process alone of the possibility of error and of grave and lingering injustice. In our system the motion for a new trial, which can be made at any time even decades after the initial adjudication, responds to this need. See Mass R. Crim. P. 30, 378 Mass. 900 (1979). But in accommodating these two conflicting thrusts, once the regular procedures have run their course the presumption tilts heavily toward finality. See Commonwealth v. Tucceri, 412 Mass. 401, 406 (1992) ("[n]ew trials should not be granted except for substantial reasons"). The mere fact that, if the process were redone, there might be a different outcome, or that some lingering doubt about the first outcome may remain, cannot be a sufficient reason to reopen what society has a right to consider closed.

Amirault, 424 Mass. at 637. This interest remains strong, even though tempered by the observation, above, that Massachusetts precedent at the time of Sanchez's state court appeals did not give him a "genuine opportunity" to raise his Soares – Batson challenge.

The defendant proposes a solution short of a new trial – reduction of the verdict to manslaughter pursuant to Rule 25(b)(2) and re-sentencing. Given the long period of incarceration he has already served, this would assure his release at some point and, very possibly, accelerate it. In his view, this proposal also avoids prejudice to the Commonwealth in the event of a retrial.[4]

The court agrees that it is essential to fashion relief that avoids prejudice to the Commonwealth from a retrial. It therefore takes account of the same factors that led the trial judge

[4] The court's exercise of discretion does not turn on other arguments advanced by the defendant , including the fact that his second degree murder conviction received a mandatory sentence that now applies to first degree murder convictions for juvenile offenders (Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 658 (2013) and an argument that the Massachusetts constitution should now be construed to prohibit a mandatory life with possibility of parole sentence for a defendant who was 17 years old at the time of the events. See Commonwealth v. Okoro, 471 Mass. 51 (2015) ("[W]e conclude that at present, a mandatory life sentence with parole eligibility after fifteen years for a juvenile homicide offender convicted of murder in the second degree does not offend the Eighth Amendment or art. 26.").

to reduce a first degree murder verdict to second degree murder because of an error in the jury instructions on premeditation and malice in Commonwealth v. Gilbert, 447 Mass. 161, 168 (2006) ("Here the motion judge noted that the 'passage of time apparently has made it difficult or impossible for the Commonwealth to try the case again.' He appropriately fashioned relief that took that fact into account. [citations omitted] (citing difficulty of Commonwealth in 'reassembl[ing] its case' and 'considerabl[e] challeng[e]' time lapses present to witnesses' memories as 'factors' to be considered in fashioning relief)."). In Gilbert, the court fashioned such relief even over the defendant's objection that the only appropriate remedy was a new trial. Here, where the defendant himself has proposed the Rule 25(b)(2) reduction, the case for doing so is even stronger.

Under Mass. R. Crim. P. 25(b)(2), the court has power to "order the entry of a finding of guilty of any offense included in the offense charged in the indictment . ..." As stated in the Reporter's Notes, "[t]his has the practical effect of extending to the trial courts, post-verdict a power in all cases much like that which had previously been reserved to the Supreme Judicial Court in capital cases under G.L. c. 2789, § 33E (as amended)." See also Gilbert, 447 Mass. at 167, citing Commonwealth v. Woodward, 427 Mass. 659, 666 (1998). A conviction for murder may be reduced to manslaughter where, for instance, "the altercation . . . was a senseless brawl [and] [t]he weight of the evidence supports the conclusion that the defendant killed the victim either as the result of reasonable provocation or through the use of excessive force in self-defense." Cf. Commonwealth v. Vargas, 475 Mass. 338, 366-367 (2016) (exercise of authority under § 33E). The Reporter's Notes to Rule 25 state: "the motion for a new trial which may be made under this subdivision [(b)(2)] is in addition to those rights which a defendant has under Rule 30(b)."

This case differs in potentially significant ways from Gilbert and the cases it cites. Given the outcome of Sanchez's initial appeal, this case does not involve an error in jury instructions or disproportionality between the evidence and the second degree murder conviction. Reliance upon

Rule 25(b)(2) therefore raises several questions. First, on its face, Rule 25 addresses reduction in the verdict where the evidence is insufficient to sustain a verdict on the more serious charge (which Gilbert, 447 Mass. at 169, extends to errors in jury instructions). Sanchez's Motion does not argue the sufficiency of the evidence supporting a second degree murder charge in anything but the most cursory manner. The court is not prepared to find the evidence insufficient without a developed argument on the point. Second, the record likely rebuts any contention that the evidence does not support a second degree murder conviction. See Sanchez, 79 Mass. App. Ct. at 196 (Brown, J., concurring) ("Apart from the troubling fact that a manslaughter instruction was neither given nor requested, I am of opinion that this case can be affirmed simply on the basis of the defendant's status as the initial aggressive user of deadly force -- a handgun."). Third, the defendant waived an entitlement to a manslaughter finding by failure to raise it at his trial and on appeal. Id.

Gilbert's footnote 7 provides important guidance about the trial court's authority under Rule 25(b)(2). It says, in relevant part:

> The rule accords judges three options, see Commonwealth v. Keough, 385 Mass. 314, 317-318 (1982), including **the discretion to reduce a verdict to a conviction of a lesser offense, even where the evidence supports the verdict returned by the jury**. See Commonwealth v. Gaulden, 383 Mass. 543, 552 (1981). A defendant who has requested a new trial is not entitled to limit the judge's discretion to accord less expansive relief. [Emphasis added].

Gilbert, 447 Mass. at 168, n.7. This formulation appears broad enough to recognize this court's authority to reduce the verdict in this case to manslaughter. It certainly rebuts any notion that the court can do so only if the evidence fails to support the second degree murder conviction.

This court's discretion is nevertheless limited. It must "apply the standard set forth in Rule 30(b) rigorously" and grant a new trial only if the defendant meets his burden to come forward with a "credible reason which outweighs the risk of prejudice to the Commonwealth." Wheeler, 52 Mass. App. Ct. at 635. The "touchstone must be to do justice." See Commonwealth v. Brescia, 471 Mass. 381, 388 (2015) ("[I]f it appears that justice may not have been done, the valuable finality of

judicial proceedings must yield to our system's reluctance to countenance significant individual injustices."); see also Commonwealth v. Epps, 474 Mass. 743, 767 (2016) (reversing denial of a post-conviction motion for a new trial).

The remedy afforded by Jones is a new trial, not a sentence reduction. That remedy itself reflects notions of fairness, where a defendant cannot realistically recreate the situation at the time of the challenged peremptory. The prima facie unlawful discriminatory use of peremptory challenges in this case "'places the **fairness** of a criminal proceeding in doubt'" and effectively deprives Sanchez of his constitutional right to be tried by an impartial jury, in violation of Article 12 of the Declaration of Rights of the Massachusetts Constitution. Commonwealth v. Vann Long, 419 Mass. 798, 806 (1995), quoting Powers v. Ohio, 499 U.S. 400, 404 (1991) (emphasis added). Notions of "fairness" in one context may not automatically translate to a concern that "justice may not have been done" under Rule 30(b), but in this case they do. Sanchez may have been deprived of a fair juror on racial grounds, and that may have made a difference in the result – and certainly makes a difference, given the importance of racially neutral jury selection to our system of justice. As a matter of law, and separately, as a matter of discretion, the court is prepared to order a new trial, to remedy the Soares violation in the unique circumstances of this case, because otherwise justice may not have been done.

In weighing the equities, the court does recognize that the law at the time of the trial required "judges to find that a pattern of improper exclusion has been shown before a party may be **required** to explain its basis for exercising a challenge." Commonwealth v. Garrey, 436 Mass. 422, 428 (2002) (emphasis added). While the practice at the time was for prosecutors not to present reasons on the record in the absence of a judicial finding of a prima facie Soares violation, nothing **compelled** the Commonwealth to refuse to give a contemporaneous explanation of its challenge, which would have greatly facilitated appellate and post-conviction review. In this case, the

Commonwealth specifically opposed the trial judge's request "to shortcut" the process "and you to . . . tell me why." Sanchez, 753 F.3d at 287, quoting trial transcript. See also Sanchez, 79 Mass. App. Ct. at 191 n.6. The trial judge's initial statement that a pattern existed for Soares purposes – later withdrawn and replaced with the opposite finding – certainly placed the Commonwealth on notice that the issue may be a very close one. The Commonwealth's decision not to give a reason for the challenge, though not in any way improper under then-existing Massachusetts precedent, was a tactical one, which carried the risks that have now come to pass. The Commonwealth could have avoided this situation; the defendant could not. Moreover, the reason later given to the U.S. District Court – shortage of challenges at the time earlier jurors were selected – was hardly a secret, the revelation of which would not have prejudiced the Commonwealth's strategy.[5] To the extent that the Commonwealth may suffer any prejudice from allowance of the Motion, the equitable impact of that prejudice is somewhat mitigated by the fact that it results from the prosecutor's own decision not to disclose his reason. So mitigated, the prejudice to the Commonwealth is greatly outweighed by the very credible reasons presented in Sanchez's Motion.

To minimize prejudice further, the court extends to the Commonwealth the opportunity to choose between remedies that do not undermine the basic need for Rule 30(b) relief. While the Commonwealth did not address remedy in the papers or at argument, even when asked, it has not disputed that a reduction to manslaughter would significantly avoid prejudice to it. Nevertheless, the Commonwealth is in the best position to assess what prejudice it might suffer. That decision involves a good deal of prosecutorial – i.e., executive branch – discretion. To the extent that the court can grant relief that gives the Commonwealth substantial opportunity to choose how to

[5] The lack of tactical prejudice from disclosure of the Commonwealth's shortage of challenges at the time of the peremptory challenge to juror 261 may itself call into question the genuineness of the prosecutor's reason, since the numbers of challenges exercised by each side was publicly known and the benefits of a full record on appeal would have accrued to the Commonwealth in the event of a conviction. To be sure, counsel sometimes adhere to an inflexible position as a matter of principle, which may also have been the case here. That is undoubtedly why the Supreme Judicial Court has seen the wisdom of a broader initial disclosure by a party exercising a peremptory challenge. See Commonwealth v. Issa, 466 Mass. 1, 11 n. 14 (2013).

exercise that discretion, it does so below. If the Commonwealth prefers to retry the murder indictment instead of accepting a reduction to manslaughter, the court will order a retrial at the Commonwealth's request. See Gilbert, 447 Mass. at 166. Otherwise, with the Commonwealth's acquiescence, the conviction will be reduced to manslaughter and scheduled for sentencing.

CONCLUSION

For the above reasons, the court grants the defendant's Motion for a New Trial. The court reduces the sentence to manslaughter, unless, by October 10, 2018, the Commonwealth files a notice of intention and request to retry the murder indictment.

Dated: August 30, 2018

Douglas H. Wilkins
Associate Justice of the Superior Court

Commonwealth v. Sanchez

Appeals Court of Massachusetts

June 8, 2010, Argued; April 1, 2011, Decided

No. 08-P-1441.

Reporter

79 Mass. App. Ct. 189 *; 944 N.E.2d 625 **; 2011 Mass. App. LEXIS 454 ***

COMMONWEALTH vs. DAGOBERTO SANCHEZ.

Subsequent History: Review denied by *Commonwealth v. Sanchez, 460 Mass. 1106, 950 N.E.2d 438, 2011 Mass. LEXIS 635 (2011)*

US Supreme Court certiorari denied by *Sanchez v. Massachusetts, 132 S. Ct. 408, 181 L. Ed. 2d 267, 2011 U.S. LEXIS 7388 (U.S., 2011)*

Writ of habeas corpus denied *Sanchez v. Roden, 2013 U.S. Dist. LEXIS 19914 (D. Mass., Feb. 14, 2013)*

Prior History: [*1]** Suffolk. Indictments found and returned in the Superior Court Department on August 5, 2005. The cases were tried before Thomas E. Connolly, J.

Disposition: Judgments affirmed.

Case Summary

Procedural Posture

After a jury trial in the Suffolk Superior Court (Massachusetts), defendant was convicted of second-degree murder and unlawful possession of a firearm. He appealed.

Overview

The prosecutor used peremptory challenges to remove eight white jurors, one Hispanic, and two black men. Defendant objected to the prosecutor's use of the 12th peremptory challenge to remove an 18-year-old black male, alleging a pattern of challenges to young black males. The appellate court held that the trial court properly overruled the objection on grounds the presumption of propriety had not been rebutted, because 1) five black persons had been seated; 2) age was not a protected class under the Equal Protection Clause or *Mass. Const. Decl. Rights art. XII*; and 3) "persons of color" (i.e., blacks and Hispanics) was not a discrete group. At trial, defendant admitted shooting the victim, but claimed he acted in defense of himself and his aunt. The trial court charged the jury that the initial aggressor could not claim self-defense, and denied defendant's request for an instruction that this rule was inapplicable to the defense of another. As the instruction was a correct statement of the law, and did not reference the defense of others theory, there was no error; the appellate court did not have to decide whether the original aggressor rule applied to the defense of another.

Outcome

The judgment was affirmed.

Counsel: *Ruth Greenberg* for the defendant.

Lynn D. Brennan, Assistant District Attorney, for the Commonwealth.

Judges: Present: Duffly, Brown, & Vuono, JJ. [1]
BROWN, J. (concurring).

Opinion by: VUONO

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[1] Justice Duffly participated in the deliberation on this case while an Associate Justice of this court, prior to her appointment as an Associate Justice of the Supreme Judicial Court.

Opinion

[*189] [626]** VUONO, J. A Superior Court jury convicted the defendant of murder in the second degree and unlawful possession of a firearm. At trial, the defendant admitted that he shot the victim, Jose Portillo, during a street confrontation. He claimed, however, that he acted in self-defense and in defense of his aunt, who had **[*190]** intervened in the fight to protect him. The defendant appeals his convictions on the grounds that the Commonwealth's peremptory challenges during jury impanelment were used improperly and that the judge's instructions on defense of another were inadequate. We affirm.

Background. We briefly summarize the facts as the jury could have found them. [2] Around seven o'clock in the **[***2]** evening on May 21, 2005, the defendant and his aunt, Theresa Cordero, were driven home from a family party by Enrique Calderon. As they approached the defendant's neighborhood, they saw Portillo standing in the middle of the street, holding an aluminum baseball bat. Portillo had been involved in a physical altercation with two or three other men. [3] Upon arriving at the scene, the defendant exchanged words with Portillo and the others. The defendant then **[**627]** left the car, went into his house, and returned a few moments later, at which time he brandished a gun and told Portillo to leave.

Portillo did not leave. Instead, he approached the defendant while "wielding" the bat and yelling, "I'll get you," and "I'm not scared." Cordero, who by this point was out of the car, stepped between the defendant and Portillo and urged the defendant to leave. Portillo continued to swing the bat and walked toward Cordero and the defendant. **[***3]** Then, with the bat raised as if he was about to take a swing, Portillo stepped forward and stated, "I'm going to kill you." Believing that Portillo was about to hit her with the bat, Cordero moved out of the way. At about the same time, the defendant yelled, "Watch out," and shot Portillo twice, once in the chest and once in the abdomen. Portillo died as a result of his wounds one day later.

Discussion. 1. Peremptory challenges. Jury selection proceeded over two days. By the second day, the Commonwealth had exercised eleven peremptory challenges to remove eight white jurors, one forty-one year old man described by the parties as Hispanic, and two males described as African-American, **[*191]** both of whom were in their twenties. [4] In addition, ten jurors, five of whom were African-American (three women and two men), [5] had been seated. When the Commonwealth exercised its twelfth peremptory challenge to remove an eighteen year old African-American male (juror no. 261), defense counsel objected, contending that a pattern of challenges directed at "African American . . . young males" had been established. See *Commonwealth v. Soares, 377 Mass. 461, 488-490, 387 N.E.2d 499*, cert. denied, *444 U.S. 881, 100 S. Ct. 170, 62 L. Ed. 2d 110 (1979)*. After **[***4]** some discussion, the judge overruled the objection, [6] explicitly finding that a prima facie showing of impropriety had not been made. As a result, the prosecutor was not

[2] The testimony of the witnesses differed slightly regarding the sequence of events. Because the discrepancies are not material to our discussion, we will not address them.

[3] There was no evidence that the defendant was part of the earlier confrontation involving Portillo.

[4] The parties appear to be in agreement as to the background of the challenged jurors.

[5] The record does not disclose the ages of the women jurors. Regarding the two men, one was thirty-four and the other was fifty-one years old.

[6] Initially, the judge responded to trial counsel's objection by stating: "[F]or purposes of this particular juror, alone, I will find that there is a pattern of challenging black young men." The judge then asked the prosecutor to explain his reasons for challenging juror no. 261. The prosecutor inquired whether the judge was making an actual finding as to whether a prima facie showing of impropriety had been made, and asserted that he was not required to provide a justification until the judge did so. The judge agreed with the prosecutor's analysis of the procedure to be followed and ultimately found that a pattern of discrimination had not been shown.

required to justify the challenge [7].

"*Article 12 of the Declaration of Rights of the Massachusetts Constitution* and the *equal protection clause of the Federal Constitution* prohibit the use of peremptory challenges to exclude prospective jurors on the basis of race." *Commonwealth v. Douglas, 75 Mass. App. Ct. 643, 648, 915 N.E.2d 1111 (2009)*, citing *Commonwealth v. Harris, 409 Mass. 461, 464, 567 N.E.2d 899 (1991)*. The defendant claims that the prosecutor's use of peremptory challenges to exclude juror no. 261 and other "young men of color" from the jury violated the State and Federal Constitutions and, therefore, that the judge's conclusion that the defendant had not met his burden of establishing a prima facie **[**628]** case of improper challenges was erroneous [8].

[*192] "Peremptory challenges are presumed to be proper, but that presumption may be rebutted on a showing that '(1) there is a pattern of excluding members of a discrete group and (2) it is likely that individuals are being excluded solely on the basis of their membership' in that group.'" *Commonwealth v. Maldonado, 439 Mass. 460, 463, 788 N.E.2d 968 (2003)*, quoting from *Commonwealth v. Garrey, 436 Mass. 422, 428, 765 N.E.2d 725 (2002)*. If the judge finds that a prima facie showing of an improper use of peremptory challenges has been made, "the burden shifts to the party exercising the challenge to provide a 'group-neutral' explanation for it." *Commonwealth v. Maldonado, supra.* Because "[a] trial judge is in the best position to decide if a peremptory challenge appears improper and requires an explanation by the party exercising it[,] . . . 'we do not substitute our judgment . . . for his if there is support for it on the record.'" *Commonwealth v. LeClair, 429 Mass. 313, 321, 708 N.E.2d 107 (1999)*, quoting from *Commonwealth v. Colon, 408 Mass. 419, 440, 558 N.E.2d 974 (1990)*.

In this case, the judge determined that the presumption of propriety had not been rebutted. He found it unlikely, in light **[***7]** of the fact that five other African-Americans had been seated, that the Commonwealth's challenges had been based solely on race. He also found that, to the extent the defendant's objection was based on the ages of the challenged jurors, it was not valid because age is not a suspect classification under *Soares, 377 Mass. at 489*. The judge also rejected the defendant's argument that "persons of color" constitute a discrete group under *Soares, supra.* Therefore, he refused to consider the prosecutor's challenge of the juror believed to be Hispanic in determining whether the defendant had established a pattern of improper exclusion based on race.

The record supports the judge's finding that no pattern of discrimination had been established. First, the fact that other members -- here, five -- of an allegedly targeted group were seated is an appropriate factor to consider in determining whether the presumption of propriety had been rebutted. See and compare *Commonwealth v. Walker, 69 Mass. App. Ct. 137, 142, 866 N.E.2d 958 (2004)*.

[*193] Second, the judge correctly ruled that age is not a protected class under either the Declaration of Rights, see *Commonwealth v. Samuel, 398 Mass. 93, 95, 495 N.E.2d 279 (1986)* ("[t]here is no constitutional **[***8]** basis for challenging the exclusion of young persons"), or the United States Constitution. See *United States v. Cresta, 825 F.2d 538, 545 (1st Cir. 1987)* (holding that young adults do not constitute a "cognizable group" for the purpose of an equal protection challenge to the composition of a petit jury).

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[7] Although the judge did not require the prosecutor to disclose his reasons for challenging the juror, the judge **[***5]** supplied his own answer to the question when he observed that juror no. 261's "youth and the fact that he's a full time college student could be a problem."

[8] The defendant also raises an equal protection claim on behalf of the challenged jurors. See *Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)*. As our analysis under either the State or Federal Constitution is the same, we focus our attention on art. 12. See *Commonwealth v. Benoit, 452 Mass. 212, 218 n.6, 892 N.E.2d 314 (2008)* ("Regardless of the perspective from which the **[***6]** problem is viewed, the result appears to be the same").

Third, the judge did not err in rejecting the defendant's assertion that "persons of color" includes both African-American and Hispanic jurors and constitutes a discrete aggregate group under *Soares, supra.* Although "[t]here is no dispute that Hispanic persons [like African-Americans] are members of a racial or ethnic **[**629]** group protected under *art. 1 of the Declaration of Rights*," *Commonwealth v. Rodriguez, 457 Mass. 461, 467 n.15, 931 N.E.2d 20 (2010)*, we are not aware of any authority requiring a trial judge to combine challenges to members of discrete racial or ethnic groups into one "catch all" category [9]. Cf. *Gray v. Brady, 592 F.3d 296, 306 (1st Cir.)*, cert. denied, *130 S. Ct. 3478, 177 L. Ed. 2d 1072 (2010)* (rejecting claim that "minorities" constitute a cognizable group under *Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 [1976]*, and expressing "serious" doubt whether classes such as "minorities" or "non-whites" possess "the definable **[***9]** quality, common thread of attitudes or experiences, or community of interests essential to recognition as a 'group'").

The defendant further argues that the procedure set forth in *Soares, supra at 489-490*, and its progeny fails to protect against discrimination in the jury selection process and, therefore, the use of peremptory challenges should be abolished. As the defendant acknowledges, it is beyond our authority "to alter, overrule or decline to follow the holding of cases the **[*194]** Supreme Judicial Court has decided." *Commonwealth v. Dube, 59 Mass. App. Ct. 476, 485, 796 N.E.2d 859 (2003)* **[***10]** (citing cases) [10].

2. Jury instructions. At the conclusion of the trial, the judge instructed the jury on both self-defense and defense of another. Upon the request of the Commonwealth, the judge also agreed to instruct the jury on the original aggressor rule, which provides that "self-defense . . . cannot be claimed by a [defendant] who provokes or initiates an assault." *Commonwealth v. Espada, 450 Mass. 687, 693, 880 N.E.2d 795 (2008)*, quoting from *Commonwealth v. Maguire, 375 Mass. 768, 772, 378 N.E.2d 445 (1978)*. The defendant objected and requested that the judge either refrain from giving an original aggressor instruction or explicitly inform the jury that the original **[***11]** aggressor rule is inapplicable to the defense of another. Eventually, the judge gave the instruction without any specific restrictions.

The defendant claims that because the judge refused to instruct the jury exactly as he had requested, he was deprived of his due process right to establish a defense. Because the issue was properly preserved, we review for prejudicial error. *Commonwealth v. Flebotte, 417 Mass. 348, 353, 630 N.E.2d 265 (1994)*.

[630]** Our cases have not specifically addressed whether the original aggressor rule applies to defense of another [11]. Assuming without deciding

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[9] The Supreme Judicial Court's decision in *Smith v. Commonwealth, 420 Mass. 291, 298, 649 N.E.2d 744 (1995)*, on which the defendant relies, is not to the contrary. There, in the context of a challenge to the racial makeup of the venire, the court held that "'nonwhites' . . . is a group characterized by race and race is a protected classification under *art. 1 of the Massachusetts Declaration of Rights.*" Ibid. However, a close reading of Smith reveals that the race-based category "nonwhites" was not inclusive of Hispanic jurors. *Id. at 293 n.4* (noting that the data it relied upon defined "minorities" as "the total Hispanic population plus the total nonwhite population" [emphasis added]).

[10] For cases noting concerns about the use of peremptory challenges, see *Commonwealth v. Rodriguez, 457 Mass. at 488* (Marshall, C.J., concurring); *Commonwealth v. Maldonado, 439 Mass. at 468* (Marshall, C.J., concurring); *Commonwealth v. Calderon, 431 Mass. 21, 29, 725 N.E.2d 182 (2000)* (Lynch, J., dissenting). See generally Brown, McGuire, & Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse?, 14 New Eng. L. Rev. 192 (1978). But see *Commonwealth v. Benoit, 452 Mass. 212, 235 n.1, 892 N.E.2d 314 (2008)* (Cowin, J., dissenting).

[11] Our review of the law from other jurisdictions does not reveal a uniform approach to the issue. Many States (in contrast to ours) address the issue by statute. See, e.g., *Colo. Rev. Stat. § 18-1-704* (2010); *Conn. Gen. Stat. § 53a-19* (2009); *Ga. Code Ann. § 16-3-21* (2007); *Kan. Stat. Ann. § 21-3214(3)* (2007). Some courts, as a matter of statutory construction, have suggested that a defendant's

that the original aggressor rule is wholly or partially inapplicable to the defense of another as that defense was asserted **[*195]** here, the error was not prejudicial [12]. "The judge is not required to grant a particular instruction so long as the charge, as a whole, adequately covers the issue." *Commonwealth v. Cruz, 445 Mass. 589, 597, 839 N.E.2d 324 (2005)*, quoting from *Commonwealth v. Daye, 411 Mass. 719, 739, 587 N.E.2d 194 (1992)*. The final charge [13] tracked the model jury instructions and correctly conveyed the elements of the defense, including the duty to retreat. Moreover, at no time did the judge state that if the jury were to find that the defendant was **[***12]** the original aggressor in the fight with Portillo he could not rely on the defense of another (Cordero) to justify his conduct [14]. Because the instructions, as given, could not have been understood as the defendant suggests, the failure to give the requested instruction "did not influence the jury, or had but very slight **[*196]** effect." *Commonwealth [**631] v. Flebotte, 417 Mass. at 353*, quoting from *Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 445, 446 N.E.2d 117 (1983)*.

Judgments affirmed.

Concur by: BROWN

Concur

BROWN, J. (concurring). Apart from the troubling fact that a manslaughter instruction was neither given nor requested, I am of opinion that this case can be affirmed simply on the basis of the defendant's status as the initial aggressive user of deadly force -- a handgun [15]. Neither the defense of another nor the failure to retreat, in my view, enters into the calculus.

As an additional aside, I think the judge's handling of the peremptory challenge issue would have been more efficacious if he had followed the teachings of *Commonwealth v. Futch, 38 Mass. App. Ct. 174, 177-178, 647 N.E.2d 59 (1995)*, and cases cited therein.

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aggressor status may properly deprive him entirely of the right to rely on defense of another. See *State v. Silveira, 198 Conn. 454, 470, 503 A.2d 599 (1986)*. At least one other jurisdiction holds that an otherwise justifiable application of force in defense of another, when rendered by an original aggressor, constitutes the imperfect defense of another and reduces **[***13]** the killing to voluntary manslaughter. See *State v. Johnson, 182 N.C. App. 63, 70, 641 S.E.2d 364 (2007)*, citing *State v. Perry, 338 N.C. 457, 466, 450 S.E.2d 471 (1994)*.

[12] Although we do not decide the issue, we note that the answer is not clear. There is some merit to the defendant's argument that it would be difficult to reconcile a rule that would deter persons -- even original aggressors -- from forcefully intervening on behalf of an apparently blameless third person, with a policy rationale based on "the social desirability of encouraging people to go to the aid of third parties who are in danger of harm as a result of the unlawful actions of others." *Commonwealth v. Monico, 373 Mass. 298, 303, 366 N.E.2d 1241 (1999)* (discussing *Commonwealth v. Martin, 369 Mass. 640, 649, 341 N.E.2d 885 [1976]*, which announced the modern defense of another rule). At the same time, we do not find it obvious that an actor's provocation or exacerbation of a conflict becomes irrelevant once an innocent third party enters the equation. A person who initiates or provokes a conflict is not in the same position as the archetypical "good Samaritan" envisioned by the Supreme Judicial Court when it first enunciated the defense in *Martin, supra.*

[13] The jury received multiple **[***14]** versions of the instructions over two days. The initial instructions contained a number of errors and were stricken entirely. The judge then reinstructed the jury in accordance with the Model Jury Instructions on Homicide (1999).

[14] During his charge to the jury, the judge explained that he would "talk a little bit about self-defense and then after that we'll talk about the defense of another" (emphasis supplied). While defining the elements of self-defense, the judge stated that "[a]n original aggressor has no right to self-defense unless he withdraws from the conflict in good faith and announces his intention of abandoning the fight." After concluding his explanation of self-defense, the judge turned to the defense of another. The subject was introduced as follows: "Now, ladies and gentlemen, there is another aspect of self defense. It's called the defense of another." The judge then discussed the elements of defense of another and never once mentioned the original aggressor rule. Thereafter, during their deliberations, the jury asked the judge for further instructions on defense of another on two occasions. The judge responded to these questions by repeating his earlier (correct) **[***15]** instruction, which, again, did not mention the original aggressor rule.

[15] The teaching point here is "sticks and stones" may break bones, but a loaded handgun will very likely kill a person.

Sanchez v. Roden

United States District Court for the District of Massachusetts

February 14, 2013, Decided; February 14, 2013, Filed

Civil No. 12-10931-FDS

Reporter
2013 U.S. Dist. LEXIS 19914 *; 2013 WL 593960

DAGOBERTO SANCHEZ, Petitioner, v. GARY RODEN, Respondent.

Subsequent History: Certificate of appealability granted *Sanchez v. Roden, 2013 U.S. Dist. LEXIS 30078 (D. Mass., Mar. 6, 2013)*

Vacated by, Remanded by *Sanchez v. Roden, 753 F.3d 279, 2014 U.S. App. LEXIS 9844 (1st Cir. Mass., 2014)*

Writ of habeas corpus denied *Sanchez v. Roden, 2015 U.S. Dist. LEXIS 13207 (D. Mass., Feb. 4, 2015)*

Prior History: *Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 944 N.E.2d 625, 2011 Mass. App. LEXIS 454 (2011)*

Counsel: **[*1]** For Dagoberto Sanchez, Petitioner: Ruth Greenberg, LEAD ATTORNEY, Swampscott, MA.

For Gary Roden, Superintendent - MCI Norfolk, Respondent: Jennifer L. Sullivan, LEAD ATTORNEY, Office of the Attorney General (MA), Worcester, MA.

Judges: F. Dennis Saylor, IV, United States District Judge.

Opinion by: F. Dennis Saylor, IV

Opinion

MEMORANDUM AND ORDER ON PETITION FOR WRIT OF HABEAS CORPUS

SAYLOR, J.

This is an action by a state prisoner seeking a writ of habeas corpus pursuant to *28 U.S.C. § 2254*. Petitioner Dagoberto Sanchez was convicted in Suffolk County of second-degree murder and unlawful possession of a firearm. He was sentenced to a term of life imprisonment (with the possibility of parole after 15 years) on the murder conviction and a concurrent two-year term on the firearm conviction. Sanchez now seeks habeas relief, contending that the prosecution deliberately exercised peremptory challenges to strike young men "of color" in violation of his constitutional rights.

For the reasons set forth below, the petition will be denied.

I. Background

A. The Trial

The facts surrounding the crime that led to Sanchez's conviction are extensively set out in the decision of the Massachusetts Appeals Court on the his direct appeal, **[*2]** and only the facts that are relevant to this opinion bear repetition. *See Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 944 N.E.2d 625 (2011)*. The petition now before the Court concerns not the events of the crime, but events that transpired at trial and on direct appeal.

On August 25, 2005, Sanchez was indicted on one count of second-degree murder and one count of unlawful possession of a firearm. His trial began on

September 25, 2006. The jury selection process took two days. By the second day, the prosecution had used eleven peremptory challenges to remove eight white jurors, one 41-year-old Hispanic man, and two African-American men, ages 24 and 25. At that point, ten jurors had been seated, five of whom were African-American. The five African-Americans already seated on the jury included two men, ages 51 and 34. Sanchez's counsel objected to the prosecution's use of its twelfth peremptory challenge against Juror No. 261, an 18-year-old African-American man. Defense counsel argued that the challenge of a third young African-American juror established a discriminatory pattern of excluding young black males, or, when taken with the exclusion of the 41-year-old Hispanic juror, established a pattern **[*3]** of excluding young dark-skinned jurors.

After counsel raised that objection, the trial court initially observed that there was a pattern of challenging young black men. After some discussion at sidebar about the racial identity of the excluded Hispanic juror, the following exchange occurred between the court and defense counsel:

> THE COURT: Counsel, the clerk indicates that we have, already, five black people sitting on this jury, okay; so I can't see, as a class; regarding to the color would be a problem. I think the only - what you're basically saying is it's because they're young black men, is that correct? In other words, the emphasis on their age?
>
> MR. SHAPIRO: I think that's certainly part of it; I mean I think that that's what distinguishes these challenges from the other black persons who weren't challenged. But I think that even if you just look at the two black persons who were challenged, that would be two out of a total of seven which is a significant percentage, in and of itself. But the additional feature to the black persons who have been challenged, I believe, are the relatively youthful – I guess one is 24 and one is 25.
>
> THE COURT: . . . Counsel, in looking at the case law **[*4]** . . . there's nothing with a reference to age here that is one of the classes under Commonwealth versus Soares.
>
> MR. SHAPIRO: I agree and . . . even if you take out Mr. Chinchilla, the Guatemalan [the excluded Hispanic juror] . . . would be the third black man challenged out of a total of eight questioned, so far. So we have three out of a total of eight; which, I say is a significant percentage –
>
> THE COURT: I make a determination that there has not been shown a pattern of discrimination in this case, under the Soares case, at this time.

The trial court allowed the exclusion of Juror No. 261 over defense counsel's objection. Because a *prima facie* showing of impropriety had not been made, the prosecutor was not required to justify his use of a peremptory challenge.[1]

The record does not reflect the final racial composition of the jury, although it appeared to have at least five African-American members. On October 6, 2006, the jury found Sanchez **[*5]** guilty of both counts.

B. The Direct Appeal

Sanchez appealed his conviction to the Massachusetts Appeals Court. He raised two arguments as to the trial judge's jury instructions that are not at issue here. He also argued that the government's use of peremptory challenges was unconstitutional. Specifically, he contended that the exclusion of four apparently young men "of color" violated the *Equal Protection Clause of the Fourteenth Amendment* and Article 12 of the Massachusetts Declaration of Rights.

The Appeals Court affirmed the conviction. The

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[1] The trial judge did note, however, that the inclusion of Juror No. 261 could present a problem because of his "youth and the fact that he's a full-time college student." *See* (Docket No. 2 at 23); *see also* *Sanchez, 79 Mass. App. Ct. 189, 191, n.7, 944 N.E.2d 625*.

court found that Sanchez had not made a *prima facie* showing of impropriety, because he could not show a pattern of "excluding members of a discrete group" where it was "likely that individuals [were excluded] solely on the basis of their membership in that group." *Sanchez, 79 Mass. App. Ct. at 192* (citing *Commonwealth v. Maldonado, 439 Mass. 460, 463, 788 N.E.2d 968 (2003)*). The court found that there was no pattern of discrimination in light of the fact that five African-Americans had already been seated on the jury; that age was not a protected class under either the United States Constitution or the Massachusetts Declaration of Rights; and that persons "of **[*6]** color" was not a cognizable group under either state or federal law. *Id. at 192-93*. Because Sanchez could not establish a *prima facie* showing of impropriety, the government was not required to justify the peremptory challenge. *Id. at 191*.

C. The Application to Leave for Further Appellate Review

Sanchez then filed an Application for Leave to Obtain Further Appellate Review (ALOFAR) with the Supreme Judicial Court (SJC). In his ALOFAR, Sanchez set forth the same three arguments, including the argument that the prosecutor improperly used peremptory challenges to discriminate against young men "of color." Sanchez, however, did not explicitly argue that the government's use of peremptory challenges discriminated against young African-American men. On June 29, 2011, the SJC summarily denied the ALOFAR. *Commonwealth v. Sanchez, 460 Mass. 1106, 950 N.E.2d 438 (2011)*. Sanchez then petitioned for a writ of certiorari from the Supreme Court of the United States, which was denied on October 11, 2011.

D. Federal Proceedings

On May 23, 2012, Sanchez filed a petition for a writ of habeas corpus in this Court. Sanchez concedes that the jury that decided his case was a fair cross-section of the community within the meaning **[*7]** of the *Sixth Amendment*. However, he contends that the government violated the *Equal Protection Clause of the Fourteenth Amendment* when the prosecutor used four peremptory challenges on "the first four apparently young dark-skinned men in the jury pool."[2] He contends that the government's use of peremptory challenges against the four dark-skinned prospective jurors established a *prima facie* case of combined color/gender discrimination. Alternatively, he contends that the exclusion of three African-American men, without consideration of the excluded Hispanic man, establishes a *prima facie* showing of racial discrimination.[3]

II. Standard of Review

A federal court may not grant an application for a writ of habeas corpus for a person in state custody unless the state court decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or the decision was an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *28 U.S.C. § 2254(d)*.

"'[A]n unreasonable application' of Supreme Court case law occurs if 'the state court identifies the correct governing legal principle for th[e] [Supreme] Court's decisions but unreasonably

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[2] Petitioner does not explain how the 34-year-old African-American man who was seated on the jury was not as "apparently young" as the 41-year-old Hispanic man who was excluded.

[3] The Court notes that in petitioner's brief to the Massachusetts Appeals Court and in his ALOFAR he argued that the government's use of peremptory challenges was unconstitutional toward "persons of color," and did not expressly argue that the government excluded members based on their status as young African-American men. It is unclear to this Court whether petitioner fairly presented his argument **[*8]** concerning African-Americans to the state courts for exhaustion purposes. Respondent did not, however, raise any such argument in his opposition. The Court, therefore, will not consider the exhaustion issue.

applies that principle to the facts of the prisoner's case." *Jackson v. Coalter, 337 F.3d 74, 81 (1st Cir. 2003)*. The "unreasonable application" determination must be decided primarily on the basis of Supreme Court holdings that were clearly established at the time of the court proceedings. *Id.* Nevertheless, factually similar cases from the lower **[*9]** federal courts "may inform such a determination, providing a valuable reference point when the relevant Supreme Court rule is broad and applies to a kaleidoscope array of fact patterns." *Rashad v. Walsh, 300 F.3d 27, 35 (1st Cir. 2002)*.

If a claim was not "adjudicated on the merits in State court proceedings," then the claim should be reviewed *de novo* by the district court. *Clements v. Clarke, 592 F.3d 45, 52 (1st Cir. 2010)*. In determining whether a claim was adjudicated on the merits in state court, the Court looks to whether the state court decision resolved the parties' claims, with *res judicata* effect, based on the substance of the claim advanced, rather than on a procedural, or other, ground. *Id.* Furthermore, to garner the protection of deferential review, the claim must not only be adjudicated on the merits, but, specifically, the merits of the *federal* claim at issue, which is complicated by the fact that determining precisely which "substance" a state court relied on may be difficult to ascertain. *Id. at 53*.

Petitioner contends that his claim was not adjudicated on the merits in state court proceedings, and, therefore, he is entitled to *de novo* review.

A.State Adjudication

The **[*10]** Massachusetts Appeals Court affirmed the trial court's finding that petitioner could not rebut the presumption of propriety in the prosecutor's use of peremptory challenges. *See Sanchez, 79 Mass. App. Ct. at 191*. In doing so, the Appeals Court reiterated the Massachusetts standard: "Peremptory challenges are presumed to be proper, but that presumption may be rebutted on a showing that '(1) there is a pattern of excluding members of a discrete group and (2) it is likely that individuals are being excluded on the basis of their membership' in that group." *Commonwealth v. Soares, 377 Mass. 461, 490, 387 N.E.2d 499 (1979)*.

The corresponding federal standard was established in *Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1979)*. To make a *prima facie* showing under *Batson*, a defendant must merely raise an inference that the prosecutor struck a juror because of race or other protected status. *See Johnson v. California, 545 U.S. 162, 169, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005)*. To make a *prima facie* showing under the Massachusetts standard, however, it must be shown that it is "likely" that the venireperson was excluded because of his protected group membership. *Maldonado, 439 Mass. at 463*. The Massachusetts "likely" standard is thus more stringent than **[*11]** the federal standard. *Aspen v. Bissonnette, 480 F.3d 571, 575 (1st Cir. 2007)*. The Appeals Court therefore held petitioner to a higher standard than federal law required.

Where, as here, it is clear that the state court analyzed a petitioner's claim under a higher standard than federal law requires, the Court can interpret the holding in two ways, both of which lead to *de novo* review of the federal claim. The Court can interpret the state court's analysis as equating the federal and state standards, and thereby resulting in the application of a standard contrary to clearly established federal law. *See Aspen, 480 F.3d at 576*. In such a situation, the Court must "consider de novo whether [petitioner] is entitled to relief under the correct *Batson* standard." *Id.* Alternatively, the Court could interpret the state court's holding as resting entirely on substantive state law grounds, which would indicate that petitioner's federal claim had not been adjudicated on the merits within the meaning of *28 U.S.C. § 2254(d)*. *See Clements, 592 F.3d at 53* ("Were we to find that the state court had relied solely on state standards that did not implicate federal constitutional issues, we would review

[*12] the matter de novo."). Accordingly, this Court will review the merits of the federal constitutional claim *de novo.*

III.Analysis

Petitioner contends that his Equal Protection rights were violated when the government used four peremptory challenges to remove three African-American men, ages 24, 25, and 18, respectively, and one dark-skinned Hispanic man, age 41, from the jury. He contends that the government violated the *Fourteenth Amendment* because it discriminated against these individuals because of their status as young men "of color." He argues that because race and gender are impermissible reasons for exclusion of jurors under federal law, the Massachusetts Appeals Court erred in affirming his conviction because it should have recognized the combination of age, gender, and race as a *Batson* violation.

For the reasons set forth below, this Court finds that the Massachusetts Appeals Court correctly applied the law in accordance with federal precedent.

A.*Prima Facie*Standard

When a defendant asserts that a prosecutor has used a peremptory challenge in a discriminatory manner, *Batson* instructs the trial judge to follow a three-step inquiry. *476 U.S. at 96-98*. The moving party bears the initial **[*13]** burden of demonstrating a *prima facie* case of discrimination. *Aspen, 480 F.3d at 574* (citing *Batson, 476 U.S. at 96-98*). If this burden is met, the non-moving party must then offer a non-discriminatory reason for striking the potential juror. *Id.* The trial court must then determine if the moving party has met its ultimate burden of persuasion that the peremptory challenge was exercised for a discriminatory reason. *Id.*

"While the *prima facie* case requirement is not onerous, neither can it be taken for granted." *United States v. Bergodere, 40 F.3d 512, 516 (1st Cir. 1994)*. To surmount this initial hurdle, the defendant must present evidence sufficient to raise an inference that the prosecutor struck the venireperson because of race. *Johnson, 545 U.S. at 169*. In determining whether a *prima facie* showing has been made, the judge should consider all relevant facts and circumstances, including the composition of the jury pool when the strikes were made. *See, e.g., Batson, 476 U.S. at 97*; *United States v. Escobar-de Jesus, 187 F.3d 148, 164-65 (1st Cir. 1999)*; *Chakouian v. Moran, 975 F.2d 931, 934 (1st Cir. 1992)*.

Status as a "minority" is not a cognizable group under *Batson. Gray v. Brady, 592 F.3d 296, 302 (1st Cir. 2010)*. **[*14]** Likewise, "young adults do not constitute a 'cognizable group' for the purpose of an Equal Protection challenge to the composition of a petit jury." *United States v. Cresta, 825 F.2d 538, 545 (1st Cir. 1987)* (citing *Barber v. Ponte, 772 F.2d 982, 996-1000 (1st Cir. 1985)* (en banc)).

B.Merits of the Claim

Petitioner argues that the government improperly discriminated against young African-American males or young men "of color," which he defines as "dark-skinned." Reviewed *de novo*, even with the benefit of the correct *Batson* standard, petitioner's *Fourteenth Amendment* claim fails.[4]

First, persons "of color" are not a cognizable group under *Batson. Id.* To prove that a prospective juror was a member of such a cognizable group, petitioner must show that "(1) the group is identifiable and limited by some clearly identifiable factor, (2) a common thread of attitudes, ideas, or experiences runs through the group, and (3) a community of interests exists among the group's members, such that the group's **[*15]** interest cannot be adequately represented if the group is excluded" from the jury. *Gray, 592 F.3d at 305-06*

[4] As noted, the jury that heard the case had at least five African-American members. Petitioner does not contend that the jury that heard his case did not represent a fair cross-section of the community.

(citing *Murchu v. United States, 926 F.2d 50, 54 (1st Cir. 1991)*). Although African-Americans and Hispanics are each a distinct cognizable group, when combined they lack the necessary characteristics, definable qualities, common thread of attitudes, or interests to be considered a cognizable "group." *Accord Gray, 592 F.3d at 306* (refusing to assume that "'minorities' possess these necessary characteristics of a 'cognizable group'"); *see also United States v. Suttiswad, 696 F.2d 645, 649 (9th Cir. 1982)* ("Any group which might casually referred to as 'non-whites' would have no internal cohesion . . . . Certainly, the members of such a group would have diverse attitudes and characteristics which would defy classification."). Simply put, status as a "dark-skinned" person is not indicative of membership in a protected group with distinct cognizable rights for purposes of a *Batson* challenge.

Second, and for similar reasons, "age" is not a cognizable group under federal law. It is noteworthy that petitioner does not consistently or clearly define the age group that he contends was the **[*16]** target of unconstitutional discrimination, alternatively describing the group as "apparently young," "every dark-skinned man under thirty," and "black men [under] forty." (Docket No. 2, at 7, 9). Such broad categories, consisting of every person between the ages of 18 and 30 (or 40), cannot constitute *Batson*-cognizable groups. *See Barber v. Ponte, 772 F.2d at 998* ("Without much effort we can point to various significant social indicators that would seem to punctuate clear differences in the attitudes, values, ideas, and experiences of 18 year olds vis-a-vis 34 year olds . . . .").

Finally, petitioner cannot establish a *prima facie* case of discrimination by cobbling together cognizable groups. Petitioner argues that the government discriminated against either young men "of color" or young African-American men.[5] Recognizing that age and status as a "minority" are not acceptable grounds for a *Fourteenth Amendment* challenge, petitioner's challenge boils down to a combination of race, gender, and age. Petitioner has essentially taken two cognizable groups (African-Americans and men) and joined them together with a third undefined category (age or a juror's "apparently young" appearance) **[*17]** in an attempt to create a cognizable subclass.

Even without the dubiously broad skin-color reference, the category advanced by petitioner ("young African-American males") fails to meet the requirements of a cognizable group set forth in *Murchu. 926 F.2d at 50*. The group lacks a clearly definable factor that separates it from other groups. In particular, it is unclear how young black men would be distinguished from older black men with respect to the common identifying characteristics necessary to establish a cognizable group under *Batson*. Indeed, petitioner himself fails to define the term "young" consistently throughout his petition. Presumably, this is, at least in part, due to the fact that the sub-category **[*18]** is to a large extent indistinguishable from the general population of African-American males. In short, petitioner has not shown that a "common thread of attitudes, ideas, or experiences runs through the group." *Murchu, 926 F.2d at 50*.

Accordingly, the Court finds that the Massachusetts Appeals Court reached a conclusion that was consistent with federal law, and the petition for a writ of habeas corpus will therefore be denied.

IV. Conclusion

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED.

So Ordered.

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[5] Even if petitioner were successful in establishing that men "of color" merited constitutional protection, it is doubtful that he would be able to show that the government followed a pattern of challenging jurors within the allegedly protected group because of their status in that group. For example, petitioner would have difficulty raising the necessary inference where the government did not challenge a 34-year-old black man, but did challenge a 41-year-old dark-skinned Hispanic man.

/s/ F. Dennis Saylor

F. Dennis Saylor IV

United States District Judge

Dated: February 14, 2013

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Sanchez v. Roden

United States Court of Appeals for the First Circuit

May 28, 2014, Decided

No. 13-1394

Reporter

753 F.3d 279 *; 2014 U.S. App. LEXIS 9844 **; 2014 WL 2210574

DAGOBERTO SANCHEZ, Petitioner, Appellant, v. GARY RODEN, SUPERINTENDENT, Respondent, Appellee.

Subsequent History: As Amended May 29, 2014.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. F. Dennis Saylor IV, U.S. District Judge.

Sanchez v. Roden, 2013 U.S. Dist. LEXIS 19914 (D. Mass., Feb. 14, 2013)

Case Summary

Overview

HOLDINGS: [1]-The state appellate court unreasonably applied Batson's first prong in that it wholly failed to consider all of the circumstances bearing on potential racial discrimination; rather, it dismissed the racial challenge out-of-hand by its facile and misguided resort to the undisputed fact that the prosecutor had allowed some African-Americans to be seated on the jury; [2]-Because petitioner satisfied his initial burden under Batson, the prosecutor should have been required to articulate a race-neutral reason for his peremptory strike.

Outcome

Vacated and remanded.

Counsel: Ruth Greenberg for appellant.

Thomas E. Bocian, Assistant Attorney General, with whom Martha Coakley, Attorney General, was on brief, for appellee.

Judges: Before Howard, Ripple,* and Thompson, Circuit Judges.

Opinion by: THOMPSON

Opinion

[*284] THOMPSON, Circuit Judge. The *Fourteenth Amendment's Equal Protection Clause* guarantees that no citizen will be excluded from jury service solely on account of his or her race. This logical proposition, bordering on the obvious, was enshrined as a matter of clearly established constitutional law in *Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)*. Indeed, "[t]he Constitution forbids striking [from the jury] even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008)* (quoting *United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994)*). The principles enunciated in Batson require both state and federal courts to "ensure that no citizen is disqualified from jury service because of his race." *476 U.S. at 99*. The matter before us involves just such a claim. After careful **[**2]** review, we conclude that we must remand this matter to the district court for further proceedings.

BACKGROUND

* Of the Seventh Circuit, sitting by designation.

The Massachusetts Appeals Court ("MAC") set forth the underlying facts as they could have been found by the jury in *Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 944 N.E.2d 625 (2011)*. Rather than regurgitate them, we refer the reader to the MAC's run-down. For our purposes, it is sufficient to note that Sanchez was charged with second degree murder and unlawful possession of a firearm after the shooting death of Jose Portillo in May 2005. *Id. at 189-90*. Sanchez contended at trial that his actions constituted lawful self-defense or lawful defense of another. Id.

1. Jury Impanelment in the Trial Court

As Sanchez's appeal arises out of the Commonwealth's use of peremptory challenges at jury impanelment, we describe that proceeding in some detail. Jury impanelment took place over the course of two days in September 2006. The size of the jury pool is not disclosed in the record. We do not know the age, racial, or ethnic background of each prospective juror or the proportion of males to females in the pool. We do know, however, that three of the jurors peremptorily challenged by the Commonwealth **[**3]** were black men aged twenty-five or younger, while another was a male Latino in his forties.

[*285] The trial judge sat a jury of sixteen, which entitled each side to sixteen peremptory strikes pursuant to *Rule 20 of the Massachusetts Rules of Criminal Procedure*. He acceded to the parties' joint request that he pose general questions to the entire panel to determine whether any prospective juror knew any of the parties or witnesses, as well as to delve into whether sitting on the jury would result in hardship to any prospective juror. This initial questioning was followed by individual voir dire.

Individual voir dire sought to ascertain whether each individual juror would be able to judge the evidence fairly and impartially. The judge identified Sanchez as a "Hispanic person" and asked each juror if he or she "ha[d] any feelings about Hispanic people that might, in any way, affect [his or her] sworn duty to be a fair and impartial juror in this case?"[1] Additional questioning was intended to ferret out whether jurors had any preexisting bias or prejudice against Sanchez and whether Sanchez's age on the date of the incident or at the time of trial, seventeen and eighteen years respectively, might **[**4]** prevent that juror from being fair and impartial. The judge told prospective jurors that there may be evidence at trial about street gangs in Chelsea, Massachusetts, and asked whether they had "any feelings or opinions about street gangs that might affect [their] ability to be fair and impartial." They were also told the case may involve the concepts of self-defense and defense of another and, finally, asked if there was any other reason why they may not be able to be "fair and impartial" to the parties. Throughout this process, the trial judge afforded the parties an opportunity to suggest additional, individualized areas of inquiry based on the responses to these questions.

The trial judge excused numerous jurors for cause, including reasons such as knowledge of a witness or potential bias for or against a likely witness or the defendant. Those jurors not excused for cause became subject to the parties' peremptory challenges, with the Commonwealth going first. If neither party exercised a peremptory challenge, the juror was immediately seated. Thus, the trial judge

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[1] Defense counsel initially asked the trial judge to make this inquiry not just with regards to "Hispanic" people but also "people of color." When the trial judge asked "What does, 'people of color,' have to do with this?" defense counsel opined, "I think that Hispanics are often considered to be people of color." Defense counsel went on: "You know, ethnic bias or racial bias and that's why I put it in terms of 'Hispanic' or 'Person's [sic] of color' because they're often considered to be a person of color, and **[**5]** that a person who is -- has feelings, negative feelings, against a person of color might also have negative feelings against somebody who is Hispanic." The trial judge did not respond to this statement and did not ask potential jurors about potential bias against "people of color" or against black people. It is unclear to us why the trial judge would consider such an inquiry to be impermissible or inappropriate in the circumstances of this case.

opted to have the parties use their challenges as the seats were filled, instead of seating sixteen qualified jurors before allowing the parties to exercise peremptory challenges. We primarily concern ourselves here with the fates of five prospective jurors.

The first is Juror No. 201, a twenty-five-year-old black male who was born in Trinidad and employed **[**6]** as a computer technician.[2] He did not reveal on his juror **[*286]** questionnaire a history of arrests or involvement with law enforcement or the court system. The transcript of his individual voir dire indicates that he responded appropriately to the questions asked, and the trial judge did not excuse him for cause. The Commonwealth, however, used its fifth peremptory challenge to keep him from being seated on the jury.

Next up is Juror No. 227, a twenty-four-year-old black man from Boston. According to his questionnaire, Juror No. 227's only past experience with law enforcement was a prior arrest arising out of an unpaid traffic violation. His responses to **[**7]** the individual voir dire questions were appropriate, the trial judge did not find any cause to excuse him, and neither party asked the court to make any further inquiry into his background. The Commonwealth exercised its seventh peremptory challenge to exclude him from the jury.

Third is Juror No. 243, a twenty-one-year-old male born in Moscow, Russia, who the parties agree is white. According to his juror questionnaire, he was a student at Boston University and worked part-time as an administrative assistant for a non-profit organization. Juror No. 243 answered the court's questions appropriately, and he did not claim that serving on the jury would negatively impact his schooling. When questioned about the nature of his studies, Juror No. 243 told the court he was studying international relations. He did not take the opportunity to ask to be excused from jury service. Neither party exercised a challenge, and he was seated.

Juror No. 246 was a forty-one-year-old man originally from Guatemala. When asked whether there was any reason that he might not be able to be fair and impartial, his response was "I hope I could be fair." Upon further questioning from the trial judge about his ability **[**8]** to remain impartial, Juror No. 246 stated "[j]ust that the responsibility — I mean, no, no." At sidebar, the Commonwealth asked the court to explore whether the prospective juror was "daunted at the responsibility of returning a verdict in this case," which led to further questioning and another rather uncertain response. The Commonwealth then exercised its eleventh peremptory challenge.

Finally, we reach Juror No. 261, a nineteen-year-old black college student from Boston. According to his juror questionnaire, he worked part-time at Home Depot and had no arrests or other contact with law enforcement or the court system. The transcript indicates that he answered the court's questions appropriately at individual voir dire. When asked, he told the court that he was a student at Northeastern University, but did not claim the disruption to his studies would constitute an undue hardship. The trial judge did not find any cause to excuse him. The Commonwealth, however, exercised its twelfth peremptory challenge to prevent Juror No. 261 from being seated.

At this point, defense counsel spoke up and objected to what he considered to be the Commonwealth's pattern of challenges against "African **[**9]** Americans[3] that have been . . .

[2] Although not appearing in the record, we presume Juror No. 201 was a United States citizen, as otherwise he would not have been qualified to serve as a juror in Massachusetts. See *Mass. Gen. Laws ch. 234A, § 4* (requiring any prospective juror to be a citizen of the United States); see also *Commonwealth v. Acen, 396 Mass. 472, 481-82, 487 N.E.2d 189 (1986)* (upholding constitutionality of citizenship requirement). For this reason, we presume the other jurors peremptorily challenged were United States citizens, and that all those seated on the jury were too.

[3] As do the parties, we use the terms "African American" and "black" interchangeably. We do the same with the terms "Hispanic" and "Latino(a)."

relatively young males." He argued "there's nothing about this juror that would support a non-discriminatory reason for exercising this challenge." The court then volunteered, "I think his youth and the fact that he's a full-time college student **[*287]** could be a problem."[4] The prosecutor, however, did not respond to the court's speculative statement or indicate that those were, in fact, the reasons for his challenge. Instead, the Commonwealth questioned whether defense counsel was "making a Batson-Soares[5] challenge or . . . just making a record of it[.]" Defense counsel confirmed he was objecting to the peremptory challenge against Juror No. 261, and argued that a prima facie showing of discrimination had been made based upon the Commonwealth's challenges to two previous young black men and Juror No. 246 (the man from Guatemala). Defense counsel then asserted that in light of the latest challenge to Juror No. 261, "this would be the fourth person of color" prevented from sitting on the jury.

The trial judge first attempted to resolve the objection by stating, "for purposes of this particular juror, alone, I will find that there is a pattern of challenging black young men." The judge then asked the Commonwealth to explain the basis for its peremptory challenge. The Commonwealth fought back, however, asking the trial judge if he was actually "finding a pattern of challenges by the Commonwealth with respect to young African American men[,]" and advising the court that it needed to find such a pattern existed before it could inquire as to the reasoning behind the challenges. The following colloquy took place between the trial judge and the prosecutor, Attorney Mark Lee:

> The Court: Basically, what I was trying to do, and I think -- I'm not so sure, so how's this, to shortcut that **[**11]** and for you to ask -- to tell me why --
>
> Mr. Lee: I don't think so, Your Honor, and I think the Supreme Judicial Court has been relatively clear on this point, and almost to the point where there needs to be almost specified language, and I would, at this point, ask the Court whether it is finding, as a matter of fact, that the Commonwealth has engaged in a pattern of discrimination.

The trial judge, after reviewing case law, indicated that the party raising the issue must make a prima facie showing of impropriety in the use of peremptory challenges by showing the prospective jurors who have been challenged are members of a discrete group. He further stated that Sanchez was required to show "that there is a likelihood that they are being excluded from the jury sole[l]y on the basis of their group membership."

The trial judge initially appeared to agree with defense counsel's position, stating, "[y]ou have [n]umber one, okay, there's a prima faci[e] showing." When defense counsel said that no non-discriminatory reason for the challenges was apparent on the record, the trial judge responded, "[b]ut the question is whether it's likely there was a likelihood they were being excluded from the **[**12]** jury sole[l]y on the basis of their group membership, that's the second issue that has to be established by the challenging party." Defense counsel maintained that the Commonwealth was obligated to show a non-discriminatory reason, stating "there was nothing that came out in the course of voir[] dire examination that would establish a non-discriminatory reason for the challenge; that is, we have minorities who were challenged **[*288]** and nothing in the voir[] dire to indicate, on [its] face, a non-discriminatory reason for it." The prosecutor shot back, telling the court he "disagree[d] entirely with that analysis," and insisted he had no burden to give any explanation for his challenges unless and until the court found the Commonwealth had "engaged in a pattern of

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[4] The Massachusetts Supreme **[**10]** Judicial Court frowns upon a trial court supplying a race-neutral reason for a prosecutor's challenge, as "that reason must come from the prosecutor, and not the judge." *Commonwealth v. Fryar, 414 Mass. 732, 739, 610 N.E.2d 903 (1993)*. "Otherwise, the judge risks assuming the role of the prosecutor (or trial counsel) . . . ." Id.

[5] *Soares v. Commonwealth, 327 Mass. 460, 99 N.E.2d 452 (1979)*, the bedrock Massachusetts case in this area.

discriminatory use of [peremptory] challenges."

The trial judge went deeper into the issue. He took another look at the jurors and had defense counsel confirm that the exclusion of Jurors No. 201, 227, and 246 formed the basis for the alleged pattern of discrimination. The trial judge opined that Juror No. 246, being from Guatemala, "under no circumstances could . . . be considered a man of color." The trial judge then reported there **[**13]** were, "already, five black people sitting on this jury, okay; so I can't see, as a class; regarding to the color would be a problem." He attempted to summarize defense counsel's position, stating "[w]hat you're basically saying is it's because they're young black men, is that correct; in other words, the emphasis on their age?" Defense counsel responded:

> I think that that's certainly part of it; I mean I think that that's what distinguishes these challenges from the other black persons who weren't challenged. But I think that even if you just look at the two black persons who were challenged, that would be two out of a total of seven which is a significant percentage, in and of itself. But the additional feature to the black persons who have been challenged, I believe, are the relatively youthful -- I guess one is 24 and one is 25.

Defense counsel continued, arguing that even if he were to "take out [Juror No. 246], the Guatemalan, [Juror No. 261] would be the third black man challenged out of a total of eight who have been questioned, so far." The prosecutor took the position that the challenged grouping was based on the young age of the prospective jurors, and that age is not "a protected **[**14]** class for purposes of Soares and Batson."

After hearing from counsel, the trial judge made an oral ruling "that there has not been shown a pattern of discrimination in this case, under the Soares case, at this time." He then permitted the prosecutor to exercise his peremptory challenge against Juror No. 261. At no time did the trial judge require the Commonwealth to justify its peremptory challenge to Juror No. 261, nor did the prosecutor ever offer any explanation for any of the challenges.

Jury selection continued, with each side exercising several additional peremptory challenges, but there were no further allegations of discrimination. The record does not reveal the ethnic backgrounds of the additional jurors, or the background of any of the others who were excluded. Thus, we know nothing about the overall ethnic makeup of the seated jury, apart from the fact that at least five members were black. The seated jurors ranged from ages twenty-one through fifty-five, although the age of Juror No. 305 does not appear in the record.

After all the evidence was in and closing arguments completed, the trial judge instructed the jurors on the elements of second degree murder and the lesser included **[**15]** offense of manslaughter, along with self-defense and defense of another. The jury found Sanchez guilty of second degree murder and possession of a firearm without a license. The court sentenced Sanchez to life in prison for the murder conviction, with a concurrent two year sentence for the gun offense.

[*289] 2. Sanchez's Appeals

Sanchez appealed his conviction to the MAC. Although he pressed several grounds on appeal, the only issue we need concern ourselves with is the Commonwealth's use of peremptory challenges. Sanchez argued the Commonwealth used its peremptory challenges to exclude all "young men of color in the jury pool" in violation of the equal protection guarantees of both the Massachusetts Declaration of Rights and the United States Constitution. According to his brief to the MAC, by the time Sanchez objected to the exclusion of Juror No. 261, the Commonwealth had "peremptorily challenged four of the six non-white men called, and every man of color under thirty[,]" while "[t]wo young white men were seated without challenge." Citing both Massachusetts and federal case law, Sanchez took the position that the

Commonwealth's challenges to "all young men of color" violated equal protection **[**16]** principles because the record established that, had they been white or female, they would have been permitted to serve. Sanchez asserted that the challenged jurors were not excluded because of their age, but because of their race.

For its part, the Commonwealth reiterated its argument that Sanchez had failed to make out a prima facie case of discrimination. Conceding it would be improper to exercise peremptory challenges on the basis of race or gender, the Commonwealth maintained that "[a]ge, however, is not a discrete group that is afforded such constitutional protection." The heart of the Commonwealth's position was, essentially, that since at the time of Sanchez's objection there were already five black people seated and only one juror was under the age of thirty, the record showed the Commonwealth challenged the three young black men--aged nineteen, twenty-four, and twenty-five--because of their youth, not their race. Thus, the Commonwealth believed the trial judge did not err when he declined to make a prima facie finding of discrimination.

The MAC sided with the Commonwealth, focusing its analysis on the Massachusetts Declaration of Rights rather than the United States Constitution **[**17]** in the belief that the outcome would be the same regardless of whether it rested its decision on state or federal law. *Sanchez, 79 Mass. App. Ct. at 191 n.8*. The MAC set forth the controlling Massachusetts law: "Peremptory challenges are presumed to be proper, but that presumption may be rebutted on a showing that '(1) there is a pattern of excluding members of a discrete group and (2) it is likely that individuals are being excluded solely on the basis of their membership' in that group." *Id. at 192* (quoting *Commonwealth v. Maldonado, 439 Mass. 460, 463, 788 N.E.2d 968 (2003)* (further citation omitted)). The MAC felt Sanchez's claim of discriminatory use of peremptory challenges was foreclosed by the fact that five other black jurors had already been seated when the Commonwealth challenged Juror No. 261. Id. It then observed "age is not a protected class under either the Declaration of Rights . . . or the United States Constitution." *Id. at 193*. The MAC further found that the trial judge "did not err in rejecting [Sanchez's] assertion that 'persons of color' includes both African-American and Hispanic jurors and constitutes a discrete aggregate group under Soares." Id. As such, the MAC agreed with **[**18]** the trial judge that Sanchez had failed to make a prima facie showing that the Commonwealth's use of peremptory challenges was likely motivated by the race of the jurors. *Id. at 192-93*.

Undaunted by the MAC's rejection of his appeal, Sanchez filed an Application for **[*290]** Leave to Obtain Further Appellate Review with the Massachusetts Supreme Judicial Court ("SJC"). Sanchez argued the Commonwealth's elimination of "four of six non-white male jurors while seating similarly situated white male jurors" required a prima facie finding of discrimination, which the trial judge erred by failing to make. Sanchez further stated the Commonwealth "deliberately" prevented all young men of color from sitting on the jury. The SJC, however, denied the petition on June 29, 2011, without issuing a written opinion. *Commonwealth v. Sanchez, 460 Mass. 1106, 950 N.E.2d 438 (2011)*. Sanchez's subsequent petition for a writ of certiorari from the United States Supreme Court was denied as well. *Sanchez v. Massachusetts, 132 S. Ct. 408, 181 L. Ed. 2d 267 (2011)*.

There being no further avenue of direct appeal in the Massachusetts courts, Sanchez turned to the federal courts and sought a writ of habeas corpus from the United States District Court for the **[**19]** District of Massachusetts. The district court denied the petition, but granted a Certificate of Appealability. This appeal followed.

DISCUSSION

1. The Lay of the Land

On appeal to this Court, Sanchez argues the Commonwealth's use of peremptory challenges against young African Americans violated the equal protection principles laid down in Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Because the equal protection jurisprudence of Batson and its progeny is at the heart of the procedural and substantive issues raised by the parties, we lay the groundwork here, at the outset, to put matters into perspective.

In Batson, the Supreme Court reaffirmed the longstanding proposition that the *Fourteenth Amendment's Equal Protection Clause* bars a prosecutor from exercising a peremptory challenge based on the race of a prospective juror. Id. at 86-87. The "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the *Fourteenth Amendment* was designed to cure." Id. at 85. Although the *Fourteenth Amendment* does not provide a defendant with a "right to a 'petit jury composed in whole or in part of persons of his own race' . . . [a] defendant does have the right to be tried **[**20]** by a jury whose members are selected pursuant to nondiscriminatory criteria." Id. at 85-86 (quoting Strauder v. West Virginia, 100 U.S. 303, 305, 25 L. Ed. 664 (1879)). The Batson Court reexamined "the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." Id. at 82.

Prior to Batson, the Supreme Court had held "[i]t was impermissible for a prosecutor to use his challenges to exclude blacks from the jury 'for reasons wholly unrelated to the outcome of the particular case on trial' or to deny blacks 'the same right and opportunity to participate in the administration of justice enjoyed by the white population.'" Id. at 91 (quoting Swain v. Alabama, 380 U.S. 202, 224, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965)). Thus, before Batson "a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system was 'being perverted' in that manner." Id. (quoting Swain, 380 U.S. at 224). A defendant could meet this standard by showing, for example

> **[*291]** that a prosecutor, "in case after case, whatever the circumstances, whatever the crime and whoever the **[**21]** defendant or the victim may be, is responsible for the removal of [African Americans] who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no [African Americans] ever serve on petit juries."

Id. at 91-92 (quoting Swain, 380 U.S. at 223). The defendant in Swain failed to meet that standard because "he offered no proof of the circumstances under which prosecutors were responsible for striking black jurors beyond the facts of his own case." Id. at 92.

Perhaps unsurprisingly given the Court's reasoning in Swain, subsequent decisions from the lower courts concluded "that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the *Equal Protection Clause*." Id. Requiring defendants to make such showings put them to "a crippling burden of proof" and effectively rendered peremptory challenges "largely immune from constitutional scrutiny." Id. at 92-93. This led the Batson Court to relax the demanding standard and declare that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's **[**22]** exercise of peremptory challenges at the defendant's trial." Id. at 96.

Under Batson as originally formulated, a defendant "first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." Id. (internal citation omitted).[6] A defendant is also

[6] A cognizable racial group is one that is "capable of being singled

"entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Id. (quoting *Avery v. Georgia, 345 U.S. 559, 562, 73 S. Ct. 891, 97 L. Ed. 1244 (1953)*). "Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." Id. It is this "combination of factors" from which the initial prima facie inference of discrimination arises. Id.

The Court went on to stress that a trial court is required to "consider all **[**23]** relevant circumstances" in determining whether a defendant has satisfied the prima facie burden. Id. It provided a couple of "illustrative" examples. *Id. at 97*. An inference of discrimination might be drawn when there is "a 'pattern' of strikes against black jurors." Id. Alternatively, a "prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." Id. Ultimately, it is up to the trial judge to determine whether the relevant circumstances in any particular case are sufficient to make out a prima facie case of discrimination. Id.

Once a defendant has made out a prima facie case, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." Id. In addition to being racially neutral, the reasoning undergirding the challenge must be "related **[*292]** to the particular case to be tried." *Id. at 98*. After the prosecutor provides a neutral explanation, it falls to the trial court "to determine if the defendant has established purposeful discrimination." Id. This inquiry has come to be referred to as the three-pronged Batson test.

Thus, while Batson lowered **[**24]** the evidentiary hurdle with respect to discriminatory use of peremptory challenges, some significant barriers remained. First, a defendant could not object to discriminatory use of challenges unless he himself was a member of a cognizable racial group. And even if the defendant was a member of such a group, he could object only if the prosecutor used peremptory challenges to eliminate jurors that shared the defendant's racial background. In other words, an African-American defendant could only object to the elimination of prospective African-American jurors. Therefore, even post-Batson, a prosecutor could exercise peremptory strikes on the basis of race, so long as the prosecutor simply avoided discriminating against members of the defendant's race.

A defendant's ability to object to discriminatory use of peremptory challenges has been expanded considerably in the years since Batson was decided. While Batson focused on a defendant's *Fourteenth Amendment* right to a fair trial, the Court turned its attention to an individual juror's right not to be discriminated against because of his or her race in *Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)*. The Court made it clear that, although "[a]n individual **[**25]** juror does not have a right to sit on any particular petit jury, . . . he or she does possess the right not to be excluded from one on account of race." *Id. at 409*. The Powers Court "conclude[d] that a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race." *Id. at 415*. Importantly, a defendant may advance such an objection "whether or not the defendant and the excluded juror share the same races." *Id. at 402*. And, in *Miller-El v. Dretke, 545 U.S. 231, 237-38, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)* ("Miller-El II"), the Supreme Court referred broadly to the harm that results from "racial discrimination" in the jury selection process and that is done when the "choice of jurors is tainted with racial bias." Accordingly, today a defendant is free to object to the use of a peremptory challenge without regard to whether the defendant and the excused juror are of the same race. See *United States v. Mensah, 737*

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out for differential treatment." *Id. at 94* (citing *Castaneda v. Partida, 430 U.S. 482, 494, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977)*).

F.3d 789, 797 (1st Cir. 2013) (black defendant objecting to peremptory challenges against Asian-Americans), cert. denied, *134 S. Ct. 1876, 188 L. Ed. 2d 917 (2014)*.

In sum, Batson has expanded and evolved to better accomplish its overriding goal of ending **[**26]** racial discrimination in the use of peremptory challenges. As such, the earlier strictures have fallen by the wayside. The proper focus of a Batson inquiry, therefore, is not whether the defendant or excluded juror is part of a cognizable group, but rather whether "a peremptory challenge was based on race." *Snyder v. Louisiana, 552 U.S. 472, 476, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008)*.[7]

[*293] Having set the stage, we turn our attention to the specific issues raised in this appeal.

2. Standard of Review

We are called upon to review the district court's dismissal of Sanchez's habeas petition. It is well established that "[o]ur review of a district court's grant or denial of habeas is de novo." *Healy v. Spencer, 453 F.3d 21, 25 (1st Cir. 2006)* (citing *Norton v. Spencer, 351 F.3d 1, 4 (1st Cir. 2003)*). Our de novo review encompasses the district court's own "determination of the appropriate standard **[**27]** of review of the state court proceeding." *Zuluaga v. Spencer, 585 F.3d 27, 29 (1st Cir. 2009)*. Although the district court's written decision may be "helpful for its reasoning, [it] is entitled to no deference." *Healy, 453 F.3d at 25*. This essentially places us "in the shoes" of the district court and requires us to determine whether the habeas petition should have been granted in the first instance.

3. Exhaustion of State Remedies

The Commonwealth argues on appeal, for the first time we note, that Sanchez's claims are barred because he failed to exhaust all available remedies in the Massachusetts courts. Placing an undue emphasis on labeling individuals as members of one group or another--as it does throughout this appeal--the Commonwealth urges us to find Sanchez failed to exhaust his remedies in state court proceedings because he variously defined the cognizable class of individuals who had been discriminated against as males who are either "young men of color" or "African-American." The Commonwealth's view is that Sanchez has not previously "allege[d] a discriminatory pattern of excluding young, African-American men, in particular, from the jury, which is the claim being made here **[**28]** on appeal." Accordingly, the Commonwealth concludes that while a claim of discrimination against men of color may have been exhausted, any claim of discriminatory use of peremptory challenges against young black men is barred for failure to exhaust remedies.

In rejoinder, Sanchez argues that the grounds pressed in state court have always included his specific claim that the Commonwealth improperly exercised its peremptory challenges to eliminate "all young black men" from the jury. Responding directly to the Commonwealth's view that a claim of discrimination against "young men of color" is different from a claim of discrimination against "young black men," Sanchez points out that "men of color" is "a politically correct term [that] necessarily includes the lesser included group of black men." Sanchez also advises that he has always claimed that the Commonwealth deprived three young black men of their *Fourteenth Amendment* rights and that "every court prior to this has recognized this as the issue presented." Therefore, Sanchez believes that he properly exhausted all state remedies before seeking relief

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[7] Equal protection applies, of course, to all individuals regardless of their race. Exercising peremptory challenges against white jurors on account of their race violates Batson just as surely as does striking black jurors because of theirs. *United States v. Walker, 490 F.3d 1282, 1292 (11th Cir. 2007)*, cert. denied, ***552 U.S. 1257, 128 S. Ct. 1649, 170 L. Ed. 2d 354 (2008)***.

by way of his habeas petition.[8]

[*294] The exhaustion requirement has been codified in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), *28 U.S.C. § 2254(b)(1)(A)*. *Clements v. Maloney, 485 F.3d 158, 161-62 (1st Cir. 2007)*. According to the statute, a habeas applicant must "exhaust[] the remedies available in the courts of the State" before running to federal court. *28 U.S.C. § 2254(b)(1)(A)*. This obligation has its genesis in the principle "that as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act." *Coningford v. Rhode Island, 640 F.3d 478, 482 (1st Cir. 2011)* (quoting *Rose v. Lundy, 455 U.S. 509, 515, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982)*). Generally speaking, a petitioner's failure to exhaust all state remedies is "fatal to the prosecution of a federal habeas case." Id.

A claim based on federal law is not exhausted unless a petitioner has "fairly and recognizably" presented it to the state courts. *Casella v. Clemons, 207 F.3d 18, 20 (1st Cir. 2000)*. By this we mean that a petitioner must have "tendered **[**31]** his federal claim 'in such a way as to make it probable that a reasonable jurist would have been alerted to the existence of the federal question.'" Id. (quoting *Adelson v. DiPaola, 131 F.3d 259, 262 (1st Cir. 1997)*). Stated somewhat differently, "'the legal theory [articulated] in the state and federal courts must be the same.'" *Clements, 485 F.3d at 162* (alteration in original) (quoting *Gagne v. Fair, 835 F.2d 6, 7 (1st Cir. 1987)*).

We have identified several ways in which a petitioner may satisfy this requirement, including "reliance on a specific provision of the Constitution, substantive and conspicuous presentation of a federal constitutional claim, on-point citation to federal constitutional precedents, identification of a particular right specifically guaranteed by the Constitution, and assertion of a state-law claim that is functionally identical to a federal constitutional claim." *Coningford, 640 F.3d at 482*. In addition, "citations to state court decisions which rely on federal law or articulation of a state claim that is, 'as a practical matter, [] indistinguishable from one arising under federal law' may suffice to satisfy the exhaustion requirement." *Clements, 485 F.3d at 162* **[**32]** (alteration in original) (quoting *Nadworny v. Fair, 872 F.2d 1093, 1099-1100 (1st Cir. 1989)*). The exhaustion requirement is not satisfied, though, if a petitioner has "simply recite[d] the facts underlying a state claim, where those facts might support either a federal or state claim." Id.

The Commonwealth's argument that Sanchez failed to meet the exhaustion requirement relies heavily on *Gray v. Brady, 592 F.3d 296 (1st Cir. 2010)*. According to the Commonwealth, we recognized in Gray that it is not improper for a prosecutor to strike potential jurors simply because they are "people of color." See *id. at 305 n.5* (noting that although "either African-Americans or Hispanics constitute a 'cognizable group' for Batson purposes[,] . . . that is a different question from whether 'minorities' constitute such a group.") Thus, the Commonwealth asserts in its **[*295]** brief that Sanchez "did not present to the MAC or to the SJC the specific claim of a discriminatory

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[8] The Commonwealth waived its exhaustion defense by **[**29]** failing to raise it before the district court. "When the State answers a habeas corpus petition, it has a duty to advise the district court whether the prisoner has, in fact, exhausted all available state remedies." *Granberry v. Greer, 481 U.S. 129, 134, 107 S. Ct. 1671, 95 L. Ed. 2d 119 (1987)*. A procedural defense, such as exhaustion, is waived if not raised in response to that petition or argued before the district court. *Rosenthal v. O'Brien, 713 F.3d 676, 683 (1st Cir.)*, cert. denied, ***134 S. Ct. 434, 187 L. Ed. 2d 292 (2013)***. While the Commonwealth did set out exhaustion of remedies as an affirmative defense in its answer to the habeas petition, it explicitly admitted Sanchez exhausted state remedies. The Commonwealth then failed to even mention an exhaustion defense in its brief to the district court. Thus, the Commonwealth has waived it. See *Bledsue v. Johnson, 188 F.3d 250, 254 (5th Cir. 1999)* (exhaustion defense waived where state admitted all state remedies had been sufficiently exhausted). Nevertheless, we proceed to the merits because the Supreme Court has advised us to "take a fresh look" at the exhaustion issue where "the **[**30]** State fails, whether inadvertently or otherwise, to raise an arguably meritorious nonexhaustion defense." *Granberry, 481 U.S. at 134*.

pattern of excluding young, African-American men from the jury," and has, therefore, failed to exhaust that claim. We do not agree with the premise of the Commonwealth's argument.

First, *Gray* is of little assistance to the Commonwealth, as **[**33]** the case simply did not concern exhaustion of remedies. Gray addressed a situation in which the defendant attempted to establish a prima facie case of discrimination against a prospective Latino juror based solely on the court's previous finding that the prosecutor's peremptory challenges against African Americans had been racially motivated. *Id. at 302-03*. Gray argued the previous strikes against African Americans demonstrated that the prosecutor was discriminating against "minorities," such that the subsequent challenge of the Latino juror should be disallowed. *Id. at 305*.

In rejecting Gray's Batson challenge, we determined that he failed to present any "factual support" for his claim that "minorities" represent a "cognizable group" for purposes of his Batson challenge. *Id. at 306*. After reviewing relevant decisions of our sister circuits, we determined that "with no evidentiary showing whatsoever, we cannot assume that 'minorities' constitute the 'cognizable group' essential to showing that the prosecutor intentionally discriminated against such a group in his or her use of peremptory challenges in violation of Batson." Id. Thus, we concluded that Gray failed to make out a prima **[**34]** facie Batson case. In sum, Gray represented an application of Batson principles and is inapplicable to the question as to whether Sanchez has presented a consistent claim so as to satisfy the exhaustion requirement applicable to his habeas petition.[9]

Furthermore, although the Commonwealth expends much energy attempting to convince us that Sanchez did not exhaust his state remedies because he objected to the exclusion of one group or another of prospective jurors (e.g., men "of color" or "young, black men") before different courts, Sanchez made only one Batson objection at trial.[10] From that time, Sanchez argued to each state court that the Commonwealth's challenge of Juror No. 261 was improper because it was based upon his race. To the extent the exact wording of Sanchez's arguments may have varied over time, we have long held that "a petitioner need not express his federal claims in precisely the same terms **[*296]** in both the state and federal courts" in order to have satisfied the exhaustion requirement. *Barresi v. Maloney, 296 F.3d 48, 51-52 (1st Cir. 2002)* (citing *Picard v. Connor, 404 U.S. 270, 277-78, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971)*). Accordingly, we are satisfied that Sanchez has espoused the same "legal theory" throughout. *Clements, 485 F.3d at 162*.

The only remaining question with respect to exhaustion is whether Sanchez sufficiently alerted the Massachusetts courts to the federal nature of his claim. While the Commonwealth has not argued that Sanchez failed to do so in the state courts, we consider it here as part of our "fresh look" at the issue. See *Granberry v. Greer, 481 U.S. 129, 134, 107 S. Ct. 1671, 95 L. Ed. 2d 119 (1987)*.

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[9] We note that in Gray we stated an "essential" element of Gray's particular Batson claim is a showing that the "prosecutor intentionally discriminated against such a [cognizable] group in his or her use of peremptory challenges." *Gray, 592 F.3d at 306*. In reaching this conclusion, we relied upon our prior opinions in *Murchu v. United States, 926 F.2d 50 (1st Cir. 1991)* and *United States v. Marino, 277 F.3d 11 (1st Cir. 2002)*, along with several cases from our sister circuits, all of which were decided prior to *Snyder. Snyder v. Louisiana, 552 U.S. 472, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008)*

In the wake of Snyder, a defendant need only show that a single peremptory challenge was exercised on the basis of race in order to make out an equal protection violation, regardless of the race of the defendant or the prospective juror. See *id. at 478*. While a defendant may meet his burden by showing a pattern of discrimination against a "cognizable group," this is but one of several **[**35]** conceivable options.

[10] Although Sanchez maintains on appeal that he is objecting to the exclusion of all three young, black men, given the jury selection process utilized in this case, Sanchez waived any objection **[**36]** to the Commonwealth's peremptory strikes against Jurors No. 201 and 227 by failing to object to those strikes at the time they were exercised. Thus, we limit our inquiry to the equal protection claim he advances on behalf of Juror No. 261.

We begin with the trial level. Immediately after the Commonwealth struck Juror No. 261, defense counsel advised the trial judge that with its latest challenge the Commonwealth "has, now, exercised [peremptory] challenges against a large number of African American[s]." He also expressed his opinion that no nondiscriminatory reason explained the strike. The prosecutor asked whether Sanchez was "making a Batson-Soares challenge," referring to the leading federal and Massachusetts cases on discriminatory use of peremptory challenges. See *Soares v. Commonwealth, 377 Mass. 461, 387 N.E.2d 499 (1979)*. Defense counsel confirmed **[**37]** he was in fact objecting to the peremptory strike. Later in the colloquy, the prosecutor again referenced both "Soares and Batson."

Significantly, the experienced trial judge[11] did not question what the parties meant by a "Batson-Soares" challenge, which suggests he was well aware of both cases and their holdings. Indeed, it is exceedingly common for attorneys and judges to use case names as short-hand references to their holdings and the legal concepts underpinning them. We have no reason to doubt that this is exactly what happened here and that the trial judge was cognizant of the federal aspect of Sanchez's claim. Based on the foregoing, we find that Sanchez fairly presented the trial judge with his claim that the Commonwealth's peremptory challenge of Juror No. 261 violated the equal protection principles of the *Fourteenth Amendment*.

Sanchez also presented his federal claim in his state appeals. A litigant satisfies the fair presentment requirement by identifying a claim as federal in his or her brief to a state appellate court. *Clements, 485 F.3d at 168* (citing **[**38]** *Baldwin v. Reese, 541 U.S. 27, 32, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004)*). This can be accomplished by referencing an amendment to the United States Constitution, id., "or by simply labeling the claim 'federal.'" *Baldwin, 541 U.S. at 32*. Sanchez's briefs to the MAC and the SJC both referenced the *Fourteenth Amendment* in general and Batson in particular, and he discussed federal case law and his interpretation of *Fourteenth Amendment* requirements. His in-depth treatment of the federal claim in his briefs easily satisfies the "fair presentment" standard.

After taking a fresh look at the issue, we find Sanchez exhausted his state remedies by "fairly and recognizably" presenting his federal claim to the Massachusetts courts. *Casella, 207 F.3d at 20*. It follows that his habeas petition is properly before us.

[*297] 4. Merits of Sanchez's Habeas Petition

i. General Habeas Principles

Having cleared the decks of the preliminary issues, we turn our attention to the merits of Sanchez's habeas petition. We begin with the AEDPA's statutory framework, *28 U.S.C. § 2241 et seq.* "[A] circuit judge . . . shall entertain an application for a writ of habeas corpus [o]n behalf of a person in custody pursuant to the judgment of a State court only **[**39]** on the ground that he is in custody in violation of the Constitution or law or treaties of the United States." *28 U.S.C. § 2254(a)*. A habeas petition

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "Federal habeas exists to

[11] We take judicial notice that the trial judge was appointed to the Massachusetts Superior Court in 1990 and retired in 2012.

rescue those in custody from the failure to apply federal rights, correctly or at all." *Nadworny, 872 F.2d at 1096*. The Supreme Court has repeatedly held that the habeas standard embodied in *Section 2254(d)* is "difficult to meet," and that the statute acts as a limitation upon the authority of federal courts that "all federal judges must obey." *White v. Woodall, 134 S. Ct. 1697, 1701-02, 188 L. Ed. 2d 698 (2014)* (internal quotation marks omitted).

"A state court's determination that a claim lacks merit precludes federal habeas relief **[**40]** so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011)*. Such a finding is a precondition to the grant of any form of habeas relief, as "habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." Id. (internal quotation marks omitted.) In sum, a petitioner bears the burden of demonstrating "that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of disagreement." *Id. at 786-87*.

These are not the only limitations with respect to habeas petitions. We shall address additional conditions as necessary.

ii. Clearly Established Federal Law

Pursuant to *Section 2254(d)(1)*, federal courts are prohibited from granting habeas relief unless the petitioner shows that the state court's decision involved "clearly established Federal law" and was either "contrary to" or an "unreasonable application of" that law. *Thaler v. Haynes, 559 U.S. 43, 47, 130 S. Ct. 1171, 175 L. Ed. 2d 1003 (2010)* (per curiam). Because a petitioner is required **[**41]** to demonstrate that his claim involves "clearly established federal law" regardless of whether the state court's decision is alleged to be "contrary to" or an "unreasonable application of" federal law, we begin our inquiry there. In the context of this case, Sanchez must show that Batson--and the proposition that a prosecutor may not exercise peremptory challenges on the basis of race--constituted clearly established federal law at the time his conviction became final in 2011.[12]

[*298] "Clearly established Federal law for purposes of *§ 2254(d)(1)* includes only the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." *White, 134 S. Ct. at 1702* (internal quotation marks omitted); see also *Thaler, 559 U.S. at 47* ("A legal principle is 'clearly established' within the meaning of this provision only when it is embodied in a holding of this Court."). In evaluating whether a principle of federal law is "clearly established," we must **[**42]** look to cases decided by the Supreme Court rather than our own case law. *Id. at 1702 n.2*. Further, we confine our inquiry to the state of federal law "as of the time of the relevant state-court decision." *Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*.

The parties are in apparent agreement that Batson sets forth "clearly established federal law." Sanchez has not briefed that specific issue, and the Commonwealth explicitly states that it does. We agree as well.

When it was decided, Batson made clear that peremptory challenges may not be exercised on the basis of race. And in recognizing that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the *Fourteenth Amendment* was designed to cure," Batson did not announce a new principle of federal law. *476 U.S. at 85*. Instead, Batson harkened back to the *Fourteenth Amendment* in order to highlight this longstanding principle's venerable lineage. Subsequent Supreme Court case law has only

[12] The MAC issued its opinion on April 1, 2011, and the SJC denied Sanchez's application for further appellate review on June 29, 2011. Our determination of the state of clearly established federal law is the same regardless of which date is utilized.

reinforced Batson's holding, culminating in Snyder's adoption in 2008 of the Ninth Circuit's statement that "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder, 552 U.S. at 478* **[**43]** (quoting *United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994)*). It is difficult to imagine a formulation of this principle that could be any more direct or explicit. We also find it significant that Snyder resulted in the Supreme Court's on-the-merits reversal of a state court's finding that certain peremptory challenges were not motivated by racial discrimination, *id. at 486*, demonstrating that the Supreme Court considers Batson and its application to constitute clearly established federal law. Accordingly, we find that at the time Sanchez's conviction became final in 2011, it was clearly established as a matter of federal law that a prosecutor is prohibited from exercising challenges on the basis of race.

iii. Unreasonable Application of Clearly Established Federal Law

We must now consider whether the MAC's decision was contrary to or represented an unreasonable application of clearly established federal law.[13] When reviewing a state court's application of federal law, we are cognizant that "state courts must reasonably apply the rules 'squarely established' by [the Supreme] Court's holdings to the facts of each case." **[*299]** *White, 134 S. Ct. at 1709* (quoting *Knowles v. Mirzayance, 556 U.S. 111, 122, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009)*). **[**44]** "[U]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Williams, 529 U.S. at 413*.

However, given the level of deference required by the habeas statute, we may not grant habeas relief simply because we disagree with a state court's reasoning or feel that it reached an incorrect result. "[A]n unreasonable application of federal law is different from an incorrect application of federal law." *Id. at 410*. For us to find that a state court unreasonably applied federal law, its application "must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *White, 134 S. Ct. at 1702*, **[**45]** (quoting *Lockyer v. Andrade, 538 U.S. 63, 75-76, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)*).

Circling back to Batson, the Supreme Court has "made it clear that in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder, 552 U.S. at 478* (citing *Miller-El II, 545 U.S. at 239*). Here, the MAC unreasonably applied Batson's first prong in that it wholly failed to consider all of the circumstances bearing on potential racial discrimination. Instead, the MAC dismissed the racial challenge out-of-hand by its facile and misguided resort to the undisputed fact that the prosecutor had allowed some African Americans to be seated on the jury. See *Sanchez, 79 Mass. App. Ct. at 192*.

Notably, the MAC's written opinion rejected Sanchez's racial discrimination claim in a single sentence that merely acknowledged the presence of other black people on the jury.[14] Id. The MAC indicated any discrimination must have been based

[13] The SJC summarily denied Sanchez's application for further appellate review. As such, we "must 'look through to the last reasoned decision' in evaluating the basis for the state court's holding." *King v. MacEachern, 665 F.3d 247, 252 (1st Cir. 2011)* (quoting *Clements v. Clarke, 592 F.3d 45, 52 (1st Cir. 2010)*) (further citations omitted). Thus, we turn our attention to the MAC's opinion.

[14] The MAC also agreed with the trial judge that "persons of color"--a grouping which would have included the Latino juror the Commonwealth struck--do not make up a "discrete aggregate group" for purposes of its Soares analysis. *Id. at 193*. Although the Latino juror also possessed the right not to be discriminated against on the basis of his race, Sanchez does not press any claims on his behalf.

on age, not race, because the prosecutor allowed a good number of potential jurors of more mature vintage to be seated. See *id. at 193*. This, in effect, recast Sanchez's race-based challenge as an **[**46]** age-based objection. The MAC gave no consideration whatsoever to Sanchez's argument that no non-discriminatory reason explained why the prosecutor struck Juror No. 261 but not other prospective jurors. Thus, the MAC disregarded the Supreme Court's exhortation that it must consider all circumstances bearing on potential discrimination.

Further, by focusing exclusively on the presence of other African Americans on the jury at the time of Sanchez's Batson challenge, the MAC ignored Juror No. 261's right not to be discriminated against on account of his race. The MAC simply missed the core concern addressed in the Supreme Court's jurisprudence. Even more troubling, the MAC's application of Batson sent the unmistakable message that a prosecutor can get away with discriminating against some African **[**47]** Americans (and by extension, individuals from any other ethnic background) on the venire: so long as a prosecutor does not discriminate against all such individuals, not only will his strikes be permitted, but he **[*300]** will not even be required to explain them. Perversely, this application may well lead to increased racial discrimination in jury selection, a result diametrically opposed to Batson's core rationale that "[a] persons's race simply 'is unrelated to his fitness as a juror.'" *Batson, 476 U.S. at 87* (quoting *Thiel v. S. Pac. Co., 328 U.S. 217, 227, 66 S. Ct. 984, 90 L. Ed. 1181 (1946)* (Frankfurter, J., dissenting)).

All in all, there can be no doubt that the MAC failed to inquire into all of the facts and circumstances relevant to Sanchez's claim of racial discrimination. It followed up by applying Batson's first prong in such a way as to permit increased racial discrimination. The MAC's treatment of Sanchez's Batson claim was more than clearly erroneous: it was objectively unreasonable in light of clearly established federal law. See *White, 134 S. Ct. at 1701*. No fairminded jurist could come to any other conclusion based on the state of clearly established federal law at the time of the MAC's opinion.

Because **[**48]** we hold that the MAC unreasonably applied clearly established federal law, it is unnecessary for us to separately address whether the MAC's conception of Batson's three-step inquiry was "contrary to" clearly established federal law. See *Thaler, 559 U.S. at 47* (recognizing that habeas may be granted where a state court's decision is either "contrary to" or represents an "unreasonable application of" clearly established federal law).[15]

iv. Application of Batson's First Prong

That the MAC unreasonably applied the first Batson prong does not necessarily entitle Sanchez to prevail on his habeas claim. See *Aspen, 480 F.3d at 576*. Sanchez must still "show that his underlying

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[15] In reliance on state law, the MAC required Sanchez to make a showing that the prosecutor's strikes were "likely" motivated by race. *Sanchez, 79 Mass. App. Ct. at 192*. In the past, we have concluded a state court that required a defendant to show it was "likely" that a prosecutor's strike was improperly motivated "judged [the defendant's] prima facie burden by a more rigid standard than that established by Batson," which "clearly established that [the defendant] was only required to make a 'likelihood' showing at the final stage of the burden-shifting framework." *Aspen v. Bissonnette, 480 F.3d 571, 575 (1st Cir. 2007)*.

Nowhere, however, did the MAC indicate that Sanchez was required to make a "more likely than not" showing to establish his prima facie case, **[**49]** and the SJC has never held that a "more likely than not" showing is required to make out a prima facie case under Soares. Thus, it is by no means clear that the term "likely" as used in Soares means "more likely than not." Moreover, the Massachusetts Declaration of Rights is intended to "provide[] at least as much protection for [a] defendant as does Batson." *Caldwell v. Maloney, 159 F.3d 639, 643 (1st Cir. 1998)*. This further weighs against our interpreting Soares to require a "more likely than not" showing, as we doubt the SJC would interpret Soares to require such a showing now in light of the clearly established federal law. As it turns out, given our conclusion that the MAC unreasonably applied Batson to the facts of Sanchez's case, we need not determine here whether the MAC applied an improper standard or imposed upon him a heavier burden than does federal law.

detention is unlawful and not just that the state court employed faulty reasoning in **[**50]** his case." Id. (citing *Bronshtein v. Horn, 404 F.3d 700, 724 (3d Cir. 2005)*). It is conceivable that Sanchez may not be entitled to relief despite the MAC's unreasonable application of Batson's first prong. This would be the case if the facts and circumstances in the record do not give rise to an inference of discrimination when Batson's first prong is properly applied. We turn now to this inquiry, "limit[ing] our review to facts gleaned from the state **[*301]** court record concerning jury selection at [Sanchez's] trial." Id.

Sanchez argues that the evidence in the record shows the Commonwealth challenged Juror No. 261, and the other two young black men, because of their "race/gender" combination. Sanchez, while freely admitting that a prosecutor may exclude all young jurors, maintains that it is unconstitutional for a prosecutor to "excuse young jurors only if they are young black men, or because of membership in any other discrete group protected by the *Fourteenth Amendment*." According to Sanchez, this is exactly what happened here, with the prosecutor striking young black men not because they were young, but because they were black. Sanchez goes on to assert that he is entitled to a new trial **[**51]** because of this constitutional violation.

The Commonwealth concedes that the existence of a prima facie case is to be determined based on the totality of the facts and circumstances, but argues that we have "largely left the question of what constitutes a prima facie case to the wisdom of the trial judges themselves." *Brewer v. Marshall, 119 F.3d 993, 1004 (1st Cir. 1997)*. It goes on to defend the MAC's decision as correct because five African Americans had been seated at the time of Sanchez's Batson challenge. Their presence, at least according to the Commonwealth's brief, demonstrates that "there is no basis in the record to conclude that the prosecutor exercised his peremptory challenges on the basis of race." The Commonwealth further argues that youth is not a suspect class for purposes of a Batson analysis and, for that matter, neither is the group of young African-American men. In addition, the Commonwealth points to its strike of Juror No. 229, a young white man who was a college sophomore, as demonstrating that the prosecutor was not only striking young African-American men from the jury.

It strikes us that many of the parties' arguments are geared primarily towards step three **[**52]** of the Batson test. Sanchez strenuously attempts to convince us that the prosecutor's strikes were racially motivated, while the Commonwealth states just as forcefully that they were not. These types of arguments are not overly helpful here, however, because Batson's third step is not at issue: the trial judge never proceeded beyond step one. Accordingly, we review the state court record de novo to determine whether Sanchez satisfied his burden of raising an inference of possible racial discrimination. See *Aspen, 480 F.3d at 576*.[16] If we find that he has, we will then address the Commonwealth's arguments that the inference is negated by other circumstances appearing in the record.

Under federal law, "[t]o establish a prima facie case, the moving party must 'raise an inference that the prosecutor used [peremptory challenges] to exclude the veniremen from the petit jury' because of their membership **[**53]** in a protected class." *Id. at 574* (second alteration in original) (quoting *Batson, 476 U.S. at 96*). "An 'inference' is generally understood to be a 'conclusion reached by considering other facts and deducing a logical consequence from them.'" *Johnson v. California, 545 U.S. 162, 168 n.4, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005)* (quoting Black's Law Dictionary 781 (7th ed. 1999)). Sanchez's burden at this first **[*302]** stage "is not substantial." *Aspen, 480 F.3d*

[16] We reject as inconsistent with our case law the Commonwealth's contention that Sanchez is required to overcome the MAC's finding by clear and convincing evidence given that the MAC unreasonably applied federal law in failing to consider all of the circumstances relevant to racial discrimination.

at 574. Indeed, step one is satisfied where the circumstances permit an inference that "discrimination may have occurred." Johnson, 545 U.S. at 173 (emphasis added).[17]

"[A] prima facie case of discrimination can be made out by offering a wide variety of evidence." Id. at 169. Although the Supreme Court has not provided an exhaustive listing of the types of evidence that may suffice, we are guided by the examples set forth in its cases and others applying Batson. First, the defendant is "entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Batson, 476 U.S. at 96 (quoting Avery, 345 U.S. at 562). Second, demonstrating a pattern of strikes against members of a cognizable group may raise an inference of discrimination against a particular juror. United States v. De Gross, 913 F.2d 1417, 1425 (9th Cir. 1990) **[**55]** (concluding the defendant's use of seven out of the allotted eight peremptory challenges against males sufficed to raise an inference of gender discrimination). In a similar vein, other factors appropriate for consideration include "the number of strikes involved in the objected-to conduct; the nature of the prosecutor's other strikes; and, as the 'capstone,' the presence of an alternative, race-neutral explanation for the strike." United States v. Girouard, 521 F.3d 110, 115-16 (1st Cir. 2008) (citing United States v. Bergodere, 40 F.3d 512, 516-17 (1st Cir. 1994)).

Also, and of great importance here, we take into account "whether similarly situated jurors from outside the allegedly targeted group were permitted to serve" on the jury in ruling on a Batson challenge. Aspen, 480 F.3d at 577 (citing Boyd v. Newland, 467 F.3d 1139, 1148-50 (9th Cir. 2006)); see also United States v. Charlton, 600 F.3d 43, 54 (1st Cir. 2010) (reviewing the record to determine if there was evidence "that similarly situated jurors (attorneys, members of clergy, or relatives of convicts) from outside the allegedly targeted group of African-Americans were permitted to serve"). Indeed, the Supreme Court puts **[**56]** great stock in this factor. Miller-El II, 545 U.S. at 241 ("More powerful than [the] bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve."). We give weight as well to whether there are any "apparent non-discriminatory reasons for striking potential jurors based on their voir dire answers." Aspen, 480 F.3d at 577 (citing United States v. Stephens, 421 F.3d 503, 515-16 (7th Cir. 2005)).

We turn first to the "numbers-based" considerations. The record here does not **[*303]** disclose the racial makeup of the jury pool or even the total number of potential jurors. What we do know based upon the parties' representations is that five African Americans had already been seated on the jury when the Commonwealth eliminated Juror No. 261. We also know that Juror No. 261 was the third African-American male under the age of thirty that the Commonwealth challenged. The Commonwealth had utilized eleven of its sixteen challenges by that time and eleven jurors had already been seated. The record does not indicate how many potential jurors remained in the pool at that point or the racial, ethnic, or gender makeup of those who **[**57]** remained. Therefore, we can infer little beyond the fact that the Commonwealth struck two young black men from the jury before it reached Juror No. 261. "Thus, as is common, the

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[17] The relatively bare-bones showing required at this stage perhaps explains our past exhortation to the trial courts to seek an explanation for a prosecutor's use of peremptory challenges even where the judge may not believe such a showing has been made, as counsel's explanation facilitates appellate review and may even serve to avoid reversal should we conclude a sufficient prima facie showing had been made. See United States v. Bergodere, 40 F.3d 512, 517 n.4 (citations omitted) ("[I]t might have been wise for the judge to have asked the prosecutor to proffer an explicit statement of the basis for the **[**54]** strike, if only to confirm the judge's intuition and flesh out the record on appeal."). The record here demonstrates Sanchez and the Commonwealth were represented at trial by skilled and zealous counsel. While we find it difficult to fault the prosecutor for failing to volunteer information not required of him by the trial judge, having done so could have resulted in a fully fleshed-out record and, potentially, avoided the result that obtains today.

numbers considered in isolation are inconclusive," *Mensah, 737 F.3d. at 802* (citations omitted), in determining whether Sanchez met his burden on step one.

We move on to consider other relevant circumstances appearing in the state court record. We begin by looking to see whether any objective reason supporting the challenge of the third young black man, Juror No. 261, appears in this record. We are limited to a search for objective differences because the prosecutor declined to share any of his subjective impressions of Juror No. 261 that may have explained his peremptory challenge, such as his appearance, demeanor, or any apparent inability to follow the judge's legal instructions.[18]

Juror No. 261's answers to the juror questionnaire and the transcript **[**58]** of his voir dire fail to provide any obvious reason for the Commonwealth's challenge. In his questionnaire, the nineteen-year-old black man indicated that he was born in Boston, that he is a first-year college student, and that he works for Home Depot as a paint/sales associate. He did not indicate that he had been arrested or convicted of any crime, been served with a court order, or been involved in a civil suit as a plaintiff, defendant, or witness. Responding to a catchall question on the form, Juror No. 261 did not report that there was "anything else in [his] background, experience, employment, training, education, knowledge, or beliefs that might affect [his] ability to be a fair and impartial juror[.]"

When questioned at voir dire, Juror No. 261 acknowledged that he had not raised his hand in response to any of the court's preliminary questions regarding hardship. He did not tell the judge that serving on this jury would harm his studies. Juror No. 261 answered all other questions appropriately, and nothing in the written transcript casts doubt on his ability to understand and follow the trial judge's instructions or evaluate the evidence fairly and impartially.

We recognize **[**59]** that as an appellate court, our review is necessarily confined to the cold record. We are unable to make the moment-to-moment analyses and judgment calls that are so crucial to trial work. Nevertheless, we do find it significant that the record fails to disclose any obvious infirmity in Juror No. 261's background or voir dire answers that would translate to an apparent reason for the Commonwealth's peremptory challenge.

As part and parcel of our inquiry into all the facts and circumstances, we consider whether there was any evidence tending to show that similarly situated jurors who **[*304]** were not African-American were allowed to sit. Our comparison between Juror No. 261, a young black man, and Juror No. 243, a young white man the Commonwealth allowed to serve on the jury, is illuminating.

Like Juror No. 261, Juror No. 243 was under twenty-five years of age. In fact, and similar to Juror No. 261, Juror No. 243 was a twenty-one-year-old college student who also held down a job. Juror No. 243 did not indicate any prior contacts with law enforcement or involvement in either the criminal justice or civil law systems on his juror questionnaire. The transcript of his voir dire indicates that he **[**60]** also answered the court's questions appropriately, and just like Juror No. 261, he did not cite his schoolwork as grounds to be excused from service. Even when directly asked about the nature of his studies, Juror No. 243 did not seek to be excused.

The only objective difference between the two young men appearing in this record is their race: Juror No. 243 was white, while Juror No. 261 was African-American. Yet, the government struck the black juror while allowing the white one to serve. Such differential treatment, while by no means dispositive as to the ultimate question of racial discrimination, suffices at Batson's first step to raise an inference of possible racial discrimination. See *United States v. McMath, 559 F.3d 657, 664*

[18] Had the prosecutor shared his subjective impressions or the reasons for the strike in response to the trial judge's original request, our analysis here would necessarily be different.

(7th Cir. 2009) (holding a prima facie case was established where white jurors sharing the "only other known characteristic" of an African-American juror were seated but the African American was not); *United States v. Allison, 908 F.2d 1531, 1538 (11th Cir. 1990)* (recognizing a defendant may establish a prima facie case of discrimination where "white persons were chosen for the petit jury who seemed to have the same qualities as stricken black venirepersons") **[**61]** (internal quotation marks and citations omitted).[19]

Furthermore, because our review must encompass all the relevant facts and circumstances bearing on possible racial discrimination, it is appropriate to consider the characteristics of the other two young black men eliminated by the Commonwealth prior to its strike of Juror No. 261 for the bearing these strikes may have on an inference of discrimination. Juror No. 201, a twenty-five-year-old male born in Trinidad, indicated on his juror questionnaire that he worked as a computer technician and had not had any previous experience **[*305]** with the criminal or civil justice systems.[20] His responses to voir dire questions were generally appropriate, with only one small hiccough: the trial judge began introducing the concepts **[**63]** of self-defense and defense of another, then stopped himself in mid-sentence and began again.[21] This resulted in a brief exchange between the juror and the trial judge about those two defenses, at the conclusion of which the judge began his explanation again and Juror No. 201 did not express any further confusion. The trial judge obviously found him fit for jury service, as he did not excuse the prospective juror for cause. Neither the Commonwealth nor Sanchez asked the trial judge to pose any further questions, and the Commonwealth then exercised a peremptory challenge.

The remaining young African-American male was Juror No. 227, a twenty-four-year-old native of Boston. His juror questionnaire indicates he obtained a high school equivalency[22] and was employed by City Year. He stated his only prior involvement with the criminal justice system was an arrest that resulted from a "[t]raffic violation that went unpaid."[23] Juror No. 227's responses to voir

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[19] Evidence of different treatment of similarly situated jurors was conspicuously absent in other cases in which we upheld a trial judge's determination that a defendant failed to make out a prima facie case. See, e.g., *Odunukwe v. Bank of America, 335 Fed. App'x 58, 60-61 (1st Cir. 2009)* (per curiam) (noting that plaintiff "[did] not point to any non-numeric form of evidence," including whether similarly situated jurors were allowed to serve); *United States v. Escobar-de Jesus, 187 F.3d 148, 164-65 (1st Cir. 1999)* (upholding finding that no prima facie case had been established where the defendant pointed to nothing more than the fact that two African Americans had been struck where "six or seven African-Americans were seated in the jury box at the time of the strikes and . . . six or seven African-Americans were eventually selected to serve on the jury"); *Brewer v. Marshall, 119 F.3d 993, 1005 (1st Cir. 1997)* (upholding trial judge's rejection of prima facie Batson case where "the numbers . . . particularly in the absence of circumstances suggesting juror bias, judge insensitivity, or improper motive by the state prosecutor, were **[**62]** not so blatant as to compel the judge to make such a finding); *Chakouian v. Moran, 975 F.2d 931, 934 (1st Cir. 1992)* (finding that defendant failed to establish a prima facie case where he relied on nothing more than "the objection asserted . . . at trial as a sufficient prima facie showing" and where he "point[ed] to no evidence relating to the racial composition of the venire or the empaneled jury"). The presence of such evidence here makes this case fundamentally different.

[20] Juror No. 201 did not complete the section of his juror questionnaire that asked for him to indicate the highest grade he completed in school. Two of the seated jurors did not provide that information either.

[21] The record reveals these affirmative defenses gave the parties and the court fits at various points throughout trial, including the jury instruction phase. See *Sanchez, 79 Mass. App. Ct. at 195 n.13* (noting the jury "received multiple versions of the instructions over two days"). On this record, we would be speculating if we concluded that the prosecutor struck Juror No. 201 because of any initial confusion **[**64]** at voir dire.

[22] The prosecutor allowed at least four jurors with high school (or less) educations to be seated. Four jurors listed their highest level of education as "high school diploma," "Highschool 12 yrs," "Diploma," and "9 Grade." Thus, we can not infer from this record that the prosecutor considered education to be a determinative factor in whether or not he exercised a peremptory challenge, or that he challenged Juror No. 227 due to his limited educational achievement.

[23] Whether the prior arrest **[**65]** served as a basis for the peremptory challenge is questionable given that Juror No. 134--who went unchallenged--disclosed a prior arrest for "drinking in public,"

dire questions were relatively unremarkable, as he answered appropriately and asked the court to repeat one question, which he then proceeded to answer, apparently without difficulty. Neither party sought more information about his prior arrest, and the trial judge did not delve into this issue on his own.

Obviously, we do not know the subjective reasoning in the prosecutor's mind as to why he challenged these two prospective jurors. We can do no more than speculate, as no reason for the challenges--at least, none that appears to have mattered to the prosecutor in light of the characteristics of other prospective jurors he did not challenge--is obvious from this record. While we are of course primarily concerned with the challenge to Juror No. 261, these particular challenges represent another facet of the relevant circumstances that the MAC should have taken into account.

We come now to the Commonwealth's argument that other facts and circumstances present in the record negate any possible inference of discrimination. The Commonwealth's position, however, misconstrues and improperly conflates the three separate steps of the Batson inquiry. Batson, as we previously described, establishes **[*306]** a framework in which a petitioner **[**66]** is first required to establish the prima facie inference, which we have said is a burden of production, not persuasion. Once that initial burden has been met, the striking party is required to articulate its race-neutral reasoning for its strike, and it is at the third stage where the petitioner bears the burden of persuasion. At the first stage of the inquiry, our concern is whether such an inference may be drawn in the first instance, not whether the inference, once drawn, may be rebutted.

Furthermore, even if it were proper to consider the Commonwealth's arguments in connection with the first prong, they are unavailing in any event. The Commonwealth reminds us that it also challenged Juror No. 229, "a young, white male," who was also a college student.[24] The Commonwealth's challenge of this juror does not undercut the inference of discrimination. The fact that the Commonwealth challenged one white college student does not change the fact that it seated another white college student (Juror No. 243) who was similarly situated to Juror No. 261. Thus, while the challenge of Juror No. 229 perhaps might have been relevant to the third prong of the Batson analysis, it does not diminish **[**67]** the strength of the prima facie showing.

Next, relying on *United States v. Cresta, 825 F.2d 538, 545 (1st Cir. 1987)*, the Commonwealth argues its use of peremptory challenges cannot have violated the precepts of Batson because they were based on age and age is not a cognizable class for purposes of equal protection challenges. Regardless of the ultimate merit of this position, it is inapposite here. The simple fact is the state court record discloses that the Commonwealth did not exercise its peremptory challenges based on age. Had it done so, it would have eliminated Juror No. 243, the white college student born in Russia.

Indeed, had age been the distinguishing characteristic motivating its challenges, the Commonwealth would presumably have eliminated all young women as well, since discrimination on the basis of gender is prohibited too. *J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 130-31, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994)* **[**68]** ("Intentional discrimination on the basis of gender . . . violates the *Equal Protection Clause* . . ."); see also *De Gross, 913 F.2d at 1425* (holding purposeful elimination of men from the jury violated equal protection). The seated jurors included three women under the age of thirty, aged

and neither the trial judge nor the Commonwealth requested any further information about that arrest at voir dire.

[24] While the record contains the transcript of Juror No. 229's voir dire, we have not been provided with a copy of his juror questionnaire. This makes it impossible for us to determine whether there are any obvious reasons for the challenge, such as an improperly completed form or inconsistent answers given at voir dire.

twenty-three, twenty-six and twenty-seven. As it is, the record demonstrates the Commonwealth may not have been exercising its peremptory challenges on the basis of age.

Moreover, the use of a constitutionally neutral characteristic--such as age--in a racially discriminatory manner constitutes race-based discrimination. The record shows here that with its strike of Juror No. 261, the Commonwealth had peremptorily challenged every young, black man in the jury pool. By contrast, it allowed other individuals who were young, male, and white or who were young and female to sit on Sanchez's jury. Only young, black men received this treatment from their government. Accordingly, it could be logical to conclude (or, put differently, to infer) that the Commonwealth's strikes may have been motivated not by age, but **[*307]** by race. This is all that was required of Sanchez at the first Batson prong.

In sum, based on **[**69]** the evidence in the state court record, we conclude the facts and circumstances were sufficient to permit an inference that the prosecutor's challenge of Juror No. 261 may have been racially motivated. We find, therefore, that Sanchez satisfied his initial burden under Batson, and the prosecutor should have been required to articulate a race-neutral reason for his peremptory strike. See *Johnson, 545 U.S. at 173* (finding prima facie case established where totality of circumstances permitted inference that "discrimination may have occurred").

5. An Appropriate Remedy

Having found not only that the MAC unreasonably applied Batson, but also that Sanchez satisfied his burden of making out a prima facie case of discrimination, we must consider the appropriate remedy. Although we have held that a Batson violation constitutes a structural error from which prejudice to the defendant is "conclusively presumed," *Scarpa v. Dubois, 38 F.3d 1, 14 (1st Cir. 1994)*, we are unable to determine from this record whether the Commonwealth's challenges were in fact racially motivated and, therefore, violative of Batson. All we know at this point is that the Commonwealth should have been required to present **[**70]** a racially neutral explanation for its challenge of Juror No. 261. It is, therefore, inappropriate to grant a new trial because Sanchez has not demonstrated he is entitled to habeas relief.

"The Batson framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson, 545 U.S. at 172*. For this reason, the Supreme Court in both Batson and Johnson ultimately remanded to allow a factual, on-the-merits determination with respect to the second and third prongs. *Batson, 476 U.S. at 100*; *Johnson, 545 U.S. at 173*. Similarly, we believe that a remand to the district court is required here because the ultimate burden of persuasion rests with Sanchez. See *Johnson, 545 U.S. at 170-71*.

We recognize that in Cullen v. Pinholster the Supreme Court held that a federal habeas court may not hold an evidentiary hearing to permit the petitioner to develop evidence to satisfy his burden of showing either that the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. *131 S. Ct. 1388, 1400, 179 L. Ed. 2d 557 (2011)*. Pinholster, however, applies only to situations in which the petitioner **[**71]** claims additional evidence beyond the state court record is necessary in order to show that he or she is entitled to habeas relief. Pinholster, we believe, does not prohibit an evidentiary hearing once a petitioner has successfully shown the state court unreasonably applied federal law.

Our conclusion that the MAC unreasonably applied Batson renders the strictures of Pinholster inapplicable here. Moreover, the Supreme Court itself ordered a remand to complete the Batson inquiry in both Batson and Johnson, and we decline to assume the Supreme Court in Pinholster

overruled that aspect of two of its leading cases in this area sub silentio. Cf. *Smith v. Cain, 708 F.3d 628, 635 (5th Cir. 2013)* (holding that "Pinholster's limitation on federal evidentiary hearings does not apply once the district court conclude[s], solely on the basis of the state court record, that the state trial court unreasonably applied federal law"). Accordingly, we believe it remains open to us **[*308]** to order a remand for an evidentiary hearing.

Because we are reviewing the district court's consideration of Sanchez's federal habeas claim, it is appropriate for the district court--as opposed to the Massachusetts trial court--to **[**72]** hold an evidentiary hearing to complete the Batson inquiry. This is the result obtained in the Ninth and Eleventh Circuits after a finding of error with respect to the first Batson prong, and it makes eminent sense to us as well. See *Paulino v. Castro, 371 F.3d 1083, 1090 (9th Cir. 2004)*; *Paulino v. Harrison, 542 F.3d 692, 694-95 (9th Cir. 2008)* (affirming district court's grant of habeas petition following initial remand to complete the Batson inquiry); *Madison v. Comm'r, Ala. Dep't of Corr., 677 F.3d 1333, 1339 (11th Cir.)* cert. denied, *133 S. Ct. 617, 184 L. Ed. 2d 411 (2012)* (finding the petitioner had met his burden of making out a prima facie case "[b]y presenting several relevant circumstances that in sum were sufficient to raise an inference of discrimination" and remanding "for the district court to complete the final two steps of the Batson proceedings"). After all, the state courts have already had their say on the matter, and Sanchez's habeas petition has not yet been fully adjudicated. It is the district court's responsibility to resolve it.[25]

Accordingly, we remand to the district court for it to hold an evidentiary hearing and complete the Batson inquiry. We acknowledge that jury selection took place more than seven-and-a-half years ago now, which is likely to present a rather challenging situation to the district court. Nonetheless, nothing in Batson or its progeny permits us to relieve Sanchez of his ultimate burden of persuasion. Further, a remand for the district court to at least attempt to put the pieces together again is in accordance with the well-reasoned decisions of our sister circuits and state courts that have grappled with how to resolve Batson claims years after trial.

In order to provide the district court and the parties with guidance as to what is expected of them on remand, we refer to the opinion of the California Supreme Court following the Supreme Court's remand in Johnson.[26] We find its roadmap directing further proceedings to be logical and well-reasoned:

> [The district] court should attempt to conduct the second and third Batson steps. It should require the prosecutor to explain his challenge[]. If the prosecutor offers a raceneutral **[**74]** explanation, the court must try to evaluate that explanation and decide whether defendant has proved purposeful racial discrimination. If the court finds that, due to the passage of time or any other reason, it cannot adequately address the issues at this stage or make a reliable determination, or if it determines that the prosecutor exercised his peremptory challenges improperly, it should set the case for a new trial. If it finds the prosecutor exercised his peremptory challenge[] in a permissible fashion, it should [affirm] the judgment.

People v. Johnson, 38 Cal. 4th 1096, 1103-04, 45 Cal. Rptr. 3d 1, 136 P.3d 804 (2004). The district court should do likewise here.

CONCLUSION

By erroneously ignoring each individual juror's

[25] For this reason, we part ways with our learned colleagues in the Seventh Circuit, who in the past have remanded to the state trial court to finish **[**73]** the Batson inquiry. *Mahaffey v. Page, 162 F.3d 481, 486 (7th Cir. 1998)*.

[26] Johnson came before the Supreme Court pursuant to a writ of certiorari.

equal protection right not to be **[*309]** discriminated against, the MAC reached a result that has the effect of fostering increased racial discrimination and immunizing it from judicial review. This is diametrically opposed to Batson's raison d'être. Accordingly, the MAC's application of Batson's first prong goes beyond clear error and represents an objectively unreasonable application of clearly established federal law.

As the unreasonable **[**75]** application of federal law occurred at the first Batson step, we are unable to say on this record that Sanchez is entitled to habeas relief given that he bears the ultimate burden of persuasion on his Batson claim. Therefore, we must remand to the district court to conduct an evidentiary hearing and complete the Batson inquiry.

Accordingly, we hereby **vacate** the judgment of the district court and **remand** this matter for further proceedings consistent with this opinion.

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Sanchez v. Roden

United States District Court for the District of Massachusetts

February 4, 2015, Decided; February 4, 2015, Filed

Civil Action No. 12-10931-FDS

Reporter
2015 U.S. Dist. LEXIS 13207 *; 2015 WL 461917

DAGOBERTO SANCHEZ, Petitioner, v. GARY RODEN, Respondent.

Subsequent History: Affirmed by *Sanchez v. Roden, 2015 U.S. App. LEXIS 21176 (1st Cir. Mass., Dec. 7, 2015)*

Prior History: *Sanchez v. Roden, 2013 U.S. Dist. LEXIS 19914 (D. Mass., Feb. 14, 2013)*

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Judges: F. Dennis Saylor IV, United States District Judge.

Opinion by: F. Dennis Saylor IV

Opinion

MEMORANDUM AND ORDER ON PETITION FOR A WRIT OF HABEAS CORPUS

SAYLOR, J.

This is an action by a state prisoner seeking a writ of habeas corpus pursuant to *28 U.S.C. § 2254*. Petitioner Dagoberto Sanchez was convicted in Suffolk County of second-degree murder and unlawful possession of a firearm. He was sentenced to a term of life imprisonment (with the possibility of parole after 15 years) on the murder conviction and a concurrent two-year term on the firearm conviction. Sanchez now seeks habeas relief, contending that the prosecution deliberately exercised peremptory challenges to strike young men on the basis of race in violation of his constitutional rights.

For the reasons set forth below, the **[*2]** petition will be denied.

I. Background

A. Procedural Background

This matter is on remand from the Court of Appeals. Petitioner initially sought a writ of habeas corpus in this Court, alleging that the Commonwealth impermissibly exercised multiple peremptory challenges on the basis of race. On appeal from this Court's denial of the petition, the Court of Appeals found that petitioner had made out a *prima face* case of discrimination. *Sanchez v. Roden, 753 F.3d at 307*. Specifically, it held that petitioner had satisfied his burden under *Batson v. Kentucky* in raising an inference of possible racial discrimination in the prosecution's exercise of a peremptory challenge against juror 261, an African-American male. *Id.*; *see Batson v. Kentucky, 476*

U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)].[1] It directed the Court to conduct an evidentiary hearing and complete the inquiry under Batson. Sanchez, 753 F.3d at 308 (1st Cir. 2014); *see* Batson, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69. Specifically, it directed as follows:

> [The district] court should attempt to conduct the second and third *Batson* steps. It should require the prosecutor to explain his challenge[]. If the prosecutor offers a race-neutral explanation, the court must try to evaluate that explanation and decide whether defendant has proved purposeful racial discrimination. If the court finds that, due to the passage of time or any **[*3]** other reason, it cannot adequately address the issues at this stage or make a reliable determination, or if it determines that the prosecutor exercised his peremptory challenges improperly, it should set the case for a new trial. If it finds the prosecutor exercised his peremptory challenge[] in a permissible fashion, it should [affirm] the judgment.

Sanchez v. Roden, 753 F.3d at 308 (alteration in original) (quoting People v. Johnson, 38 Cal. 4th 1096, 45 Cal. Rptr. 3d 1, 136 P.3d 804 (Cal. 2006)).

On September 8, 2014, the Court held an evidentiary hearing. The only witness at the hearing was Suffolk County Assistant District Attorney Mark Lee, who was the lead prosecutor at Sanchez's trial.

B. Factual Background

Unless otherwise stated, the following facts are taken from transcripts and juror questionnaires from Sanchez's trial or Lee's testimony at the September 8, 2014 hearing.

The facts surrounding the crime that led to Sanchez's conviction are set out in the decision of the Massachusetts Appeals Court on the his direct appeal, and only the facts that are relevant to this opinion bear repetition. **[*4]** *See* Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 944 N.E.2d 625 (2011).

Dagoberto Sanchez was charged with second-degree murder and unlawful possession of a firearm. Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 189, 944 N.E.2d 625 (2011). Sanchez contended that he had acted in self-defense and in the defense of another. *Id*.

Jury empanelment for the trial began on September 25, 2006. Judge Thomas E. Connolly of the Massachusetts Superior Court was the presiding judge. Prior to the voir dire, the prosecution and defense were given copies of one-page written questionnaires that had been completed by each prospective juror. The juror questionnaires included basic information such as the juror's name, age, city or town of residence, marital status, occupation, spouse's occupation, and whether the juror had children. The questionnaires also included three or four discrete questions concerning a juror's past experiences with, and connections to, the criminal justice system.

Assistant District Attorney Mark Lee was the chief prosecutor for the Commonwealth. Lee testified that once he receives the questionnaires, it is his practice, "at least as is practicable, to look through every questionnaire and make sort of a preliminary indication." (E.R. at 10). Lee explained that he looks at these questionnaires before the judge calls the court **[*5]** to order and during any preliminary remarks. (E.R. at 11). More specifically, he testified that "almost the first demographic I look at on that questionnaire is the age of the individual." (E.R. at 30).

Judge Connolly began the empanelment process with a series of questions to the entire venire that

[1] The court also found that Sanchez had waived any objection to the challenges uses against other jurors, including jurors 201 and 227, by failing to object to those challenges at the time they were made. Sanchez, 753 F.3d at 295 n.10.

were intended to address possible biases. (Tr. Sep. 25, 2006 at 64-82). Once that voir dire was completed, jurors were brought forward one by one, in ascending numerical order, and examined individually. Judge Connolly then either excused the juror for cause or determined that no such cause existed. If the juror was not excused for cause, the judge gave both attorneys an opportunity to exercise a peremptory challenge. The prosecution and the defense were granted 16 challenges each. The prosecutor was always asked for his decision first; if the prosecutor did not exercise a challenge, defense counsel was then given an opportunity to do so. If both sides chose not to exercise a challenge, the juror was immediately seated and there was no further opportunity to strike the juror.

Lee testified that during such a process, it is his practice to "always monitor[] how many peremptory challenges [he has] left versus **[*6]** how many peremptory challenges defense counsel has left" and also to consider "what [he] understand[s] to be upcoming based upon the questionnaires." (E.R. at 15). If a juror questionnaire includes a response that concerns him, it is his practice to ask the judge to follow up on that response. (E.R. at 28-29). He also testified that he challenges young jurors "as a general practice." (E.R. at 28).

Lee exercised his fifth peremptory challenge on juror 201, a 25-year-old male named L.D.[2] L.D. indicated on his questionnaire that he was born in Trinidad. (E.R. at 14, 33; S.A. at 281). His race is not clearly indicated in the record, although he appears to have been dark-skinned. The questionnaire further indicated that he was employed part-time as a computer technician. (S.A. at 281). The only other pieces of information on the questionnaire were his address and that he was single with no children. (*Id.*). He responded in the negative to all of the judge's inquiries as to whether he would have any difficulty being a fair and impartial juror. (Tr. Sep. 25, 2006 at 165-70). Lee testified that he challenged L.D. due to his age. (E.R. at 14).

Lee exercised his seventh challenge on juror 227, a 24-year-old black male named P.M. (E.R. at 14, 36, 38; S.A. at 282). P.M. indicated on his questionnaire that he was an employee of City Year Inc. in Boston and that his highest academic degree was a G.E.D. (S.A. at 282). He also disclosed that he had once been arrested for a "[t]raffic violation that went unpaid." (*Id.*). He responded in the negative to all of the judge's inquiries as to whether he would have any difficulty being a fair and impartial juror. (Tr. Sep. 26, 2006 at 13-16). Lee testified that he challenged P.M. due to his age. (E.R. at 14-15, 37).

Lee exercised his eighth challenge on juror 229, a white male named R.C. who was a sophomore at Boston University. (E.R. at 38-39). His exact age is not reflected in the record, but presumably he was approximately 19 years old. R.C. responded in the negative to all of the judge's inquiries as to whether he would have any difficulty being a fair and impartial juror. (Tr. Sep. 26, 2006 at 19-23). Lee could not specifically **[*8]** recall his reasoning behind challenging R.C.; however, he testified that based on his general practice, he believes he challenged R.C. "because he was in college and because of his age." (E.R. at 38). He further testified that he "could tell you with almost 100 percent certainty if he was in college and he was young, I was going to strike him, and I did strike him." (E.R. at 38-39).

Lee did not challenge juror 243, a 21-year-old white male of Russian descent named I.R. (E.R. at 43; S.A. at 293). I.R.'s questionnaire specifically indicated that he had been born in Moscow, Russia. (S.A. at 293). It further indicated that he was a student at Boston University and that he worked

[2] Lee's first four challenges were exercised on jurors 174, 183, 192, and 193. (Tr. Sep. 25, 2006 at 131-35, 145-49, 152-56, 156-59). The questionnaires filled **[*7]** out by these jurors are not part of the record, and these challenges do not appear to be directly relevant to the *Batson* analysis. The same applies to the challenges exercised by Lee on jurors 223, 237, 241, 284, and 310. (Tr. Sep. 26, 2006 at 6-10, 39-46, 49-53, 147-50, 180-85).

part-time for a non-profit organization. (*Id.*). Lee testified that he did not challenge I.R., "despite not wanting to take him," in part because he was "running out of challenges at that point," in part due to some of I.R.'s characteristics that "barely" overcame his youth, and in part "based upon an examination of who remained in the venire." (E.R. at 13, 43, 45). Lee specifically testified:

> I took him, despite not wanting to take him, but I was—there are a number of young jurors who I will take based upon what I consider to be indications on their questionnaire that might make them not fit their chronological **[*9]** age, which is to say that he was 21 years old, but I noted he was born in Moscow, I noted that he came here on his own to begin his own education, and so I thought if I had to take a young juror, that would be somebody who might be a better candidate than most.

(E.R. at 13). He further explained that his "inclination was to strike him":

> It was more of a hold-your-nose situation and take him because I thought somebody who came to this country to go to school at the age of 21 may have been chronologically a little bit older than someone else in terms of life experiences, and that's really what I'm looking at that somebody who has some level of maturity and life experience.

(E.R. at 44). He later clarified that "[I] didn't mean that I knew his life history. I knew he was 21, and I knew that he was here attending school and he was born in another country." At the time, Lee had six challenges remaining and defense counsel had twelve. (E.R. at 45). When defense counsel also chose not to challenge I.R., he became the ninth juror seated.

Lee exercised his eleventh challenge on juror 246, a 41-year-old man born in Guatemala named M.C. (E.R. at 52-53; S.A. at 283). During his individual voir dire, M.C. responded to a portion of Judge Connolly's questioning **[*10]** as follows:

> Q Is there any reason you can think of that you, as a juror, might not be able to be fair and impartial to the Commonwealth and to the defendant, Mr. Sanchez, and to decide this case solely on the law and the evidence as given in this case?
> A I hope I could be fair.
> Q Well, is there any question in your mind whether you could be fair?
> A No.
> Q Consciously?
> A Just that the responsibility—I mean, no, no.
> Q There isn't?
> A No.

(Tr. Sep. 26, 2006 at 73-74). At sidebar, Lee asked Judge Connolly to inquire further on that subject, because Lee was "concerned about whether he's daunted at the responsibility of returning a verdict in this case." (*Id.* at 74). That led to the following exchange between Judge Connolly and M.C.:

> Q Sir; in response to one of my questions you indicated concerning the responsibility; something like that, do you remember that?
> A You said do you feel like you can do a good job, so at the end—I understood the—So what I understood as, in terms of judging somebody, do you have anything that would make you believe you can do a fair job; but the way I see it is, what makes you believe you can do a good job? Or to anybody, I guess, so it's more after—
>
> Q Let me back up a little bit. **[*11]** Your job, as a juror, is to follow the law as I instruct you and to decide the questions of fact that are presented to the jury, and you're asked to do the best you can after you've observed and heard and examined the exhibits, you're asked to do the best you can. No one can ask any human being to do better than they can; that's all anyone can ask of us, do you have any problems with that?
> A No, given that I agree; I think too.

(*Id.* at 75). After that exchange, Lee exercised a challenge on M.C.

At the hearing on September 8, 2014, Lee testified:

"I exercised a challenge against [M.C.] because in response to one of the questions, he expressed concern about the responsibility of being a juror. That is, what I consider—what he suggested was an overwhelming responsibility or a responsibility that he didn't know whether he could meet." (E.R. at 53). Lee was then asked the following question and gave the following response:

> Q Is it your testimony that every time some juror expressed a concern about the weight of the responsibility that you would challenge them?
>
> A Every single time, no, but probably most times. If somebody came up there and said, I'm concerned about the level of responsibility that being a juror **[*12]** entails, having anybody agree unanimously on a first-degree murder conviction is extraordinarily difficult, and anybody who expresses doubt about their ability to do something like that is going to be a cause of concern for me. Now, is it every single juror that I exercise a peremptory challenge on? I couldn't possibly tell you that, but more times than not, I would.

(E.R. at 54).

With five challenges remaining, Lee did not exercise a challenge on juror 255, a 27-year-old female named J.O. (Tr. Sep. 26, 2006 at 109-13; S.A. at 300). J.O.'s questionnaire indicated that she worked in project management for Beacon Hill Staffing in Boston. (S.A. at 300). Lee testified: "I think when that person or that prospective juror came up, I was down to, I believe, either four or five challenges. She was 27 years old, which I didn't consider to be overly young. She was working. I don't recall what her job was at the time, but I was—probably may have been somebody I might have taken anyway but certainly was going to take given the number of peremptory challenges I had remaining." (E.R. at 15).[3]

Lee exercised his twelfth challenge on juror 261, a 19-year-old **[*13]** black male named A.D. (Tr. Sep. 26, 2006 at 120; S.A. at 284). Eleven of sixteen jurors had been seated at that point. (S.A. at 285-300). According to his questionnaire, A.D. worked for Home Depot and was in his first year of college. (S.A. at 284). During his individual voir dire, A.D. stated that he attended Northeastern University. (Tr. Sep. 26, 2006 at 119). He answered "no" to all of the judge's inquiries as to whether he would have any difficulty being a fair and impartial juror. (*Id*. at 116-19). (*Id*. at 116). Lee exercised a challenge directly after the individual voir dire. (*Id*. at 120).

After Lee indicated his intent to challenge A.D. at sidebar, defense counsel objected on the basis that "Mr. Lee has, now, exercised [per]emptory challenges against a large number of African American [jurors]." (Tr. Sep. 26, 2006 at 120). Following a discussion, defense counsel specified that he was referring to jurors 201, 227, and 246—L.D., P.M., and M.C.—as establishing a pattern of discrimination. (*Id*. at 129).[4]

In response, Judge Connolly first stated that M.C. should be excluded from consideration, because "under no circumstances could this man be considered a man of color. In my opinion, he's a Guatemalan; he's from Central America." (*Id*.). Defense counsel then argued that even excluding M.C., Judge Connolly should still find a pattern of discrimination based on the fact that A.D. "would

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[3] At one point, Lee mistakenly testified that he "was down to I believe four peremptory challenges" when he chose not to strike J.O. (E.R. at 63).

[4] As noted above, L.D.'s questionnaire indicates that he was born in Trinidad. During the discussion among Lee, Judge Connolly, and defense counsel, defense counsel characterized L.D. as a "person of color." (Tr. Sep. 26, 2006 at 122). Neither Judge Connolly nor Lee **[*14]** disputed the characterization. (*Id*. at 122-33). There is, however, some question as to whether he was black, as opposed to (for example) a dark-skinned South Asian or person of mixed race. A substantial majority of the population of Trinidad is of South Asian, African, or mixed African-Asian background. GOV'T OF THE REPUBLIC OF TRINIDAD & TOBAGO, MINISTRY OF PLANNING AND SUSTAINABLE DEVELOPMENT CENTRAL STATISTICAL OFFICE, TRINIDAD & TOBAGO 2011 POPULATION AND HOUSING CENSUS DEMOGRAPHIC REPORT 15 (2012). At the September 2014 hearing, Lee stated that he had no memory as to whether L.D. was in fact dark-skinned. (E.R. at 34-35). For purposes of this opinion, the Court will assume that L.D. was black.

be the third black man challenged out of a total of eight who have been questioned, so far. So we have three out of a total of eight; **[*15]** which, I say, is a significant percentage." (*Id.* at 132).[5] Judge Connolly then stated: "I just find, after determination and having discussions with counsel, I make a determination that there has not been shown a pattern of discrimination in this case, under the *Soares* case, at this time." (*Id.*)[6]

At the September 2014 hearing, Lee was asked directly about his reasoning behind challenging A.D.:

> Q I want to direct your attention, Mr. Lee, to Juror Number 261. That was the 19-year-old black male juror who attended Northeastern and worked at Home Depot. Do you recall that juror?
> A Yes.
> Q And did you challenge that juror?
> A I did challenge him.
> Q What was the basis? What is the basis for that challenge?
> A His age.

(E.R. at 11). He later added: "I struck [A.D.] because he was age 19, and I didn't see anything else on his questionnaire that would give me reason to believe that he had a maturity level greater than that of an age 19-year-old person." (E.R. at 62). Speaking to his decision to challenge the 19-year-old A.D. after not challenging the 21-year-old I.R., Lee stated:

> I don't even know what [A.D.'s] race was, to be perfectly truthful, I just know that at age 19, if I was going to draw a distinction between **[*17]** him and [I.R.], that was the distinction I was going to draw, and, as I said, I didn't see anything on his questionnaire that would allow me to distinguish him in any way, and so, therefore, I, out of concern for, again, the number of jurors that still needed to be selected, by the time I got to Mr. [A.D.] , I was down to four challenges, and I thought that I should exercise a challenge against him at that point.

(E.R. at 61).[7]

With three remaining challenges, Lee did not challenge a 26-year-old woman named J.F. (juror 293). (*Id.* at 155; S.A. at 295). J.F. indicated on her questionnaire that she was a college graduate and that she worked as a "provider account manager" for Tufts Health Plan in Watertown. (S.A. at 295). At the September 2014 hearing, Lee was asked why he did not strike J.F. He responded: "I believe that woman was a college graduate, and I believe that at that point I was down to three peremptory challenges, and based up on what I was seeing coming up, I felt I needed to preserve what few peremptory challenges I had." (E.R. at 16).

With two challenges remaining, Lee did not challenge a 23-year-old (apparently Hispanic) woman named M.P. (juror **[*18]** 333). (Tr. Sep. 26, 2006 at 206; S.A. at 299). M.P.'s questionnaire indicated that she had completed college and was employed as a secretary for the Venezuelan consulate in Boston. (S.A. at 299). It further

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[5] On the present record, there is no way to verify defense counsel's statement that exactly eight black men had undergone the individual voir dire process to that point. The record contains only a small selection of juror questionnaires, and the questionnaires do not directly report a juror's race. However, the jury did ultimately include at least five African-Americans (three women and two men), so it is safe to conclude that Lee chose not to challenge at least five potential jurors who were African-American.

[6] Judge Connolly was referring to *Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979)*, which the Court of Appeals referred to as "the bedrock Massachusetts case in this area." *Sanchez, 753 F.3d at 287 n.5*. In *Soares* (which predated *Batson*), the Massachusetts high court held that the Massachusetts Constitution proscribes "the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular, defined groupings in **[*16]** the community" and later specified that "blacks constitute a discrete group" for purposes of that proscription. *Id. at 486, 488*. The court considered this rule to be necessary in order to effectuate the right of the accused to be subject only to "the judgment of his peers." *Id. at 477* (quoting *Mass. Const. pt. 1, art. XII*).

[7] As this was Lee's twelfth challenge, he in fact had five challenges remaining as of the time he challenged A.D. *See Sanchez, 753 F.3d at 286*.

indicated that she had worked for the probation department of the Suffolk Superior Court in high school. (*Id*.). As to his reasoning in allowing M.P. to remain on the jury, Lee testified: "It was the same reason, which I believe I was down to three challenges at that point as well."[8] (E.R. at 16-17). He further testified that, while he could not specifically recall how many challenges defense counsel had remaining, the number "did play a role" in his thinking. (*Id*. at 17). M.P. was the sixteenth and final juror seated. (Tr. Sep. 26, 2006 at 207-09).

The jury included at least five African-Americans, two of whom were men; one was 51 and the other was 34. (S.A. at 25).

At the conclusion of Lee's testimony at the September 2014 hearing, he was asked by the Court whether he remembered anything else about the prospective jurors, such as their "physical appearance, clothing, demeanor, what they were holding in their hands, **[*19]** anything like that." (E.R. at 65-66). Lee responded that he did not. (*Id*.).

The jury empanelment took place in September 2006. The evidentiary hearing took place nearly eight years later, in September 2014. The evidence was thus subject to "the usual risks of imprecision and distortion from the passage of time." *Miller-El v. Cockrell, 537 U.S. 322, 343, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*. Nonetheless, the Court found Lee to be credible in all respects. His demeanor was professional and credible throughout. His testimony was based in part on memory and in part on his routine empanelment practices, and he endeavored to distinguish between the two as he testified. His testimony was subject to extensive cross-examination. Petitioner did not call any witnesses. Jonathan Shapiro, the defense counsel who had represented Sanchez at the trial, did not testify.

[8] Lee had challenged one other juror between J.F. and M.P., so in fact he had only two challenges remaining. (Tr. Sep. 26, 2006 at 185).

II. Analysis

A. The *Batson* Standard

The *Equal Protection Clause of the Fourteenth Amendment* prohibits discrimination against certain cognizable groups in the process of jury selection. "Indeed, the Constitution forbids striking . . . even a single prospective juror for a discriminatory purpose." *Sanchez, 753 F.3d at 284* (internal quotation marks omitted) (citing *Snyder v. Louisiana, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008)*). Factors that prosecutors may not consider in exercising their peremptory challenges include gender and race. *J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994)*; *Batson v. Kentucky, 476 U.S. 79, 86-87, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)*.

"Although the *Fourteenth Amendment* does not provide **[*20]** a defendant with a 'right to a petit jury composed in whole or in part of persons of his own race . . . [a] defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.'" *Sanchez, 753 F.3d at 290* (quoting *Batson, 476 U.S. at 85-86* (internal quotation marks omitted)). Accordingly, a criminal defendant has standing to raise an equal-protection issue where a juror may have been the subject of a discriminatory challenge. *See Campbell v. Louisiana, 523 U.S. 392, 118 S. Ct. 1419, 140 L. Ed. 2d 551 (1998)*.

When a defendant asserts that a prosecutor has used a peremptory challenge in a racially discriminatory manner, *Batson* instructs the trial judge to follow a three-step inquiry. *476 U.S. at 96-98*. "The moving party bears the initial burden of demonstrating a *prima facie* case of discrimination. If this burden is met, the non-moving party must then offer a non-discriminatory reason for striking the potential juror." *Aspen v. Bissonnette, 480 F.3d 571, 574 (1st Cir. 2007)* (citing *Batson, 476 U.S. at 96-98*). The

trial court must then determine "if the moving party has met its ultimate burden of persuasion that the peremptory challenge was exercised for a discriminatory reason." *Id*.

"[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." **[*21]** *Snyder v. Louisiana, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008)* (citing *Miller-El v. Dretke, 545 U.S. 231, 239, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)*. Ultimately, the "critical question" is whether the trial court finds "the prosecutor's race-neutral explanations to be credible." *Miller-El, 537 U.S. at 338-39*. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id. at 339*.

A *Batson* violation may be established if race forms any part of the reason for a peremptory challenge. As the Court of Appeals noted, "the use of a constitutionally neutral characteristic—such as age—in a racially discriminatory manner constitutes race-based discrimination." *Sanchez, 753 F.3d at 306*. Thus, if a prosecutor strikes a juror because he was young *and* black (or young, male, *and* black), as opposed to simply striking him because he was young, a constitutional violation has occurred.

B. The First and Second Steps under *Batson*

The Court of Appeals held that petitioner met his initial burden of demonstrating a *prima facie* case of discrimination. It then directed this Court as follows:

> [The district] court should attempt to conduct the second and third *Batson* steps. It should require the prosecutor to explain his challenge[]. If the prosecutor **[*22]** offers a race-neutral explanation, the court must try to evaluate that explanation and decide whether defendant has proved purposeful racial discrimination. If the court finds that, due to the passage of time or any other reason, it cannot adequately address the issues at this stage or make a reliable determination, or if it determines that the prosecutor exercised his peremptory challenges improperly, it should set the case for a new trial. If it finds the prosecutor exercised his peremptory challenge[] in a permissible fashion, it should [affirm] the judgment.

Sanchez v. Roden, 753 F.3d at 308 (alteration in original) (quoting *People v. Johnson, 38 Cal. 4th 1096, 45 Cal. Rptr. 3d 1, 136 P.3d 804 (Cal. 2006))*. The Court of Appeals also found that "Sanchez waived any objection to the Commonwealth's peremptory strikes against Jurors No. 201 and 227 by failing to object to those strikes at the time they were exercised." *Sanchez, 753 F.3d at 295 n.10*. Thus, the specific peremptory challenge to be evaluated is that exercised by Lee on juror 261.

The second *Batson* step is relatively easy to resolve. "The second step of th[e *Batson*] process does not demand an explanation that is persuasive, or even plausible. At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory **[*23]** intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett v. Elem, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995)* (alteration in original) (quoting *Hernandez v. New York, 500 U.S. 352, 360, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)* (internal quotation marks omitted). At the motion hearing of September 8, 2014, Lee offered a non-discriminatory, race-neutral explanation for challenging A.D.: "[h]is age." (E.R. at 11). Lee testified on multiple occasions that he struck A.D. due to his age, and because he "didn't see anything else on his questionnaire that would give me reason to believe that he had a maturity level greater than that of an

age 19-year-old person." (E.R. at 62). Age is a facially valid, race-neutral consideration and a permissible ground on which to exercise a peremptory challenge under *Batson*. *See, e.g.*, *United States v. Helmstetter, 479 F.3d 750, 753-54 (10th Cir. 2007)* (noting that "every other circuit to address the issue has rejected the argument that jury-selection procedures discriminating on the basis of age violate equal protection"); *Cresta, 825 F.2d at 544-45*. Accordingly, this explanation satisfies the government's burden under the second step of *Batson*.

C. The Third Step under *Batson*

The third step of the *Batson* test requires this Court to evaluate the race-neutral explanation and determine whether the petitioner has "met [his] ultimate burden of persuasion that the peremptory **[*24]** challenge was exercised for a discriminatory reason." *Aspen, 480 F.3d at 574*. Making that determination involves "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" and consideration of "all relevant circumstances." *United States v. Mensah, 737 F.3d 789, 797 (1st Cir. 2013)* (quoting *Batson, 476 U.S. at 93, 96)*. Ultimately, the "critical question" is whether the trial court finds "the prosecutor's race-neutral explanations to be credible." *Miller-El, 537 U.S. at 338-39*. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id. at 339*.

Lee stated unequivocally at the September 2014 hearing that he struck juror 261 as a result of his age. He gave no alternate justification, although he did supplement his reasoning by explaining that he also evaluated juror 261's questionnaire and found no "reason to believe that he had a maturity level greater than that of an age 19-year-old person." (E.R. at 62). Thus, the "critical question" is whether Lee's explanation is credible—that is, whether he indeed struck juror 261 due to his youth, or whether he impermissibly struck him, in whole or in part, due to his race.

1. Discrimination on the [*25] Basis of Youth in Jury Selection

As a general matter, discrimination on the basis of race is prohibited, but discrimination on the basis of youth is not.[9] Our legal system and our society routinely discriminate against individuals on the basis of their youth. For example, persons under a certain age, typically 16, cannot drive automobiles. *E.g.*, *Mass. Gen. Laws ch. 90, § 10*. Persons under the age of 18 generally cannot vote. *E.g.*, *Mass. Gen. Laws ch. 51, § 1*; *see Oregon v. Mitchell, 400 U.S. 112, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970)*. They also cannot serve as jurors. *See 28 U.S.C. § 1865*. Persons under the age of 21 cannot purchase alcoholic beverages. 26 U.S.C. § 158. Persons under the age of 25 seeking to rent a car are commonly forced to pay a substantial surcharge, and are often blocked from renting one at all. *See* Lisa Fritscher, *Age Requirement to Rent a Car*, USA TODAY, *http://traveltips.usatoday.com/age-requirement-rent-car-62294.html*. Indeed, the Constitution itself includes a form of youth discrimination: it requires that representatives be 25 years of age, senators 30, and presidents 35. U.S. CONST. art. I, §§ 2, 3; art. II, § 1.

Of course, those restrictions are based on generalizations that may be false in specific instances. A 17-year-old could well prove to be an excellent juror, just as a 24-year-old could be an excellent driver. Nonetheless, those generalizations are deeply rooted in experience and common sense, particularly the basic proposition that as people grow older they are more likely to mature and gain

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[9] Referring to the issue as "age" discrimination somewhat clouds the inquiry, as that term also applies to discrimination against older persons. *See, e.g.*, the Age Discrimination in Employment Act, *29 U.S.C. § 621 et. seq.* (prohibiting discrimination against persons over the age of 40). **[*26]** For that reason, this opinion will generally use the term "youth" rather than "age."

experience, and that with maturity and experience they are more likely to exercise their duties and privileges responsibly.

Moreover, age is not a binary metric. A person is not "young" at one point and suddenly "not young" at another. While it is common to use somewhat arbitrary age cut-offs in a variety of contexts, in reality no such bright lines exist. Perhaps more importantly, there is commonly a vast gulf between the experience and maturity levels of very young adults and those even a few years older. Most people change and mature considerably from 18 to 21, and the difference between 18-year-olds and 27-year-olds is usually even more stark. Again, generalizations are always subject to exceptions, and without **[*27]** question there are mature 18-year-olds and immature 27-year-olds. But the distinction between very young adults and slightly older ones—which, again, the law recognizes in multiple respects—is nonetheless perfectly sensible and practical, and one that is routinely observed in a variety of contexts.

For those reasons, among others, prosecutors have frequently sought to exercise peremptory challenges against youthful jurors on the ground that they may not have the necessary maturity and experience to make a difficult decision wisely. *See, e.g., Phase 2 of Jury Selection Set to Begin in Boston Marathon Bombing Trial*, FOX NEWS (Jan. 15, 2015), http://www.foxnews.com/us/2015/01/15/judge-to-question-prospective-jurors-for-trial-boston-marathon-bombing-suspect/ (quoting a former federal prosecutor and current criminal defense attorney on the subject of jury empanelment in the Boston Marathon bombing trial: "As a prosecutor, you want to have somebody who is adult, grown-up, had some experience in life, perhaps has some ups and downs, someone who understands that actions have consequences, and they've had exposure to making tough decisions."). The sheer number of courts to have been faced with the issue of youth-based peremptory challenges by prosecutors is evidence that the strategy **[*28]** is commonplace. *See Helmstetter, 479 F.3d at 754* (listing cases).

That strategy has also withstood multiple legal challenges. Every Court of Appeals to have considered the question has held that age is an acceptable race-neutral justification for exercising a peremptory challenge. *See Helmstetter, 479 F.3d at 753-54* (collecting cases). Many of those cases have specifically upheld peremptory challenges based on the youth of the potential jurors. *See, e.g., United States v. Bryce, 208 F.3d 346, 350 n.3 (2d Cir. 2000)* (upholding challenge of prospective juror who was the only African-American in the pool, but also its youngest member; the prosecutor alleged that his primary motivation for the strike was the juror's age and "lack of life experience"); *United States v. Maxwell, 160 F.3d 1071, 1075-76 (6th Cir. 1998)*; *United States v. Pichay, 986 F.2d 1259, 1260 (9th Cir. 1993)*. The First Circuit has specifically held that Batson does not prohibit the systematic exclusion of "young adults," which the defendants in that case had defined as persons between the ages of 18 and 34. *United States v. Cresta, 825 F.2d 538, 544-45 (1st Cir. 1987)*; *see Barber v. Ponte, 772 F. 2d 982, 996-1000 (1st Cir. 1985)* (en banc).

2. The Dynamic of Exercising Peremptory Challenges

A prosecutor's strategy in selecting jurors is also affected by the manner in which courts permit the exercise of peremptory challenges.[10] Here, the trial

[10] Peremptory challenges permit the parties some limited ability to exercise a veto over prospective jurors, without having to articulate their reasons for doing so. They are often criticized on the ground that they tend to be based on generalizations or even stereotypes (subject, of course, to the restrictions of *Batson*). But the proposition that all potential jurors who (1) meet the minimum qualifications and (2) are not struck for cause will perform their duties wisely and responsibly is itself based on a generalization, **[*30]** and an inaccurate one at that. Peremptory challenges permit both parties an opportunity to strike a handful of potential jurors that they believe will be least helpful or sympathetic to their cause. Among their many virtues is that they substantially increase the likelihood that the jury will be fair, impartial, and responsible, both in reality and in the

court required peremptory challenges to be exercised one by one, as each prospective juror was called forward. Both sides were limited to **[*29]** 16 challenges. Both sides had a limited amount of information as to each prospective juror; counsel relied substantially on the one-page questionnaires and the responses to the statutory and voir dire questions.[11] Furthermore, it is fair to assume that each challenge had to be exercised in a limited amount of time and that the prosecutor and defense counsel were generally working at cross-purposes. The record also indicates that both sets of counsel knew relatively little about the prospective jurors in the pipeline—that is, the candidates who would be next up if a challenge were exercised. It appears that counsel had the questionnaire for each juror and little else.[12]

The peremptory challenges in this case were thus exercised under dynamic and fluid circumstances. Every time a challenge was exercised, at least two things happened: a new prospective juror was called forward, and one side lost one of its sixteen challenges. The number of remaining challenges was thus constantly dwindling, but no new information as to the prospective jurors in the pipeline was provided. Each side therefore had an incentive to use each succeeding challenge more carefully, or even hold challenges in reserve, in order to **[*32]** ensure that challenges would remain available to use against the later (largely unknown) candidates. Moreover, the ease with which challenges were exercised was necessarily affected by the number of jurors seated and the number of challenges that had been used by opposing counsel. Typically, counsel might choose to be more free with the exercising of challenges at the outset, but less so over time if many seats remain open and opposing counsel has many challenges remaining.

3. Whether the Prosecutor Impermissibly Discriminated on the Basis of Race

The Court turns next to the dispositive issue in this case: whether Lee struck juror 261, a 19-year-old black male, because of his youth, and not (even in part) because of his race. Again, the "critical question" is whether the Court finds "the prosecutor's race-neutral explanations to be credible." *Miller-El, 537 U.S. at 338-39*. In making that determination, the Court may consider, among other things, the prosecutor's demeanor, the reasonableness or unreasonableness of his explanations, and "whether the proffered rationale has some basis in accepted trial strategy." *Id. at 339*. The overall percentage of eligible black jurors who were struck by the prosecutor is also

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perception of the parties.

[11] During the September 2014 hearing, both counsel for petitioner and Lee referred to the questionnaires as containing "bare bones" information. (E.R. at 21). Counsel for petitioner and Lee then had the following exchange:

> Q And is it also fair to say that the statutory questions also are relatively bare bones, that is, the statutory questions that are used to weed out the most obvious prejudices?
>
> A The jury [e]mpanelment questions that are asked by statute, yes, I don't consider them to be particularly detailed.

(E.R. at 21-22).

[12] During the September 2014 hearing, counsel for petitioner and Lee had the following exchange in reference to his practice while conducting the individual voir dire:

> Q As you're turning around and looking at who's seated in the venire, actually you can't see who's seated in the venire at that point?
>
> A Right. I don't even know **[*31]** if they are in there. . . . I'm not 100 percent certain, but what I do know is I had the stack of questionnaires in front of me of jurors who had not yet been brought to the sidebar.
>
> Q And you told us, you've already told us that you don't get a lot of time to look at those questionnaires?
>
> A Correct.
>
> . . .
>
> Q So the questionnaires only gives [sic] you the roughest possible sense of who somebody is and what they might be like as a juror?
>
> A Yes. I mean, it gives—it gives you what it gives you. There's a limited number of questions on the questionnaire. It's one page long, and you try to draw as many conclusions as you can from the information you're given.

(E.R. at 46-47).

relevant **[*33]** to that determination. *Id. at 331* (stating that the percentage of black jurors removed by peremptory strikes is "relevant" to the credibility inquiry).

Petitioner contends that Lee could not have struck juror 261 on the basis of youth because he chose not to strike other young jurors. In particular, petitioner points to the fact that Lee did not strike juror 243 (the 21-year-old white male born in Russia) and jurors 255, 293, and 333 (three white or Hispanic females aged 27, 26, and 23, respectively). In addition, petitioner notes that Lee struck two other dark-skinned young men: juror 201, the 25-year-old from Trinidad, and juror 227, the 24-year-old black male. Petitioner contends that this inconsistency proves that Lee challenged juror 261 not simply because he was young, but because he was a young, black male.

Petitioner's claim of racial bias thus depends almost entirely on the alleged inconsistency: if Lee were telling the truth, the argument goes, he would have struck the 21-year-old Russian-American, and indeed struck all the youngest jurors. The Court is satisfied, however, that Lee's explanation for his challenges is entirely credible and that the claimed inconsistency does not prove **[*34]** otherwise.

First, and as noted, every person under the age of 30 should not be swept into a category called "young," without accounting for the huge distinctions between members of that group. A 19-year-old and a 27-year-old may both qualify as "young" for some purposes, but to a lawyer exercising a peremptory challenge, the 27-year-old is far more likely to be mature, experienced, and responsible than the 19-year-old. Here, there were two prospective jurors under the age of 20: juror 229 (a 19-year-old white male) and juror 261 (a 19-year-old black male). Lee struck them both. There were also two prospective "young" jurors over the age of 25: juror 255 (a 27-year-old white female) and juror 293 (a 26-year-old white female). Lee kept them both.[13]

Second, every potential juror presented for questioning at a different time and under different circumstances. Again, when exercising a challenge, an attorney must consider not just the individual characteristics of each potential juror, but also factors such as the number of challenges remaining (both for oneself and for one's opponent), the **[*35]** number of jury seats to be filled, and the list of jurors to come. A juror who presents early in the process, when a prosecutor is holding more challenges, may be struck more readily than one with the same profile who presents at a time when the prosecutor has few challenges remaining. Under the circumstances, at least some minor inconsistencies are to be expected.

Viewed in that light, Lee's explanation for his decision to challenge jurors 201 and 227 (the 25-year-old male from Trinidad and the 24-year-old black male), and not to challenge jurors 293 and 333 (the 26-year-old white female and 23-year-old Hispanic female), is reasonable and race-neutral. Lee still had twelve peremptory challenges when he challenged juror 201 and ten when he challenged juror 227.[14] By contrast, he had just three challenges when he chose not to challenge juror 293 and only two when he chose not to challenge juror 333. For that reason, he had substantially more flexibility when considering jurors 201 and 227 than when considering jurors 293 and 333.[15]

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[13] As to juror 255, Lee testified: "She was 27 years old, which I didn't consider to be overly young." (E.R. at 15).

[14] After using his seventh challenge to strike juror 227 (the 24-year-old black male), Lee used his eighth challenge to strike juror 229 (the 19-year-old white college **[*36]** student) (juror 228 was excused for cause). Lee thus considered two "young" males in close succession—one black, one white—and reached the same decision on both.

[15] There were additional factors at work, as well, in choosing among those four jurors. The two jurors who were struck appeared to have less formal education than the two who were kept. Lee testified that he chose not to challenge juror 293 in part because her questionnaire indicated that she was a college graduate. (E.R. at 16). Juror 333 also completed college. (S.A. at 299). By contrast, juror 227's highest level of education was a GED. Juror 201 did not indicate his level of

Third, while chronological age is a proxy for maturity and experience, it need not be treated as a rigid requirement that trumps all other factors. The principal instance in which Lee allegedly acted inconsistently came with respect to jurors 243 (the 21-year-old white male college student who had been born in Russia, whom he kept) and 261 (the 19-year-old black male college student, whom he struck). Petitioner contends that the *only* meaningful difference between these two potential jurors is their race. Indeed, the Court of Appeals specifically **[*37]** relied on Lee's apparently differential treatment of these two jurors to find *prima facie* evidence of racial discrimination. *Sanchez, 753 F.3d at 304*.

Lee testified at the September 2014 hearing that while his "inclination was to strike" juror 243, he ultimately chose not to due to "indications on [his] questionnaire that might make [h]im not fit [his] chronological age." (E.R. at 13). He testified that because juror 243 was born in Moscow and had moved to the United States prior to starting his college education, he thought he "may have been chronologically a little bit older than someone else in terms of life experiences, and that's really what I'm looking at that somebody who has some level of maturity and life experience." (E.R. at 44). He also testified: "I thought if I had to take a young juror, that would be somebody who might be a better candidate than most." (E.R. at 13). By contrast, he testified that as to juror 261, he "didn't see anything else on his questionnaire that would give me reason to believe that he had a maturity level greater than that of an age 19-year-old person." (E.R. at 62).

That race-neutral explanation, under the circumstances presented here, is reasonable and credible. Again, a prosecutor who seeks to exclude jurors on **[*38]** the basis of youth is likely using age as a proxy for two things: maturity and life experience. Those are exactly the two factors referred to by Lee in his testimony. Juror 243 was two years older than juror 261, and had experience living in two different countries, including one with a different language and culture than the United States. Lee plausibly assumed—perhaps correctly, perhaps not— that Juror 243 came to the United States "on his own" and "to begin his education." It was not unreasonable for Lee to infer that an individual in juror 243's position was likely to have greater life experience and maturity than an individual in juror 261's position.

That does not, of course, mean that Lee's assumptions are factually correct; the 21-year-old Russian-American immigrant might well prove to be less mature than the 19-year-old African-American. There was no way for Lee to know for certain either way. And another person might have drawn a different conclusion. But the issue is neither the accuracy nor the universality of the assumption; it is the credibility of the prosecutor's explanation. *See Aleman v. Uribe, 723 F.3d 976, 982 (9th Cir. 2013)* (" . . . the court need not believe that the stated reason represents a sound strategic **[*39]** judgment to find the prosecutor's rational persuasive; rather, it need be convinced only that the justification should be believed."). That explanation was credible, and petitioner has not shown otherwise.

Petitioner further contends that Lee should have been more likely to strike juror 243 than 261, because Lee had more challenges remaining when he considered juror 243 than when he considered juror 261. But the number of challenges remaining is not the only relevant consideration; the number of jurors left to be seated necessarily plays a role as well. For example, an attorney with four challenges remaining and only one juror left to be seated has more flexibility than one with five challenges remaining and twelve jurors left to be seated. Here, Lee had six challenges remaining with eight jurors left to be seated when he considered juror 243. When he considered juror 261, he had five challenges remaining with five jurors left to be

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education on his questionnaire.

seated.[16] Thus, his ratio of challenges remaining to open jury seats was actually slightly better when he considered juror 261 than when he considered juror 243. Regardless, the numbers are close, and that factor is not dispositive in either direction.

Finally, because the ultimate question is whether the prosecutor's intent (in whole or in part) was racially motivated, his actions as to other African-American prospective jurors are also relevant. *Miller-El, 537 U.S. at 331* (stating that the percentage of black jurors removed by prosecutor by peremptory strikes is "relevant" to the credibility inquiry). Defense counsel stated during his initial *Batson* challenge that Lee had challenged three out of the first eight black men questioned.[13] This statement is not fully verifiable on the record, but it implies that Lee had chosen not to challenge five black men to that point.[16] (The record is silent as to how many black women were questioned.) Furthermore, the jury ultimately included three black women and two black men. Lee thus apparently did not strike at least eight of eleven potential jurors who were black: the three black women on the jury plus the five black men who defense counsel said that **[*41]** Lee had not challenged. Indeed, even if defense counsel's statement is ignored as unverifiable, Lee necessarily did not challenge the five African-Americans who ended up on the jury.

Again, the fact that Lee did not challenge some black jury members is not by itself dispositive. *Batson* prohibits prosecutors from exercising even a single challenge on the basis of race. *476 U.S. at 86-88*; *United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987)*. But just as Lee's decision not to challenge some white jurors is relevant circumstantial evidence to the question of his intent in striking juror 261, so is his decision not to challenge at least five black jurors. *See United States v. Briscoe, 896 F.2d 1476, 1489 (7th Cir. 1990)*.

Petitioner also cites Lee's challenge of juror 246, the **[*42]** 41-year-old Guatemalan-American man, as further evidence of his tendency to strike jurors based on race. There is no evidence, however, that juror 246 was black; Judge Connolly observed that "under no circumstances could [he] be considered a man of color." Status as a "minority" is not a cognizable group under Batson. *Gray v. Brady, 592 F.3d 296, 302 (1st Cir. 2010)*. Furthermore, and in any event, juror 246 was far more equivocal than the other jurors in responding to the judge's questions about whether he could be fair as a juror. When asked if there was any question in his mind as to whether he could be fair, juror 246 responded: "Just that the responsibility—I mean, no, no." (Tr. Sep. 26, 2006 at 73-74). The transcript reflects that Lee immediately asked Judge Connolly (at sidebar) to follow up on that line of questioning, and that after further questioning he exercised a challenge. (*Id*. at 74-76). At the September 2014 hearing, Lee testified: "I exercised a challenge against [juror 246] because in response to one of the questions, he expressed concern about the responsibility of being a juror. That is, what I consider—what he suggested was an overwhelming responsibility that he didn't know what he could meet." (E.R. at 53). On the record, Lee's rationale **[*43]** behind striking juror 246 seems clearly related to his hesitation in agreeing that he could be fair and not any race-based consideration. Moreover, juror 246 was 41 years old. He is thus outside the category of

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[16] During **[*40]** the motion hearing of September 8, 2014, counsel for petitioner asked a question implying that no jurors had been seated between juror 243 and juror 261. (E.R. at 61). In fact, jurors 250 and 255 had been seated in between. (Tr. Sep. 26, 2006 at 89-93, 109-14).

[13] Defense counsel excluded juror 246 (the 41-year-old Guatemalan-American male) from consideration; during a sidebar conference that took place during the questioning of juror 261, he stated as follows: "[E]ven if you take out [juror 246], the Guatemalan, this gentlemen in the box, now, would be the third black man challenged out of a total of eight who have been questioned, so far." (Tr. Sep. 26, 2006 at 132).

[16] The statement was made by the proponent of the *Batson* challenge, so there is no reason to believe that the number cited was overly generous to Lee.

"young, black men" regardless of his race.[17] Lee's challenge of juror 246 thus adds little, if any, weight to petitioner's argument.

In sum, petitioner's *Batson* claim falls short at the third step of the analysis. Petitioner has not met its burden of persuasion that the government used its peremptory challenge on juror 261 on a discriminatory basis. The Court credits Lee's testimony that he struck juror 261 (and other young jurors, both black and white) for appropriate, race-neutral reasons based largely on age, and that he chose not to strike some young jurors for similarly appropriate reasons. Accordingly, the petition for habeas relief will be denied.

III. Conclusion

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED.

So Ordered.

/s/ F. Dennis Saylor

F. Dennis Saylor IV

United States District Judge

Dated: February **[*44]** 4, 2015

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[17] Lee also kept juror 333, a 23-year-old apparently Hispanic female, on the jury. It is unclear whether any other Hispanic jurors were questioned.

Sanchez v. Roden

United States Court of Appeals for the First Circuit

December 7, 2015, Decided

No. 15-1197

Reporter
808 F.3d 85 *; 2015 U.S. App. LEXIS 21176 **

DAGOBERTO SANCHEZ, Petitioner, Appellant, v. GARY RODEN, Respondent, Appellee.

Subsequent History: US Supreme Court certiorari denied by *Sanchez v. Roden, 2016 U.S. LEXIS 2676 (U.S., Apr. 18, 2016)*

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. F. Dennis Saylor, IV, U.S. District Judge.

Sanchez v. Roden, 2015 U.S. Dist. LEXIS 13207 (D. Mass., Feb. 4, 2015)

Case Summary

Overview
HOLDINGS: [1]-In the context of a *28 U.S.C.S. § 2254* habeas petition, and following remand to the federal district court for an evidentiary hearing as to steps two and three of Batson, the court affirmed the district court's finding that the prosecutor's explanation -- that he struck the young black juror at issue because of his age -- was race-neutral, and satisfied the state's burden at step two to articulate a nondiscriminatory reason for the strike; [2]-As to step three of the Batson challenge, the district court did not abuse its broad discretion as factfinder on matters of credibility in concluding that the petitioner had not proven that there was racial discrimination.

Outcome
Denial of habeas petition affirmed.

Counsel: Ruth Greenberg, for appellant.

Thomas E. Bocian, Assistant Attorney General, Criminal Bureau, with whom Maura Healey, Attorney General of Massachusetts, was on brief, for appellee.

Judges: Before Lynch, Thompson, and Kayatta, Circuit Judges. THOMPSON, Circuit Judge, concurring.

Opinion by: LYNCH

Opinion

[*86] LYNCH, Circuit Judge. This habeas corpus petition comes to us again following our previous opinion remanding to the federal district court. *Sanchez v. Roden (Sanchez I), 753 F.3d 279, 309 (1st Cir. 2014)*. The petition contests the state court's conclusion that the state prosecutor did not violate the *Fourteenth Amendment* in his exercise of a peremptory challenge during jury selection for Dagoberto Sanchez's state trial on charges of second-degree murder and unlawful possession of a firearm. Sanchez contends that the challenge was impermissibly based on race.

Previously, this court found that, contrary to the state court's ruling, Sanchez had established a prima facie case of racial discrimination under step one of the framework established in *Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)*. We remanded the case to the federal district court for an evidentiary hearing as to steps two and three of Batson. After that hearing, **[**2]**

which included testimony from the prosecutor who exercised the challenge, the district court ruled against Sanchez on the final step of Batson and denied his petition. *Sanchez v. Roden, No. 12-10931, 2015 U.S. Dist. LEXIS 13207, 2015 WL 461917 (D. Mass. Feb. 4, 2015)*. We affirm.

I.

We recite only the facts necessary to these habeas proceedings, as our previous opinion in this case describes Sanchez's conviction and direct appeal in detail. In 2005, Sanchez was indicted for second-degree murder and unlawful possession of a firearm. During jury selection for his trial, state prosecutor Mark Lee exercised peremptory challenges, as relevant here, **[*87]** to strike three black men age 25 or under (Jurors 201, 227, and 261).[1] After striking Jurors 201 and 227 but before striking Juror 261, a 19-year-old black male college student, Prosecutor Lee seated Juror 243, a 21-year-old white male college student born in Russia. When Lee moved to strike Juror 261, Sanchez's defense counsel objected, arguing that Lee was striking young black potential jurors on the basis of a combination of their race, youth, and gender. The judge ruled that Sanchez had not made a prima facie case of discrimination. Ultimately, the impaneled jury of sixteen included three black women and two black men. The jury convicted Sanchez, **[**3]** and he was sentenced to life imprisonment for murder, with a concurrent two-year sentence on the firearm charge.

On appeal to the Massachusetts Appeals Court, Sanchez contended, among other things, that Lee had improperly exercised peremptory challenges against young "men of color," but the state appeals court rejected that contention, *Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 944 N.E.2d 625, 628-29 (Mass. App. Ct. 2011)*, and the Massachusetts Supreme Judicial Court denied further review, *Commonwealth v. Sanchez, 460 Mass. 1106, 950 N.E.2d 438 (Mass. 2011)* (table decision). Sanchez subsequently petitioned for a writ of habeas corpus under *28 U.S.C. § 2254* in federal district court. The district court, determining the state court's application of federal law was reasonable, denied the petition. *Sanchez v. Roden, No. 12-10931, 2013 U.S. Dist. LEXIS 19914, 2013 WL 593960, at *6 (D. Mass. Feb. 14, 2013)* (applying the Batson framework).

This court disagreed with the Massachusetts Appeals Court and with the district court's finding. *Sanchez I, 753 F.3d at 309*. This court held that the state appeals court's Batson analysis had unreasonably focused on the overall racial composition of the impaneled jury, ignoring evidence of possible discrimination against the subset of young **[**4]** black men. *Id. at 299-300*. Reviewing the record de novo, the panel found that a prima facie case of racial discrimination in the prosecution's peremptory challenge against Juror 261 had been established under Batson. Noting that Lee had not yet provided a reason for the challenge, *id. at 307*, the panel remanded the case to the federal district court to complete the Batson inquiry, *id. at 308* (instructing the district court to follow the guidance set forth in *People v. Johnson, 38 Cal. 4th 1096, 45 Cal. Rptr. 3d 1, 136 P.3d 804, 808 (Cal. 2006)*).

On remand, the district court held an evidentiary hearing on September 8, 2014, in which Lee alone testified and was subject to cross-examination by petitioner's counsel. Lee testified that he challenged Juror 261 -- the 19-year-old black male -- and several other jurors, including Jurors 201, 227, and 229, a white male college student, because of their youth. He stated that his general practice is to challenge young jurors, such that when he reviews jury questionnaires at the beginning of jury selection, "one of the very first things" he looks at is the age of prospective jurors, which he circles in red.

Lee testified that the dynamics of jury selection

[1] The record does not clearly establish Juror 201's race, but given indications in the state court proceedings that he was a "person of color," we count him among the black jurors for the purposes of our Batson analysis.

also played a "significant role" in exercising challenges. He stated, "I'm always monitoring how many peremptory **[**5]** challenges I have left versus how many peremptory challenges defense counsel has left and also in consideration of what I understand to be upcoming based upon the questionnaires." He explained, "the **[*88]** more challenges the defense has, the more flexible they can be about exercising those challenges, and, therefore, I have to be careful about the number of challenges that I'm exercising under those circumstances." Lee testified that during individual questioning of the prospective jurors, he flipped through the jury questionnaires and a chart that he kept to track which jurors had been struck by which party. On cross-examination, he maintained that he does this "in every trial all the time" and is "constantly looking through the questionnaires." He stated specifically that his low number of remaining challenges and "the number of jurors that still needed to be selected" in combination also motivated his choices regarding striking Juror 261 and keeping Juror 243.

When asked to explain why he did not challenge Juror 243 -- the 21-year-old white male college student from Russia -- Lee testified that he was "running out of challenges." He explained that when he has few challenges remaining, **[**6]** he reviews the jury "questionnaires to determine how many of the remaining challenges [he is] likely to have to use," and he then accepts young jurors based on indications that "might make them not fit their chronological age." In the case of Juror 243, Lee stated, "I took him, despite not wanting to take him," as "he was born in Moscow . . . [and] he came here on his own to begin his own education, and so I thought if I had to take a young juror, that would be somebody who might be a better candidate than most." On cross-examination, Lee conceded that there was no way to know whether Juror 243 had grown up abroad, but he reiterated that he was looking for "somebody who has some level of maturity and life experiences," and he thought Juror 243 seemed "a little bit older than someone else in terms of life experience."

During cross-examination, Lee stated that the only "outward" difference between Juror 243 and Juror 261 was that one was white and the other black. The district judge then asked, "Well, one was 19 and one was 21, right, do I have that right?" Both Sanchez's counsel and Lee responded affirmatively. The following colloquy between Sanchez's counsel and Lee ensued:

> Lee: Yes, **[**7]** [Juror 243] was two years older.
>
> Sanchez's Counsel: But you challenged people who were older than 21 for age, did you not?
>
> Lee: Yes. There is a distinction, but, as I said, my inclination would have been to strike [Juror 243] under all things being equal.
>
> Sanchez's Counsel: So the two years was not the defining difference for you?
>
> Lee: At that stage of the game, every possible distinction was relevant.

Subsequent questioning turned to the importance of trial dynamics to Lee's choices.

In a February 4, 2015, order, the district court denied Sanchez's habeas petition. In reaching its decision, the district court considered Lee's testimony, oral argument by both parties, the Commonwealth's Supplemental Answer to the 2012 habeas petition, which included jury questionnaires, as well as the parties' opposing memoranda of law. The court specifically found Lee's demeanor "professional and credible throughout." At Batson step two, the court concluded that Lee's testimony that he struck Juror 261 because of his age was facially valid and race-neutral. At Batson step three, the court focused on Lee's testimony at the evidentiary hearing. Recognizing the practice of striking potential jurors because **[**8]** of their youth as an accepted trial strategy, the court credited Lee's explanation of his decision to strike Juror 261 based on his age. As to the alleged inconsistency in Lee's application of that practice, **[*89]** the court credited two additional points: first, that Lee drew distinctions between young people that led him to keep some jurors but strike others; and second, that considerations of

remaining challenges for either party, the number of jury seats to fill, and the pool of potential jurors motivated Lee to depart from his practice regarding age. After an extensive review of the evidence, the district court concluded that Sanchez had not proven Lee exercised a peremptory challenge to Juror 261 on the basis of race. This appeal followed.

II.

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), sets forth the three-step framework courts use to assess claims of racial discrimination in jury selection. When raising an objection to a prosecutor's use of a peremptory challenge, a criminal defendant must first make a prima facie case of racial discrimination. *Snyder v. Louisiana, 552 U.S. 472, 476, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008)*. If such a showing is made, then "the prosecution must offer a race-neutral basis for striking the juror in question." *Id. at 477* (quoting *Miller-El v. Dretke, 545 U.S. 231, 277, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)* (Thomas, J., dissenting)). Finally, based on "all of **[**9]** the circumstances," the court must determine whether the defendant has carried his ultimate burden of showing purposeful racial discrimination. *Id. at 478*.

Since this court previously determined that Sanchez had made a prima facie case, this appeal concerns only the latter two steps of the *Batson* inquiry as applied to Juror 261.[2] Typically, we may not on habeas review order an evidentiary hearing under *28 U.S.C. § 2254(e)(2)*, barring statutorily enumerated exceptions not applicable here. See *Cullen v. Pinholster, 563 U.S. 170, 131 S. Ct. 1388, 1398-1400, 179 L. Ed. 2d 557 (2011)*. However, we note, as we did in our previous decision, that our remand to the federal district court for an evidentiary hearing on an issue of federal law about which "the state courts have already had their say" was permissible in light of the fact that the paucity of the record was owing to the state court's unreasonable application of Batson's first step. *Sanchez I, 753 F.3d at 308*; see *Madison v. Comm'r, Ala. Dep't of Corrections, 761 F.3d 1240, 1249-50 (11th Cir. 2014)*; *Paulino v. Harrison, 542 F.3d 692, 698 & n.5 (9th Cir. 2008)*; cf. *Smith v. Cain, 708 F.3d 628, 635 (5th Cir. 2013)* (finding Batson evidentiary hearing ordered by district court to satisfy *§ 2254(e)(2)* where criminal defendant raised Batson objection "but the state court failed to provide him the opportunity to develop the factual basis of his claim through its misapplication of the Batson standard"). Neither party has objected to this procedure.

We review the district court's decision to deny a petition for habeas corpus de novo, *Sanchez I, 753 F.3d at 293*, and in the Batson context, we apply clear error review to the fact-finding court's ruling on discriminatory intent, *Snyder, 552 U.S. at 477*; *United States v. Monell, 801 F.3d 34, 43 (1st Cir. 2015)*. Where the federal district court conducted an evidentiary hearing and took testimony from the prosecutor who exercised the challenge **[*90]** at issue, we recognize that "determinations of credibility and demeanor lie 'peculiarly within [its] province.'" *Snyder, 552 U.S. at 477* (quoting *Hernandez v. New York, 500 U.S. 352, 365, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)*). We must uphold the district court's ruling unless "we are left with the definite and firm conviction that a mistake has been committed." United *States v. Mensah, 737 F.3d 789, 796-97 (1st Cir. 2013)* (quoting *United States v. Gonzalez-Melendez, 594 F.3d 28, 35 (1st Cir. 2010)*); see also *Madison, 761 F.3d at 1245*; *Paulino, 542 F.3d at 698*.

A. Batson Step Two

When called upon to provide a race-neutral basis for his actions, Lee explained that he challenged

[2] We previously held that Sanchez waived **[**10]** any objection to the prosecution's challenges to other jurors by failing to raise them at trial, *Sanchez I, 753 F.3d at 295 & n.10*, and Sanchez cannot revive such challenges in this appeal. We note, however, that challenges to other jurors nonetheless may be relevant to the issue of discriminatory intent, *Dretke, 545 U.S. at 241*, and so we consider such evidence for that purpose.

Juror 261 because of his "age." Age is not a protected category under Batson. See *United States v. Cresta, 825 F.2d 538, 545 (1st Cir. 1987)*; see also *United States v. Helmstetter, 479 F.3d 750, 754 (10th Cir. 2007)* (collecting agreeing sister **[**11]** circuits).[3]

Bearing in mind that at step two, the prosecution's reason does not have to be "persuasive, or even plausible," *Purkett v. Elem, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995)* (per curiam), we easily affirm the district court's finding that Lee's explanation -- that he struck Juror 261 because of his age -- is race-neutral, *United States v. Bowles, 751 F.3d 35, 38 (1st Cir. 2014)*, and satisfies the state's burden at step two to articulate a nondiscriminatory reason for the strike, *Purkett, 514 U.S. at 769*.

B. Batson Step Three

The critical issue at this step "is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El v. Cockrell, 537 U.S. 322, 338-39, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*. The burden of proof lies with Sanchez to show that Lee acted with discriminatory **[**12]** purpose. *Purkett, 514 U.S. at 768*. Since this step turns on credibility determinations and a fact-driven evaluation of all the relevant circumstances that the district court is best suited to make, *Cockrell, 537 U.S. at 339*, we review the court's ruling through "a highly deferential glass," *United States v. Lara, 181 F.3d 183, 194 (1st Cir. 1999)*. We affirm the district court's finding that Sanchez has not established that Lee's challenge to Juror 261 was race-based.

Sanchez argues, as he did before the district court, that Lee was not motivated to challenge Juror 261 because of his youth, since were youth a criterion, he would have struck a similarly situated juror, Juror 243 (the 21-year-old white male born in Russia).[4] Courts may consider "whether similarly situated jurors from outside the allegedly targeted group were permitted to serve." *United States v. Aranjo, 603 F.3d 112, 115 (1st Cir. 2010)* **[*91]** (quoting *Aspen v. Bissonnette, 480 F.3d 571, 577 (1st Cir. 2007)*); see also *Dretke, 545 U.S. at 241*. Lee testified that although he was inclined to challenge Juror 243, he decided instead not to because he was "running out of challenges," and Juror 243 appeared more mature than his "chronological age." Lee testified:

> I took [Juror 243], despite not wanting to take him, but I was -- there are a number of young jurors who I will take based upon what I consider to be indications on their questionnaire that might make them not fit **[**13]** their chronological age, which is to say that he was 21 years old, but I noted he was born in Moscow, I noted that he came here on his own to begin his own education, and so I thought if I had to take a young juror, that would be somebody who might be a better candidate than most.

Regarding Juror 261, in contrast, Lee testified that he "didn't see anything else on [Juror 261's] questionnaire that would give [him] reason to believe that he had a maturity level greater than that of an age 19-year-old person."

Sanchez attempts to undercut the district court's finding as to this explanation's credibility. First, he points to Lee's concession on cross-examination that he was aware jury members must be U.S. citizens as proof that Lee did not believe Juror 243

[3] Disputing Lee's explanation, Sanchez contends that our opinion in Sanchez I conclusively determined that "age" did not motivate Lee in striking Juror 261. See *Sanchez I, 753 F.3d at 306*. That contention is meritless, and it misses the point and purpose of the remand. Whatever conclusions we drew about Lee's motivations in our prior opinion reflected only the limited facts then available on the state court record, *id. at 307*. Our prior analysis pertained only to Batson step one and does not determine our current review of the latter Batson steps, based on the district court's findings, which are based on a different and augmented record.

[4] As to other young jurors, the record amply supports the district court's determination that Lee declined to strike Juror 255 because she was, at age 27, not "overly young," and declined to strike Juror 293, a 26-year-old female, and Juror 333, a 23-year-old female, because he had only three and two challenges remaining, respectively.

"came here on his own to begin his own education," and so could not have perceived the juror to be more **[**14]** mature on that basis. Second, Sanchez argues that Lee could not have viewed being foreign-born as a sign of maturity because, had this been his view, he would not have struck Juror 201 (a 25-year-old male from Trinidad). Third, he argues that the district court improperly supplied Lee with the idea that the difference in age between 19 and 21 was meaningful. None of the arguments have merit.

Sanchez's first argument does not establish clear error. Even if Lee was ultimately mistaken in his assumptions about Juror 243's biography, what matters is whether the explanation genuinely "reflected [his] true motive." *Aranjo, 603 F.3d at 116*. The district court observed Lee testify, including subject to an extensive cross-examination, and concluded that it was plausible that Lee had seen Juror 243's foreign origin as conferring greater maturity. The court's rejection of Sanchez's first argument is not clear error.

The second argument fares no better, and it misconstrues Lee's testimony. Lee did testify that he generally sought to exclude young potential jurors, but he did not testify that he perceived being foreign-born as an absolute exception to his rule on youth. Lee stated that in the particular case of Juror 243, **[**15]** he was looking for indications that he was "a little bit older than someone else in terms of life experiences" because of the diminishing number of challenges remaining. Examining the dynamics of the jury selection process, the district court correctly noted that Lee "had substantially more flexibility when considering juror[] 201," the Trinidadian, than when considering later jurors, as he had 12 out of 16 peremptory challenges remaining at the time. It was not clear error for the district court to credit the sincerity of Lee's consideration of Juror 243's foreign birth.

Sanchez's third argument is qualitatively different. He argues that the district court improperly supplied Lee with a way to distinguish between Juror 243 and Juror 261. Sanchez points to a moment during cross-examination following a concession by Lee that both Jurors 243 and 261 were young college students and that their only "outward" ascertainable difference **[*92]** was race. The district judge at that point interjected: "Well, one was 19 and one was 21, right, do I have that right?" After both Sanchez's counsel and Lee responded affirmatively to the judge's question, the following colloquy between Sanchez's counsel and **[**16]** Lee occurred:

> Sanchez's Counsel: But you challenged people who were older than 21 for age, did you not?
>
> Lee: Yes. There is a distinction, but, as I said, my inclination would have been to strike [Juror 243] under all things being equal.
>
> Sanchez's Counsel: So the two years was not the defining difference for you?
>
> Lee: At that stage of the game, every possible distinction was relevant.

Although the district court does not refer to this particular exchange, Sanchez relies on *Miller-El v. Dretke, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)*, to suggest that the trial judge improperly supplied Lee with the difference in age between the jurors as the reason for striking, *id. at 252*.

This argument lacks merit for a number of reasons. As a matter of law, any reliance on *Dretke* is misplaced. Dretke involved a Batson challenge in which the appellate court justified a prosecutor's strike based on a "rational basis" for his actions that the court supplied, without taking full account of the record. Id. The Court held that neither trial nor appellate courts may disregard the record and "imagine a reason" for a prosecutor's actions. Id. That is not what happened here. Here, in concluding that Lee perceived a difference in maturity between Juror 243 and Juror 261, the district **[**17]** court recited ample record evidence, including Lee's testimony from before the contested exchange. The district court's conclusions do not rely on, or even mention, the disputed exchange. But even so, we note that the disputed statement

that "every possible distinction was relevant," referring to the difference in the jurors' chronological ages, was made in response to opposing counsel's question and not that of the district judge. We simply do not have a case where after the fact the district court concocted an explanation from whole cloth without record support.[5] Given the highly deferential standard of review on questions of credibility, we have no trouble affirming the district court's finding that Lee regarded Jurors 243 and 261 as different based on differences other than race.

Further, Lee's choice to keep Juror 243 but strike Juror 261 is also supported by his testimony concerning the importance of strategically using and preserving strikes in light of the dynamics of jury selection. As the district court noted, consideration of the number of jurors to be seated and the number of remaining challenges of either party is valid. *Mensah, 737 F.3d at 802* (noting as a valid concern a prosecutor's cautiousness over a single remaining strike when faced with unknown upcoming jurors). Sanchez argues that Lee could not have so calculated the number of remaining challenges, unseated jurors, and characteristics of potential jurors. Lee explained his practice concerning these calculations **[*93]** and on cross-examination maintained, "I do it in every trial all the time. I'm constantly looking through the questionnaires." There is nothing improbable about a trial lawyer using such a practice. The district court's crediting of this explanation was not clearly erroneous.

Sanchez's remaining arguments do not convince us otherwise. Sanchez points to the fact that **[**19]** the prosecutor eliminated one-hundred percent of young black men from the venire. We have previously held that this is not alone sufficient to prove discrimination, especially where there are small numbers of potential jurors of the allegedly targeted group. See *id. at 801* (cautioning against weighing heavily that prosecutor struck all Asian-Americans where only two were in venire); *Caldwell v. Maloney, 159 F.3d 639, 656 (1st Cir. 1998)* (upholding peremptory strikes of all four potential jurors of one race). Sanchez also points to Lee's failure to explain his use of a peremptory challenge during the original jury selection, but Lee was not required to provide such an explanation until one was requested of him. Sanchez I issued such a request, and Lee has now duly offered his explanation.

We acknowledge both the difficulties in making a Batson determination on a cold record many years following the original jury selection and also the importance of protecting the right of every juror to serve and of every defendant to have a trial free of the taint of racial discrimination. See *Batson, 476 U.S. at 87*. But here the district court did not abuse its broad discretion as factfinder on matters of credibility in concluding that Sanchez has not proven that there was racial discrimination. **[**20]** That ends the matter.

III.

For the reasons stated, we affirm the denial of the habeas petition.

Concur by: THOMPSON

Concur

THOMPSON, Circuit Judge, concurring. The majority opinion accurately sets forth the applicable law and cogently explains why, given our standard of review, we cannot reverse the district court's rejection of Dagoberto Sanchez's Batson challenge. Therefore, I reluctantly concur in the majority's

[5] To be clear, a trial judge has discretion to make inquiries of witnesses as necessary to facilitate a full and fair hearing. See *Fed. R. Evid. 614(b)*; *United States v. Melendez-Rivas, 566 F.3d 41, 50 (1st Cir. 2009)*. It is permissible in the normal course of a Batson hearing for a judge to ask clarifying questions and at times engage with witnesses directly. Indeed, the fact that the district judge here did so several times apart from the contested exchange further indicates that, seen **[**18]** in the context of a normal hearing, there was nothing prejudicial in the judge's question about the difference in age between Jurors 243 and 261.

result and reasoning. I write separately to point out that Sanchez's Batson challenge has traveled an arduous route through the state and federal courts and because of that historical journey, I am left with a queasy confidence in the decision we reach today. Let me explain.

When defense counsel first raised a Batson challenge in state court way back in September of 2006, the trial judge was ready with an immediate (and inappropriate) response. Without asking for the prosecution's justification, the judge gratuitously said in reference to the just-struck 19-year-old African American (Juror No. 261): "I think his youth and the fact that he's a full-time college student could be a problem." *Sanchez v. Roden, 753 F.3d 279, 286-87 (1st Cir. 2014)*. With that, the judge not only put words in the prosecutor's mouth, but he also telegraphed what the court **[**21]** would consider to be acceptable, race-neutral reasons justifying the peremptory strike.

And it should come as no surprise that nearly eight years later, when finally called upon to explain why he struck this particular juror, the prosecutor seized upon the juror's "youth." In doing so, the prosecutor did nothing more than parrot back the trial judge's unprompted suggestion.

How well this case illustrates the Massachusetts Supreme Judicial Court's warning that a trial judge who offers up his own reason for a prosecutor's peremptory **[*94]** strike "risks assuming the role of the prosecutor." *Commonwealth v. Fryar, 414 Mass. 732, 610 N.E.2d 903, 908 (Mass. 1993)*. It takes no great amount of thought to conclude that, had the trial judge required a contemporaneous explanation for the prosecutor's strikes, my trust in having reached the correct outcome (whichever way it went) would be greatly increased. Unfortunately, we will never know what the prosecutor would have said in September 2006 had the trial judge not erred in his application of the Supreme Court's Batson protocol. As a result, there will always be a nagging question in my mind as to whether structural error occurred at Sanchez's trial which has not been detected or corrected. Cf. *Snyder v. Louisiana, 552 U.S. 472, 477, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008)* (recognizing the trial **[**22]** court's "pivotal role in evaluating Batson claims" because "'the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge'" (alteration in original) (quoting *Hernandez v. New York, 500 U.S. 352, 365, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)* (plurality opinion))).

Now, Sanchez's habeas petition was essentially doomed when, following the district court's evidentiary hearing, the district judge "found [the prosecutor's testimony] to be credible in all respects." *Sanchez v. Roden, No. 12-cv-10931-FDS, 2015 U.S. Dist. LEXIS 13207, 2015 WL 461917, at *7 (D. Mass. Feb. 4, 2015)*. And why did the judge believe the prosecutor's adoption of the trial judge's suggestion explained his peremptory challenges? Because "[h]is demeanor was professional and credible throughout" the proceeding. Id. Through this observation, the judge effectively said that he found a professional to be professional. But again, what else would be expected when the prosecutor went into the hearing not only having had almost eight years to consider what he would say, but also with the awareness of what the state trial judge considered to be a perfectly valid and acceptable justification for the strike?

To be sure, the district judge also noted that the prosecutor's testimony "was based in part on memory and in part on his routine empanelment **[**23]** practices, and [that] he endeavored to distinguish between the two as he testified." Id. He also gave a nod to defense counsel's "extensive cross-examination" of the prosecutor. Id. These factors, it appears, must have played contributory roles in the overall finding of credibility.

But the prosecutor's testimony was not exactly monolithic. On direct, he explained why he accepted Juror No. 243, the 21-year-old white

college student from Russia, but not Juror No. 261, the 19-year-old black college student from Boston:

> I go through those [juror] questionnaires to determine how many of the remaining challenges I'm likely to have to use, and in that particular instance, I took him, despite not wanting to take him, but I was -- there are a number of young jurors who I will take based upon what I consider to be indications on their questionnaire that might make them not fit their chronological age, which is to say that he was 21 years old, but I noted he was born in Moscow, I noted that he came here on his own to begin his own education, and so I thought if I had to take a young juror, that would be somebody who might be a better candidate than most.

Thus, the reason given for accepting one **[**24]** young college student while striking the other is that there was something "more" (my word, not the prosecutor's) in the white juror's questionnaire -- and which was absent from the young black man's -- **[*95]** that led the prosecutor to believe Juror No. 243 might be more mature than he would expect other 21-year-olds to be. As it turns out, the prosecutor's unequivocal testimony about this "more" -- that the questionnaire told him Juror No. 243 traveled to the United States "on his own to begin his own education" -- did not hold up on cross-examination.

After confirming that the white 21-year-old had been born in Moscow, Russia (as opposed to Moscow, Maine) the prosecutor had the following exchange with Sanchez's counsel:

> Q. Okay. This is somebody who wouldn't have the same experience with our system of law as other citizens?
>
> A. I don't know. All I know is that he was born in another country and was attending school in the United States.
>
> Q. Okay. And what about that did you find beneficial? Was there something about him that overcame the fact that he was young?
>
> A. Barely, yes. The fact that I was down to six challenges and looking at him, my inclination was to strike him, but was there anything **[**25]** specifically that said to me, [']oh, I want this person, ['] not that I can remember. It was more of a hold-your-nose situation and take him because I thought somebody who came to this country to go to school at the age of 21 may have been chronologically a little bit older than someone else in terms of life experiences, and that's really what I'm looking at that somebody who has some level of maturity and life experience.

The prosecutor initially stood strong and maintained the position he took on direct, namely, that Juror No. 243 came to the United States on his own to attend college. But the very next exchange opened up a chink in the foundation:

> Q. Well, he couldn't have come here to go to school, he had to be a citizen [to serve on the jury], correct?
>
> A. I didn't mean that I knew his life history. I knew he was 21, and I knew that he was here attending school and he was born in another country.

This next colloquy brought the testimonial edifice tumbling down:

> Q. The fact that the man was born in Russia, you don't know whether he came here at six days old, six months old, six, sixteen years old; you have no idea?
>
> A. Correct, absolutely no idea.

So much for the prosecutor's professed **[**26]** belief that Juror 243 might be more mature than other 21-year-olds as a result of his having come to the United States on his own to further his education.

Nevertheless, seizing on this about-face to reject the district judge's credibility determination would overlook the fact that the prosecutor actually gave another reason for believing this particular 21-year-old might be more mature than his chronological age would generally indicate. After all, the

prosecutor also said that he relied on the fact that the prospective juror had been "born in Moscow." Cross-examination did not substantially undercut this second reason. Indeed, he explained, "I thought somebody who came to this country to go to school at the age of 21 may have been chronologically a little bit older than someone else in terms of life experiences, and that's really what I'm looking at that somebody who has some level of maturity and life experience."

That Juror No. 243 was born in Moscow, Russia is uncontested on this record. And it's a fact that technically differentiates Juror No. 243 from Juror No. 261, who was born in the Boston area. Whether this ostensibly race-neutral fact[6] -- as opposed **[*96]** to one being white and **[**27]** the other black -- explains the prosecutor's exercise of his peremptory challenges depends entirely on the credibility of the prosecutor's testimony. The district judge, after hearing his testimony on direct and cross-examination, found it credible and determined that the prosecutor did not strike Juror No. 261 on account of his race.

This case is devoid of extrinsic evidence of racial discrimination. We do not, for example, have trial notes from the prosecutor indicating that race played a role in jury selection. We do not have evidence that the prosecutor manipulated trial procedures in an attempt to influence the racial makeup of the jury. See, e.g., *Miller-El v. Dretke, 545 U.S. 231, 253-55, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)* (commenting on the prosecutor's use of a "jury shuffle" to keep black members of the venire at the back of the line). Nor is there evidence of a long standing tradition of racial discrimination in the use of peremptory challenges in the prosecutor's office,[7] or evidence that prosecutors were encouraged to exercise peremptories so as to keep minorities off the jury. See *id. at 263-66* (taking into account a particular county's "specific policy of systematically excluding blacks from juries," *id. at 263*). And nothing in the record **[**29]** clearly demonstrates that the prosecutor's proffered reason for accepting Juror No. 243 but not Juror No. 261 was pretextual. See *id. at 240-52, 255-63* (comparing the prosecution's treatment and questioning of black versus white venire members at voir dire and concluding that "the implication of race in the prosecutors' choice of questioning cannot be explained away," *id. at 263*); see also *Snyder, 552 U.S. at 485* (concluding that the justification offered by the prosecutor was pretextual after conducting a comparative juror analysis).

In sum, whether the prosecutor's strike of Juror No. 261 violated Batson comes down entirely to his credibility in explaining his strikes that day and, in particular, why he did not challenge Juror No. 243. We have said time and time again that making credibility determinations is a job for the district court, not something for us to do looking at a cold record. Absent other evidence in the record pointing to racial discrimination, we simply cannot say that the district judge clearly erred in accepting the prosecutor's explanation and upholding the peremptory challenge. This holds true **[**30]** even if any one (or all) of us, sitting as the trial judge, might have reached a contrary conclusion.

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[6] Presumably, place of birth would only make a difference if the individual lived there beyond his or her early childhood. Had Juror No. 243 moved from Russia to the United States when he was, say, two years old, there is no reason at all to believe that his Russian birthplace could render him more mature than his chronological age or distinguish him from Juror No. 261. The prosecutor admitted, of course, that he has "no idea" how long Juror No. 243 lived in Russia. But, as the majority opinion correctly points out, under Batson the reason for a peremptory strike need not be correct, persuasive or even plausible, so long as it is race neutral. Moreover, once a race-neutral reason is advanced, the peremptory challenge will be allowed so long as the trial judge is convinced that the challenging party provided the real motivation for the strike, and that the **[**28]** reason was not offered merely to camouflage racial discrimination. Thus, what is important for our purposes here is not whether a young man who happened to have been born in Moscow is more mature than other young men of his age who had been born in Boston, but whether the prosecutor genuinely believed that to be possible. And the district judge found that he did.

[7] Although counsel has represented that this has been a problem in Suffolk County, the arguments of counsel are note vidence.

Finally, because a trial judge faced with a Batson challenge must consider the totality **[*97]** of the circumstances, it is appropriate for us to acknowledge them here. Although we are unable to say the district judge clearly erred in finding that the prosecutor's strike was not motivated by Juror No. 261's race, the end result is that all young, black men and young men of color in the venire -- indeed all those who resembled Dagoberto Sanchez -- found themselves dismissed at the behest of their own government. No other group of prospective jurors received such treatment.

The facts in this record certainly raise the judicial antennae. But given the standard of review, I can do no more than register my discomfort at having to affirm the denial of habeas relief even though the best evidence as to whether or not a *Batson* violation occurred -- the prosecutor's contemporaneous explanation -- has been irretrievably lost to us.

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CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k). This brief complies with the length limit of Mass. R. App. P. 20: it is written in 14-point Century Schoolbook and contains 7844 non-excluded words, as determined by using Microsoft Word 2010.

/s/ Nicholas Brandt
NICHOLAS BRANDT
Assistant District Attorney

No. 2019-P-0146

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

COMMONWEALTH OF MASSACHUSETTS,
Appellant

v.

DAGOBERTO SANCHEZ,
Defendant-Appellee

BRIEF FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, ss. No. 2019-P-0146

COMMONWEALTH OF MASSACHUSETTS,
Appellant

v.

DAGOBERTO SANCHEZ,
Defendant-Appellee

COMMONWEALTH'S CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I have today made service of the brief for the Commonwealth on the defendant via the Tyler e-filing system to:

Ruth Greenberg, Esq.
ruthgreenberg44@aol.com

Respectfully submitted
For the Commonwealth,

RACHAEL ROLLINS
District Attorney
For The Suffolk District
/s/ Nicholas Brandt
NICHOLAS BRANDT
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June 21, 2019

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2019-P-0146

COMMONWEALTH OF MASSACHUSETTS,
Appellant

v.

DAGOBERTO SANCHEZ,
Defendant-Appellee

RECORD APPENDIX FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY

RACHAEL ROLLINS
District Attorney
For The Suffolk District

NICHOLAS BRANDT
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For the Suffolk District
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JUNE 2019

COMMONWEALTH'S APPENDIX

INDICTMENT

Murder, 2nd Degree
C. 265, §1

Commonwealth of Massachusetts

SUFFOLK, SS.

At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS, begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of August in the year of our Lord two thousand and five.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

DAGOBERTO SANCHEZ,

on May 29, 2005, did assault and beat Jose Portillo with intent to murder him and by such assault and beating did kill and murder Jose Portillo and the Jurors further say that the defendant is guilty of murder in the second degree and not in the first degree.

A TRUE BILL

Assistant District Attorney

Foreman of the Grand Jury

Superior Court Department - Criminal Business *August, Sitting, 2005*

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

Clerk Of Court

INDICTMENT Possession of Firearm Not Having Been Issued Firearm Identification Card C. 269, §10 (h)

Commonwealth of Massachusetts

SUFFOLK, SS.

At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS, begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of August in the year of our Lord two thousand and five.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

DAGOBERTO SANCHEZ,

on May 29, 2005, did unlawfully possess a firearm, to wit: a semi-automatic handgun, without complying with the requirements relating to the firearm identification card provided for in G.L. c. 140, § 129C.

A TRUE BILL

Assistant District Attorney

Foreman of the Grand Jury

Superior Court Department - Criminal Business *August, Sitting, 2005*

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

Clerk Of Court

Skip to main content

0584CR10545 Commonwealth vs. Sanchez, Dagoberto

- Case Type
- Indictment
- Case Status
- Open
- File Date
- 08/05/2005
- DCM Track:
- C - Most Complex
- Initiating Action:
- MANSLAUGHTER c265 §13
- Status Date:
- 08/05/2005
- Case Judge:
-
- Next Event:
-

All Information | Party | Charge | Event | Tickler | Docket | Disposition

Party Information

Commonwealth
- Prosecutor

Alias

Party Attorney
- Attorney
- Brandt, Esq., Nicholas
- Bar Code
- 670808
- Address
- Suffolk County District Attorney's Office
  One Bulfinch Place
  Suite 300
  Boston, MA 02114
- Phone Number
- (617)619-4000
- Attorney
- Zanini, Esq., John P
- Bar Code
- 563839
- Address
- Office of Suffolk County D.A.
  One Bulfinch Place
  Boston, MA 02114
- Phone Number
- (617)619-4000

More Party Information

Sanchez, Dagoberto
- Defendant

Alias

Party Attorney
- Attorney
- Greenberg, Esq., Ruth
- Bar Code
- 563783
- Address
- 450B Paradise Rd 166
  Swampscott, MA 01907
- Phone Number
- (781)632-5959

More Party Information

Party Charge Information

- **Sanchez, Dagoberto**
- Defendant

Charge # 1 :
265/1-0 - Felony MURDER c265 §1

- Original Charge
  - 265/1-0 MURDER c265 §1 (Felony)
  - Indicted Charge
  -
  - Amended Charge
  -

Charge Disposition
Disposition Date
Disposition
10/06/2006
Guilty Verdict

- **Sanchez, Dagoberto**
- - Defendant

Charge # 2 :
269/10/G-1 - Misdemeanor - more than 100 days incarceration FIREARM WITHOUT FID CARD, POSSESS c269 §10(h)

- Original Charge
  - 269/10/G-1 FIREARM WITHOUT FID CARD, POSSESS c269 §10(h) (Misdemeanor - more than 100 days incarceration)
  - Indicted Charge
  -
  - Amended Charge
  -

Charge Disposition
Disposition Date
Disposition
10/06/2006
Guilty Verdict

Events

Date	Session	Location	Type	Event Judge	Result
08/16/2005 09:30 AM	Magistrate's Session		Arraignment		Held as Scheduled
09/13/2005 02:00 PM	Criminal 6		Pre-Trial Conference		Held as Scheduled
11/01/2005 02:00 PM	Criminal 6		Pre-Trial Conference		Held as Scheduled
12/15/2005 02:00 PM	Criminal 6		Hearing RE: Discovery Motion(s)		Rescheduled
01/19/2006 09:00 AM	Criminal 6		Hearing		Rescheduled
02/16/2006 09:00 AM	Criminal 6		Pre-Trial Hearing		Canceled
02/28/2006 02:00 PM	Criminal 6		Status Review		Not Held
03/16/2006 02:00 PM	Criminal 6		Status Review		
04/13/2006 09:00 AM	Criminal 6		Hearing on Compliance		Canceled
04/13/2006 02:00 PM	Criminal 6		Hearing on Compliance		Not Held
05/11/2006 02:00 PM	Criminal 6		Trial Assignment Conference		Held as Scheduled
07/25/2006 09:00 AM	Criminal 6		Final Pre-Trial Conference		Canceled
08/14/2006 09:00 AM	Criminal 6		Jury Trial		Canceled
09/07/2006 09:00 AM	Criminal 5		Final Pre-Trial Conference		Not Held
09/07/2006 09:00 AM	Criminal 2		Final Pre-Trial Conference		Canceled

Date	Session	Location	Type	Event Judge	Result
09/07/2006 02:00 PM	Criminal 6		Final Pre-Trial Conference		Not Held
09/22/2006 09:00 AM	Criminal 2		Jury Trial		Rescheduled
09/22/2006 09:00 AM	Criminal 5		Jury Trial		Not Held
09/22/2006 09:00 AM	Criminal 6		Jury Trial		Not Held
09/25/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
09/26/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
09/27/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
09/28/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
09/29/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
10/03/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
10/04/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
10/05/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
10/06/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
10/12/2006 09:30 AM	Criminal 1		Hearing for Sentence Imposition		Held as Scheduled
01/13/2009 02:00 PM	Criminal 2		Hearing		Held as Scheduled
07/11/2018 02:00 PM	Criminal 3	BOS-8th FL, CR 808 (SC)	Hearing on Motion for New Trial	Wilkins, Hon. Douglas H	Held as Scheduled
11/20/2018 02:00 PM	Criminal 6	BOS-9th FL, CR 906 (SC)	Bail Hearing	Roach, Christine M	Canceled
11/28/2018 09:30 AM	Criminal 1		Conference to Review Status	Miller, Hon. Rosalind H	Held as Scheduled
11/30/2018 09:30 AM	Magistrate's Session	BOS-7th FL, CR 705 (SC)	Bail Hearing	Curley, Edward J	Rescheduled
12/10/2018 02:00 PM	Criminal 1	BOS-7th FL, CR 704 (SC)	Hearing for Sentence Imposition	Miller, Hon. Rosalind H	Held as scheduled

Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Pre-Trial Hearing	08/16/2005	08/16/2005	0	07/14/2011
Final Pre-Trial Conference	08/16/2005	07/25/2006	343	07/14/2011
Case Disposition	08/16/2005	08/14/2006	363	07/14/2011

Docket Information

Docket Date	*Docket Text*	File Ref Nbr.
08/05/2005	Indictment returned as to offense #001 Murder in the 2nd degree.	1

Docket Date	Docket Text	File Ref Nbr.
08/05/2005	Motion by Commonwealth for arrest warrant to issue; filed & allowed (Locke J)	2
08/05/2005	Warrant on indictment issued	
08/05/2005	Warrant was entered onto the Warrant Management System 8/5/2005	
08/05/2005	Notice & copy of indictment & entry on docket sent to Sheriff	
08/16/2005	Defendant brought into court for arraignment. Warrant recalled.	
08/16/2005	Warrant canceled on the Warrant Management System 8/16/2005	
08/16/2005	Order of notice of finding of murder indictment read with return of service.	
08/16/2005	Appointment of Counsel Jonathan Shapiro, pursuant to Rule 53	
08/16/2005	Deft arraigned before Court	
08/16/2005	Indictment read as to offense #001. Deft waives reading of indictment as to offense #002.	
08/16/2005	RE Offense 1:Plea of not guilty	
08/16/2005	RE Offense 2:Plea of not guilty	
08/16/2005	Bail set: $7,500,000.00 with surety or $750,000.00 cash without prejudice. Bail warning read. Mittimus issued	
08/16/2005	Continued to 2/16/2006 for pre trial hearing by agreement in the 6th Criminal Session at 2:00 PM.	
08/16/2005	Continued to 9/13/2005 for pre trial conference by agreement in the 6th Criminal Session.	
08/16/2005	Continued to 7/25/2006 for final pre trial conference by agreement in the 6th Criminal Session.	
08/16/2005	Assigned to track "C" see scheduling order	
08/16/2005	Continued to 8/14/2006 for presumptive trial date by agreement in the 6th Criminal Session. Wilson, MAG - M. Lee, ADA - ERD - J. Shapiro, Attorney	
08/16/2005	Deft files motion for authorization of funds for an investigator.	3
08/16/2005	Motion (P#3) allowed	
08/19/2005	Commonwealth files Notice of Discovery I	4
09/02/2005	Commonwealth files notice of discovery II.	5
09/13/2005	Defendant brought into court - Further PTC compliance continued by agreement. Rule 36 waived. Hinkle,RAJ - M. Lee, ADA - J. Shapiro, Attorney - R. LeRoux, Court Reporter.	
09/14/2005	Commonwealth files Notice of Discovery III	6
10/05/2005	Commonwealth files notice of discovery IV.	7
11/01/2005	Defendant not in Court. P.T.C. held.	
11/01/2005	Pre-trial conference report filed.	8
11/01/2005	Commonwealth files certificate of compliance.	9
11/01/2005	Continued to 12/15/2005 by agreement at 2 P.M. - hearing re: non-eveidentiary motions. Court orders Rule 36 waived. Hinkle, J. - M. Lee, ADA - M. Malley, Court Reporter - J. Shapiro, Attorney.	
11/15/2005	Commonwealth files notice of Discovery V.	10
12/15/2005	Defendant not present, continued until 1/19/2006 @ the request of the Defendant for filing and hearing of non-evidentiary motions. Donovan J - M. Lee, ADA - P. Collins, Court reporter - M. Lee, ADA - J. Shapiro, Attorney.	
01/19/2006	Defendant not present, defense counsel not available.	
01/19/2006	Rule 36 waived	
01/19/2006	Continued to 2/28/2006. Hinkle RAJ - M. Lee, ADA - D. Cercone, Court reporter	

Docket Date	Docket Text	File Ref Nbr.
02/28/2006	Defendant not present - Defense counsel not available. Continued by order of Court re: status. Notice to counsel. Hinkle, RAJ -M. Lee, ADA - D. Cercone, Court Reporter.	
03/16/2006	Defendant not present, Status conference before, Hinkle RAJ	
03/16/2006	Rule 36 waived	
03/16/2006	Continued until 4/13/2006 by agreement for hearing re: discovery compliance and trial date. Hinkle RAJ - M. Lee, ADA - D. Cercone, Court reporter - J. Shapiro, Attorney.	
04/13/2006	Defendant not present, Commonwealth attorney not available, rescheduled to 5/11/06 by agreement re: trial assignment - compliance and possible scheduling of motion to suppress date of 8/14/06 for trial and 7/25/06 for FPTC cancelled. Hinkle RAJ - E. Roscoe, Court reporter - J. Shaparo, Attorney	
05/11/2006	Defendant not present - Defendant files motion to amend Tracking Order.	11
05/11/2006	Motion (P#11) allowed. Conference held re: trial date, after conference case scheduled for trial on September 22, 2006 and final pre-trial conerence on September 7, 2006 by agreement. Hinkle, RAJ - M. Lee, ADA - J. Shapiro, Attorney - A. Pollier, Court Reporter.	
05/26/2006	Commonwealth files: Notice of Discovery VI	12
07/13/2006	Case held in Session- Ready for trial. Court, Hinkle, RAJ assigns case to the 5th Criminal Session for Trial.	
07/28/2006	Case held in Session- Ready for trial. Court Hinkle, RAJ assigns case to the 2nd Criminal Session for Trial on 9/22/06.	
09/13/2006	Commonwealth files Notice of discovery VII	13
09/18/2006	Commonwealth files notice of discovery VIII	14
09/21/2006	Commonwealth files notice of discovery IX	15
09/21/2006	Commonwealth files notice of discovery X	16
09/25/2006	Defendant brought into court	
09/25/2006	Commonwealth files motion for view	17
09/25/2006	MOTION (P#17 after hearing) allowed	
09/25/2006	Commonwealth files motion in limine regarding demostrative charts and diagrams	18
09/25/2006	MOTION (P#18 after hearing) allowed	
09/25/2006	Commonwealth files motion in limine regarding photographs of victim	19
09/25/2006	Commonwealth's MOTION #19 after hearing, deferred by agreement	
09/25/2006	Commonwealth files motion in limine to exempt family members of victim from general order of sequestration	20
09/25/2006	MOTION (P#20 after hearing, denied. ref: endorsement and record) denied	
09/25/2006	Commonwealth files motion for judical inquiry into criminal history of potential trial juror or, in the alternative, notice of intent to independently seek such information for limited purposes of jury empanelment	21
09/25/2006	MOTION (P#21 after hearing,) allowed. ref: endorsement and record	
09/25/2006	Commonwealth files notice regarding testimony of expert witnesses	22
09/25/2006	Commonwealth files proposed statement of the case and proposed individual voir dire questions for purposes or jury empanelment	23
09/25/2006	Commonwealth files motion in limine to admit evidence of defendant's gang or organization affiliation and related testimony	24
09/25/2006	Deft files motion for individual voir dire of prospective jurors	25
09/25/2006	After hearing, Court orders the empanelment of sixteen jurors.	
09/25/2006	Commonwealth moves for trial.	

Docket Date	Docket Text	File Ref Nbr.
09/25/2006	After the empanelment of seven jurors, the Court recessed for the day, and orders the continuation of jury empanelment Tuesday September 26, 2006. E. Blake, C.R.	
09/26/2006	Defendant brought into court	
09/26/2006	After hearing, Court continues jury empanelment.	
09/26/2006	After the empanelment of sixteen jurors, the Court recessed the day and further orders trial poceedings continued until Wednesday September 27, 2006. E. Blake, C.R.	
09/27/2006	Defendant brought into court	
09/27/2006	Out of the presence of the jury, the Court conducts voir dire with Juror Maria Plasencia (333) and thereafter, the Court orders that said juror continue service on this trial.	
09/27/2006	Trial with jury (16) before Connolly, J. Jury sworn. Issue read. E. Blake, C.R.	
09/28/2006	Defendant brought into court	
09/28/2006	Trial with jury (16) continues before Connolly, J. E. Blake, C.R.	
09/29/2006	Defendant brought into court	
09/29/2006	Trial with jury (16) continues before Connolly, J.	
10/03/2006	Defendant brought into court	
10/03/2006	Trial with jury (16) continues before Connolly, J.	
10/03/2006	At the conclusion of the Commonwealth's case-in-chief, Defendant's motion for a required findings of not guilty filed and after hearing, denied.	26
10/03/2006	At the conclusion of the Defendant's case-in-chief, Defendant's motion for required findings of not guilty filed and denied.	27
10/03/2006	Deft files requested jury instructions on eyewitness identification, murder in the second degree, voluntary manslaughter, self defense, defense of another and unlawful possession of a firearm	28
10/03/2006	Commonwealth files request for jury instructions	29
10/04/2006	Defendant brought into court	
10/04/2006	Commonwealth files supplemental request for jury instructions	30
10/04/2006	Trial with jury (16) continues before Connolly, J. J. Rentel, C.R.	
10/05/2006	Defendant brought into court	
10/05/2006	Trial with jury (16) continues before Connolly, J.	
10/05/2006	Out of the presence of the jury, the Court conducts voire dire with Juror Maria Plasencia (333) and thereafter, the Court excused siad juror from further serviece on this trial. (ref: record)	
10/05/2006	At the conclusion of the Court's instructions to the jury, the Court orders that the jury be reduced to twelve members. The names Joseph Comenzo (294), Caroline Smith (212) and Melvinia Brown (202) were each drawn by lot and designated as Alternate Jurors.	
10/06/2006	Defendant brought into court	
10/06/2006	After hearing, Court orders jury to resume their deliberations	
10/06/2006	RE Offense 1:Guilty verdict. Verdict affirmed. Verdict slip filed.	31
10/06/2006	RE Offense 2:Guilty verdict. Verdict affirmed. Verdict slip filed.	32
10/06/2006	Continued until 10/12/2006 for disposition.	
10/06/2006	Mittimus without bail issued to Suffolk County Jail (Nashua Street) Connolly, J. - M. Lee, ADA - J. Rental, C.R. - J. Shapiro, Attorney	
10/12/2006	Defendant brought into court.	
10/12/2006	Deft files: Motion for Authorization to Purchase Court Clothes for Defendant.	33
10/12/2006	Deft files: Motion for Additional Authorization of Funds for an Investigator.	34

Docket Date	Docket Text	File Ref Nbr.
10/12/2006	Deft files: Motion to Reduce Verdict to Voluntary Manslaughter. Commonwealth moves for scentencing.	35
10/12/2006	Defendant sentenced at to Offense #001 MCI Cedar Junction Life. Mittimus issued.	
10/12/2006	Defendant sentenced as to Offense #002 Two years Suffolk County House of Correction South Bay This sentence to be served concurrently with Offense #001. Mittimus issued.	
10/12/2006	Victim-witness fee assessed: $90.00	
10/12/2006	Sentence credit given as per 279:33A: (489 days)	
10/12/2006	Notified of right of appeal under Rule 65	
10/12/2006	NOTICE of APPEAL FILED by Dagoberto Sanchez	36
10/12/2006	MOTION (P#33) allowed in the amount of $267.90	
10/12/2006	MOTION (P#34) allowed in the amount not to exceed $1,500.00.	
10/12/2006	MOTION (P#35) denied. Commonwealth moves for sentencing	
10/12/2006	Defendant warned per Chapter 22E Sec. 3 of DNA. Connolly, J. - M. Lee, ADA - J. Rental, Court Reporter - J. Shapiro, Attorney	
10/19/2006	Copy of notice of appeal mailed to Connolly, J. and M. Lee, ADA	
10/19/2006	Court Reporter Blake, Ellen is hereby notified to prepare one copy of the transcript of the evidence of September 25, 26, 27, 28, 29, 2006 Motions - Impanelemnt - Trial before Connolly, J. Certificate of clerk-filed.	37
10/19/2006	Court Reporter Rentel, Jan is hereby notified to prepare one copy of the transcript of the evidence of October 3, 4, 5, 6, 12, 2006 Motions - Trial - Verdict - Disposition before Connonlly, J.	
02/12/2007	Notice of assignment of counsel appointing Attorney Jonathan Shapiro for direct appeal	
09/27/2007	Transcript of testimony received from court reporter, Rentel, Jan	
09/28/2007	Appearance of Deft's Atty: Ruth Greenberg	38
10/01/2007	Notice of assignment of counsel assigning Ruth Greenberg on defendant's direct appeal filed.	
01/17/2008	Court Reporter Blake, Ellen is hereby notified to prepare one copy of the transcript of the evidence. SECOND NOTICE.	
03/11/2008	Deft files : Motion to compel the completion of transcripts for appeal. (Connolly, J. notified w/copy and docket sheets)	39
05/29/2008	Notice sent to attorneys that transcripts are available. J. Zanini and J. Shapiro, Atty	
06/03/2008	Certificate of delivery of transcript by clerk filed. J. Zanini	40
06/04/2008	Certificate of delivery of transcript by clerk filed. Ruth Greenberg, Esq	41
08/25/2008	Notice of completion of assembly of record sent to clerk of Appeals Court and attorneys for the Commonwealth and defendant. J. Zanini and R. Greenberg	
08/25/2008	Two (2) certified copies of docket entries, original and copy of transcript, two (2) copies of exhibit list , and copy of the notice of appeal, each transmitted to clerk of appellate court(Paper #36).	
09/03/2008	Notice of Docket Entry received from the Appeals Court, case was entered in this court 8/25/08	42
09/12/2008	Deft files Motion to allow copy of juror questionaires (Connolly, J and ADA J. Zanini notified 9/15/08)	43
01/09/2009	Deft files second and supplemental motion for inspection and copying of juror questionaires for purpose of appellate review and affidavit of Ruth Greenberg	44
01/13/2009	Defendant's MOTION #43 after hearing, ref: endorsement and record. Connolly, J. - J. Zanini, ADA - D. Cercone, C.R. - R. Greenberg, Attorney	

Docket Date	Docket Text	File Ref Nbr.
11/03/2010	Deft files Motion for stay (Connolly, J and ADA J. Zanini notified 11/3/10)	45
11/08/2010	MOTION (P#45) denied and endorsed on 11/4/10. Connolly, J (notified w/copy - J. Zanini, ADA and R. Goldberg, Attorney)	
07/14/2011	Rescript received from Appeals Court; judgment AFFIRMED	46
09/26/2015	Warrant CKA alias created for party #1 Alias Name: Dagoberto Sanchez	
01/10/2018	Defendant 's Motion for new trial /Reduction in Verdict, and/or relief from Unlawful Sentence. (Notice sent to Roach-RAJ and ADA J. Zanini with copy of Motion and Docket Sheets).	47
01/17/2018	Endorsement on Motion for new trial / Reduction in Verdict, and/ or Relief from Unlawful Sentence., (#47.0): Other action taken Commonwealth to Respond within 60 days, by no later than 03/16/2018 (Notice sent to Atty R. Greenberg and ADA J. Zanini with copy of Endorsement). Judge: Roach, Christine M	
01/19/2018	Commonwealth 's Notice of Appearance filed by Nicholas Brandt, Esquire	48
03/16/2018	Commonwealth 's Motion to Enlarge (Notice sent to Roach-RAJ with copy of Motion and Docket Sheets).	49
03/29/2018	Endorsement on Motion to enlarge time, (#49.0): ALLOWED (copy sent to N. Brandt, ADA and Ruth Greenberg, Atty Judge: Roach, Christine M	
03/29/2018	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Ruth Greenberg, Esq. Attorney: Nicholas Brandt, Esq.	
03/29/2018	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Ruth Greenberg, Esq. Attorney: Nicholas Brandt, Esq.	
05/17/2018	Commonwealth 's Motion (Second) to Enlarge Filed (copy with docket to Roach,RAJ)	50
05/24/2018	Endorsement on Motion (Second) To Enlarge, (#50.0): ALLOWED (Copy of Endorsement to N.Brandt and R.Greenberg, Atty) Judge: Roach, Christine M	
05/24/2018	Opposition to paper #47.0 The defendant's motion for new trial, reduction in verdict, and relief from unlawful sentence. filed by Commonwealth (Copy of motion with docket report sent to Roach, RAJ)	51
05/30/2018	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Ruth Greenberg, Esq. Attorney: Nicholas Brandt, Esq.	
06/25/2018	Habeas Corpus for defendant issued to Northeastern Correctional Center (Concord) returnable for 07/11/2018 02:00 PM Hearing on Motion for New Trial. Atty Greenberg informs the court that her client is at Northeast Correctional Center(NECC) at Concord, a minimum security institution. Docket changed accordingly to reflect the new holding institution. Judge: Wilkins, Hon. Douglas H	52
07/11/2018	Defendant brought into court. Motion for new trial heard. After hearing, court takes motion under advisement. Wilkins,J. -N.Brandt,ADA. -- R.Greenberg,Atty FTR. Judge: Wilkins, Hon. Douglas H	
08/30/2018	ORDER: and Finding of Fact Conclusions of law and Order of Defendants Motion for New Trial filed by Wilkins,J (Copy of Endorsement on page #47 and complete copy of Page # 53 to J. Zanini, ADA and R.Greenburg, ATTY) Judge: Wilkins, Hon. Douglas H	53

Docket Date	Docket Text	File Ref Nbr.
08/31/2018	Endorsement on Motion For New trial/reduction in redirect and/or relief from unlawful sentence "After Hearing allowed, see finding and order(Page#53) of this date, the Commonwealth shall report by October 10,2018 regarding its preferred remedy, new trial on manslaughter", (#47.0): ALLOWED (Copy of Endorsement on Pg#47 and complete copy of Pg #53 to J.Zanani ADA and R.Greenberg, ATTY) Judge: Roach, Christine M	
09/17/2018	Notice of appeal filed by Commonwealth regarding Court's Order (Wilkins, J.), dated August 30, 2018, granting the defendant's motion for new trial and reducing the verdict	54
09/21/2018	OTS is hereby notified to provide the JAVS transcript of the proceedings of 07/11/2018 02:00 PM Hearing on Motion for New Trial. FTR	
09/24/2018	Defendant 's Motion to Set Bail Pending Appeal/Strike Notice of Appeal Filed (Referred to the First session)	55
10/31/2018	Habeas Corpus for defendant issued to Northeastern Correctional Center (Concord) returnable for 11/20/2018 02:00 PM Bail Hearing. By agreement of ADA N.Brandt and Atty R.Greenberg, Matter continued to 11/20/18 at 2PM for hrg re: Defendant 's Motion (P#55) to Set Bail Pending Appeal/Strike Notice of Appeal (Cttrm 906) Note: Hearing to be held before Wilkins J.	56
11/01/2018	OTS is hereby notified to provide the JAVS transcript of the proceedings of 07/11/2018 02:00 PM Hearing on Motion for New Trial.	
11/06/2018	Appeal: notice of assembly of record sent to Counsel Atty R.Greenberg, ADA J.Zanini, and Clerk J.Stanton	
11/06/2018	Appeal: Statement of the Case on Appeal (Cover Sheet).	57
11/13/2018	Notice of Entry of appeal received from the Appeals Court Case was entered in this court on November 7, 2018.	58
11/16/2018	Notice of docket entry received from Appeals Court RE#3: Allowed. Appellate proceedings stayed to 1/2/19 pending ongoing trial court proceedings. Status report due then or within 7 days of completion of the proceedings, whichever date is earlier.	60
11/19/2018	Habeas Corpus for defendant issued to Northeastern Correctional Center (Concord) returnable for 11/20/2018 02:00 PM Bail Hearing. - NOTE: HABE FOR 11/20/18 CANCELED INSTITUTION NOTIFIED VIA FAX -	59
11/19/2018	Event Result:: Bail Hearing scheduled on: 11/20/2018 02:00 PM Defendant not in Court. Event not held. Matter canceled priot to Date, Court unavailable Parties to coordinate with Judge Wilkins Criminal Clerk re: Rescheduling hrg re: Defendant's motion (P#55) to Set Bail Pending Appeal/Strike Notice of Appeal (ctrm TBD, Habe needed to NECC Concrd) - ADA N.Brandt and Atty R.Greenberg each notified via electronic mail - Judge: Wilkins, Hon. Douglas H Judge: Wilkins, Hon. Douglas H	
11/28/2018	Defendant not in court Conference to Review Status,Held Continued to 11/30/2018 by agreement Hearing RE:Live Bail before Wilkins J. (ctrm 705) N.Brandt and R.Greenberg Notified via Email R.Miller,J	
11/28/2018	Habeas Corpus for defendant issued to Northeastern Correctional Center (Concord) returnable for 11/30/2018 09:30 AM Bail Hearing. Judge: Miller, Hon. Rosalind H	61
11/30/2018	Defendant brought into court. Case continued to 12/10/18 by agreement for Hearing Re: Sentencing and Possible Bail Hearing at 2:00PM (Criminal 1, CTRM 704) *Habe needed to NECC at Concord* M. Lee and N. Brandt, ADA - R. Greenberg, Atty - FTR Judge: Wilkins, Hon. Douglas H	
11/30/2018	Habeas Corpus for defendant issued to Northeastern Correctional Center (Concord) returnable for 12/10/2018 02:00 PM Hearing for Sentence Imposition.	62

Docket Date	Docket Text	File Ref Nbr.
12/10/2018	Defendant sentenced:: Sentence Date: 12/10/2018 Judge: Hon. Douglas H Wilkins Charge #: 1 MANSLAUGHTER c265 §13 State Prison Sentence Not Less Than: 15 Years, 0 Months, 0 Days Not More Than: 15 Years, 0 Months, 1 Days Committed to Northeastern Correctional Center (Concord) Nunc Pro Tunc to 10/17/06 Credits 489 Days Further Orders of the Court: Jail credits per order of the Court	
12/10/2018	Commonwealth 's Objection to Resentencing (Filed)	64
12/10/2018	ORDER: On vacated Sentence (Filed)	65
12/10/2018	Issued on this date: Mitt For Sentence (First 6 charges) Sent On: 12/10/2018 16:36:37	66
12/10/2018	Defendant notified of right of appeal to the Appelate Division of the Superior Court within ten (10) days. Judge: Wilkins, Hon. Douglas H	
12/10/2018	Defendant brought into Court Hearing for Sentence Imposition RE: Sentencing (See Paper #53), Held After hearing, Court REVOKES sentence imposed on 10/12/06 - #001 As to #002 Sentence Deemed Served: (Two years Suffolk Court House of Correction at South Bay concurrent with Sentence Imposed on Offense #001) M. Lee, N. Brandt, ADA K. Greenberg, Atty FTR	
12/20/2018	Defendant 's Motion to withdraw without Prejudice the Defendant's Request to strike Notice of Appeal and all related Motions (Notice sent to Wilkins, J. with copy of Motion and Docket Sheets).	67
12/21/2018	Notice of appeal filed by the Commonwealth regarding court's orders (Wilkins, J.), of November 30, 2018, and December 10, 2018, reducing the verdict and resentencing the defendant	68
12/27/2018	OTS is hereby notified to provide the JAVS transcript of the proceedings of 11/30/2018 09:30 AM Bail Hearing, 12/10/2018 02:00 PM Hearing for Sentence Imposition.	
01/04/2019	Endorsement on Defendant 's Motion to withdraw without Prejudice the Defendant's Request to strike Notice of Appeal and all related Motions, (#67.0): (Copy to R. Greenberg, Attorney and J. Zanini, ADA) Judge: Wilkins, Hon. Douglas H	
01/24/2019	Appeal: JAVS DVD/CD Received from OTS of dates 11/30/18 and 12/10/18. (Copy of transcript sent to J. Zanini, ADA and R. Greenberg, Atty via email)	
01/25/2019	Appeal: notice of assembly of record sent to Counsel ADA J. Zanini, Atty R. Greenberg, and Clerk J. Stanton.	
01/25/2019	Appeal: Statement of the Case on Appeal (Cover Sheet).	69
01/31/2019	Notice of Entry of appeal received from the Appeals Court Case was entered in this court on January 25, 2019	70
02/19/2019	Notice of Entry of appeal received from the Appeals Court RE#9:The stay of appellate proceedings in 18-P-1541 is vacated. The appeals 18-P-1541 and 19-P-146 are consolidated for briefing and decision. 18-P-1541 is closed. All papers shall be transferred to 19-P-146. All future filings shall refer only to 19-P-146. The Commonwealth's brief and appendix in the consolidated appeal are due on or before 03/06/2019.	71

Case Disposition

Disposition	Date	Case Judge
Disposed by Jury Verdict	10/06/2006	

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COMMONWEALTH OF MASSACHUSETTS

18 JAN 10 AM 11:23

SUFFOLK, SS. RECEIVED DOCKET NO.: 2005-10545

COMMONWEALTH OF MASSACHUSETTS
V.

JAN 16 2018

DAGOBERTO SANCHEZ

DEFENDANT'S MOTION FOR NEW TRIAL/REDUCTION IN VERDICT, AND/OR RELIEF FROM UNLAWFUL SENTENCE

COMES NOW Dagoberto Sanchez, by counsel, and in the unique circumstances of this case asks peculiar relief; that he either be granted a new trial or reduction in verdict, or that he be relieved from unlawful sentence on his conviction of second degree murder and sentenced to a term of years consistent with manslaughter because he was only seventeen when the homicide which forms the basis of his conviction occurred, and a mandatory sentence of natural life violates both Article 26 and the Eighth Amendment, even when such sentence allows for the possibility of eventual discretionary relief by some future Board of Parole.

As grounds:

1. Defendant Sanchez was a child of seventeen when the homicide on which this conviction is predicated occurred. He was indicted in Suffolk County on a charge of second degree murder only, prior to the decision of the Supreme Judicial Court in Commonwealth v. Walczak, 463 Mass.

808 (2012), requiring grand jury instruction on mitigating circumstances in juvenile homicide cases, and therefore did not receive the grand jury protections regarding mitigation which have since been mandated by Walczak.

2. Defendant's case was entirely a mitigation case; it was undisputed, as recited by the Appeals Court, that Mr. Sanchez displayed no weapon until the decedent, drunken and enraged, threatened to kill him and menaced him with a bat. They had no prior relationship; the drunken decedent had been threatening everyone on the street when the defendant and his aunt arrived home from a baby birthday party. The defendant asked the decedent repeatedly to put down the bat and the decedent kept swinging. The defendant's aunt, Teresa Cordeiro, walked between the defendant and the bat-wielding decedent, the decedent threatened Mrs. Cordeiro, and the defendant, in a misguided effort to protect Mrs. Cordeiro, fired. Defendant Sanchez took responsibility for the homicide; his statement to the police, which was not admitted at trial, is part of the court file.

3. There was much confusion about appropriate instruction on defense of third parties in this case. At best, Judge Connolly's instructions were garbled, with several contradictory versions given, over objection, to the defendant's jury, which expressed concern over the proper

application of defense of another and whether Ms. Cordeiro's failure to retreat (she was attempting, obviously unsuccessfully, to defuse the interaction) deprived Mr. Sanchez of any legal opportunity for justification or mitigation for the act which saved his aunt's life.

3. Defendant was convicted by his jury as charged, and appealed, complaining, *inter alia*, of the garbled instructions on defense of another and on excessive force in defense of another, and also complaining of the trial judge's (Connolly, J.) violation of both the Declaration of Rights and the Fourteenth Amendment in refusing to hold a Batson/Soares inquiry at the defendant's request. In Massachusetts, the post-appeal remedy for such a violation is the automatic grant of a new trial. No further evidentiary burden, other than showing the initial violation claimed, is required. See Commonwealth v. Maurice Jones, __ Mass __ (June 20, 2017) and cases cited. However, the Appeals Court, by published opinion, Commonwealth v. Sanchez, (2011), held, with regard to the defendant's Batson/Soares claim, that Judge Connolly had committed no error; Further appellate review was denied, and the defendant, having been unpersuasive as to whether Judge Connolly's refusal to hold a hearing was unconstitutional, received no relief on this or any other claim from

Massachusetts. It was not until Sanchez v. Roden, 754 F.3d 279 (First Cir. 2014), that it was judicially acknowledged that Judge Connolly had erred in refusing to order the Batson/Soares inquiry requested by the defense.

4. Had Massachusetts appellate courts correctly decided Defendant's Batson/Soares claim in the first instance, Defendant Sanchez would, under Massachusetts law, have been automatically granted a new trial, without necessity of bearing any further burden of proof.

5. Regrettably, and through no fault of the defendant, Massachusetts messed up, and Defendant Sanchez was obliged to proceed all the way to the First Circuit for a determination that Judge Connolly's refusal to conduct a Batson/Soares inquiry was unconstitutional. And because this Circuit chose to impose a different remedy than the remedy Massachusetts requires when a trial court erroneously denies a Batson/Soares hearing, the Circuit did not give the defendant the remedy he would have gotten had Massachusetts correctly decided his case in the first instance. Instead, the Circuit placed a burden upon the defendant to prove, many years after the trial and in front of a different judge who had not witnessed the proceedings and the prospective jurors, that the selection of his jury had indeed been discriminatory. This is a remedy for Batson/Soares error

which Massachusetts has repeatedly rejected as inadequate. The defendant did not get the benefit of Massachusetts's presumption in his favor. Instead, he was assigned a burden of proof Massachusetts has repeatedly recognized as too difficult to meet. This burden of further proof was indeed too great a burden for Defendant Sanchez to bear (the First Circuit has held that any explanation offered at a post-conviction hearing of an apparently discriminatory challenge, "however implausible", suffices to moot a Batson challenge) and this defendant, who would have been entitled to a new trial had Massachusetts appellate courts correctly decided his case, inequitably received no actual relief at all.

6. In short, had Massachusetts done the right thing in the Appeals Court or at the Supreme Judicial Court, and recognized Judge Connolly's mistake for the state and federal constitutional violation that it was, a new trial would have been automatically granted, without putting this defendant to any further proof. But because Massachusetts incorrectly, unconstitutionally, denied relief, the defendant was forced to federal court, and there given a burden greater than he could bear, result being he was denied the new trial Massachusetts was required under its own state interpretation of the Fourteenth Amendment to

give. This is fundamentally unfair. Mr. Sanchez should be placed where he would have been had the Appeals Court done the right thing.

7. Contrast Commonwealth v. Jones, supra. Mr. Jones, exactly like Mr. Sanchez, was denied the Batson /Soares inquiry to which the Fourteenth Amendment and Article 12 entitled him. He protested. The Supreme Judicial Court, having been educated by the First Circuit in Sanchez v. Roden, supra, in 2014, applied the correct rule (citing Sanchez at least a dozen times), found Jones's trial judge's refusal to hold an inquiry to be error, and immediately ordered a new trial for Mr. Jones. The Commonwealth's request to reconsider and order an evidentiary hearing was denied. Mr. Jones, arguing his case after Mr. Sanchez, gets the benefit of Sanchez's litigation in Massachusetts, and Defendant Sanchez, who had to go all the way to federal court, does not. Defendant Sanchez bears an almost unmeetable evidentiary burden; Mr. Jones does not. A wilier defendant than Defendant Sanchez could have waited for Mr. Jones to litigate, Mr. Jones to lose in Massachusetts and petition for habeas, Mr. Jones to win in federal court, and instead of a "Sanchez rule" we would have a "Jones rule", cited in Sanchez's appeal, and Defendant Sanchez would benefit and Mr. Jones might not. But justice is not

supposed to be about who can delay litigating longest, or about who goes first. Similarly situated defendants, both erroneously denied a Batson/Soares hearing, should be treated similarly, and Massachusetts should at long last grant Mr. Sanchez a new trial, as was granted Mr. Jones. Same error, same relief. Cf. Fiore v. White, 531 U.S. 225 (2001); Fiore's conviction was final and then his co-defendant's case was reversed on the same insufficiency grounds Mr. Fiore had claimed; the Supreme Court said the rule of finality did not apply and the state should put Mr. Fiore where he would have been had the state court done the right thing in the first place. Cf. also Rose v. Mitchell, 443 U.S. 545 (1979), discussing the specter of unremediated discrimination in the jury selection process even where, as here, a defendant can prove no actual harm or unfairness at trial: it "impairs the confidence of the public in the administration of justice". The confidence of the public in the administration of justice is grossly impaired when Defendant Sanchez gets less relief than Mr. Jones only because of two reasons: he timely pursued his appeal; and the Appeals Court erred.

8. Defendant Sanchez recognizes the difficulties to which the Commonwealth would be put in retrying his case after this passage of time. Defendant Sanchez has already

served thirteen years of his fifteen year sentence. He would give up his argument for a new trial and be content if the verdict against him were to be reduced by this Court pursuant to Rule 25(b)2 to mitigation manslaughter, in all the circumstances of this case, and given advances in our understanding of the juvenile brain, given that he acted in defense of Ms. Cordeiro even if only mistakenly believing himself entitled, given the garbled jury instructions on defense of another, given that he did not get the benefit of Walczak when the grand jury considered his case, and given that, absent any relief, he, charged and convicted of second degree murder, now serves the sentence he would have been serving had he committed deliberate premeditated cruel and atrocious murder, which he clearly did not. A manslaughter verdict and a manslaughter sentence would be more consonant with justice in this case, and this Court has the power to make this verdict consonant with justice under Rule 25(b)2. The defendant would accept whatever manslaughter sentence the Court sought fit to impose after hearing. He has brilliantly rehabilitated himself during his period of incarceration. He proffers evidence of his capacity for reform, and of his reform, attached. He has completed his GED. He has participated in every possible program available to him. He has raised a puppy and trained

her to help this disabled. He has forworn all gang related affiliation and kept to that promise. To grant relief on this basis would not be granting relief on post-conviction conduct—the post-conviction conduct is the illustration of the young man he was when sentenced way back when.

10. Should this Court decline either to grant either a new trial, as was granted to Mr. Jones on identical facts, or to reduce the verdict in this case to manslaughter as more consonant with justice under Rule 25(b)(2), the defendant asks for resentencing to a term of years not to exceed a term of years permitted for manslaughter even though he was convicted of murder in the second degree, because the Eighth Amendment and Article 26 are not satisfied in the absence of individualized sentencing for a child under eighteen years old. The mandatory life sentence relieved only by the possibility that some future parole board might exercise its discretion to release him early which was imposed on Defendant Sanchez, without a hearing and without individualized consideration, should now be invalidated as cruel and/or unusual, both state and federally. Defendant understands that the Supreme Judicial Court in Commonwealth v. Okoro, 471 Mass 51 (2015), deferred the question of mandatory life sentences for juvenile homicide "to a later day", and opined in Okoro that the

issue was not adequately argued under Article 26. Defendant Sanchez says that if no other relief is possible, then today is the day to which the question was deferred. Defendant Sanchez does not here argue that either the Eighth Amendment or Article 26 prohibit a sentence of fifteen to life, or that the Massachusetts sentence scheme provides no meaningful opportunity for release. He argues against the mandatory nature of his sentence, and argues also that Article 26 may be more protective against the cruelty to children created by a mandatory life sentence than is the Eighth Amendment. Defendant Sanchez further submits that Article 26 should entirely preclude a life sentence of any sort for a juvenile in cases where there was no clear proof and no necessary finding of intent to kill, and no opportunity for grand jury mitigation, nor any instruction on a reasonable child's view of the necessity to defend another from deadly harm. It is now generally recognized that a child's apprehension of risk differs significantly from that of an adult. Furthermore, as the Supreme Court has stated in Miller v. Alabama, 132 S.Ct. 2455 (2012), "lack of ability to extricate themselves from horrific, crime-producing settings" is among the primary attributes of youth. Miller at 2464. This case is a perfect example of a child unable to extricate himself from a horrific crime

producing setting, with no intent to kill, who simply, because he was a child, could understand no other way out.

Defendant Sanchez is hopeful he need not be the person to argue this point. Mr. Sanchez returns to his first point; state and federal due process require he be given the same remedy he would have gotten had the appellate courts of Massachusetts correctly faulted Judge Connolly for his failure to hold the Batson/Soares inquiry required by the Fourteenth Amendment: a new trial. If Mr. Jones was entitled to a new trial (and he was) then so is Defendant Sanchez. Defendant Sanchez is willing to forfeit that remedy, eager to forfeit that remedy, if only this Court is willing to look at the unique circumstances of his case, recognize he has displayed the exceptional capacity for reform which might have been evident at the time of his conviction had a sentencing hearing been allowed, indeed has reformed, and therefore reduce the verdict against him to manslaughter and sentence him accordingly. If the Court is not willing, Defendant Sanchez then asks leave to further brief the issue he has raised here challenging sentencing for juveniles convicted of murder in the second degree.

Conclusion

COMMONWEALTH vs. DAGOBERTO SANCHEZ.

79 Mass. App. Ct. 189

June 8, 2010 - April 1, 2011

Court Below: Superior Court, Suffolk

Present: DUFFLY, BROWN, & VUONO, JJ. [Note 1]

Practice, Criminal, Challenge to jurors, Instructions to jury. Self-Defense. Defense of Others.

At a murder trial in which the defendant alleged that the prosecutor used peremptory challenges to exclude certain prospective jurors based solely on race, the record supported the judge's finding that no pattern of discrimination had been established. [190-194] BROWN, J., concurring.

At a murder trial, no prejudicial error arose from the judge's instructions to the jury, in which he instructed on self-defense, defense of another, and the original aggressor rule but declined to inform the jury that the original aggressor rule was inapplicable to the defense of another, where the charge, as a whole, tracked the model jury instructions and correctly conveyed the elements of the defense, including the duty to retreat; and where the charge could not have been understood to mean that the defendant could not rely on the defense of another if he were found to be the original aggressor. [194-196] BROWN, J., concurring.

INDICTMENTS found and returned in the Superior Court Department on August 5, 2005.

The cases were tried before Thomas E. Connolly, J.

Ruth Greenberg for the defendant.

Lynn D. Brennan, Assistant District Attorney, for the Commonwealth.

VUONO, J. A Superior Court jury convicted the defendant of murder in the second degree and unlawful possession of a firearm. At trial, the defendant admitted that he shot the victim, Jose Portillo, during a street confrontation. He claimed, however, that he acted in self-defense and in defense of his aunt, who had

intervened in the fight to protect him. The defendant appeals his convictions on the grounds that the Commonwealth's peremptory challenges during jury impanelment were used improperly and that the judge's instructions on defense of another were inadequate. We affirm.

Background. We briefly summarize the facts as the jury could have found them. [Note 2] Around seven o'clock in the evening on May 21, 2005, the defendant and his aunt, Theresa Cordero, were driven home from a family party by Enrique Calderon. As they approached the defendant's neighborhood, they saw Portillo standing in the middle of the street, holding an aluminum baseball bat. Portillo had been involved in a physical altercation with two or three other men. [Note 3] Upon arriving at the scene, the defendant exchanged words with Portillo and the others. The defendant then left the car, went into his house, and returned a few moments later, at which time he brandished a gun and told Portillo to leave.

Portillo did not leave. Instead, he approached the defendant while "wielding" the bat and yelling, "I'll get you," and "I'm not scared." Cordero, who by this point was out of the car, stepped between the defendant and Portillo and urged the defendant to leave. Portillo continued to swing the bat and walked toward Cordero and the defendant. Then, with the bat raised as if he was about to take a swing, Portillo stepped forward and stated, "I'm going to kill you." Believing that Portillo was about to hit her with the bat, Cordero moved out of the way. At about the same time, the defendant yelled, "Watch out," and shot

Portillo twice, once in the chest and once in the abdomen. Portillo died as a result of his wounds one day later.

Discussion. 1. Peremptory challenges. Jury selection proceeded over two days. By the second day, the Commonwealth had exercised eleven peremptory challenges to remove eight white jurors, one forty-one year old man described by the parties as Hispanic, and two males described as African-American,

both of whom were in their twenties. [Note 4] In addition, ten jurors, five of whom were African-American (three women and two men), [Note 5] had been seated. When the Commonwealth exercised its twelfth peremptory challenge to remove an eighteen year old African-American male (juror no. 261), defense counsel objected, contending that a pattern of challenges directed at "African American . . . young males" had been established. See Commonwealth v. Soares, 377 Mass. 461 , 488-490, cert. denied, 444 U.S. 881 (1979). After some discussion, the judge overruled the objection, [Note 6] explicitly finding that a prima facie showing of impropriety had not been made. As a result, the prosecutor was not required to justify the challenge. [Note 7]

"Article 12 of the Declaration of Rights of the Massachusetts Constitution and the equal protection clause of the Federal Constitution prohibit the use of peremptory challenges to exclude prospective jurors on the basis of race." Commonwealth v. Douglas, 75 Mass. App. Ct. 643 , 648 (2009), citing Commonwealth v. Harris, 409 Mass. 461 , 464 (1991). The defendant claims that the prosecutor's use of peremptory challenges to exclude juror no. 261 and other "young men of color" from the jury violated the State and Federal Constitutions and, therefore, that the judge's conclusion that the defendant had not met his burden of establishing a prima facie case of improper challenges was erroneous. [Note 8]

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"Peremptory challenges are presumed to be proper, but that presumption may be rebutted on a showing that '(1) there is a pattern of excluding members of a discrete group and (2) it is likely that individuals are being excluded solely on the basis of their membership' in that group." Commonwealth v. Maldonado, 439 Mass. 460 , 463 (2003), quoting from Commonwealth v. Garrey, 436 Mass. 422 , 428 (2002). If the judge finds that a prima facie showing of an improper use of peremptory challenges has been made, "the burden shifts to the party exercising the challenge to provide a 'group-neutral' explanation for it." Commonwealth v. Maldonado, supra. Because "[a] trial judge is in the best position to decide if a peremptory challenge appears improper and requires an explanation by the party exercising it[,] . . . 'we do not substitute our judgment . . . for his if there is support for it on the record.' " Commonwealth v. LeClair, 429 Mass. 313 , 321 (1999), quoting from Commonwealth v. Colon, 408 Mass. 419 , 440 (1990).

In this case, the judge determined that the presumption of propriety had not been rebutted. He found it unlikely, in light of the fact that five other African-Americans had been seated, that the Commonwealth's challenges had been based solely on race. He also found that, to the extent the defendant's objection was based on the ages of the challenged jurors, it was not valid because age is not a suspect classification under Soares, 377 Mass. at 489. The judge also rejected the defendant's argument that "persons of color" constitute a discrete group under Soares, supra. Therefore, he refused to consider the prosecutor's challenge of the juror believed to be Hispanic in determining whether the defendant had established a pattern of improper exclusion based on race.

The record supports the judge's finding that no pattern of discrimination had been established. First, the fact that other members -- here, five -- of an

allegedly targeted group were seated is an appropriate factor to consider in determining whether the presumption of propriety had been rebutted. See and compare Commonwealth v. Walker, 69 Mass. App. Ct. 137 , 142 (2004).

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Second, the judge correctly ruled that age is not a protected class under either the Declaration of Rights, see Commonwealth v. Samuel, 398 Mass. 93 , 95 (1986) ("[t]here is no constitutional basis for challenging the exclusion of young persons"), or the United States Constitution. See United States v. Cresta, 825 F.2d 538, 545 (1st Cir. 1987) (holding that young adults do not constitute a "cognizable group" for the purpose of an equal protection challenge to the composition of a petit jury).

Third, the judge did not err in rejecting the defendant's assertion that "persons of color" includes both African-American and Hispanic jurors and constitutes a discrete aggregate group under Soares, supra. Although "[t]here is no dispute that Hispanic persons [like African-Americans] are members of a racial or ethnic group protected under art. 1 of the Declaration of Rights," Commonwealth v. Rodriguez, 457 Mass. 461 , 467 n.15 (2010), we are not aware of any authority requiring a trial judge to combine challenges to members of discrete racial or ethnic groups into one "catch all" category. [Note 9] Cf. Gray v. Brady, 592 F.3d 296, 306 (1st Cir.), cert. denied, 130 S. Ct. 3478 (2010) (rejecting claim that "minorities" constitute a cognizable group under Batson v. Kentucky, 476 U.S. 79 [1976], and expressing "serious" doubt whether classes such as "minorities" or "non-whites" possess "the definable quality, common thread of attitudes or experiences, or community of interests essential to recognition as a 'group' ").

The defendant further argues that the procedure set forth in Soares, supra at 489-490, and its progeny fails to protect against discrimination in the jury selection process and, therefore, the use of peremptory challenges should be

abolished. As the defendant acknowledges, it is beyond our authority "to alter, overrule or decline to follow the holding of cases the Supreme Judicial

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Court has decided." Commonwealth v. Dube, 59 Mass. App. Ct. 476 , 485 (2003) (citing cases). [Note 10]

2. Jury instructions. At the conclusion of the trial, the judge instructed the jury on both self-defense and defense of another. Upon the request of the Commonwealth, the judge also agreed to instruct the jury on the original aggressor rule, which provides that "self-defense . . . cannot be claimed by a [defendant] who provokes or initiates an assault." Commonwealth v. Espada, 450 Mass. 687 , 693 (2008), quoting from Commonwealth v. Maguire, 375 Mass. 768 , 772 (1978). The defendant objected and requested that the judge either refrain from giving an original aggressor instruction or explicitly inform the jury that the original aggressor rule is inapplicable to the defense of another. Eventually, the judge gave the instruction without any specific restrictions.

The defendant claims that because the judge refused to instruct the jury exactly as he had requested, he was deprived of his due process right to establish a defense. Because the issue was properly preserved, we review for prejudicial error. Commonwealth v. Flebotte, 417 Mass. 348 , 353 (1994).

Our cases have not specifically addressed whether the original aggressor rule applies to defense of another. [Note 11] Assuming without deciding that the original aggressor rule is wholly or partially inapplicable to the defense of another as that defense was asserted

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here, the error was not prejudicial. [Note 12] "The judge is not required to

grant a particular instruction so long as the charge, as a whole, adequately covers the issue." Commonwealth v. Cruz, 445 Mass. 589 , 597 (2005), quoting from Commonwealth v. Daye, 411 Mass. 719 , 739 (1992). The final charge [Note 13] tracked the model jury instructions and correctly conveyed the elements of the defense, including the duty to retreat. Moreover, at no time did the judge state that if the jury were to find that the defendant was the original aggressor in the fight with Portillo he could not rely on the defense of another (Cordero) to justify his conduct. [Note 14] Because the instructions, as given, could not have been understood as the defendant suggests, the failure to give the requested instruction "did not influence the jury, or had but very slight

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effect." Commonwealth v. Flebotte, 417 Mass. at 353, quoting from Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437 , 445 (1983).

Judgments affirmed.

BROWN, J. (concurring) . Apart from the troubling fact that a manslaughter instruction was neither given nor requested, I am of opinion that this case can be affirmed simply on the basis of the defendant's status as the initial aggressive user of deadly force -- a handgun. [Note Concur-1] Neither the defense of another nor the failure to retreat, in my view, enters into the calculus.

As an additional aside, I think the judge's handling of the peremptory challenge issue would have been more efficacious if he had followed the teachings of Commonwealth v. Futch, 38 Mass. App. Ct. 174 , 177-178 (1995), and cases cited therein.

FOOTNOTES

[Note 1] Justice Duffly participated in the deliberation on this case while an Associate Justice of this court, prior to her appointment as an Associate Justice of the Supreme Judicial Court.

[Note 2] The testimony of the witnesses differed slightly regarding the sequence of events. Because the discrepancies are not material to our discussion, we will not address them.

[Note 3] There was no evidence that the defendant was part of the earlier confrontation involving Portillo.

[Note 4] The parties appear to be in agreement as to the background of the challenged jurors.

[Note 5] The record does not disclose the ages of the women jurors. Regarding the two men, one was thirty-four and the other was fifty-one years old.

[Note 6] Initially, the judge responded to trial counsel's objection by stating: "[F]or purposes of this particular juror, alone, I will find that there is a pattern of challenging black young men." The judge then asked the prosecutor to explain his reasons for challenging juror no. 261. The prosecutor inquired whether the judge was making an actual finding as to whether a prima facie showing of impropriety had been made, and asserted that he was not required to provide a justification until the judge did so. The judge agreed with the prosecutor's analysis of the procedure to be followed and ultimately found that a pattern of discrimination had not been shown.

[Note 7] Although the judge did not require the prosecutor to disclose his reasons for challenging the juror, the judge supplied his own answer to the question when he observed that juror no. 261's "youth and the fact that he's a full time college student could be a problem."

[Note 8] The defendant also raises an equal protection claim on behalf of the challenged jurors. See Powers v. Ohio, 499 U.S. 400, 411 (1991). As our analysis under either the State or Federal Constitution is the same, we focus our attention on art. 12. See Commonwealth v. Benoit, 452 Mass. 212 , 218 n.6 (2008) ("Regardless of the perspective from which the problem is viewed, the result appears to be the same").

[Note 9] The Supreme Judicial Court's decision in Smith v. Commonwealth, 420 Mass. 291 , 298 (1995), on which the defendant relies, is not to the contrary. There, in the context of a challenge to the racial makeup of the venire, the court held that " 'nonwhites' . . . is a group characterized by race and race is a protected classification under art. 1 of the Massachusetts Declaration of Rights." Ibid. However, a close reading of Smith reveals that the race-based category "nonwhites" was not inclusive of Hispanic jurors. Id. at 293 n.4 (noting that the data it relied upon defined "minorities" as "the total Hispanic population *plus* the total nonwhite population" [emphasis added]).

[Note 10] For cases noting concerns about the use of peremptory challenges, see Commonwealth v. Rodriguez, 457 Mass. at 488 (Marshall, C.J., concurring); Commonwealth v. Maldonado, 439 Mass. at 468 (Marshall, C.J., concurring); Commonwealth v. Calderon, 431 Mass. 21 , 29 (2000) (Lynch, J., dissenting). See generally Brown, McGuire, & Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse?, 14 New Eng. L. Rev. 192 (1978). But see Commonwealth v. Benoit, 452 Mass. 212 , 235 n.1 (2008) (Cowin, J., dissenting).

[Note 11] Our review of the law from other jurisdictions does not reveal a uniform approach to the issue. Many States (in contrast to ours) address the issue by statute. See, e.g., Colo. Rev. Stat. § 18-1-704 (2010); Conn. Gen. Stat. § 53a-19 (2009); Ga. Code Ann. § 16-3-21 (2007); Kan. Stat. Ann. § 21- 3214(3) (2007). Some courts, as a matter of statutory construction, have suggested that a defendant's aggressor status may properly deprive him entirely of the right to rely on defense of another. See State v. Silveira, 198 Conn. 454, 470 (1986). At least one other jurisdiction holds that an otherwise justifiable application of force in defense of another, when rendered by an original aggressor, constitutes the imperfect defense of another and reduces the killing to voluntary manslaughter. See State v. Johnson, 182 N.C. App. 63, 70 (2007), citing State v. Perry, 338 N.C. 457, 466 (1994).

[Note 12] Although we do not decide the issue, we note that the answer is not clear. There is some merit to the defendant's argument that it would be difficult to reconcile a rule that would deter persons -- even original aggressors -- from forcefully intervening on behalf of an apparently blameless third person, with a policy rationale based on "the social desirability of encouraging people to go to the aid of third parties who are in danger of harm as a result of the unlawful actions of others." Commonwealth v. Monico, 373 Mass. 298 , 303 (1999) (discussing

Commonwealth v. Martin, 369 Mass. 640 , 649 [1976], which announced the modern defense of another rule). At the same time, we do not find it obvious that an actor's provocation or exacerbation of a conflict becomes irrelevant once an innocent third party enters the equation. A person who initiates or provokes a conflict is not in the same position as the archetypical "good Samaritan" envisioned by the Supreme Judicial Court when it first enunciated the defense in Martin, supra.

[Note 13] The jury received multiple versions of the instructions over two days. The initial instructions contained a number of errors and were stricken entirely. The judge then reinstructed the jury in accordance with the Model Jury Instructions on Homicide (1999).

[Note 14] During his charge to the jury, the judge explained that he would "talk a little bit about self-defense and then *after that* we'll talk about the defense of another" (emphasis supplied). While defining the elements of self-defense, the judge stated that "[a]n original aggressor has no right to self-defense unless he withdraws from the conflict in good faith and announces his intention of abandoning the fight." After concluding his explanation of self-defense, the judge turned to the defense of another. The subject was introduced as follows: "Now, ladies and gentlemen, there is another aspect of self defense. It's called the defense of another." The judge then discussed the elements of defense of another and never once mentioned the original aggressor rule. Thereafter, during their deliberations, the jury asked the judge for further instructions on defense of another on two occasions. The judge responded to these questions by repeating his earlier (correct) instruction, which, again, did not mention the original aggressor rule.

[Note Concur-1] The teaching point here is "sticks and stones" may break bones, but a loaded handgun will very likely kill a person.

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SANCHEZ v. RODEN

No. 15-1197.

808 F.3d 85 (2015)

Dagoberto SANCHEZ, Petitioner, Appellant, v. Gary RODEN, Respondent, Appellee.

United States Court of Appeals, First Circuit.

December 7, 2015.

Attorney(s) appearing for the Case

Ruth Greenberg, for appellant.

Thomas E. Bocian, Assistant Attorney General, Criminal Bureau, with whom Maura Healey, Attorney General of Massachusetts, was on brief, for appellee.

Before LYNCH, THOMPSON, and KAYATTA, Circuit Judges.

LYNCH, *Circuit Judge.*

This habeas corpus petition comes to us again following our previous opinion remanding to the federal district court. *Sanchez v. Roden* (*Sanchez I*), 753 F.3d 279, 309 (1st Cir.2014). The petition contests the state court's conclusion that the state prosecutor did not violate the Fourteenth Amendment in his exercise of a peremptory challenge during jury selection for Dagoberto Sanchez's state trial on charges of second-degree murder and unlawful possession of a firearm. Sanchez contends that the challenge was impermissibly based on race.

Previously, this court found that, contrary to the state court's ruling, Sanchez had established a prima facie case of racial discrimination under step one of the framework established in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). We remanded the case to the federal district court for an evidentiary hearing as to steps two and three of *Batson*. After that hearing, which included testimony from the prosecutor who exercised the challenge, the district court ruled against Sanchez on the final step of *Batson* and denied his petition. *Sanchez v. Roden*, No. 12-10931, 2015 WL 461917 (D. Mass. Feb. 4, 2015). We affirm.

I.

We recite only the facts necessary to these habeas proceedings, as our previous opinion in this case describes Sanchez's conviction and direct appeal in detail. In 2005, Sanchez was indicted for second-degree murder and unlawful possession of a firearm. During jury selection for his trial, state prosecutor Mark Lee exercised peremptory challenges, as relevant here,

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to strike three black men age 25 or under (Jurors 201, 227, and 261). [1] After striking Jurors 201 and 227 but before striking Juror 261, a 19-year-old black male college student, Prosecutor Lee seated Juror 243, a 21-year-old white male college student born in Russia. When Lee moved to strike Juror 261, Sanchez's defense counsel objected, arguing that Lee was striking young black potential jurors on the basis of a combination of their race, youth, and gender. The judge ruled that Sanchez had not made a prima facie case of discrimination. Ultimately, the impaneled jury of sixteen included three black women and two black men. The jury convicted Sanchez, and he was sentenced to life imprisonment for murder, with a concurrent two-year sentence on the firearm charge.

On appeal to the Massachusetts Appeals Court, Sanchez contended, among other things, that Lee had improperly exercised peremptory challenges against young "men of color," but the state appeals court rejected that contention, *Commonwealth v. Sanchez,* 79 Mass.App.Ct. 189, 944 N.E.2d 625, 628-29 (2011), and the Massachusetts Supreme Judicial Court denied further review, *Commonwealth v. Sanchez,* 460 Mass. 1106, 950 N.E.2d 438 (2011) (table decision). Sanchez subsequently petitioned for a writ of habeas corpus under 28 U.S.C. § 2254 in federal district court. The district court, determining the state court's application of federal law was reasonable, denied the petition. *Sanchez v. Roden,* No. 12-10931, 2013 WL 593960, at *6 (D. Mass. Feb. 14, 2013) (applying the *Batson* framework).

This court disagreed with the Massachusetts Appeals Court and with the district court's finding. *Sanchez I,* 753 F.3d at 309. This court held that the state appeals court's *Batson* analysis had unreasonably focused on the overall racial composition of the impaneled jury, ignoring evidence of possible discrimination against the subset of young black men. *Id.* at 299-300. Reviewing the record de novo, the panel found that a prima facie case of racial discrimination in the prosecution's peremptory challenge against Juror 261 had been established under *Batson.* Noting that Lee had not yet provided a reason for the challenge, *id.* at 307, the panel remanded the case to the federal district court to complete the *Batson* inquiry, *id.* at 308 (instructing the district court to follow the guidance set forth in *People v. Johnson,* 38 Cal.4th 1096, 45 Cal.Rptr.3d 1, 136 P.3d 804, 808 (2006)).

On remand, the district court held an evidentiary hearing on September 8, 2014, in which Lee alone testified and was subject to cross-examination by petitioner's counsel. Lee testified that he challenged Juror 261—the 19-year-old black male— and several other jurors, including Jurors 201, 227, and 229, a white male college student, because of their youth. He stated that his general practice is to challenge young jurors, such that when he reviews jury questionnaires at the beginning of jury selection, "one of the very first things" he looks at is the age of prospective jurors, which he circles in red.

Lee testified that the dynamics of jury selection also played a "significant role" in exercising challenges. He stated, "I'm always monitoring how many peremptory challenges I have left versus how many peremptory challenges defense counsel has left and also in consideration of what I understand to be upcoming based upon the questionnaires." He explained, "the

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more challenges the defense has, the more flexible they can be about exercising those challenges, and, therefore, I have to be careful about the number of challenges that I'm exercising under those circumstances." Lee testified that during individual questioning of the prospective jurors, he flipped through the jury questionnaires and a chart that he kept to track which jurors had been struck by which party. On cross-examination, he maintained that he does this "in every trial all the time" and is "constantly looking through the questionnaires." He stated specifically that his low number of remaining challenges and "the number of jurors that still needed to be selected" in combination also motivated his choices regarding striking Juror 261 and keeping Juror 243.

When asked to explain why he did not challenge Juror 243—the 21-year-old white male college student from Russia—Lee testified that he was "running out of challenges." He explained that when he has few challenges remaining, he reviews the jury "questionnaires to determine how many of the remaining challenges [he is] likely to have to use," and he then accepts young jurors based on indications that "might make them not fit their chronological age." In the case of Juror 243, Lee stated, "I took him, despite not wanting to take him," as "he was born in Moscow . . . [and] he came here on his own to begin his own education, and so I thought if I had to take a young juror, that would be somebody who might be a better candidate than most." On cross-examination, Lee conceded that there was no way to know whether Juror 243 had grown up abroad, but he reiterated that he was looking for "somebody who has some level of maturity and life experiences," and he thought Juror 243 seemed "a little bit older than someone else in terms of life experience."

During cross-examination, Lee stated that the only "outward" difference between Juror 243 and Juror 261 was that one was white and the other black. The district judge then asked, "Well, one was 19 and one was 21, right, do I have that right?" Both Sanchez's counsel and Lee responded affirmatively. The following colloquy between Sanchez's counsel and Lee ensued:

> Lee: Yes, [Juror 243] was two years older.
>
> Sanchez's Counsel: But you challenged people who were older than 21 for age, did you not?
>
> Lee: Yes. There is a distinction, but, as I said, my inclination would have been to strike [Juror 243] under all things being equal.
>
> Sanchez's Counsel: So the two years was not the defining difference for you?
>
> Lee: At that stage of the game, every possible distinction was relevant.

Subsequent questioning turned to the importance of trial dynamics to Lee's choices.

In a February 4, 2015, order, the district court denied Sanchez's habeas petition. In reaching its decision, the district court considered Lee's testimony, oral argument by both parties, the Commonwealth's Supplemental Answer to the 2012 habeas petition, which included jury questionnaires, as well as the parties' opposing memoranda of law. The court specifically found Lee's demeanor "professional and credible throughout." At *Batson* step two, the court concluded that Lee's testimony that he struck Juror 261 because of his age was facially valid and race-neutral. At *Batson* step three, the court focused on Lee's testimony at the evidentiary hearing. Recognizing the practice of striking potential jurors because of their youth as an accepted trial strategy, the court credited Lee's explanation of his decision to strike Juror 261 based on his age. As to the alleged inconsistency in Lee's application of that practice,

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the court credited two additional points: first, that Lee drew distinctions between young people that led him to keep some jurors but strike others; and second, that considerations of remaining challenges for either party, the number of jury seats to fill, and the pool of potential jurors motivated Lee to depart from his practice regarding age. After an extensive review of the evidence, the district court concluded that Sanchez had not proven Lee exercised a peremptory challenge to Juror 261 on the basis of race. This appeal followed.

II.

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), sets forth the three-step framework courts use to assess claims of racial discrimination in jury selection. When raising an objection to a prosecutor's use of a peremptory challenge, a criminal defendant must first make a prima facie case of racial discrimination. *Snyder v. Louisiana,* 552 U.S. 472, 476, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008). If such a showing is made, then "the prosecution must offer a race-neutral basis for striking the juror in question." *Id.* at 477, 128 S.Ct. 1203 (quoting *Miller-El v. Dretke,* 545 U.S. 231, 277, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (Thomas, J., dissenting)). Finally, based on "all of the circumstances," the court must determine whether the defendant has carried his ultimate burden of showing purposeful racial discrimination. *Id.* at 478, 125 S.Ct. 2317.

Since this court previously determined that Sanchez had made a prima facie case, this appeal concerns only the latter two steps of the *Batson* inquiry as applied to Juror 261. [2] Typically, we may not on habeas review order an evidentiary hearing under 28 U.S.C. § 2254(e)(2), barring statutorily enumerated exceptions not applicable here. *See Cullen v. Pinholster,* 563 U.S. 170, 131 S.Ct. 1388, 1398-1400, 179 L.Ed.2d 557 (2011). However, we note, as we did in our previous decision, that our remand to the federal district court for an evidentiary hearing on an issue of federal law about which "the state courts have already had their say" was permissible in light of the fact that the paucity of the record was owing to the state court's unreasonable application of *Batson's* first step. *Sanchez I,* 753 F.3d at 308; *see Madison v. Comm'r, Ala. Dep't of Corrections,* 761 F.3d 1240, 1249-50 (11th Cir. 2014); *Paulino v. Harrison,* 542 F.3d 692, 698 & n. 5 (9th Cir.2008); *cf. Smith v. Cain,* 708 F.3d 628, 635 (5th Cir.2013) (finding *Batson* evidentiary hearing ordered by district court to satisfy § 2254(e)(2) where criminal defendant raised *Batson* objection "but the state court failed to provide him the opportunity to develop the factual basis of his claim through its misapplication of the *Batson* standard"). Neither party has objected to this procedure.

We review the district court's decision to deny a petition for habeas corpus de novo, *Sanchez I,* 753 F.3d at 293, and in the *Batson* context, we apply clear error review to the fact-finding court's ruling on discriminatory intent, *Snyder,* 552 U.S. at 477, 128 S.Ct. 1203; *United States v. Monell,* 801 F.3d 34, 43 (1st Cir.2015). Where the federal district court conducted an evidentiary hearing and took testimony from the prosecutor who exercised the challenge

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at issue, we recognize that "determinations of credibility and demeanor lie `peculiarly within [its] province.'" *Snyder,* 552 U.S. at 477, 128 S.Ct. 1203 (quoting *Hernandez v. New York,* 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)). We must uphold the district court's ruling unless "we are left with the definite and firm conviction that a mistake has been committed." *United States v. Mensah,* 737 F.3d 789, 796-97 (1st Cir.2013) (quoting *United States v. Gonzalez-Melendez,* 594 F.3d 28, 35 (1st Cir.2010)); *see also Madison,* 761 F.3d at 1245; *Paulino,* 542 F.3d at 698.

A. *Batson* Step Two

When called upon to provide a race-neutral basis for his actions, Lee explained that he challenged Juror 261 because of his "age." Age is not a protected category under *Batson. See United States v. Cresta,* 825 F.2d 538, 545 (1st Cir.1987); *see also United States v. Helmstetter,* 479 F.3d 750, 754 (10th Cir.2007) (collecting agreeing sister circuits). [3]

Bearing in mind that at step two, the prosecution's reason does not have to be "persuasive, or even plausible," *Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam), we easily affirm the district court's finding that Lee's explanation—that he struck Juror 261 because of his age—is race-neutral, *United States v. Bowles,* 751 F.3d 35, 38 (1st Cir.2014), and satisfies the state's burden at step two to articulate a nondiscriminatory reason for the strike, *Purkett,* 514 U.S. at 769, 115 S.Ct. 1769.

B. *Batson* Step Three

The critical issue at this step "is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El v. Cockrell,* 537 U.S. 322, 338-39, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). The burden of proof lies with Sanchez to show that Lee acted with discriminatory purpose. *Purkett,* 514 U.S. at 768, 115 S.Ct. 1769. Since this step turns on credibility determinations and a fact-driven evaluation of all the relevant circumstances that the district court is best suited to make, *Cockrell,* 537 U.S. at 339, 123 S.Ct. 1029, we review the court's ruling through "a highly deferential glass," *United States v. Lara,* 181 F.3d 183, 194 (1st Cir.1999). We affirm the district court's finding that Sanchez has not established that Lee's challenge to Juror 261 was race-

based.

Sanchez argues, as he did before the district court, that Lee was not motivated to challenge Juror 261 because of his youth, since were youth a criterion, he would have struck a similarly situated juror, Juror 243 (the 21-year-old white male born in Russia).[4] Courts may consider "whether similarly situated jurors from outside the allegedly targeted group were permitted to serve." *United States v. Aranjo,* 603 F.3d 112, 115 (1st Cir.2010)

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(quoting *Aspen v. Bissonnette,* 480 F.3d 571, 577 (1st Cir.2007)); *see also Dretke,* 545 U.S. at 241, 125 S.Ct. 2317. Lee testified that although he was inclined to challenge Juror 243, he decided instead not to because he was "running out of challenges," and Juror 243 appeared more mature than his "chronological age." Lee testified:

> I took [Juror 243], despite not wanting to take him, but I was—there are a number of young jurors who I will take based upon what I consider to be indications on their questionnaire that might make them not fit their chronological age, which is to say that he was 21 years old, but I noted he was born in Moscow, I noted that he came here on his own to begin his own education, and so I thought if I had to take a young juror, that would be somebody who might be a better candidate than most.

Regarding Juror 261, in contrast, Lee testified that he "didn't see anything else on [Juror 261's] questionnaire that would give [him] reason to believe that he had a maturity level greater than that of an age 19-year-old person."

Sanchez attempts to undercut the district court's finding as to this explanation's credibility. First, he points to Lee's concession on cross-examination that he was aware jury members must be U.S. citizens as proof that Lee did not believe Juror 243 "came here on his own to begin his own education," and so could not have perceived the juror to be more mature on that basis. Second, Sanchez argues that Lee could not have viewed being foreign-born as a sign of maturity because, had this been his view, he would not have struck Juror 201 (a 25-year-old male from Trinidad). Third, he argues that the district court improperly supplied Lee with the idea that the difference in age between 19 and 21 was meaningful. None of the arguments have merit.

Sanchez's first argument does not establish clear error. Even if Lee was ultimately mistaken in his assumptions about Juror 243's biography, what matters is whether the explanation genuinely reflected [his] true motive. *Aranjo,* 603 F.3d at 116. The district court observed Lee testify, including subject to an extensive cross-examination, and concluded that it was plausible that Lee had seen Juror 243's foreign origin as conferring greater maturity. The court's rejection of Sanchez's first argument is not clear error.

The second argument fares no better, and it misconstrues Lee's testimony. Lee did testify that he generally sought to exclude young potential jurors, but he did not testify that he perceived being foreign-born as an absolute exception to his rule on youth. Lee stated that in the particular case of Juror 243, he was looking for indications that he was "a little bit older than someone else in terms of life experiences" because of the diminishing number of challenges remaining. Examining the dynamics of the jury selection process, the district court correctly noted that Lee "had substantially more flexibility when considering juror[] 201," the Trinidadian, than when considering later jurors, as he had 12 out of 16 peremptory challenges remaining at the time. It was not clear error for the district court to credit the sincerity of Lee's consideration of Juror 243's foreign birth.

Sanchez's third argument is qualitatively different. He argues that the district court improperly supplied Lee with a way to distinguish between Juror 243 and Juror 261. Sanchez points to a moment during cross-examination following a concession by Lee that both Jurors 243 and 261 were young college students and that their only "outward" ascertainable difference

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was race. The district judge at that point interjected: "Well, one was 19 and one was 21, right, do I have that right?" After both Sanchez's counsel and Lee responded affirmatively to the judge's question, the following colloquy between Sanchez's counsel and Lee occurred:

> Sanchez's Counsel: But you challenged people who were older than 21 for age, did you not?
>
> Lee: Yes. There is a distinction, but, as I said, my inclination would have been to strike [Juror 243] under all things being equal.
>
> Sanchez's Counsel: So the two years was not the defining difference for you?
>
> Lee: At that stage of the game, every possible distinction was relevant.

Although the district court does not refer to this particular exchange, Sanchez relies on *Miller-El v. Dretke,* 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005), to suggest that the trial judge improperly supplied Lee with the difference in age between the jurors as the reason for striking, *id.* at 252, 125 S.Ct. 2317.

This argument lacks merit for a number of reasons. As a matter of law, any reliance on *Dretke* is misplaced. *Dretke* involved a *Batson* challenge in which the appellate court justified a prosecutor's strike based on a "rational basis" for his actions that the court supplied, without taking full account of the record. *Id.* The Court held that neither trial nor appellate courts may disregard the record and "imagine a reason" for a prosecutor's actions. *Id.* That is not what happened here. Here, in concluding that Lee perceived a difference in maturity between Juror 243 and Juror 261, the district court recited ample record evidence, including Lee's testimony from before the contested exchange. The district court's conclusions do not rely on, or even mention, the disputed exchange. But even so, we note that the disputed statement that "every possible distinction was relevant," referring to the difference in the jurors' chronological ages, was made in response to opposing counsel's question and not that of the district judge. We simply do not have a case where after the fact the district court concocted an explanation from whole cloth without record support.[5] Given the highly deferential standard of review on questions of credibility, we have no trouble affirming the district court's finding that Lee regarded Jurors 243 and 261 as different based on differences other than race.

Further, Lee's choice to keep Juror 243 but strike Juror 261 is also supported by his testimony concerning the importance of strategically using and

preserving strikes in light of the dynamics of jury selection. As the district court noted, consideration of the number of jurors to be seated and the number of remaining challenges of either party is valid. *Mensah,* 737 F.3d at 802 (noting as a valid concern a prosecutor's cautiousness over a single remaining strike when faced with unknown upcoming jurors). Sanchez argues that Lee could not have so calculated the number of remaining challenges, unseated jurors, and characteristics of potential jurors. Lee explained his practice concerning these calculations

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and on cross-examination maintained, "I do it in every trial all the time. I'm constantly looking through the questionnaires." There is nothing improbable about a trial lawyer using such a practice. The district court's crediting of this explanation was not clearly erroneous.

Sanchez's remaining arguments do not convince us otherwise. Sanchez points to the fact that the prosecutor eliminated one-hundred percent of young black men from the venire. We have previously held that this is not alone sufficient to prove discrimination, especially where there are small numbers of potential jurors of the allegedly targeted group. *See id.* at 801 (cautioning against weighing heavily that prosecutor struck all Asian-Americans where only two were in venire); *Caldwell v. Maloney,* 159 F.3d 639, 656 (1st Cir. 1998) (upholding peremptory strikes of all four potential jurors of one race). Sanchez also points to Lee's failure to explain his use of a peremptory challenge during the original jury selection, but Lee was not required to provide such an explanation until one was requested of him. *Sanchez I* issued such a request, and Lee has now duly offered his explanation.

We acknowledge both the difficulties in making a *Batson* determination on a cold record many years following the original jury selection and also the importance of protecting the right of every juror to serve and of every defendant to have a trial free of the taint of racial discrimination. *See Batson,* 476 U.S. at 87, 106 S.Ct. 1712. But here the district court did not abuse its broad discretion as factfinder on matters of credibility in concluding that Sanchez has not proven that there was racial discrimination. That ends the matter.

III.

For the reasons stated, we affirm the denial of the habeas petition.

THOMPSON, *Circuit Judge*, concurring.

The majority opinion accurately sets forth the applicable law and cogently explains why, given our standard of review, we cannot reverse the district court's rejection of Dagoberto Sanchez's *Batson* challenge. Therefore, I reluctantly concur in the majority's result and reasoning. I write separately to point out that Sanchez's *Batson* challenge has traveled an arduous route through the state and federal courts and because of that historical journey, I am left with a queasy confidence in the decision we reach today. Let me explain.

When defense counsel first raised a *Batson* challenge in state court way back in September of 2006, the trial judge was ready with an immediate (and inappropriate) response. Without asking for the prosecution's justification, the judge gratuitously said in reference to the just-struck 19-year-old African American (Juror No. 261): "I think his youth and the fact that he's a full-time college student could be a problem." *Sanchez v. Roden,* 753 F.3d 279, 286-87 (1st Cir.2014). With that, the judge not only put words in the prosecutor's mouth, but he also telegraphed what the court would consider to be acceptable, race-neutral reasons justifying the peremptory strike.

And it should come as no surprise that nearly eight years later, when finally called upon to explain why he struck this particular juror, the prosecutor seized upon the juror's "youth." In doing so, the prosecutor did nothing more than parrot back the trial judge's unprompted suggestion.

How well this case illustrates the Massachusetts Supreme Judicial Court's warning that a trial judge who offers up his own reason for a prosecutor's peremptory

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strike "risks assuming the role of the prosecutor." *Commonwealth v. Fryar,* 414 Mass. 732, 610 N.E.2d 903, 908 (1993). It takes no great amount of thought to conclude that, had the trial judge required a contemporaneous explanation for the prosecutor's strikes, my trust in having reached the correct outcome (whichever way it went) would be greatly increased. Unfortunately, we will never know what the prosecutor would have said in September 2006 had the trial judge not erred in his application of the Supreme Court's *Batson* protocol. As a result, there will always be a nagging question in my mind as to whether structural error occurred at Sanchez's trial which has not been detected or corrected. *Cf. Snyder v. Louisiana,* 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (recognizing the trial court's "pivotal role in evaluating *Batson* claims" because "'the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge'" (alteration in original) (quoting *Hernandez v. New York,* 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion))).

Now, Sanchez's habeas petition was essentially doomed when, following the district court's evidentiary hearing, the district judge "found [the prosecutor's testimony] to be credible in all respects." *Sanchez v. Roden,* No. 12-cv-10931-FDS, 2015 WL 461917, at *7 (D.Mass. Feb. 4, 2015). And why did the judge believe the prosecutor's adoption of the trial judge's suggestion explained his peremptory challenges? Because "[h]is demeanor was professional and credible throughout" the proceeding. *Id.* Through this observation, the judge effectively said that he found a professional to be professional. But again, what else would be expected when the prosecutor went into the hearing not only having had almost eight years to consider what he would say, but also with the awareness of what the state trial judge considered to be a perfectly valid and acceptable justification for the strike?

To be sure, the district judge also noted that the prosecutor's testimony "was based in part on memory and in part on his routine empanelment practices, and [that] he endeavored to distinguish between the two as he testified." *Id.* He also gave a nod to defense counsel's "extensive cross-examination" of the prosecutor. *Id.* These factors, it appears, must have played contributory roles in the overall finding of credibility.

But the prosecutor's testimony was not exactly monolithic. On direct, he explained why he accepted Juror No. 243, the 21-year-old white college student from Russia, but not Juror No. 261, the 19-year-old black college student from Boston:

> I go through those [juror] questionnaires to determine how many of the remaining challenges I'm likely to have to use, and in that particular instance, I took him, despite not wanting to take him, but I was—there are a number of young jurors who I will take based upon what I consider to be indications on their questionnaire that might make them not fit their chronological age, which is to say that he was 21 years old, but I noted he was born in Moscow, I noted that he came here on his own to begin his own education, and so I thought if I had to take a young juror, that would be somebody who might be a better candidate than most.

Thus, the reason given for accepting one young college student while striking the other is that there was something "more" (my word, not the prosecutor's) in the white juror's questionnaire—and which was absent from the young black man's—

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that led the prosecutor to believe Juror No. 243 might be more mature than he would expect other 21-year-olds to be. As it turns out, the prosecutor's unequivocal testimony about this "more"—that the questionnaire told him Juror No. 243 traveled to the United States "on his own to begin his own education"—did not hold up on cross-examination.

After confirming that the white 21-year-old had been born in Moscow, Russia (as opposed to Moscow, Maine) the prosecutor had the following exchange with Sanchez's counsel:

> Q. Okay. This is somebody who wouldn't have the same experience with our system of law as other citizens?
>
> A. I don't know. All I know is that he was born in another country and was attending school in the United States.
>
> Q. Okay. And what about that did you find beneficial? Was there something about him that overcame the fact that he was young?
>
> A. Barely, yes. The fact that I was down to six challenges and looking at him, my inclination was to strike him, but was there anything specifically that said to me, [`]oh, I want this person,[`] not that I can remember. It was more of a hold-your-nose situation and take him because I thought somebody who came to this country to go to school at the age of 21 may have been chronologically a little bit older than someone else in terms of life experiences, and that's really what I'm looking at that somebody who has some level of maturity and life experience.

The prosecutor initially stood strong and maintained the position he took on direct, namely, that Juror No. 243 came to the United States on his own to attend college. But the very next exchange opened up a chink in the foundation:

> Q. Well, he couldn't have come here to go to school, he had to be a citizen [to serve on the jury], correct?
>
> A. I didn't mean that I knew his life history. I knew he was 21, and I knew that he was here attending school and he was born in another country.

This next colloquy brought the testimonial edifice tumbling down:

> Q. The fact that the man was born in Russia, you don't know whether he came here at six days old, six months old, six, sixteen years old; you have no idea?
>
> A. Correct, absolutely no idea.

So much for the prosecutor's professed belief that Juror 243 might be more mature than other 21-year-olds as a result of his having come to the United States on his own to further his education.

Nevertheless, seizing on this about-face to reject the district judge's credibility determination would overlook the fact that the prosecutor actually gave another reason for believing this particular 21-year-old might be more mature than his chronological age would generally indicate. After all, the prosecutor also said that he relied on the fact that the prospective juror had been "born in Moscow." Cross-examination did not substantially undercut this second reason. Indeed, he explained, "I thought somebody who came to this country to go to school at the age of 21 may have been chronologically a little bit older than someone else in terms of life experiences, and that's really what I'm looking at that somebody who has some level of maturity and life experience."

That Juror No. 243 was born in Moscow, Russia is uncontested on this record. And it's a fact that technically differentiates Juror No. 243 from Juror No. 261, who was born in the Boston area. Whether this ostensibly race-neutral fact [6]—as opposed

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to one being white and the other black—explains the prosecutor's exercise of his peremptory challenges depends entirely on the credibility of the prosecutor's testimony. The district judge, after hearing his testimony on direct and cross-examination, found it credible and determined that the prosecutor did not strike Juror No. 261 on account of his race.

This case is devoid of extrinsic evidence of racial discrimination. We do not, for example, have trial notes from the prosecutor indicating that race played a role in jury selection. We do not have evidence that the prosecutor manipulated trial procedures in an attempt to influence the racial makeup of the jury. *See, e.g., Miller-El v. Dretke,* 545 U.S. 231, 253-55, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (commenting on the prosecutor's use of a "jury shuffle" to keep black members of the venire at the back of the line). Nor is there evidence of a longstanding tradition of racial discrimination in the use of peremptory challenges in the prosecutor's office, [7] or evidence that prosecutors were encouraged to exercise peremptories so as to keep minorities off the jury. *See id.* at 263-66, 125 S.Ct. 2317 (taking into account a particular county's "specific policy of systematically excluding blacks from juries," *id.* at 263, 125 S.Ct. 2317). And nothing in the record clearly demonstrates that the prosecutor's proffered reason for accepting Juror No. 243 but not Juror No. 261 was pretextual. *See id.* at 240-52, 255-63, 125 S.Ct. 2317 (comparing the prosecution's treatment and questioning of black versus white venire members at voir dire and concluding that "the implication of race in the prosecutors' choice of questioning cannot be explained away," *id.* at 263, 125 S.Ct. 2317); *see also Snyder,* 552 U.S. at 485, 128 S.Ct. 1203 (concluding that the justification offered by the prosecutor was pretextual after

conducting a comparative juror analysis).

In sum, whether the prosecutor's strike of Juror No. 261 violated *Batson* comes down entirely to his credibility in explaining his strikes that day and, in particular, why he did not challenge Juror No. 243. We have said time and time again that making credibility determinations is a job for the district court, not something for us to do looking at a cold record. Absent other evidence in the record pointing to racial discrimination, we simply cannot say that the district judge clearly erred in accepting the prosecutor's explanation and upholding the peremptory challenge. This holds true even if any one (or all) of us, sitting as the trial judge, might have reached a contrary conclusion.

Finally, because a trial judge faced with a *Batson* challenge must consider the totality

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of the circumstances, it is appropriate for us to acknowledge them here. Although we are unable to say the district judge clearly erred in finding that the prosecutor's strike was not motivated by Juror No. 261's race, the end result is that all young, black men and young men of color in the venire—indeed all those who resembled Dagoberto Sanchez—found themselves dismissed at the behest of their own government. No other group of prospective jurors received such treatment.

The facts in this record certainly raise the judicial antennae. But given the standard of review, I can do no more than register my discomfort at having to affirm the denial of habeas relief even though the best evidence as to whether or not a *Batson* violation occurred—the prosecutor's contemporaneous explanation—has been irretrievably lost to us.

FootNotes

1. The record does not clearly establish Juror 201's race, but given indications in the state court proceedings that he was a "person of color," we count him among the black jurors for the purposes of our *Batson* analysis.

2. We previously held that Sanchez waived any objection to the prosecution's challenges to other jurors by failing to raise them at trial, *Sanchez I,* 753 F.3d at 295 & n. 10, and Sanchez cannot revive such challenges in this appeal. We note, however, that challenges to other jurors nonetheless may be relevant to the issue of discriminatory intent, *Dretke,* 545 U.S. at 241, 125 S.Ct. 2317, and so we consider such evidence for that purpose.

3. Disputing Lee's explanation, Sanchez contends that our opinion in *Sanchez I* conclusively determined that "age" did not motivate Lee in striking Juror 261. *See Sanchez I,* 753 F.3d at 306. That contention is meritless, and it misses the point and purpose of the remand. Whatever conclusions we drew about Lee's motivations in our prior opinion reflected only the limited facts then available on the state court record, *id.* at 307. Our prior analysis pertained only to *Batson* step one and does not determine our current review of the latter *Batson* steps, based on the district court's findings, which are based on a different and augmented record.

4. As to other young jurors, the record amply supports the district court's determination that Lee declined to strike Juror 255 because she was, at age 27, not "overly young," and declined to strike Juror 293, a 26-year-old female, and Juror 333, a 23-year-old female, because he had only three and two challenges remaining, respectively.

5. To be clear, a trial judge has discretion to make inquiries of witnesses as necessary to facilitate a full and fair hearing. *See* Fed. R.Evid. 614(b); *United States v. Melendez-Rivas,* 566 F.3d 41, 50 (1st Cir.2009). It is permissible in the normal course of a *Batson* hearing for a judge to ask clarifying questions and at times engage with witnesses directly. Indeed, the fact that the district judge here did so several times apart from the contested exchange further indicates that, seen in the context of a normal hearing, there was nothing prejudicial in the judge's question about the difference in age between Jurors 243 and 261.

6. Presumably, place of birth would only make a difference if the individual lived there beyond his or her early childhood. Had Juror No. 243 moved from Russia to the United States when he was, say, two years old, there is no reason at all to believe that his Russian birthplace could render him more mature than his chronological age or distinguish him from Juror No. 261. The prosecutor admitted, of course, that he has "no idea" how long Juror No. 243 lived in Russia. But, as the majority opinion correctly points out, under *Batson* the reason for a peremptory strike need not be correct, persuasive or even plausible, so long as it is race neutral. Moreover, once a race-neutral reason is advanced, the peremptory challenge will be allowed so long as the trial judge is convinced that the challenging party provided the real motivation for the strike, and that the reason was not offered merely to camouflage racial discrimination. Thus, what is important for our purposes here is not whether a young man who happened to have been born in Moscow is more mature than other young men of his age who had been born in Boston, but whether the prosecutor genuinely believed that to be possible. And the district judge found that he did.

7. Although counsel has represented that this has been a problem in Suffolk County, the arguments of counsel are not evidence.

Certificate of Achievement

presented to:

Dagoberto Sanchez

For successfully completing the specialized training of a NEADS Assistance Dog

Hearing Dog Samantha

2/22/17
Date

Anne Wilcox
NEADS Trainer

Certificate of Completion

A collaborative program of the Massachusetts Department of Correction and Spectrum Health Systems, Inc

This is to certify that

Dagoberto Sanchez

has successfully completed the 8 -week program

Motivational Enhancement Program

On this 25th day of *March 2011*

Director of Treatment

Program Supervisor

8

Certificate of Participation

S.B.C.C.

This certificate is awarded to

Dagoberto Sanchez

For participation in the following academic class:

Title I

Ending on June 14, 2007

Instructor

Brian K. Hogan

Principal

08

Certificate of Completion

A collaborative program of the Massachusetts Department of Correction and Spectrum Health Systems, Inc

This is to certify that

DAGOBERTO SANCHEZ

has successfully completed the 8 -week program

Relapse Prevention

On this 28th day of JANUARY, 2011

Director of Treatment

Program Supervisor

CA.47

8

Commonwealth of Massachusetts
Department of Correction

Certificate of Achievement

awarded to:

DAGOBERTO SANCHEZ W-88481

for having successfully completed the 4- hour

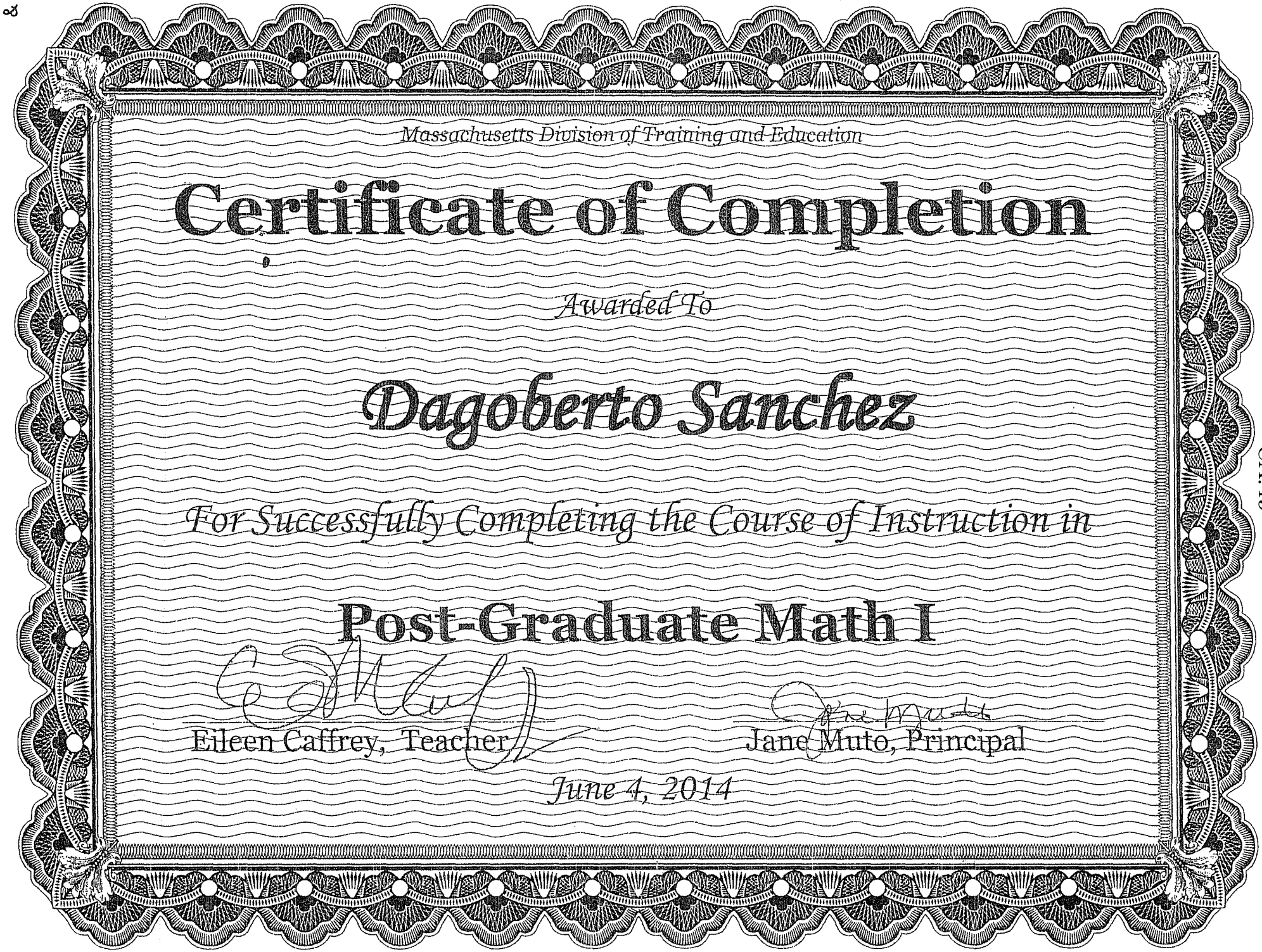
Setting Goals Workshop

attended on June 29 & July 6, 2011

Director of Treatment

Program Facilitator

July 6, 2011



Massachusetts Division of Training and Education

Certificate of Completion

Awarded To

Dagoberto Sanchez

For Successfully Completing the Course of Instruction in

Post-Graduate Math I

Eileen Caffrey, Teacher

Jane Muto, Principal

June 4, 2014

Certificate of Achievement

Awarded to

Dagoberto Sanchez

For participation in

Transforming Anger with Nonviolent Communication

This is a twelve-session program in communication and self-awareness that fosters the development of skills for making mindful choices which lead to new, life-serving behaviors. The class explores strategies for effectively dealing with intense emotions, especially anger, and lays the groundwork for developing a needs-based consciousness essential in transforming habits of criticism and blame into self-responsibility and compassionate communication. The program focuses on exploration of deeply-held core beliefs, discovering the true motivations behind our actions and words, and developing skills for honest self-expression that are more likely to lead to connection and understanding rather than conflict or violence. The course is based on the work of Marshall B. Rosenberg's book "Nonviolent Communication: A Language of Life".

Awarded April 19, 2016 at MCI - Concord, Concord, Massachusetts

(Director of Classification/Treatment)

Program Sponsored by Concord Prison Outreach

8

Certificate of Participation

Awarded to

Dagoberto Sanchez

for participation in

CONFLICT RESOLUTION AND NEGOTIATION
ETHNIC CONFLICT AND GENOCIDE IN POST-COLONIAL AFRICA

A one-day seminar led by Boston University Professor Carl Hobert, and supported by MCIC Education and Concord Prison Outreach, that used the Rwandan Genocide as a lens to study conflict and negotiation skills. The historical and political aspects of the conflict were examined as well as key figures in the affair. Participants were tasked with developing one of six characters involved in the conflict and assume their perspective about a given scenario. Using their character's point of view, participants took part in a role playing activity with other characters that simulated a negotiation session in an attempt to reach a resolution to the given problem. Discussion after the fact reflected on the conflict resolution process and how these skills can be applied in situations closer to home.

April 19, 2016

Carl Hobert
Professor Carl Hobert

MCI-Concord School Principal

CA 51

Certificate of Completion

A collaborative program of the Massachusetts Department of Correction & Spectrum Health Systems, Inc

This certificate is awarded to

Dagoberto Sanchez

for successfully completing the Correctional Recovery Academy

on this 1st *day of* February 2013

Because we know that our lives matter, that we can be greater than our circumstances, that we can return good for harm, we therefore humble ourselves to learning. Our graduation is a true commencement – let us begin anew.

Director of Treatment

CRA Supervisor

Correctional Recovery Academy

Modified Therapeutic Community

In Recognition of...

Dagoberto Sanchez

...as a Member of the Upper Structure

Certificate of Achievement

Awarded to

Dagoberto Sanchez

For participation in

Victim Impact Education

A twelve-session program in self-awareness and human choice. The class develops strategies for effectively dealing with emotions including anger, grief and shame. The class explores our deeply held beliefs and the root causes of offensive behavior, based on the book "Teens Who Hurt: Clinical Interventions to Break the Cycle of Adolescent Violence" by Ken Hardy and Tracey Laszloffy. It offers alternatives based in greater self-understanding and connection. It focuses on the impact of offensive behavior on victims, oneself and the community at large. This class considers the importance of accountability through the writing of Howard Zehr on restorative justice processes.

Awarded July 26, 2016 at MCI Concord, Massachusetts

Director of Classification/Treatment

Program Sponsored by Concord Prison Outreach

Commonwealth of Massachusetts
Department of Corrections

Certificate of Achievement
Awarded to

Dagoberto Sanchez

For having successfully completed the 4 hour

Cognitive Skills
Assertive Communication

Completed on 5/9/16

Program Facilitator

Director of Treatment

Program Facilitator

5/9/16
Date

8

Certificate of Achievement

Awarded to

Dagoberto Sanchez

For participation in and successful completion of the

Entrepreneurship Class

A twelve-session program in entrepreneurship. The class helped participants understand what it takes to establish a successful business. The primary focus of the class was to help students prepare a viable business plan, including setting short- and long-term goals. As part of this process, participants identified their personal and business strengths and weaknesses, considered opportunities/threats and determined how best to maximize their competitive advantages. The program emphasized the importance of market research and realistic budgeting. Participants also worked on their presentation skills, including preparing a compelling "elevator" pitch.

Awarded: April 11, 2016 at MCI - Concord, Concord, Massachusetts

Director of Classification/Treatment

Program Sponsored by Concord Prison Outreach

CA 56

Commonwealth of Massachusetts
Department of Corrections

Certificate of Achievement
Awarded to

Dagoberto Sanchez

For having successfully completed the 4 hour

Cognitive Skills
Active Listening Workshop

Completed on 4/4/16

Program Facilitator

Program Facilitator

Director of Treatment

Date

Certificate of Achievement

Awarded to

Dagoberto Sanchez

For participation in

BEACON

A twelve-session program in emotional literacy exploring human behavior and choice. The class develops strategies for effectively dealing with emotions, including anger, grief, shame and guilt. It explores forgiveness, taking responsibility, and self-understanding as paths to healing and changing behavior. It is based on the "Houses of Healing" curriculum of Robin Casarjian.

Awarded December 17, 2015 at MCI - Concord, Massachusetts

(Director of Classification/Treatment)

Program Sponsored by Concord Prison Outreach

&

CA.59

Certificate of Achievement

Awarded to

Dagoberto Sanchez

For Participation in

TURNING THE PAGES PROGRAM

Awarded May 27, 2015 at MCI Concord

Program Facilitator

Kimberley Lincoln, Director of Treatment

GED SM Official Transcript of GED Tests Results

Issued by
OFFICIAL GED TESTING CENTERS
of the
General Educational Development Testing Service of the American Council on Education
(For additional transcripts, contact the center below.)

Candidate's Name

Last: SANCHEZ First: DAGOBERTO Middle Initial:

Address: PO BOX 8000
SHIRLEY, MA 014640000

Phone Number:

Date of Birth: 10/28/1987 Social Security Number(if required): 027702799

Issue Date: 05/15/2007 Reported to: Massachusetts

Test Format: EP

Examiner's Signature Date 05-15-07

Center Name: Mass. Dept. of Corrections
Center Identification No.: 3000240038
Phone Number:
Center Address: Div. Of Inmate Training & Educ.-GED
PO Box 9103
Norfolk, MA 02056-9103

CA.60

	TEST DATE	TEST FORM	**STANDARD SCORE	PERCENTILE RANK
Language Arts, Reading	05/01/2007	IH	510	54
Language Arts, Writing	04/30/2007	IH	430	24
Mathematics	05/01/2007	IH	490	46
Science	05/01/2007	IH	610	86
Social Studies	05/01/2007	IH	470	38

INDIVIDUAL TEST STANDARD SCORE

200 Below 410 PASSING SCORE Above 800

		*PASS	*NON-PASS
Standard Score Total	2510		
Battery Average	502	X	

200 Below 450 BATTERY PASSING SCORE Above 800

** Standard Score. The scores on this report are the *highest* scores achieved by the candidate and not necessarily the most recent. If retest scores are lower than scores previously achieved, the retest scores are not reported.

*Pass or Non-Pass as determined by jurisdictional policy

TOTAL BATTERY

You have demonstrated the 21st century skills of:
-Communication
-Information processing
-Problem solving
-Higher order thinking skills
in the five tests areas (Reading, Writing, Mathematics, Science, and Social Studies) to perform effectively in the workplace or in higher education.

Language Arts, Reading

Your score meets or exceeds the GED passing score requirement. You demonstrated essential reading skills in the following areas: comprehending, analyzing, evaluating, and synthesizing workplace and literary texts.

Language Arts, Writing

Your score meets or exceeds the GED passing score requirement. You demonstrated essential skills in the following areas: using the elements of standard English to edit workplace and informational documents and to generate well-organized and developed written text.

Mathematics

Your score meets or exceeds the GED passing score requirement. You demonstrated essential skills in the following areas: understanding and interpreting mathematical concepts in algebra, data analysis, statistics, geometry, and number operations applied to visual and written text from academic and workplace contexts.

Science

Your score exceeds the GED passing score requirement and the scores of 80% of graduating seniors. You demonstrated superior skill in the following areas: understanding, interpreting, and applying concepts of life, earth and space sciences, physics, and chemistry to visual and written text from academic and workplace contexts.

Social Studies

Your score meets or exceeds the GED passing score requirement. You demonstrated essential skills in the following areas: understanding, interpreting, and applying key history, geography, economics, and civics concepts and principles to visual and written text from academic and workplace contexts.

8

COMMONWEALTH OF MASSACHUSETTS

S.B.C.C. EDUCATION DEPARTMENT

This Certifies That

Dagoberto Sanchez

Has successfully completed the Requirements for a

G.E.D.

And in testimony of his achievement is awarded this certificate on this eleventh Day in June, in the year of our Lord two thousand and seven

Instructor

Principal

CA 19

8

CERTIFICATE OF COMPLETION

Awarded to

Dagoberto Sanchez

For completing
the Health Awareness Peer Education Program

May 2014

HIV/AIDS Program Coordinator

HIV/AIDS Test Counselor/Educator

Certificate

Workshops For Training In Nonviolence
Alternatives to Violence Project
An International Project Initiated in New England by

The Religious Society of Friends (Quakers)

This is to certify that

Diego Sanchez (W88481)

has satisfactorily completed the First Level Course in Nonviolent Conflict Resolution

Trainers

December 19, 2010
Date

CA 93

8

Certificate

Workshops For Training In Nonviolence

Alternatives to Violence Project

An International Project Initiated in New England by

The Religious Society of Friends (Quakers)

This is to certify that

Dagoberto Sanchez

has satisfactorily completed the Trainers Course in
Nonviolent Conflict Resolution

Bonnie Morton, Susan Gruber — 10/21/12

Trainers — Date

LITHO. IN U.S.A.

CA.64

Certificate

Workshops for Training in Nonviolence

Alternatives to Violence Project / Massachusetts

Awards this Certificate to

Dagoberto Sanchez

Who has satisfactorily completed the ~~Advanced~~ Course in

Nonviolent Conflict Resolution

Christl Ferguson — Facilitators

Sept 2 2012 — Date

Certificate

Workshops For Training In Nonviolence
Alternatives to Violence Project
An International Project Initiated in New England by

The Religious Society of Friends (Quakers)

This is to certify that

Dagoberto Sanchez

has been trained as a facilitator for Alternatives to Violence Workshops

Trainers

May 26, 2013
Date

8

Certificate of Completion

Massachusetts Department of Correction
Souza-Baranowski Correctional Center

SPECTRUM
Health Systems

This is to certify that

Dagoberto Sanchez

has successfully completed the 12 week program

Violence Reduction

On this 9th Day of *September 2011*

Director of Treatment

Program Supervisor

Certificate

Workshops For Training In Nonviolence
Alternatives to Violence Project

An International Project Initiated in New England by

The Religious Society of Friends (Quakers)

This is to certify that

Dago Sanchez W88481

has satisfactorily completed the Basic Course in Nonviolent Conflict Resolution

Trainers

December 19, 2010

Date

The Jericho Circle Project

at

MCI-Norfolk (MA-D.O.C.)

Certificate of Completion

Presented to

Dagoberto Sanchez

For active participation and support of the
Jericho Circle Project Men's Integrity Circle
July 17, 2012 – September 4, 2012

witness and certification whereof

Sherry Elliott
Acting Director of Treatment
MCI-Norfolk

Larry Cotton
Program Coordinator
Jericho Circle Project, Inc.

The Jericho Circle Project

at

MCI-Norfolk (MA-D.O.C.)

Certificate of Completion

Presented to

Dagoberto Sanchez

For active participation and support of the
Jericho Circle Project Intensive Training
September 29-30, 2012

witness and certification whereof

Sherry Elliott
Director of Treatment, MCI-Norfolk

Steven Spitzer
President, Jericho Circle Project, Inc.

8

COMMONWEALTH OF MASSACHUSETTS

VOCATIONAL EDUCATION

CERTIFICATION OF COMPLETION

AWARDED ON JUNE 23, 2014

DAGOBERTO SANCHEZ

FOR COMPUTER SKILLS CLASS

INTRODUCTION TO COMPUTERS, MICROSOFT WORD, MICROSOFT POWERPOINT

Richard Leighton
INSTRUCTOR

EXH 11

8

Certificate of Completion

Massachusetts Department of Correction

Souza Baranowski Correctional Center

SPECTRUM

Health Systems

This is to certify that

DAGOBERTO SANCHEZ

has successfully completed the 12-week program

Criminal Thinking

On this 16th day of JUNE, 2011

Director of Treatment

Program Supervisor

CA.72

Prison Mindfulness Institute

Path of Freedom

A Certificate of Completion for the Path of Freedom Class

Is Awarded To

Dagoberto Sanchez

Path of Freedom Facilitator

&

Certificate of Participation

A collaborative program of the Massachusetts Department of Correction & Spectrum Health Systems, Inc

This certificate is awarded to

Dagoberto Sanchez

for attending the ***Graduate Maintenance Program***

12-3-15 — 12-22-16

Because we know that our lives matter, that we can be greater than our circumstances, that we can return good for harm, we therefore humble ourselves to learning.

Director of Treatment

Program Counselor

8

Cognitive Behavior Therapy

Certificate of Completion

is hereby granted to

Dagoberto Sanchez

Name

MCI-Concord

Facility

for completion of the Cognitive Behavior Therapy

10/31/16

Date

K Basile, LCSW

Mental Health Professional

Certificate of Achievement

Awarded to

Dagoberto Sanchez

For participation in

Cognitive Skills – Assertive Communication

This is a two-session program in Assertive Communication. Assertive communication involves taking responsibility for a direct and honest talk. There is a decision to respect personal needs and the rights of others. Acting assertively, and not aggressively, can develop self-worth. Assertive Communication can include being open in expressing wishes, thoughts and feelings. This way of communicating can bring a greater response and increased respect from others both while incarcerated and in the outside community.

Awarded November 14, 2016 at MCI Concord, Massachusetts

(Director of Classification/Treatment)

Program Sponsored by Concord Prison Outreach

8

Certificate of Completion

Presented to:

Dagoberto Sanchez

on this 23rd day of May 2017

This certificate certifies completion of the
Anger Management Group
provided by Mental Health Services at MCI-Concord.

Eileen English LMHC
Group Facilitator

CA.77

American Community Corrections Institute

CERTIFIES THAT

Dagoberto Sanchez

has successfully completed the

ACCI *Anger Management Cognitive Lifeskills Course*

Agency: MCI Concord

Inmate Number: W88481

Completion Date: 3/3/2017

Authorized Signature: Taylor Bishop

AMERICAN COMMUNITY ACCI LIFESKILLS CORRECTIONS INSTITUTE

Massachusetts Department of Correction

Personalized Program Plan

This report printed on : 20170228 14:52:47

Commit #	Name	Institution	Commit Date	ERD
W88481	SANCHEZ DAGOBERTO	MCI CONCORD	20061012	

Risk Assessments

Assessment Type	Assessment Date	Risk of Violence	Risk of Recidivism
Standing Population Risk Assessment	20100504	Low	Medium

Assessment Type	Assessment Date	Substance Abuse	Criminal Thinking	Anger	Cognitive Behavioral	Vocational/ Education	MA Sex Offender
Standing Population Need Assessment	20100510	Low	Low	Low	High	High	No

Recommendations

Need Area	Program Name	Recommended Date	Outcome	Outcome Date	Transferred Date to Inst
Academic Education/Vocational	IT Essentials	20161114	Enrolled	20161201	
	Barber Training	20151102	Program Not Available	20151109	
	IT Essentials	20141104	Ineligible	20140928	
	Barber Training	20140924	Accepted	20140926	
	Computer Skills I	20130102	Completed Program	20140619	
	*Life Skills-Advanced Math	20131107	Completed Program	20140529	
	*Life Skills-Book Discussion	20140207	Accepted	20140207	
	*Commercial Drivers License	20131107	Accepted	20131107	
	Barber Training	20120425	Accepted	20120427	
	Culinary Arts: Foundations I	20120313	Inmate Declined	20120427	
	Computer Skills I	20111005	Accepted	20111005	
	Title 1	20150514	Completed Program	20070614	
	*GED	20120427	*Completed Program with earned GED	20070515	
Anger	Violence Reduction-Male	20110817	Completed Program	20110908	
Cognitive Behavioral	General Population Maintenance Program	20160801	Accepted	20160801	
	Thinking for a Change-Cognitive	20140924	Program Not Available	20140924	

Massachusetts Department of Correction

Personalized Program Plan

This report printed on : 20170228 14:52:47

	Thinking for a Change-Cognitive	20110818	Program Not Available	20110818
Criminal Thinking Self Report/Observation	Criminal Thinking	20110921	Completed Program	20110617
Low Risk - Alternative	Cog. Skills- Prob Solving	20161122	Enrolled	20161122
	Cog. Skills- Assertive Comm	20161018	Completed Program	20161118
	Victim Impact Education Program	20160503	Completed Program	20160728
	Cog. Skills- Assertive Comm	20160426	Completed Program	20160509
	Cog. Skills- Active Listening	20160324	Completed Program	20160411
	Entrepreneurship 101	20160113	Completed Program	20160411
	Transforming Anger with Non Violent Communication	20160115	Enrolled	20160120
	Beacon Program	20150304	Completed Program	20151217
	Toastmasters	20150408	Inmate Declined	20151009
	Writing for Results	20150513	Incomplete	20150716
	Creative Writing	20150610	Accepted	20150610
	Turning the Pages	20150408	Completed Program	20150527
	Math Skills	20150324	Accepted	20150324
	Transforming Anger with Non Violent Communication	20150309	Accepted	20150309
	Fatherhood Project	20150304	Accepted	20150304
	Cog. Skills- Active Listening	20150304	Accepted	20150304
	Book Discussion and Dialog	20141215	Accepted	20150303
	Leadership and Transformational Thinking	20141211	Accepted	20150303
	Basic Computer Skills	20141015	Accepted	20150303
	Able Minds	20141024	Accepted	20150303
	Path of Freedom	20140123	Incomplete	20150112
	Path of Freedom	20150112	Completed Program	20150112
	Practical Writing Skills for World Work	20140930	Incomplete	20141231

Massachusetts Department of Correction

Personalized Program Plan

This report printed on : 20170228 14:52:47

	Money Management	20140926	Accepted	20140926
	Health Awareness	20120425	Completed Program	20140528
	Toastmasters	20140822	Completed Program	20140417
	Altern to Viol Trainers	20150514	Completed Program	20130728
	Altern to Viol Trainers	20130814	Completed Program	20130728
	Altern to Viol Basic	20150514	Completed Program	20121219
	Jericho Circle Project	20150514	Completed Program	20120929
	Jericho Circle	20120313	Completed Program	20120904
	Altern to Viol Advance	20150514	Completed Program	20120902
	Emotional Awarenes	20120313	Accepted	20120426
	Able Minds	20120313	Accepted	20120426
	Motivational Enhancement Program	20110921	Completed Program	20110322
	Alternatives to Violence	20120822	Completed Program	20101219
MA Sex Offender	Not Considered a need area for this offender, no recommendation required			
Substance Abuse	Graduate Maintenance Program	20150710	Completed Program	20161229
	CRA	20120524	Completed Program	20130201
	TCUD Assessment	20160224	Completed Program	20120725
	Relapse Prevention	20110921	Completed Program	20110128

CA.81

The Commonwealth of Massachusetts
Executive Office of Public Safety & Security
Department of Correction
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Charles D. Baker
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Michael G. Grant
Deputy Commissioners

July 23, 2015

Dagoberto Sanchez, W88481
MCI-Concord
965 Elm St.
Concord, MA 01742

Dear Mr. Sanchez:

I am pleased to inform you that your willingness to disassociate your membership as a Security Threat Group (Bloods) member has been accepted. However, you are advised that if at any time you continue any Security Threat Group behavior, your disassociation will be suspended for a minimum of one year and that all Security Threat Group disciplinary infractions will be subject to enhanced sanctions.

Sincerely,

Thomas E. Dickhaut, Deputy Commissioner
Prison Division

cc: Patrick T. DePalo, Jr., Chief, Office of Investigative Services
Lois Russo, Acting Superintendent, MCI-Concord
File

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Dagoberto Sanchez
Student

MCI Concord
Academy Name

United States
Location

Thomas Romaniecki
Instructor

Sep 29, 2017
Date

Instructor Signature

CRTR2709-CR

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CRIMINAL
Docket Report

0584CR10545 Commonwealth v Sanchez, Dagoberto

CASE TYPE:	Indictment	**FILE DATE:**	08/05/2005
ACTION CODE:	265/1-0	**CASE TRACK:**	C - Most Complex
DESCRIPTION:	MURDER c265 §1		
CASE DISPOSITION DATE	10/06/2006	**CASE STATUS:**	Open
CASE DISPOSITION:	Disposed by Jury Verdict	**STATUS DATE:**	08/05/2005
CASE JUDGE:		**CASE SESSION:**	Criminal 2

LINKED CASE

DCM TRACK

Tickler Description	Due Date	Completion Date
Pre-Trial Hearing	08/16/2005	07/14/2011
Final Pre-Trial Conference	07/25/2006	07/14/2011
Case Disposition	08/14/2006	07/14/2011

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Other interested party
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CONVERSION, MA

Other interested party
Rouse, Honorable Barbara J
Chief Justice
Suffolk Superior Criminal Court

CONVERSION, MA

No.

IN THE
Supreme Court of the United States

AHMAD BRIGHT,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

On Petition for a Writ of Certiorari
to the Massachusetts Appeals Court

PETITION FOR A WRIT OF CERTIORARI

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October 28, 2016

QUESTIONS PRESENTED

In *Miller v. Alabama*, this Court held that "when a juvenile confronts a sentence of life (and death) in prison," the sentencing judge must have the opportunity to consider the child's "age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"—and "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him." 132 S. Ct. 2455, 2468 (2012).

Petitioner Ahmad Bright was convicted of second-degree murder as a joint venturer. Although Bright was only 16 years old at the time of the offense, he was automatically tried as an adult, and the sentencing judge had no opportunity to consider Bright's age, his participation in the crime, or how familial or peer pressures may have affected him before imposing a mandatory life sentence with the possibility that the State executive branch's parole board could, in its discretion, grant early release after 15 years.

The questions presented are:

1. Whether the Eighth Amendment's requirement of individualized sentencing for a child who confronts a sentence of life in prison is satisfied by the possibility that a future parole board may exercise its discretion to release him early.

2. Whether the imposition of a mandatory life sentence on a child convicted on a joint venture theory, without any individualized sentencing consideration, violates the Eighth Amendment's prohibition of cruel and unusual punishment.

PARTIES TO THE PROCEEDING

Petitioner is Ahmad Bright, defendant-appellant below.

Respondent is the Commonwealth of Massachusetts, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ahmad Bright respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Appeals Court.

OPINIONS BELOW

The decision of the Massachusetts Appeals Court (Pet. App. 1a-5a) is unreported but is available at 2016 WL 1295044. The Massachusetts Superior Court's order denying petitioner's motion for resentencing (Pet. App. 6a-14a) is unreported.

JURISDICTION

The judgment of the Massachusetts Appeals Court denying petitioner's motion for resentencing was entered on April 4, 2016. On June 30, 2016, the Massachusetts Supreme Judicial Court ("Massachusetts SJC") denied petitioner's timely application for further appellate review. Pet. App. 15a-16a. On August 30, 2016, Justice Breyer extended the time for filing this petition for certiorari to and including October 28, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Eighth Amendment to the U.S. Constitution; Mass. Gen. Laws ch. 119, §§ 72B, 74; Mass. Gen. Laws ch. 265, § 2; and Mass. Gen. Laws ch. 279, § 24 are reprinted in the Appendix, *infra*, at 67a-72a.

INTRODUCTION

This case concerns the constitutionality of a mandatory sentencing regime under which a child who participated in a shooting that was committed by a co-defendant was automatically sentenced to spend the rest of his life in prison unless a future parole board grants discretionary early release.

Petitioner Ahmad Bright was a 16-year-old boy when he got caught up in a feud between adult drug dealers, one of whom was his older brother, that resulted in the shooting and death of Corey Davis. After being convicted of second-degree homicide as a joint venturer, Bright was never afforded any consideration of his age, the nature of his involvement in the crime, the extent to which peer and familial pressure might have affected his actions, or any other age-attendant factors before he received an automatic life sentence with the future possibility of parole. Individualized sentencing consideration is critical for children like Bright because, as this Court stated in *Miller v. Alabama*, children are vulnerable to "negative influences and outside pressures, including from their family and peers; they have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." 132 S. Ct. 2455, 2464 (2012) (alteration in original) (quotation marks omitted). This case is a perfect example of why such a sentencing regime is inconsistent with the Court's reasoning in *Miller* and violates the Eighth Amendment.

This Court has not previously confronted this issue, although it recently assumed in *Montgomery v. Louisiana* that the opportunity for parole would ad-

dress the concerns that animated *Miller*'s individualized-sentencing requirement. 136 S. Ct. 718, 736 (2016). But the Court's statements regarding parole were made without the benefit of briefing on the role and reality of the parole system, including that (a) parole falls within the province of the executive branch, and parole boards (and parole rates) are highly susceptible to political pressure; (b) parole boards make decisions based on the risk of recidivism and the welfare of the community and not based on the offender's culpability or proportionality principles under the Eighth Amendment; (c) parole decisions are entirely discretionary and insulated from judicial review; and (d) a juvenile offender serving a life sentence has no expectation of early release. This Court should grant review to squarely consider this important issue. And it should do so *now* to resolve the confusion that has resulted from *Miller* and *Montgomery* as States struggle to conform their sentencing laws consistent with the Eighth Amendment.

STATEMENT

A. Bright Was A Good Child With No Criminal History And A Promising Future.

On June 28, 2006, Ahmad Bright returned from a trip to visit Emory University and Morehouse College and voluntarily surrendered to face charges for the murder of Corey Davis. Mass. Appeals Ct. App. 64-65, 75.[1] Bright was just 16 years old and had never had a run-in with the law. *Id.* at 69.

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[1] No. 2014-P-0546.

Bright was known as a kind and shy boy who had overcome adversity to become a promising student and accomplished athlete. Bright's father, who suffered from substance abuse and physical disabilities, abandoned Bright at a young age. Bright's older brother, Sherrod, was involved in drug trafficking and moved out when Bright was 8 years old. Mass. Appeals Ct. App. 61, 68. Bright's family had limited financial means; at one point during his sophomore year, Bright and his mother shared a bedroom at his grandmother's house.

Notwithstanding these challenges, Bright excelled academically and athletically. He earned a full scholarship to attend Cambridge Friends School, a Quaker primary school in Cambridge, Massachusetts. Mass. Appeals Ct. App. 69. He then earned a full scholarship to Cambridge's Buckingham, Browne & Nichols School, which he attended while living with his mother in Dorchester. *Id.* at 60-61, 69. Bright was challenged by the academic demands there; he struggled early on but was focused on improvement in preparation for college applications and had earned his highest grades during the semester before his arrest. *Id.* at 72-73.

Bright was also a disciplined athlete. When he was 6 years old, Bright picked up tennis at a free after-school program, and he went on to compete nationally. Mass. Appeals Ct. App. 70, 72. Before his arrest, Bright had lined up a summer job teaching at a children's tennis camp. *Id.* at 75.

Bright was not a troublemaker. As the numerous letters in support of his request for release on bail demonstrated, Bright was a kind, respectful, and

ambitious child who had a bright future ahead of him when he got caught up in a feud between adults.

B. Bright Became Involved In A Feud Between Adult Drug Dealers.

On the night of March 18, 2006, a drug dealer named Corey "Gunner" Davis was shot and killed by 21-year-old Remel Ahart at the purported direction of petitioner's 23-year-old brother, Sherrod, because Davis had allegedly stolen money from Sherrod. *Commonwealth v. Bright*, 974 N.E.2d 1092, 1097-98 (Mass. 2012). Unlike petitioner, Sherrod and Ahart were adults with criminal records who were involved in drug trafficking. Mass. Appeals Ct. App. 68, 107; *Bright*, 974 N.E.2d at 1097. The other individual involved was James Miller, a 23-year-old convicted felon and aspiring drug dealer whom Ahart had befriended in jail; the two had been released only weeks earlier. Mass. Appeals Ct. App. 43-44, 104, 107; 2/18/09 Tr. 8. Miller was the initial murder suspect. *Id.* at 101-02. He was arrested after fleeing to Virginia but, after cooperating with police and testifying against Bright and Ahart, was not charged for the murder. *Id.* at 34-36.

The jury heard conflicting testimony about Bright's participation in Davis's death. The only witness to the shooting, Davis's cousin, testified that a second unidentified individual was at the scene and pointed a gun at him but did not fire it. Mass. SJC App. 36.[2] Miller was the only witness who placed Bright at the scene of the crime. Through wildly varying and contradictory testimony, Miller said that Bright was the unidentified second individ-

[2] FAR-24324.

ual but froze and did not shoot; that Bright drove the vehicle on the night of the shooting; and that Bright helped to procure a weapon from Sherrod on the night of the shooting. *Id.* at 49-50; 2/18/09 Tr. 22-32, 36-37, 55.

C. Bright Was Convicted As A Joint Venturer And Given A Mandatory Life Sentence.

Although he was only 16 when Davis was killed, Bright was automatically transferred to adult court. Mass. Gen. Laws ch. 119, § 74. At trial, the Commonwealth did not allege that Bright killed Davis. Instead, it prosecuted him as a joint venturer.[3] The jury was instructed that Bright could be found guilty of murder if it found that he "aided or assisted the commission of the murder, or that by agreement he was willing and available to assist Ahart in carrying out the murder if necessary." Pet. App. 47a-48a.

After deliberating for seven days, the jury found Bright guilty of (1) second-degree murder as a joint venturer;[4] (2) unlawful possession of a firearm; and (3) assault by means of a dangerous weapon as a joint venturer. Pet. App. 63a-66a. It did not find Bright guilty of first-degree murder, armed assault with intent to murder (as a principal or joint venturer), or assault by means of a dangerous weapon as a

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[3] A joint venturer is equivalent to an aider/abetter. *See generally Commonwealth v. Zanetti*, 910 N.E.2d 869 (Mass. 2009).

[4] "Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree." Mass. Gen. Laws ch. 265, § 1.

principal. *Id.* Furthermore, the fact that Bright was not convicted of assault as a principal means that the jury could not have found that Bright was the second unidentified individual who pointed a gun at Troy Davis but did not fire it, as the Commonwealth had alleged. *See* Pet. App. 54a (instructing jury that it could find Bright guilty as a principal if the Commonwealth proved that "Mr. Bright himself" "attempted to commit a battery" or "engaged in conduct which would put a reasonable person in fear of immediate bodily harm").

Under Massachusetts law, the trial judge had no discretion over Bright's sentence.[5] The judge said, "[T]his is a sentencing which, on one level, there isn't much for the Judge to say. By law, the sentence for murder in the second degree is life in prison, with eligibility for parole after 15 years." Mass. Appeals Ct. App. 175. Thus, the judge was not able to consider Bright's age, the nature of the crime, the nature of Bright's participation in the crime, or whether peer and familial pressures from the other adults involved in the shooting may have affected Bright's conduct.

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[5] In Massachusetts, everyone convicted of second-degree murder is automatically sentenced to life in prison with the possibility of parole. Mass. Gen. Laws ch. 265, § 2. Juvenile offenders are parole eligible after 15 years, and sentencing judges have discretion to set adult parole eligibility between 15 and 25 years. Mass. Gen. Laws ch. 279, § 24; Mass. Gen. Laws ch. 119, § 72B. All juveniles convicted of first-degree murder are automatically sentenced to life in prison with parole eligibility between 20 and 30 years. Mass. Gen. Laws ch. 279, § 24.

D. Bright Moved For Resentencing In Light Of *Miller v. Alabama*.

Following this Court's decision in *Miller v. Alabama*, Bright submitted a motion for resentencing. Among other things, he argued that Massachusetts' mandatory life-sentencing provisions violate the Eighth and Fourteenth Amendments to the U.S. Constitution. He also argued that the theoretical availability of discretionary parole does not cure these constitutional defects.

The trial court denied Mr. Bright's motion, and the Massachusetts Appeals Court affirmed. The court of appeals held that the "unconstitutional aspect" of a life sentence "is its irrevocability" through the absence of the possibility of parole. Pet. App. 4a. Citing *Miller* and *Commonwealth v. Okoro*, 26 N.E.3d 1092 (Mass. 2015)—which rejected the argument that a mandatory life sentence with parole eligibility for a juvenile offender violates the Eighth Amendment—the court of appeals stated that Bright's arguments should be "addressed to those courts whose precepts we are bound to follow." Pet. App. 5a. The Massachusetts SJC denied further appellate review.

REASONS FOR GRANTING THE PETITION

This Court has long recognized that "children are different" when it comes to Eighth Amendment proportionate sentencing requirements. The Court most recently applied that principle to prohibit mandatory sentences of life without parole for juvenile offenders, *Miller*, 132 S. Ct. at 2469, and noted that the instances in which a juvenile offender should serve an entire life sentence should be extremely rare, *Montgomery*, 136 S. Ct. at 734. This Court should grant

certiorari to determine whether, given the role and reality of parole boards, this principle should likewise prohibit mandatory life sentences with parole eligibility after a term of years—*i.e.*, statutes requiring every child convicted of particular offenses to be sentenced to spend the rest of his life in prison unless the State's executive branch elects to release him through discretionary parole.

At the very least, this Court should grant certiorari to determine whether a mandatory sentencing scheme that requires a child convicted as a joint venturer to receive the exact same mandatory life sentence as someone convicted as a principal violates the Eighth Amendment's requirement that punishment be "proportioned to both the offender and the offense." *Miller*, 132 S. Ct. at 2463 (quotation marks omitted).

I. This Court Should Grant Certiorari To Determine Whether The Eighth Amendment Permits A Child To Be Sentenced To A Mandatory Life Sentence, With The Mere Possibility Of Discretionary Parole.

In *Miller*, this Court recognized that children who commit crimes, even very serious crimes, are less culpable than adults. 132 S. Ct. at 2463-64. The Court held that a sentencing judge must have the opportunity to consider a juvenile defendant's youth and its attendant circumstances before "imposing a State's harshest penalties." *Id.* at 2468. The Court's reasoning applies fully to Massachusetts' mandatory life-sentencing scheme for children convicted of homicide, and the possibility that a State's executive

branch may grant discretionary early release is not an adequate substitute for individualized consideration by a sentencing judge.

A. A Mandatory Life Sentence For A Juvenile Offender Is Inconsistent With This Court's Precepts, Irrespective of the Possibility of Discretionary Parole.

Bright's mandatory life sentence is inconsistent with this Court's determination in *Miller* that the State cannot impose its harshest penalties on children without affording the sentencer the opportunity to conduct an individualized sentencing analysis.

1. This Court has repeatedly recognized that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464; *accord Graham v. Florida*, 560 U.S. 48, 68 (2010); *Roper v. Simmons*, 543 U.S. 551, 569-70, 572-73 (2005). As "any parent knows," and "developments in psychology and brain science continue to show," there are "fundamental differences between juvenile and adult minds." *Miller*, 132 S. Ct. at 2464 (quoting *Roper* and *Graham*).

First, children have a "proclivity for risk, and inability to assess consequences" due to a "lack of maturity and an underdeveloped sense of responsibility." *Miller*, 132 S. Ct. at 2464-65 (quoting *Roper*, 543 U.S. at 569); *see also Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) ("The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."). Second, children are far more vulnerable to "negative influences and outside pressures, including

from their family and peers;" they have a limited ability to control "their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 132 S. Ct. at 2464 (quotation mark omitted). Third, a child's immaturity is "transient," *id.* at 2469; his "character is not as 'well formed' as an adult's" and "his traits are 'less fixed.'" *Id.* at 2464 (quoting *Roper*, 543 U.S. at 570).

Because of these differences, "a sentencing rule permissible for adults may not be so for children." *Miller*, 132 S. Ct. at 2470. Children cannot be subjected to the harshest sentences in the same way that adults can, because children are inherently less culpable than adults. *See id.* at 2463 (sentencing cases "have specially focused on juvenile offenders, because of their lesser culpability"); *Graham*, 560 U.S. at 92 (Roberts, J., concurring) ("[H]is lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing noted by the majority, all suggest that he was markedly less culpable than a typical adult who commits the same offenses." (citation omitted)).[6]

This Court has applied these principles in the sentencing context for decades. In *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), and *Johnson v. Texas*, 509 U.S. 350, 367 (1993), this Court held that in a capital case, the sentencer must be permitted to consider the mitigating qualities of youth. A few years

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[6] The Court's acknowledgment in *Miller* that "children are different" is not unique to sentencing; it reflects a broader understanding that "children cannot be viewed simply as miniature adults" and our justice system must account for that reality. *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011); *see id.* at 272-77 (providing examples).

after *Eddings*, a plurality held that the Constitution prohibits the execution of a person younger than 16 at the time of the offense, *Thompson*, 487 U.S. at 838, and in *Roper*, this Court held that "[t]he logic of *Thompson* extends to those who are under 18," 543 U.S. at 574. In *Graham*, the Court extended this principle to the non-capital context, holding that the Eighth Amendment prohibits children who commit non-homicide crimes from being sentenced to life without parole. 560 U.S. at 69-74.

Relying on its reasoning in *Roper* and *Graham*, this Court recognized in *Miller* that even where the Eighth Amendment does not categorically forbid the State from imposing a certain sentence on *any* child (as in *Roper* and *Graham*), it may still limit the State from automatically imposing "the most severe punishments" on *every* child convicted of a particular offense. Thus, in *Miller*, this Court held that a child who "confronts a sentence of life (and death) in prison" must receive an individualized sentencing determination that permits the sentencer to consider the child's age and the "wealth of characteristics and circumstances attendant to it," such as whether the child was from a stable or chaotic household, was a shooter or an accomplice, or was affected by peer or familial pressure. *Id.* at 2467-68. Unless the sentencer has the ability and opportunity to "examine all of these circumstances" to determine whether the harshest penalty available is appropriate for the defendant, there is simply "too great a risk of disproportionate punishment." *Id.* at 2469.

This Court further clarified in *Montgomery* that *Miller* did not simply prescribe procedural protections for children but rather "announced a substan-

tive rule of constitutional law" and must be applied retroactively. 136 S. Ct. at 734. *Montgomery* also made clear that penological justifications almost never justify an individual spending his life in prison for a crime he committed as a child. *See id.* at 726 ("[A] lifetime in prison is a disproportionate sentence for all but the rarest of children ....").

2. At sentencing, although Bright was "confront[ing] a sentence of life (and death) in prison," *Miller*, 132 S. Ct. at 2468, the sentencing judge could not not consider Bright's age, his lack of criminal history, the level of his participation as a non-shooting joint venturer, the adversity that characterized his childhood, the probable effects of peer and familial pressure from the adults who participated in the crime, whether his age made it difficult for him to "extricate" himself from a "crime-producing" situation, or any other circumstances that could have shed light on whether a life sentence was appropriate. As the Court noted in *Miller*, this scheme "misses too much":

> [E]very juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile ... will receive the same sentence as the vast majority of adults committing similar homicide offenses ....

Id. at 2467-68.

The same concerns are present here. Bright had no criminal record and was a scholarship student and accomplished tennis player with a bright future;

he worked hard to overcome the drug dealing and criminal lifestyle that typified the lives of his peers in Dorchester—including his older brother. Yet under Massachusetts' sentencing scheme, he automatically will serve the same sentence as every other child convicted of second-degree murder—even those who, unlike Bright, are repeat offenders with long rap sheets who commit the most heinous offenses alone and not at the behest of adults. Indeed, Bright will serve the same sentence as many adults who commit similar crimes and other juveniles who commit *first-degree* murder. *See supra* note 5.

At no instance was Bright's youth *ever* taken into account—not when he was transferred to stand trial as an adult, and not when he was sentenced. Just like the sentence at issue in *Miller*, Massachusetts' mandatory sentencing scheme, which "mak[es] youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence"— life with the possibility of discretionary parole—"poses too great a risk of disproportionate punishment." 132 S. Ct. at 2469.

B. The Future Possibility Of Discretionary Parole Is Not An Adequate Substitute For Individualized Sentencing.

The Massachusetts SJC has narrowly cabined *Miller* to apply only to sentences of life without parole and held that the opportunity for a parole board to consider the unique characteristics of children provides all the protection that the Eighth Amendment requires. But this interpretation is inconsistent with the core reasoning of *Miller*. Moreover, there are many reasons why parole does not and cannot serve

as an Eighth Amendment backstop. This Court should grant certiorari to squarely consider whether the State may mandate that every child convicted of certain crimes be sentenced to spend his life in prison unless a parole board exercises its discretion to release him early.

1. The Massachusetts Appeals Court held that Bright's sentence did not implicate *Miller* because the Massachusetts SJC "has construed *Miller* and its consideration of individualized sentencing to be limited to the question whether a juvenile homicide offender can be subjected to a mandatory sentence of life in prison without parole eligibility." Pet. App. 3a (quoting *Okoro*, 26 N.E.3d at 1097). In *Okoro*, the court repeatedly noted that this Court's reasoning in *Miller* reached beyond the life-without-parole context to sentences like Bright's. 26 N.E. 2d at 1097 ("We agree with the defendant that certain language in *Miller* can be read to suggest that individualized sentencing is required whenever juvenile homicide offenders are facing a sentence of life in prison."); *id.* at 1099 ("*Miller* contains language suggesting that the requirement of individualized sentences for juveniles may extend beyond sentences of life without parole ...."). It concluded, however, that "*Miller*'s actual holding was narrow and specifically tailored to the cases before the Court," and thus declined to extend the Court's reasoning beyond life without parole. *Id.* at 1097. It concluded that the Eighth Amendment was satisfied by a mandatory life-sentencing scheme in which a future parole board could "take into account 'the unique characteristics' of [children] that make them constitutionally distinct from adults" and afford the opportunity for early re-

lease "based on demonstrated maturity and rehabilitation." *Id.* at 1098 (quotation mark omitted).

But this Court has repeatedly rejected States' attempts to restrictively read its precedents that afford additional protections for juvenile offenders. Indeed, *Miller* itself recognized that the principle that "children are constitutionally different from adults for sentencing purposes" was not unique to the specific crimes or sentences at issue in *Graham* or *Roper;* instead, those cases more broadly established that "children are less deserving of the most severe punishments." 132 S. Ct. at 2464; *see id.* at 2466 ("*Graham*'s (and also *Roper*'s) foundational principal [is] that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.").

It can hardly be disputed that a life sentence, even with the potential for future discretionary parole, is one of the "most severe penalties" imposed. A 16-year-old child—who has been able to read and write for only a decade, has never lived on his own, and is not legally permitted to drink or vote or join the military—confronting such a sentence may never see his family or friends outside of prison, go on a date, have children, enjoy a celebratory dinner, or travel to another city absent a prison transfer. Indeed, the presumption is that none of these things will ever happen unless the executive branch makes the entirely discretionary decision to release him early. *See infra* pp. 23-24.

Indeed, in Massachusetts, as elsewhere, a life sentence with parole eligibility is "the most severe punishment[]" imposed on any child, and the most severe punishment imposed on any person convicted of sec-

ond-degree homicide. Imposing the same sentence on all such individuals, irrespective of their age and age-attendant characteristics, the nature of the crime, or their participation therein cannot be squared with this Court's statement that "children are constitutionally different for sentencing purposes" when that sentence could confine the child in prison forever. And, as discussed below, the realities of the parole system make parole an inadequate Eighth Amendment safeguard for the individualized sentencing that *Miller* requires.

2. By making youth and its attendant circumstances irrelevant to the imposition of a severe sentence, a mandatory sentencing scheme "poses too great a risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469. Parole does not and cannot ameliorate this risk.

First, unlike judges, who are neutral decisionmakers bound to safeguard the constitutional rights of children who come before them, parole boards are highly susceptible to political pressure. The Massachusetts Parole Board is, like most boards, part of the executive branch—the branch responsible for prosecuting defendants and pursuing lengthy prison sentences. *See Diatchenko v. Dist. Attorney for Suffolk Dist.*, 27 N.E.3d 349,369 (Mass. 2015) ("Parole is an executive action separate and distinct from a judicial sentence."); *id.* at 364 ("[T]he power to grant parole, being fundamentally related to the execution of a prisoner's sentence, lies exclusively within the province of the executive branch."). Parole board members are appointed by the governor, 120 Mass. Code Regs. 101.01, and external political dynamics can play a major role in determining who (if anyone)

is released on parole. Indeed, the American Law Institute ("ALI") recently observed when revising the Model Penal Code, "The American history of parole boards as releasing authorities has been bleak ... and in recent years parole boards have proven highly susceptible to political influences," where "a telephone call from the governor can materially change release practices." ALI, Model Penal Code: Sentencing, Discussion Draft No. 2, at 90 (Apr. 8, 2009); *see also* ALI, Model Penal Code: Sentencing, Discussion Draft No. 3, at 4 (Mar. 29, 2010) (ALI 2010) ("There are many instances in which the parole-release policy of a jurisdiction has changed overnight in response to a single high-profile crime.").

Massachusetts is a perfect example. In 2011, after a parolee killed a policeman, Governor Patrick faced "intense pressure from police chiefs, rank-and-file officers, and lawmakers to take action against the Parole Board;" he responded by demanding resignations from every board member who voted for release and appointing a new board. Jonathan Saltzman, *Patrick overhauls parole*, Boston Globe, Jan. 14, 2011, http://archive.boston.com/news/politics/articles/2011/01/14/five_out_as_governor_overhauls_parole_board. Thereafter, parole rates in Massachusetts plummeted—from 78% in 2009 to just 26% under the new board.[7] The average wait time for a decision af-

[7] Patricia Garin, et al., *White Paper: The Current State of Parole in Massachusetts*, 2-3 (Feb. 2013), http://www.cjpc.org/2013/White-Paper-Addendum-2.25.13.pdf (Garin); *id.* at 4-5 (18.5% of inmates serving a life sentence who had a parole hearing were granted parole in the 18 months after the new parole board was installed, and only two individuals were actually released).

ter a parole hearing increased from 30-60 days to 262 days.[8]

A similarly dramatic, politically-initiated swing happened when the newly elected governor appointed prosecutor Paul Treseler as board chair in September 2015, replacing the prior chair, who was a forensic psychologist.[9] Between January 2014 and September 2015, 45% of juveniles serving mandatory life sentences ("juvenile lifers") received positive parole decisions; not one juvenile lifer who has had a hearing since Treseler became chair has been granted parole[10]:

	Pre-Treseler Board[11]	Treseler Board[12]
Granted Parole	15 (45.5%)	0 (0%)
Denied Parole	18 (54.5%)	16 (100%)
Total	33	16

The capriciousness of the parole process is not unique to Massachusetts. "What in the middle dec-

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[8] *Id.* at 6.

[9] Massachusetts Parole Board, Parole Board Members, *available at* http://www.mass.gov/eopss/agencies/parole-board/board-members.html (last visited Oct. 24, 2016).

[10] 2014-2016 data agglomerated from the Massachusetts Parole Board's website, which posts all parole decisions regarding inmates serving life sentences at http://www.mass.gov/eopss/agencies/parole-board/lifer-records-of-decision.html. Data include "initial hearings" and "review hearings" but exclude "revocation review" hearings.

[11] Decisions issued in 2014 and 2015 regarding juvenile lifers who had parole hearings before Treseler was appointed board chair.

[12] Decisions issued regarding juvenile lifers who had parole hearings after Treseler became chair.

ades of the 20th century was a meaningful process in which parole boards seriously considered individual claims of rehabilitation has become in most cases a meaningless ritual in which the form is preserved but parole is rarely granted." Sharon Dolovich, *Creating the Permanent Prisoner*, *in* Life Without Parole: America's New Death Penalty? 96, 110-11 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) (Dolovich). In Ohio, for example, the parole grant rate was 6.9% in 2011; in Florida, the grant rate was 3.5% in 2011-2012. Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373, 397 (2014).

In Maryland, lifers were regularly paroled in the 1990s, but not a single juvenile lifer has received a positive parole decision in the past *two decades*. Alison Knezevich, *Maryland Parole Commission to Hold Hearings for Hundreds of Juvenile Lifers*, Washington Post, Oct. 15, 2016, http://wapo.st/2e7uEoh. In California, "[t]he grant rate has fluctuated over the last 30 years—nearing zero percent at times and never rising above 20 percent." Robert Weisberg, et al., Stanford Criminal Justice Center, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California* 4 (Sept. 2011) (Weisberg), *available at* http://stanford.io/2dZtCuM. And factoring in the governor's frequently-exercised power to reverse the

parole board's grant of parole,[13] the probability of actually being released is just 6%. Weisberg 13-15.[14]

A child's right to a constitutionally proportionate sentence should not be subject to institutions that shift with the political winds. But that is exactly the nature of parole boards. Indeed, the ALI recently deemed parole boards "failed institutions" and observed that "no one has come forward with an example in contemporary practice, or from any historical era, of a parole-release agency that has performed its function reasonably well." ALI 2010, at 4. The possibility of future discretionary parole simply cannot serve as an Eighth Amendment backstop.

Second, a parole board's decisionmaking process bears little resemblance to that of a judge imposing a constitutionally sound sentence. "Few, perhaps no, judicial responsibilities are more difficult than sentencing. The task is usually undertaken by trial judges who seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society." *Graham*, 560 U.S. at 77. But the Massachusetts Parole Board does not exercise nearly the same "diligence and professionalism" during parole hearings. *See* Garin 11-12 (discussing the negative and confrontational attitude of parole board members, including such statements as, "[Y]ou don't have a snowball's

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[13] Cal. Const. art. V § 8(b). Other governors have similar power. Md. Code Ann., Corr. Servs. § 7–301(d); 57 Okl. St. §§ 332, 332.16.

[14] These rates are particularly concerning given this Court's statement in *Montgomery* "that a lifetime in prison is a disproportionate sentence for all but the rarest of children." 136 S. Ct. at 726 (citation omitted).

chance in hell of getting a parole board to let you walk out that door"); *cf.* Beth Schwartzapfel, *How parole boards keep prisoners in the dark and behind bars*, Washington Post, July 11, 2015, https://www.washingtonpost.com/national/the-power-and-politics-of-parole-boards/2015/07/10/49c18 44e-1f71-11e5-84d5-eb37ee8eaa61_story.html (Schwartzapfel) (average parole board makes 35 decisions per day and some members spend "two to three minutes" per decision).

Furthermore, a sentence judge has sworn to ensure that a defendant's sentence passes constitutional muster, and she does so "by applying generally accepted criteria to analyze the harm caused or threatened to the victim or society, and the culpability of the offender." *Id.* at 96 (Roberts, C.J., concurring) (quotation marks omitted). A parole board does not consider culpability or other issues of proportionality. Rather, as the Massachusetts Parole Board articulates in each of its decisions, "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." 120 Mass. Code Regs. 300.04; *see also* Cara Lombardo, *Juvenile offenders in legal limbo despite supreme court rulings*, Milwaukee Journal Sentinel, Oct. 10, 2016, http://projects.jsonline.com/news/2016/10/22/juveniles-sentenced-to-life-in-wisconsin-have-little-chance-for-release.html ("If I have to make a call as the parole chair, I am always going to defer to public safety before I take a chance on redemption." (Wisconsin Parole Commission chair)). Thus, the parole process cannot provide a back-end

substitute for individualized sentencing by a judge who may consider a child's diminished culpability to fashion a fair and proportionate sentence.

Third, an offender serving a life sentence has no right to early release and presumptively will be imprisoned for the rest of his life. *See Greenholtz v. Inmates of the Neb. Penal & Corr. Complex,* 442 U.S. 1, 7 (1979). The Massachusetts SJC recently recognized as much, noting that "there is no constitutionally protected expectation that a juvenile homicide offender will be released to the community after serving a statutorily prescribed portion of his sentence." *Deal v. Comm'r of Corr.*, 56 N.E.3d 800, 802 (Mass. 2016); *accord Diatchenko,* 27 N.E.3d at 357 (juvenile lifer has no "expectation of release through parole").

Moreover, a decision to deny parole is an entirely discretionary decision that is insulated from judicial review. Even where, as in Massachusetts, the parole board is instructed to consider particular factors before deciding whether to parole a juvenile lifer, "[a] judge may not reverse a decision by the board denying a juvenile homicide offender parole and require that parole be granted." *Diatchenko,* 27 N.E.3d at 366. Instead, a reviewing court's role "is limited to the question whether the board has carried out its responsibility to take into account the attributes or factors just described in making its decision." *Id.* at 365.

In other words, as long as the parole board has ticked off the correct boxes by listing the factors it is required to consider, its discretionary parole decision cannot be overturned. Unsurprisingly, *pro forma* decisions that lack any analysis of the relevant factors

as applied to the parole applicant, and that lack any guidance about what the applicant can do to earn release, are the rule since the current chair took office in September 2015. *E.g.*, *In the Matter of Louis Costa*, W-44737, at 4 (July 28, 2016), http://www.mass.gov/eopss/docs/pb/lifer-decisions/2016/costarod2016.pdf;[15] *In the Matter of Thomas Young*, W-35434 3-4 (March 1, 2016), http://www.mass.gov/eopss/docs/pb/lifer-decisions/2015/youngrod2016.pdf.

A parole board's discretionary and unchallengeable parole decision, through which an offender has "no expectation of release," cannot possibly serve the Eighth Amendment safeguard function that is necessary to ameliorate the risk of disproportionate sentencing identified in *Miller*. That is not what parole was designed to do, and juvenile offenders should not be expected to rely on parole boards for this purpose. Just as it would be unthinkable to suggest that a *prosecutor's* discretion to seek a particular sentence would be an adequate Eighth Amendment substitute for a judge's considered determination, parole simply

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[15] Costa, who was convicted for murdering two individuals at the behest of adult co-defendants in 1986, *Commonwealth v. Costa*, 33 N.E.3d 412, 415 (Mass. 2015), was considered the poster child parole candidate. Costa has not received a single disciplinary report since 1989, and while in prison he received his GED, graduated *cum laude* in history from Boston University's Metropolitan College, successfully completed virtually every program the DOC offers, and founded MCI-Norfolk's Restorative Justice Program, which builds bridges between homicide offenders and families of homicide victims. Mem. in Support of Parole 4-12, *In the Matter of Louis Costa* (Feb. 18, 2016). Yet the parole board denied Costa's petition without any individualized analysis of the relevant factors—just a boilerplate statement that he is not yet rehabilitated and that his release is incompatible with the welfare of society.

involves "too great a risk" that juvenile offenders will serve disproportionate sentences. *Miller*, 132 S. Ct. at 2469.

3. In *Montgomery v. Louisiana*, this Court addressed "whether *Miller* adopts a new substantive rule that applies retroactively." 136 S. Ct. at 727. The Court answered that question in the affirmative. *Id.* at 734. In dicta, however, the Court also speculated that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them," because "[a]llowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.* at 736.

But neither the question whether resentencing is required to remedy a *Miller* violation, nor the question whether parole is an adequate Eighth Amendment safeguard for the concerns that animated *Miller*'s holding, were before the Court in *Montgomery*. Instead, the only question that was briefed and argued by the parties was *Miller*'s retroactivity.[16]

Furthermore, applying *Miller*'s individualized-sentencing requirement only if parole is prohibited ignores the reasoning that animated *Miller*'s holding. The essence of the Court's decision was that a sentence that may be permissible for an adult may not be so for children "because of their lesser culpabil-

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[16] Both parties in *Montgomery* assumed that resentencing would be necessary to remedy a *Miller* violation. *See* Br. in Opp. at 6 (Aug. 24, 2015); Reply Br. at 11 (Sept. 23, 2015).

ity." 132 S. Ct. at 2463; *see also id.* at 2467 (prior cases "insisted ... that a sentencer have the ability to consider the 'mitigating qualities of youth' ... in assessing [a child's] culpability"); *id.* at 2468 (discussing mitigating factors in favor of one petitioner and noting that "[a]ll these circumstances go to [petitioner's] culpability for the offense").

To be sure, this Court in *Miller* also discussed that a life sentence that forecloses parole eligibility, much like the death penalty, forbids a sentencer from taking into account "a child's capacity for change." *Id.* at 2465. But the Court used the similarity between the death penalty and life without parole as just "another way" to demonstrate how the "mandatory" application of "a State's most severe penalties" was unconstitutional with respect to children, *id.* at 2466, and as the last in a long line of reasons why such a sentence is unconstitutional, *id.* at 2468 ("And finally, this mandatory punishment disregards the possibility of rehabilitation ...."). Elevating the rehabilitation rationale to be dispositive is inconsistent with the Court's admonition in *Miller* against a "myopic" view of juvenile sentencing matters, as well is its repeated acknowledgment that "children are different" where severe penalties are on the line. Children do not become constitutionally identical to adults just because they may come before a parole board decades down the road.

4. This Court had no opportunity to consider the attributes of parole boards before it assumed in *Montgomery* that parole is an adequate Eighth Amendment safeguard for mandatory life-sentencing schemes. The Court's assumption may have been animated by its previously-expressed belief that

"[a]ssuming good behavior, [parole] is the normal expectation in the vast majority of cases." *Solem v. Helm*, 463 U.S. 277, 300 (1983); *see also id.* at 301 ("[I]t is possible to predict, at least to some extent, when parole might be granted."). As demonstrated above, however, while that belief may have been sound thirty years ago, it is not an accurate assumption today. *See* Schwartzapfel (inmates in the 1980s were typically released when they became parole eligible but by the end of the twentieth century, "life means life" was the rule rather than the exception). And given the realities of the parole system, a rule that relies upon the adequacy of parole to "ensure[] that juveniles ... will not be forced to serve a disproportionate sentence," *Montgomery*, 136 S. Ct. at 736, gives the executive branch, and not the judiciary, the final say on whether the sentence served is proportionate "to both the offender and the offense," *Miller*, 132 S. Ct. at 2463.

This Court should grant review to squarely consider whether parole can adequately address the concerns that animated *Miller*'s holding or whether, in light of the role and reality of parole, the mandatory imposition of life with parole eligibility "poses too great a risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469.

C. The Growing Trend In Favor Of Individualized Sentencing For Children Underscores The Unconstitutionality Of Bright's Sentence.

The growing trend (both here and abroad) toward individualized sentencing for chilren who face harsh

penalties highlights the risk posed by Massachusetts' mandatory-sentencing scheme.

1. In recent years, States have shed statutes with mandatory life sentences for children and replaced them with discretion for the sentencing judge. In New Mexico, a judge must be given discretion to sentence children convicted of first- and second-degree murder to a term-of-years sentence *or* a life sentence.[17] In Montana, Washington, and Iowa, mandatory minimums and mandatory life sentences no longer apply to children.[18] In South Dakota, no child may receive a life sentence.[19] The recent revisions to the Model Penal Code likewise embrace judicial discretion for juvenile sentences, providing that "[t]he court shall have authority to impose a sentence that deviates from any mandatory-minimum term of imprisonment under state law." Model Penal Code § 6.11A(f) (Approved Tentative Draft 2011).

Several other States that still permit mandatory life sentences for children at least permit a neutral judge, rather than an arm of the executive branch, to determine whether early release is appropriate.[20] And while numerous States have increased judicial discretion over juvenile sentences, no States are countering with an *increased* use of mandatory minimums for children.

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[17] N.M. Stat. Ann. § 31-18-13 (enacted 2011).

[18] Wash. Rev. Code Ann. § 9.94A.540 (enacted 2014); Mont. Code Ann. §46-18-222 (enacted 2013); *State v. Lyle*, 854 N.W.2d 378 (Ia. 2014).

[19] S.D.C.L. § 22-6-1.3 (enacted 2016).

[20] *E.g.*, Del. Code Ann. Tit. 11, § 4209 (enacted 2013); Fla. Stat. Ann. § 921.1402 (enacted 2014).

2. The laws and treaties of other nations similarly demonstrate a trend in favor of individualized sentencing for children. The UN Convention on the Rights of the Child ("CRC"), Nov. 20, 1989, 1577 U.N.T.S. 3, which the Court looked to in *Roper*, requires that the "imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time." CRC Art. 37(b). It mandates that a "variety of dispositions ... be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." CRC Art. 40(4). A mandatory life sentence, even with a possibility of parole, is incompatible with the CRC's standard.

The sentencing laws of most countries afford much greater protection to children than the mandatory life-sentencing regime under which Bright was sentenced. Many nations provide judges with discretion over juvenile offenders' sentences.[21] Many other countries limit the maximum sentence that can be imposed on children to a term much shorter than life imprisonment.[22] Indeed, as several comprehensive analyses of juvenile sentencing laws demonstrate, the lengthy and mandatory juvenile-sentencing regimes of States like Massachusetts are out of step with the rest of the world. *See* Human Rights Advo-

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[21] *E.g.*, Ley Orgánica Para La Protección Del Niño y Del Adolescente, 1998, arts. 2, 528, 532, 551, 620 (Venezuelan judges retain wide discretion in sentencing children); CRC/C/8/Add.44, 27 February 2002, par. 1372 (Israeli minimum-sentencing legislation inapplicable to juveniles).

[22] *E.g.*, Juvenile Act of Japan, Act No. 168 of 1948, art. 51 (15-year maximum); Youth Courts Law (Germany), Sec. 18 (10-year maximum).

cates, *Extreme Criminal Sentencing for Juveniles: Violations of International Standards* 5 (Feb. 2014) (of 164 countries surveyed, 127 sentence children to determinate, rather than life, sentences, and 92 have determinate sentences that are 25 years or less); Connie de la Vega, et al., Univ. of S.F. Sch. of Law, *Cruel and Unusual: U.S. Sentencing Practices in a Global Context* 47-59, Appendix (May 2012), *available at* http://www.cpcjalliance.org/wp-content/uploads/2013/04/Cruel-And-Unusual.pdf; Michele Deitch, et al., LBJ Sch. of Pub. Affairs, Univ. of Tex. at Austin, *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System* 73-75, Appendix A (2009), *available at* http://lbj.utexas.edu/archive/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf.

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This Court recognized in *Miller* that if youth is irrelevant to the imposition of a State's harshest penalties, "such a scheme poses too great a risk of disproportionate punishment." 132 S. Ct. at 2469. A life sentence, with or without parole eligibility, is one "of a State's most severe penalties," *id.* at 2466, and *Miller*'s reasoning applies fully to Mr. Bright's mandatory life sentence with parole eligibility after 15 years. This Court has never had the opportunity to consider the adequacy of parole in ameliorating the risk of disproportionate punishment identified in *Miller*. The Court should grant certiorari to squarely consider this important issue.

D. This Court Should Not Delay Review Of This Critical Issue.

The time to address this issue is *now*. *Miller* and *Montgomery* have created considerable confusion for state courts and legislatures. Courts have noted that restricting *Miller* solely to life without parole sentences is in tension with much of the reasoning in *Miller*. *E.g.*, *Okoro*, 26 N.E.3d 1094, 1097-98. Consequently, they have interpreted *Miller* and *Montgomery* in divergent ways. Some courts have held that *Miller* prohibits the mandatory imposition of only an actual sentence of life without parole,[23] while others have held that *Miller* also applies to the practical equivalent of such a sentence,[24] and still others have interpreted *Miller* and its progeny to more broadly prohibit the mandatory imposition of lifetime penalties or prison time on children.[25] Such State-by-State variation in interpreting the floor set by the Eighth Amendment makes an inherently harsh sentence all the more unjust: whether a child can be automatically sentenced to spend his life in prison (with only a future opportunity for discretionary parole by the executive branch) depends on the State in which he is sentenced.

Now is the appropriate time to resolve this issue. Indeed, the Massachusetts SJC has expressed its desire for additional guidance from this Court. *See*

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[23] *E.g.*, *State v. Brown*, 118 So. 3d 332 (La. 2013) (upholding mandatory 70-year sentence).

[24] *E.g.*, *Bear Cloud v. State*, 334 P.3d 132, 141–42 (Wyo. 2014).

[25] *See State v. Lyle*, 854 N.W.2d 378 (Ia. 2014) (mandatory minimum prison sentences); *In re C.P.*, 967 N.E.2d 729 (Ohio 2012) (mandatory lifetime sex-offender registration and notification that is open to review after 25 years).

Okoro, 26 N.E.2d at 1099-1100. States are in the process of revising their juvenile-sentencing schemes in light of the Eighth Amendment issues identified in *Miller* and *Montgomery*, and they are struggling to do so consistent with the Eighth Amendment. While some States have passed legislation making all mandatory minimums inapplicable to children,[26] some States (like Massachusetts) have simply severed parole ineligibility from mandatory life-sentencing schemes as applied to children.[27] Other States are still in the process of amending their sentencing laws.[28] It makes little sense for States to expend years of effort and considerable resources revising their sentencing laws to excise parole ineligibility, only to have to undertake the same efforts several years from now if this Court determines that the availability of discretionary parole is not an adequate Eighth Amendment backstop for the concerns animating *Miller*. Denying review of this case and delaying consideration of this important issue will have precisely that result.

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[26] *E.g.*, Mont. Code Ann. § 46-18-222 (enacted 2013); N.M. Stat. Ann. § 31-18-13 (enacted 2011).

[27] *E.g.*, Mass. Gen. L. ch. 119, § 72B (enacted 2014); Wyo. Stat. Ann. § 6-10-301 (enacted 2013); Haw. Rev. Stat. § 706-656 (enacted 2014).

[28] *See* Anne Teigen, National Conference of State Legislatures, *Miller v. Alabama And Juvenile Life Without Parole Laws* (last visited Oct. 26, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/miller-v-alabama-and-juvenile-life-without-parole-laws.aspx (identifying States that have not yet revised their unconstitutional juvenile-sentencing laws).

II. This Court Should Grant Certiorari To Determine Whether A Child Who Is Convicted As A Joint Venturer Can Be Sentenced To Life In Prison With The Possibility Of Parole.

The second question presented is independently worthy of certiorari. The rationale underlying *Miller* and its progeny has special application in the joint-venture context. This Court has recognized that the diminished culpability of non-principals sometimes precludes the application of mandatory-sentencing regimes to defendants who participated in but did not commit a murder. *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (culpability of non-principals must be individually examined in a capital case even though "States generally have wide discretion" to punish aiders and abetters as principals); *see also Enmund v. Florida*, 458 U.S. 782 (1982). To be sure, *Tison* and *Enmund* involved convictions under felony-murder rules and questions of transferred intent, but even more robust distinctions are warranted when sentencing a child: "a sentencing rule permissible for adults may not be so for children." *Miller*, 132 S. Ct. at 2470. As this Court has repeatedly acknowledged, children are far more vulnerable than adults to the effects of peer and familial pressure. *Miller*, 132 S. Ct. at 2468; *Eddings*, 455 U.S. at 115 (describing youth as a "condition of life when a person may be most susceptible to influence and to psychological damage"); *Schall v. Martin*, 467 U.S. 253, 266 (1984) (acknowledging "the downward spiral of criminal activity into which peer pressure may lead the child").

Moreover, children often "lack the ability to extricate themselves from horrific, crime-producing set-

tings." *Miller*, 132 S. Ct. at 2464. Thus, while it may be entirely reasonable to impose the same sentences on adult principals and joint venturers because adults should be expected to walk away when a sketchy situation turns criminal, children do not have the same capacity for independence.[29] This does not, of course, mean that a juvenile joint venturer should be "absolved of responsibility for his actions." *Graham*, 560 U.S. at 68. But it does mean that "his transgression 'is not as morally reprehensible as that of an adult,'" *id.* (citation omitted), and it should mean that for children, a mandatory sentencing scheme that treats principals and joint venturers identically "poses too great a risk of disproportionate punishment," *Miller*, 132 S. Ct. at 2469.

This case is a perfect example. Bright was surrounded by hardened criminals—all adults who were involved in gang and drug activity, including hisown brother. The State did not allege that Bright killed the victim, and he was convicted on a joint venture theory that allowed the jury to convict him based merely on a finding that he "aided or assisted the commission of the murder" or was "willing and available to assist" if necessary. Pet. App. 47a-48a. Indeed, the jury was specifically instructed that the participation requirement could be met "by agreeing to stand by, at or near the scene to render aid, assistance, or encouragement if such became necessary, or by assisting the perpetrator of the crime in making an escape from the scene." *Id.* at 38a. Yet, at sentencing, the judge was precluded from considering the nature of Bright's participation in the crime

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[29] *See Miller*, 132 S. Ct. at 2468 (petitioner's age could have affected "his willingness to walk away").

and whether his level of participation, understood in light of his youth and its attendant factors, warranted a lesser sentence than life imprisonment.

A State's most severe penalties should not be imposed equally upon an adult who shoots a victim and a child who, under pressure from adults (including family members), is "willing and available to assist" if necessary. Yet that result is precisely what Massachusetts' sentencing scheme requires. This Court should, at the very least, grant certiorari to determine whether imposing a mandatory life sentence both on children who do not kill and on children (or adults) who do violates the Eighth Amendment.

III. This Case Is An Ideal Vehicle For This Court To Consider The Questions Presented.

This case presents an excellent opportunity for this Court to address whether *Miller*'s individualized-sentencing requirement for children facing life in prison can be substituted by the potential for discretionary early release by an arm of the executive branch—either in joint venture cases or in all cases. The Massachusetts Appeals Court's decision was a clear federal constitutional holding because the court was presented with and rejected Bright's contention that his sentence violates the Eighth Amendment as applied in *Miller*. *See* Pet. App. 2a-5a. And, because this case is an appeal from a state court decision and not from a federal court's denial of a habeas petition, the Court could confront this important constitutional issue directly, applying *de novo* review.

Furthermore, this petition presents precisely the type of case in which a judge would likely decline to

impose a life sentence if he had discretion to do so. Unlike some cases involving juveniles who personally committed truly heinous acts on another person, or who demonstrated a pattern of violent behavior, Bright was an ambitious child with no criminal record and a promising future. Bright regrettably became involved in a feud between adult drug dealers at the behest of his older brother, but he indisputably did not kill Davis. Had the court considered Bright's "past criminal history," "the extent of his participation in the conduct," "the way familial and peer pressures may have affected him," and the extent to which Bright may have "lack[ed] the ability to extricate [himself] from horrific crime-producing settings," it might well have imposed a lesser sentence. *Miller*, 132 S. Ct. at 2464, 2468. Indeed, the judge noted that while there was "a great deal to say about this case, the events that led up to it and the lives that have been affected by it," he would leave such things "unsaid," as the mandatory sentencing scheme left little role for him to play. Mass. Appeals Ct. App. 175-176. In short, this is exactly the type of case in which sentencing discretion would have made a difference.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT
No. 0584CR10545

COMMONWEALTH

v.

DAGOBERTO SANCHEZ

COMMONWEALTH'S OPPOSITION TO THE DEFENDANT'S MOTION FOR NEW TRIAL, REDUCTION IN VERDICT, AND RELIEF FROM UNLAWWFUL SENTENCE

The Commonwealth respectfully opposes the defendant's "Motion For New Trial/Reduction In Verdict, And/Or Relief From Unlawful Sentence" ("the defendant's motion"). The defendant claims he is entitled to relief because the federal and state courts reached different conclusions about whether the trial judge erred in applying the first step of the inquiry, under *Batson v. Kentucky*, 476 U.S. 79 (1976), into the prosecutor's exercise of peremptory challenges (although both state and federal courts ultimately agreed that there had been no constitutional violation). The claim fails because the defendant was entitled to no remedy in state court where the state court found no error, and because the defendant received the remedy to which he was entitled in federal court for the error found by the federal court.

BACKGROUND

A. The Trial.

On September 25, 2006, the defendant's trial on indictments for second-degree murder and possession of a firearm began before the Honorable Thomas E. Connolly ("the trial judge") and a jury (CR.1, 4).[1] During jury empanelment, the defendant objected to the Commonwealth's exercise of its twelfth peremptory challenge as constituting a pattern excluding young black men. *Commonwealth v. Sanchez*, 79 Mass. App. Ct. 189, 191 (2011)

[1] References to the Commonwealth's appendix will be cited as (CR.[page]), and references to the defendant's motion as (D.MNT.[page]).

(*Sanchez I*). The trial judge found that the defendant had not made a sufficient showing of a pattern of exclusion based solely upon race, and therefore did not require the prosecutor to provide an explanation for the twelfth challenge. *Id.* at 191-192.

At trial, the defendant admitted that he had shot the victim during a fight but claimed that he had done so in in defense of himself and a relative. *Id.* at 189-190. On October 6, 2006, the jury returned guilty verdicts on both second-degree murder and possession of a firearm (CR.5). The defendant, who was seventeen at the time of the murder, was sentenced to a mandatory term of life with the possibility of parole after fifteen years (CR.6).

B. The Appeal in Massachusetts.

On direct appeal, the defendant, *inter alia*, claimed that the prosecutor had exercised peremptory challenges in a racially discriminatory way. *Sanchez I*, 79 Mass. App. Ct. at 190. Specifically, he claimed that the trial judge's failure to find a pattern and failure to require an explanation were error under both the State and Federal Constitutions. *Id.* at 191. Analyzing the claim under article 12, the Appeals Court held that there was adequate record support for the trial judge's determination that the defendant had not established a pattern of discrimination, and therefore that there was no error.[2] *Id.* at 191 n.8, 191-193.

The defendant unsuccessfully petitioned the Supreme Judicial Court for further appellate review, *Commonwealth v. Sanchez*, 460 Mass. 1106 (2011), and unsuccessfully petitioned the United States Supreme Court for certiorari. *Sanchez v. Massachusetts*, 132 S. Ct. 408 (2011).

C. The Habeas Corpus Petition in Federal Court.

On May 23, 2012, the defendant petitioned the United States District Court for Massachusetts for a writ of habeas corpus.[3] *Sanchez v. Roden*, No. 12-10931-FDS, 2013

[2] The defendant also challenged the trial judge's jury instructions. *Sanchez I*, 79 Mass. App. Ct. at 190. The Appeals Court found no error in those instructions, *id.* at 194-196, and the instructions are not the subject of the instant motion.
[3] See 28 U.S.C. § 2254.

U.S. Dist. LEXIS 19914, at *1, *6 (D. Mass. 2013) (reproduced at CR.8-14). His claim for habeas relief was the prosecutor's purported discriminatory exercise of peremptory challenges in violation of the equal protection clause. *Id.* at *1, *7. On February 14, 2013, the district court denied the petition, finding that the Appeals Court "reached a conclusion that was consistent with federal law." *Id.* at *18.

The defendant appealed the denial of his habeas petition. *Sanchez v. Roden*, 753 F.3d 279, 290 (1st Cir. 2014) (*Sanchez II*). The First Circuit Court of Appeals held that the Appeals Court had "unreasonably applied clearly established federal law" by "fail[ing] to consider all of the circumstances" in analyzing whether the defendant had raised an inference that the prosecutor had used peremptory challenges to exclude jurors based on race. *Id.* at 291, 299, 298-300. In other words, the Court held, the Appeals Court had unreasonably applied the so-called "first *Batson* prong." *Id.* at 300. The First Circuit ultimately concluded that the record on appeal was "sufficient to permit an inference" that the Commonwealth's twelfth peremptory challenge had been motivated by race, that the first prong of *Batson* had been satisfied, and that "the prosecutor should have been required to articulate a race-neutral reason" for that challenge. *Id.* at 307.

The Court noted, however, that the record before it was insufficient to determine whether, in fact, the challenge was racially motivated. Because only a racially motivated challenge violates *Batson*, and because the record was insufficient to determine anything more than that the first prong of *Batson* had been satisfied, the Court concluded that the appropriate remedy under federal law was remand to the district court for an evidentiary hearing "to complete the *Batson* inquiry." *Id.* at 308. The Court explained that only when all three prongs of *Batson* have been satisfied is there presumptive prejudice because only then has a peremptory challenge been shown to have been racially motivated in fact. *Id.* at 307.

On remand, in 2014, the district court conducted an evidentiary hearing at which the trial prosecutor testified. *Sanchez v. Roden*, No. 12-10931-FDS, 2015 U.S. Dist. LEXIS

13207, at *3 (D. Mass. 2015) (reproduced at CR.15-29). Based upon that testimony, the district court found that the Commonwealth had satisfied its burden under the second prong of *Batson* to provide a facially valid race-neutral explanation (age) for the twelfth peremptory challenge. *Id.* at *21-*23. The district court found credible that age, not race, was in fact the reason for the challenge, and thus held the defendant had failed to meet his burden of persuasion under the third prong of *Batson* to show that the twelfth peremptory challenge had been exercised discriminatorily. *Id.* at *23-*24, *43. The defendant's habeas petition was denied. *Id.* at *43.

On appeal, the First Circuit affirmed the denial of the habeas petition. *Sanchez v. Roden*, 808 F.3d 85, 86 (1st Cir. 2015) (*Sanchez III*). In so doing, the Court concluded that "the district court did not abuse its broad discretion as factfinder on matters of credibility in concluding that [the defendant] has not proven that there was racial discrimination" in the exercise of the peremptory challenge. *Id.* at 93.

ARGUMENT

I. THAT THE STATE COURT FOUND NO *BATSON* VIOLATION WHILE THE FEDERAL COURT FOUND A FIRST-STEP *BATSON* ERROR BUT ULTIMATELY FOUND NO *BATSON* VIOLATION OFFERS NO GROUNDS UPON WHICH TO GRANT A NEW TRIAL OR REDUCE THE VERDICT BECAUSE THE DEFENDANT ALWAYS AND ONLY RECEIVED THE REMEDY TO WHICH HE WAS ENTITLED.

The defendant's argument is that he is entitled to some relief (whether in the form of a new trial or reduction of the verdict) because Massachusetts courts concluded that there was no error with respect to the prosecutor's exercise of peremptory challenges, while the federal courts opined that, the trial judge erred in the first step of applying the *Batson* framework. This argument fails because there is nothing inherently contradictory about these results where, in the final analysis, both courts determined that there was no constitutional violation at the defendant's trial.

Peremptory challenges may not be used to exclude a potential juror based upon that juror's membership in a discrete group. *Batson*, 476 U.S. at 84-88 (impermissible under the equal protection clause); *Commonwealth v. Soares*, 377 Mass. 461, 486-488 (1979)

(impermissible under art. 12). Under federal law, the focus is on the prospective juror's right to be free from discrimination, while state law examines the defendant's right to be tried by a jury assembled without discrimination. *Commonwealth v. Jones*, 477 Mass. 307, 319 (2017).

A claim of a *Batson* violation is analyzed under a three-step framework that differs depending on what law is applied.[4] Under federal law, the first step of the analysis requires a showing that "'raise[s] an inference'" that the prosecutor used a peremptory challenge to exclude jurors because of their class membership. *Aspen v. Bissonnette*, 480 F.3d 571, 574 (2007) (quoting *Batson*, 476 U.S. at 96). Then, the burden shifts to the striking party to "articulat[e] a nondiscriminatory reason" for the peremptory. *Purkett v. Elem*, 514 U.S. 765, 769 (1995). The trial judge decides in the third step "whether the opponent of the strike has proved purposeful racial discrimination." *Id.* at 767.

In Massachusetts, the first step is whether the presumption of proper exercise of peremptory challenges has been rebutted by showing "a pattern of excluding jurors" who belong to a discrete group and that "it is likely" that the sole reason for exclusion is those jurors' group membership. *Commonwealth v. Benoit* 452 Mass. 212, 218 (2008). If that showing is made, then the party exercising the peremptory must provide a group-neutral reason for the challenge. *Id.* at 219. Finally, the trial judge must determine whether that reason is adequate and genuine. *Id.* at 219.

Turning to the case at hand, the defendant approaches the peremptory-challenge issue as a zero-sum game in which one court was correct and the other, necessarily, was incorrect. In the defendant's words, "Massachusetts messed up" (D.MNT.4) by failing to

[4] Under both federal and state law, inquiry seeks to ferret out the same prohibited and unconstitutional act: the discriminatory exercise of a peremptory strike. "'Regardless of the perspective from which the problem is viewed, [however,] the result appears to be the same.'" *Jones*, 477 Mass. at 319 (quoting *Commonwealth v. Benoit*, 452 Mass. 212, 218 n.6 (2008)). That does not mean, though, that the analytical steps are equivalent. *See Sanchez v. Roden*, No. 12-10931-FDS, 2013 U.S. Dist. LEXIS 19914, at *9-*11 (noting that the Massachusetts standard under the first step of *Batson* is more stringent than the federal standard).

find a first-step *Batson* violation. Of course, the "correctness" of a legal decision, the application of a law to a set of facts, is neither inherently right nor wrong, but only one judge's interpretation of how to make that application. And the appellate review of such an application of law to fact is no more than the appellate court's opinion[5] of what the outcome should be.[6] There is no magic "truth" at the core of a judicial decision. The reality is that the decision is reached by a fallible human being and that a different fallible human being might reach a different one.

So, that the Massachusetts courts found no first-step *Batson* error while the First Circuit did is not some inextricably contradictory outcome but instead the legitimate byproduct of different judicial decisionmakers arriving at different results. Moreover, where the legal standard for finding a first-step error depends on the applicable law, those different results are even more understandable. The frailty of the defendant's argument is also found in the fact that the Commonwealth could marshal it with equal rhetorical force: it was the federal court who "messed up" and the Massachusetts court who got it right, and therefore the defendant has misplaced his reliance on the federal decision to support the instant post-conviction claim.

What the defendant's argument boils down to then is that he disagrees with the decision of the Appeals Court. But the judicial system already has in place a mechanism by which an aggrieved party can challenge an adverse decision; the defendant utilized it here by seeking further appellate review of the Appeals Court decision, and after that request for review was denied, petitioning the United States Supreme Court for certiorari. That the federal court concluded that there was a first-step *Batson* error does not permit the defendant to revisit the state court appellate process which, after exhaustion, concluded that there was no error.

[5] The very word used to identify the conclusion of an appellate court speaks volumes.
[6] That is not to say that we all (as citizens) should not afford legal decisions respect and deference – without that respect and deference we could not have a functioning legal system.

Indeed, the federal court's finding of a first-step *Batson* error entitled the defendant to nothing more than the federal remedy for such a finding. Appropriately, that is precisely the remedy that this defendant received. The First Circuit noted that a first-step *Batson* error is not the equivalent of a *Batson* violation. "Although we have held that a *Batson* violation constitutes a structural error from which prejudice to the defendant is "conclusively presumed," we are unable to determine from this record whether the Commonwealth's challenges were in fact racially motivated and, therefore, violative of *Batson*." *Sanchez II*, 743 F.3d at 307 (internal citation omitted). Based upon the first-step *Batson* error alone, "[i]t is, therefore, inappropriate to grant a new trial because [the defendant] has not demonstrated he is entitled to habeas relief." *Id.* Adhering to federal precedent, the First Circuit remanded the case to the district court for an evidentiary hearing. *Id.* at 307-308. The defendant's complaint that he faced an impossible burden at that hearing is based on the actual facts of the case and the prosecutor's actual race-neutral reason for his peremptory challenge, and is not a complaint justifying a new trial or reduction in verdict. The defendant would only be entitled to a state court remedy if the state court had found an error requiring that remedy. Here, the state court found no first-step *Batson* error, so the defendant has no grounds on which to invoke the state court remedy, whatever that remedy purports to be.[7]

[7] Contrary to the defendant's claim (D.MNT.3), *Jones* does not stand for the proposition that a new trial is the only remedy for a trial judge's erroneously finding that a defendant has not made a prima facie showing of an improper peremptory challenge. While it may be "long disfavored," the Court "acknowledged the constitutionally permissible option of remanding for an evidentiary hearing." *Jones*, 477 Mass. at 326 n.31. Thus there is no automatic entitlement under Massachusetts law for a first-step *Batson* error. Moreover, via the same footnote, *Jones* brushed aside and ignored a trial court's fact-finding ability (in stark contrast to the federal approach). *Id.* And, the Court relegated to the same footnote its rationale for equating a finding that there was a first-step *Batson* error (the judge failing to have found a pattern of exclusion likely based on group affiliation) with the finding that the entire three-step *Batson* inquiry had been satisfied (and therefore that there had been a structural error for which prejudice is presumed). *Id.*

Finally, the ultimate conclusion of both the state and federal courts was the same: the prosecutor's peremptory challenges were not impermissibly used to exclude jurors based on race. *Sanchez I*, 79 Mass. App. Ct. at 191-193; *Sanchez III*, 808 F.3d at 93. In other words, two courts reviewed the jury selection process, and both deemed that process to have been constitutional and for the defendant's trial to have been fair. Without any constitutional violation, there is no need for a remedy.

II. CONTROLLING PRECEDENT ESTABLISHES THAT THE DEFENDANT'S SENTENCE IS CONSTITUTIONAL UNDER BOTH THE EIGHTH AMENDMENT AND ART. 26, AND SO HIS CLAIM OF UNCONSTITUTIONALITY MUST BE DENIED.

The defendant also makes a brief argument that his mandatory sentence for second degree murder (life in prison with the possibility of parole) violates the Eighth Amendment and art. 26 (D.MNT.9-11). As the defendant acknowledges, his resentencing argument is at odds with the state of the law in the Commonwealth. "[A] mandatory life sentence with parole eligibility after fifteen years for a juvenile homicide offender convicted of murder in the second degree does not offend the Eighth Amendment or article 26." *Commonwealth v. Okoro*, 471 Mass. 51, 62 (2015). As this Court is bound to follow *Okoro*, the defendant's claim that his sentence is unconstitutional must fail.

CONCLUSION

Accordingly, the Commonwealth requests that this Court deny the defendant's motion.

Respectfully submitted
For The Commonwealth,

DANIEL F. CONLEY
DISTRICT ATTORNEY

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May 24, 2018

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the pains and penalties of perjury that I have today made service on the defendant by directing that a copy of this opposition and appendix be sent (with assent of counsel) via email to:

Ruth Greenberg, Esq.
ruthgreenberg44@aol.com

_____
Nicholas Brandt
Assistant District Attorney

May 24, 2018

RECORD APPENDIX OF THE COMMONWEALTH

0584CR10545 Commonwealth vs. Sanchez, Dagoberto

Case Type	Indictment
Case Status	Open
File Date	08/05/2005
DCM Track:	C - Most Complex
Initiating Action:	MURDER c265 §1
Status Date:	08/05/2005
Case Judge:	
Next Event:	

All Information | Party | Charge | Event | Tickler | Docket | Disposition

Party Information

Commonwealth - Prosecutor

Alias

Party Attorney

Attorney	Brandt, Esq., Nicholas
Bar Code	670808
Address	Suffolk County District Attorney's Office One Bulfinch Place Suite 300 Boston, MA 02114
Phone Number	(617)619-4000
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More Party Information

Sanchez, Dagoberto - Defendant

Alias

Party Attorney

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More Party Information

Party Charge Information

Sanchez, Dagoberto - Defendant

Charge # 1 :

265/1-0 - Felony MURDER c265 §1

Original Charge 265/1-0 MURDER c265 §1 (Felony)
Indicted Charge
Amended Charge

Charge Disposition

Disposition Date	Disposition
10/06/2006	Guilty Verdict

Sanchez, Dagoberto - Defendant

Charge # 2 :

269/10/G-1 - Misdemeanor - more than 100 days incarceration FIREARM WITHOUT FID CARD, POSSESS c269 §10(h)

Original Charge 269/10/G-1 FIREARM WITHOUT FID CARD, POSSESS c269 §10(h) (Misdemeanor - more than 100 days incarceration)
Indicted Charge
Amended Charge

Charge Disposition

Disposition Date	Disposition

10/06/2006
Guilty Verdict

Events

Date	Session	Location	Type	Event Judge	Result
08/16/2005 09:30 AM	Magistrate's Session		Arraignment		Held as Scheduled
09/13/2005 02:00 PM	Criminal 6		Pre-Trial Conference		Held as Scheduled
11/01/2005 02:00 PM	Criminal 6		Pre-Trial Conference		Held as Scheduled
12/15/2005 02:00 PM	Criminal 6		Hearing RE: Discovery Motion(s)		Rescheduled
01/19/2006 09:00 AM	Criminal 6		Hearing		Rescheduled
02/16/2006 09:00 AM	Criminal 6		Pre-Trial Hearing		Canceled
02/28/2006 02:00 PM	Criminal 6		Status Review		Not Held
03/16/2006 02:00 PM	Criminal 6		Status Review		
04/13/2006 09:00 AM	Criminal 6		Hearing on Compliance		Canceled
04/13/2006 02:00 PM	Criminal 6		Hearing on Compliance		Not Held
05/11/2006 02:00 PM	Criminal 6		Trial Assignment Conference		Held as Scheduled
07/25/2006 09:00 AM	Criminal 6		Final Pre-Trial Conference		Canceled
08/14/2006 09:00 AM	Criminal 6		Jury Trial		Canceled
09/07/2006 09:00 AM	Criminal 5		Final Pre-Trial Conference		Not Held
09/07/2006 09:00 AM	Criminal 2		Final Pre-Trial Conference		Canceled
09/07/2006 02:00 PM	Criminal 6		Final Pre-Trial Conference		Not Held
09/22/2006 09:00 AM	Criminal 6		Jury Trial		Not Held
09/22/2006 09:00 AM	Criminal 5		Jury Trial		Not Held
09/22/2006 09:00 AM	Criminal 2		Jury Trial		Rescheduled
09/25/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
09/26/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
09/27/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
09/28/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
09/29/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
10/03/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
10/04/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
10/05/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
10/06/2006 09:00 AM	Criminal 2		Jury Trial		Held as Scheduled
10/12/2006 09:30 AM	Criminal 1		Hearing for Sentence Imposition		Held as Scheduled
01/13/2009 02:00 PM	Criminal 2		Hearing		Held as Scheduled

Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Pre-Trial Hearing	08/16/2005	08/16/2005	0	07/14/2011
Final Pre-Trial Conference	08/16/2005	07/25/2006	343	07/14/2011
Case Disposition	08/16/2005	08/14/2006	363	07/14/2011

Docket Information

Docket Date	Docket Text	File Ref Nbr.
08/05/2005	Indictment returned as to offense #001 Murder in the 2nd degree.	1
08/05/2005	Motion by Commonwealth for arrest warrant to issue; filed & allowed (Locke J)	2
08/05/2005	Warrant on indictment issued	
08/05/2005	Warrant was entered onto the Warrant Management System 8/5/2005	
08/05/2005	Notice & copy of indictment & entry on docket sent to Sheriff	
08/16/2005	Defendant brought into court for arraignment. Warrant recalled.	
08/16/2005	Warrant canceled on the Warrant Management System 8/16/2005	
08/16/2005	Order of notice of finding of murder indictment read with return of service.	
08/16/2005	Appointment of Counsel Jonathan Shapiro, pursuant to Rule 53	
08/16/2005	Deft arraigned before Court	
08/16/2005	Indictment read as to offense #001. Deft waives reading of indictment as to offense #002.	
08/16/2005	RE Offense 1:Plea of not guilty	
08/16/2005	RE Offense 2:Plea of not guilty	
08/16/2005	Bail set: $7,500,000.00 with surety or $750,000.00 cash without prejudice. Bail warning read. Mittimus issued	
08/16/2005	Continued to 2/16/2006 for pre trial hearing by agreement in the 6th Criminal Session at 2:00 PM.	
08/16/2005	Continued to 9/13/2005 for pre trial conference by agreement in the 6th Criminal Session.	
08/16/2005	Continued to 7/25/2006 for final pre trial conference by agreement in the 6th Criminal Session.	
08/16/2005	Assigned to track "C" see scheduling order	
08/16/2005	Continued to 8/14/2006 for presumptive trial date by agreement in the 6th Criminal Session. Wilson, MAG - M. Lee, ADA - ERD - J. Shapiro, Attorney	
08/16/2005	Deft files motion for authorization of funds for an investigator.	3
08/16/2005	Motion (P#3) allowed	
08/19/2005	Commonwealth files Notice of Discovery I	4
09/02/2005	Commonwealth files notice of discovery II.	5
09/13/2005	Defendant brought into court - Further PTC compliance continued by agreement. Rule 36 waived. Hinkle,RAJ - M. Lee, ADA - J. Shapiro, Attorney - R. LeRoux, Court Reporter.	
09/14/2005	Commonwealth files Notice of Discovery III	6
10/05/2005	Commonwealth files notice of discovery IV.	7
11/01/2005	Defendant not in Court. P.T.C. held.	
11/01/2005	Pre-trial conference report filed.	8
11/01/2005	Commonwealth files certificate of compliance.	9
11/01/2005	Continued to 12/15/2005 by agreement at 2 P.M. - hearing re: non-eveidentiary motions. Court orders Rule 36 waived. Hinkle, J. - M. Lee, ADA - M. Malley, Court Reporter - J. Shapiro, Attorney.	
11/15/2005	Commonwealth files notice of Discovery V.	10
12/15/2005	Defendant not present, continued until 1/19/2006 @ the request of the Defendant for filing and hearing of non-evidentiary motions. Donovan J - M. Lee, ADA - P. Collins, Court reporter - M. Lee, ADA - J. Shapiro, Attorney.	
01/19/2006	Defendant not present, defense counsel not available.	
01/19/2006	Rule 36 waived	
01/19/2006	Continued to 2/28/2006. Hinkle RAJ - M. Lee, ADA - D. Cercone, Court reporter	

Docket Date	Docket Text	File Ref Nbr.
02/28/2006	Defendant not present - Defense counsel not available. Continued by order of Court re: status. Notice to counsel. Hinkle, RAJ -M. Lee, ADA - D. Cercone, Court Reporter.	
03/16/2006	Defendant not present, Status conference before, Hinkle RAJ	
03/16/2006	Rule 36 waived	
03/16/2006	Continued until 4/13/2006 by agreement for hearing re: discovery compliance and trial date. Hinkle RAJ - M. Lee, ADA - D. Cercone, Court reporter - J. Shapiro, Attorney.	
04/13/2006	Defendant not present, Commonwealth attorney not available, rescheduled to 5/11/06 by agreement re: trial assignment - compliance and possible scheduling of motion to suppress date of 8/14/06 for trial and 7/25/06 for FPTC cancelled. Hinkle RAJ - E. Roscoe, Court reporter - J. Shaparo, Attorney	
05/11/2006	Defendant not present - Defendant files motion to amend Tracking Order.	11
05/11/2006	Motion (P#11) allowed. Conference held re: trial date, after conference case scheduled for trial on September 22, 2006 and final pre-trial conerence on September 7, 2006 by agreement. Hinkle, RAJ - M. Lee, ADA - J. Shapiro, Attorney - A. Pollier, Court Reporter.	
05/26/2006	Commonwealth files: Notice of Discovery VI	12
07/13/2006	Case held in Session- Ready for trial. Court, Hinkle, RAJ assigns case to the 5th Criminal Session for Trial.	
07/28/2006	Case held in Session- Ready for trial. Court Hinkle, RAJ assigns case to the 2nd Criminal Session for Trial on 9/22/06.	
09/13/2006	Commonwealth files Notice of discovery VII	13
09/18/2006	Commonwealth files notice of discovery VIII	14
09/21/2006	Commonwealth files notice of discovery IX	15
09/21/2006	Commonwealth files notice of discovery X	16
09/25/2006	Defendant brought into court	
09/25/2006	Commonwealth files motion for view	17
09/25/2006	MOTION (P#17 after hearing) allowed	
09/25/2006	Commonwealth files motion in limine regarding demostrative charts and diagrams	18
09/25/2006	MOTION (P#18 after hearing) allowed	
09/25/2006	Commonwealth files motion in limine regarding photographs of victim	19
09/25/2006	Commonwealth's MOTION #19 after hearing, deferred by agreement	
09/25/2006	Commonwealth files motion in limine to exempt family members of victim from general order of sequestration	20
09/25/2006	MOTION (P#20 after hearing, denied. ref: endorsement and record) denied	
09/25/2006	Commonwealth files motion for judical inquiry into criminal history of potential trial juror or, in the alternative, notice of intent to independently seek such information for limited purposes of jury empanelment	21
09/25/2006	MOTION (P#21 after hearing,) allowed. ref: endorsement and record	
09/25/2006	Commonwealth files notice regarding testimony of expert witnesses	22
09/25/2006	Commonwealth files proposed statement of the case and proposed individual voir dire questions for purposes or jury empanelment	23
09/25/2006	Commonwealth files motion in limine to admit evidence of defendant's gang or organization affiliation and related testimony	24
09/25/2006	Deft files motion for individual voir dire of prospective jurors	25
09/25/2006	After hearing, Court orders the empanelment of sixteen jurors.	
09/25/2006	Commonwealth moves for trial.	

Docket Date	Docket Text	File Ref Nbr.
09/25/2006	After the empanelment of seven jurors, the Court recessed for the day, and orders the continuation of jury empanelment Tuesday September 26, 2006. E. Blake, C.R.	
09/26/2006	Defendant brought into court	
09/26/2006	After hearing, Court continues jury empanelment.	
09/26/2006	After the empanelment of sixteen jurors, the Court recessed the day and further orders trial poceedings continued until Wednesday September 27, 2006. E. Blake, C.R.	
09/27/2006	Defendant brought into court	
09/27/2006	Out of the presence of the jury, the Court conducts voir dire with Juror Maria Plasencia (333) and thereafter, the Court orders that said juror continue service on this trial.	
09/27/2006	Trial with jury (16) before Connolly, J. Jury sworn. Issue read. E. Blake, C.R.	
09/28/2006	Defendant brought into court	
09/28/2006	Trial with jury (16) continues before Connolly, J. E. Blake, C.R.	
09/29/2006	Defendant brought into court	
09/29/2006	Trial with jury (16) continues before Connolly, J.	
10/03/2006	Defendant brought into court	
10/03/2006	Trial with jury (16) continues before Connolly, J.	
10/03/2006	At the conclusion of the Commonwealth's case-in-chief, Defendant's motion for a required findings of not guilty filed and after hearing, denied.	26
10/03/2006	At the conclusion of the Defendant's case-in-chief, Defendant's motion for required findings of not guilty filed and denied.	27
10/03/2006	Deft files requested jury instructions on eyewitness identification, murder in the second degree, voluntary manslaughter, self defense, defense of another and unlawful possession of a firearm	28
10/03/2006	Commonwealth files request for jury instructions	29
10/04/2006	Defendant brought into court	
10/04/2006	Commonwealth files supplemental request for jury instructions	30
10/04/2006	Trial with jury (16) continues before Connolly, J. J. Rentel, C.R.	
10/05/2006	Defendant brought into court	
10/05/2006	Trial with jury (16) continues before Connolly, J.	
10/05/2006	Out of the presence of the jury, the Court conducts voire dire with Juror Maria Plasencia (333) and thereafter, the Court excused siad juror from further serviece on this trial. (ref: record)	
10/05/2006	At the conclusion of the Court's instructions to the jury, the Court orders that the jury be reduced to twelve members. The names Joseph Comenzo (294), Caroline Smith (212) and Melvinia Brown (202) were each drawn by lot and designated as Alternate Jurors.	
10/06/2006	Defendant brought into court	
10/06/2006	After hearing, Court orders jury to resume their deliberations	
10/06/2006	RE Offense 1:Guilty verdict. Verdict affirmed. Verdict slip filed.	31
10/06/2006	RE Offense 2:Guilty verdict. Verdict affirmed. Verdict slip filed.	32
10/06/2006	Continued until 10/12/2006 for disposition.	
10/06/2006	Mittimus without bail issued to Suffolk County Jail (Nashua Street) Connolly, J. - M. Lee, ADA - J. Rental, C.R. - J. Shapiro, Attorney	
10/12/2006	Defendant brought into court.	
10/12/2006	Deft files: Motion for Authorization to Purchase Court Clothes for Defendant.	33
10/12/2006	Deft files: Motion for Additional Authorization of Funds for an Investigator.	34

Docket Date	Docket Text	File Ref Nbr.
10/12/2006	Deft files: Motion to Reduce Verdict to Voluntary Manslaughter. Commonwealth moves for scentencing.	35
10/12/2006	Defendant sentenced at to Offense #001 MCI Cedar Junction Life. Mittimus issued.	
10/12/2006	Defendant sentenced as to Offense #002 Two years Suffolk County House of Correction South Bay This sentence to be served concurrently with Offense #001. Mittimus issued.	
10/12/2006	Victim-witness fee assessed: $90.00	
10/12/2006	Sentence credit given as per 279:33A: (489 days)	
10/12/2006	Notified of right of appeal under Rule 65	
10/12/2006	NOTICE of APPEAL FILED by Dagoberto Sanchez	36
10/12/2006	MOTION (P#33) allowed in the amount of $267.90	
10/12/2006	MOTION (P#34) allowed in the amount not to exceed $1,500.00.	
10/12/2006	MOTION (P#35) denied. Commonwealth moves for sentencing	
10/12/2006	Defendant warned per Chapter 22E Sec. 3 of DNA. Connolly, J. - M. Lee, ADA - J. Rental, Court Reporter - J. Shapiro, Attorney	
10/19/2006	Copy of notice of appeal mailed to Connolly, J. and M. Lee, ADA	
10/19/2006	Court Reporter Blake, Ellen is hereby notified to prepare one copy of the transcript of the evidence of September 25, 26, 27, 28, 29, 2006 Motions - Impanelemnt - Trial before Connolly, J. Certificate of clerk-filed.	37
10/19/2006	Court Reporter Rentel, Jan is hereby notified to prepare one copy of the transcript of the evidence of October 3, 4, 5, 6, 12, 2006 Motions - Trial - Verdict - Disposition before Connonlly, J.	
02/12/2007	Notice of assignment of counsel appointing Attorney Jonathan Shapiro for direct appeal	
09/27/2007	Transcript of testimony received from court reporter, Rentel, Jan	
10/01/2007	Notice of assignment of counsel assigning Ruth Greenberg on defendant's direct appeal filed.	
01/17/2008	Court Reporter Blake, Ellen is hereby notified to prepare one copy of the transcript of the evidence. SECOND NOTICE.	
03/11/2008	Deft files : Motion to compel the completion of transcripts for appeal. (Connolly, J. notified w/copy and docket sheets)	39
05/29/2008	Notice sent to attorneys that transcripts are available. J. Zanini and J. Shapiro, Atty	
06/03/2008	Certificate of delivery of transcript by clerk filed. J. Zanini	40
06/04/2008	Certificate of delivery of transcript by clerk filed. Ruth Greenberg, Esq	41
08/25/2008	Notice of completion of assembly of record sent to clerk of Appeals Court and attorneys for the Commonwealth and defendant. J. Zanini and R. Greenberg	
08/25/2008	Two (2) certified copies of docket entries, original and copy of transcript, two (2) copies of exhibit list , and copy of the notice of appeal, each transmitted to clerk of appellate court(Paper #36).	
09/03/2008	Notice of Docket Entry received from the Appeals Court, case was entered in this court 8/25/08	42
09/12/2008	Deft files Motion to allow copy of juror questionaires (Connolly, J and ADA J. Zanini notified 9/15/08)	43
01/09/2009	Deft files second and supplemental motion for inspection and copying of juror questionaires for purpose of appellate review and affidavit of Ruth Greenberg	44
01/13/2009	Defendant's MOTION #43 after hearing, ref: endorsement and record. Connolly, J. - J. Zanini, ADA - D. Cercone, C.R. - R. Greenberg, Attorney	
11/03/2010	Deft files Motion for stay (Connolly, J and ADA J. Zanini notified 11/3/10)	45

Docket Date	Docket Text	File Ref Nbr.
11/08/2010	MOTION (P#45) denied and endorsed on 11/4/10. Connolly, J (notified w/copy - J. Zanini, ADA and R. Goldberg, Attorney)	
07/14/2011	Rescript received from Appeals Court; judgment AFFIRMED	46
09/26/2015	Warrant CKA alias created for party #1 Alias Name: Dagoberto Sanchez	
01/10/2018	Defendant 's Motion for new trial /Reduction in Verdict, and/or relief from Unlawful Sentence. (Notice sent to Roach-RAJ and ADA J. Zanini with copy of Motion and Docket Sheets).	47
01/17/2018	Endorsement on Motion for new trial / Reduction in Verdict, and/ or Relief from Unlawful Sentence., (#47.0): Other action taken Commonwealth to Respond within 60 days, by no later than 03/16/2018 (Notice sent to Atty R. Greenberg and ADA J. Zanini with copy of Endorsement). Judge: Roach, Christine M	
01/19/2018	Commonwealth 's Notice of Appearance filed by Nicholas Brandt, Esquire	48
03/16/2018	Commonwealth 's Motion to Enlarge (Notice sent to Roach-RAJ with copy of Motion and Docket Sheets).	49
03/29/2018	Endorsement on Motion to enlarge time, (#49.0): ALLOWED (copy sent to N. Brandt, ADA and Ruth Greenberg, Atty Judge: Roach, Christine M	
03/29/2018	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Ruth Greenberg, Esq. Attorney: Nicholas Brandt, Esq.	
03/29/2018	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Ruth Greenberg, Esq. Attorney: Nicholas Brandt, Esq.	
05/17/2018	Commonwealth 's Motion (Second) to Enlarge Filed (copy with docket to Roach,RAJ)	50

Case Disposition

Disposition	Date	Case Judge
Disposed by Jury Verdict	10/06/2006	

Sanchez v. Roden

United States District Court for the District of Massachusetts

February 14, 2013, Decided; February 14, 2013, Filed

Civil No. 12-10931-FDS

Reporter
2013 U.S. Dist. LEXIS 19914 *; 2013 WL 593960

DAGOBERTO SANCHEZ, Petitioner, v. GARY RODEN, Respondent.

Subsequent History: Certificate of appealability granted *Sanchez v. Roden, 2013 U.S. Dist. LEXIS 30078 (D. Mass., Mar. 6, 2013)*

Vacated by, Remanded by *Sanchez v. Roden, 753 F.3d 279, 2014 U.S. App. LEXIS 9844 (1st Cir. Mass., 2014)*

Writ of habeas corpus denied *Sanchez v. Roden, 2015 U.S. Dist. LEXIS 13207 (D. Mass., Feb. 4, 2015)*

Prior History: *Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 944 N.E.2d 625, 2011 Mass. App. LEXIS 454 (2011)*

Counsel: **[*1]** For Dagoberto Sanchez, Petitioner: Ruth Greenberg, LEAD ATTORNEY, Swampscott, MA.

For Gary Roden, Superintendent - MCI Norfolk, Respondent: Jennifer L. Sullivan, LEAD ATTORNEY, Office of the Attorney General (MA), Worcester, MA.

Judges: F. Dennis Saylor, IV, United States District Judge.

Opinion by: F. Dennis Saylor, IV

Opinion

MEMORANDUM AND ORDER ON PETITION FOR WRIT OF HABEAS CORPUS

SAYLOR, J.

This is an action by a state prisoner seeking a writ of habeas corpus pursuant to *28 U.S.C. § 2254*. Petitioner Dagoberto Sanchez was convicted in Suffolk County of second-degree murder and unlawful possession of a firearm. He was sentenced to a term of life imprisonment (with the possibility of parole after 15 years) on the murder conviction and a concurrent two-year term on the firearm conviction. Sanchez now seeks habeas relief, contending that the prosecution deliberately exercised peremptory challenges to strike young men "of color" in violation of his constitutional rights.

For the reasons set forth below, the petition will be denied.

I. Background

A. The Trial

The facts surrounding the crime that led to Sanchez's conviction are extensively set out in the decision of the Massachusetts Appeals Court on the his direct appeal, **[*2]** and only the facts that are relevant to this opinion bear repetition. *See Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 944 N.E.2d 625 (2011)*. The petition now before the Court concerns not the events of the crime, but events that transpired at trial and on direct appeal.

On August 25, 2005, Sanchez was indicted on one count of second-degree murder and one count of unlawful possession of a firearm. His trial began on

September 25, 2006. The jury selection process took two days. By the second day, the prosecution had used eleven peremptory challenges to remove eight white jurors, one 41-year-old Hispanic man, and two African-American men, ages 24 and 25. At that point, ten jurors had been seated, five of whom were African-American. The five African-Americans already seated on the jury included two men, ages 51 and 34. Sanchez's counsel objected to the prosecution's use of its twelfth peremptory challenge against Juror No. 261, an 18-year-old African-American man. Defense counsel argued that the challenge of a third young African-American juror established a discriminatory pattern of excluding young black males, or, when taken with the exclusion of the 41-year-old Hispanic juror, established a pattern **[*3]** of excluding young dark-skinned jurors.

After counsel raised that objection, the trial court initially observed that there was a pattern of challenging young black men. After some discussion at sidebar about the racial identity of the excluded Hispanic juror, the following exchange occurred between the court and defense counsel:

> THE COURT: Counsel, the clerk indicates that we have, already, five black people sitting on this jury, okay; so I can't see, as a class; regarding to the color would be a problem. I think the only - what you're basically saying is it's because they're young black men, is that correct? In other words, the emphasis on their age?
>
> MR. SHAPIRO: I think that's certainly part of it; I mean I think that that's what distinguishes these challenges from the other black persons who weren't challenged. But I think that even if you just look at the two black persons who were challenged, that would be two out of a total of seven which is a significant percentage, in and of itself. But the additional feature to the black persons who have been challenged, I believe, are the relatively youthful – I guess one is 24 and one is 25.
>
> THE COURT: . . . Counsel, in looking at the case law **[*4]** . . . there's nothing with a reference to age here that is one of the classes under Commonwealth versus Soares.
>
> MR. SHAPIRO: I agree and . . . even if you take out Mr. Chinchilla, the Guatemalan [the excluded Hispanic juror] . . . would be the third black man challenged out of a total of eight questioned, so far. So we have three out of a total of eight; which, I say is a significant percentage –
>
> THE COURT: I make a determination that there has not been shown a pattern of discrimination in this case, under the Soares case, at this time.

The trial court allowed the exclusion of Juror No. 261 over defense counsel's objection. Because a *prima facie* showing of impropriety had not been made, the prosecutor was not required to justify his use of a peremptory challenge.[1]

The record does not reflect the final racial composition of the jury, although it appeared to have at least five African-American members. On October 6, 2006, the jury found Sanchez **[*5]** guilty of both counts.

B. The Direct Appeal

Sanchez appealed his conviction to the Massachusetts Appeals Court. He raised two arguments as to the trial judge's jury instructions that are not at issue here. He also argued that the government's use of peremptory challenges was unconstitutional. Specifically, he contended that the exclusion of four apparently young men "of color" violated the *Equal Protection Clause of the Fourteenth Amendment* and Article 12 of the Massachusetts Declaration of Rights.

The Appeals Court affirmed the conviction. The

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[1] The trial judge did note, however, that the inclusion of Juror No. 261 could present a problem because of his "youth and the fact that he's a full-time college student." *See* (Docket No. 2 at 23); *see also* *Sanchez, 79 Mass. App. Ct. 189, 191, n.7, 944 N.E.2d 625*.

court found that Sanchez had not made a *prima facie* showing of impropriety, because he could not show a pattern of "excluding members of a discrete group" where it was "likely that individuals [were excluded] solely on the basis of their membership in that group." *Sanchez, 79 Mass. App. Ct. at 192* (citing *Commonwealth v. Maldonado, 439 Mass. 460, 463, 788 N.E.2d 968 (2003)*). The court found that there was no pattern of discrimination in light of the fact that five African-Americans had already been seated on the jury; that age was not a protected class under either the United States Constitution or the Massachusetts Declaration of Rights; and that persons "of **[*6]** color" was not a cognizable group under either state or federal law. *Id. at 192-93*. Because Sanchez could not establish a *prima facie* showing of impropriety, the government was not required to justify the peremptory challenge. *Id. at 191*.

C. The Application to Leave for Further Appellate Review

Sanchez then filed an Application for Leave to Obtain Further Appellate Review (ALOFAR) with the Supreme Judicial Court (SJC). In his ALOFAR, Sanchez set forth the same three arguments, including the argument that the prosecutor improperly used peremptory challenges to discriminate against young men "of color." Sanchez, however, did not explicitly argue that the government's use of peremptory challenges discriminated against young African-American men. On June 29, 2011, the SJC summarily denied the ALOFAR. *Commonwealth v. Sanchez, 460 Mass. 1106, 950 N.E.2d 438 (2011)*. Sanchez then petitioned for a writ of certiorari from the Supreme Court of the United States, which was denied on October 11, 2011.

D. Federal Proceedings

On May 23, 2012, Sanchez filed a petition for a writ of habeas corpus in this Court. Sanchez concedes that the jury that decided his case was a fair cross-section of the community within the meaning **[*7]** of the *Sixth Amendment*. However, he contends that the government violated the *Equal Protection Clause of the Fourteenth Amendment* when the prosecutor used four peremptory challenges on "the first four apparently young dark-skinned men in the jury pool."[2] He contends that the government's use of peremptory challenges against the four dark-skinned prospective jurors established a *prima facie* case of combined color/gender discrimination. Alternatively, he contends that the exclusion of three African-American men, without consideration of the excluded Hispanic man, establishes a *prima facie* showing of racial discrimination.[3]

II. Standard of Review

A federal court may not grant an application for a writ of habeas corpus for a person in state custody unless the state court decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or the decision was an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *28 U.S.C. § 2254(d)*.

"'[A]n unreasonable application' of Supreme Court case law occurs if 'the state court identifies the correct governing legal principle for th[e] [Supreme] Court's decisions but unreasonably

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[2] Petitioner does not explain how the 34-year-old African-American man who was seated on the jury was not as "apparently young" as the 41-year-old Hispanic man who was excluded.

[3] The Court notes that in petitioner's brief to the Massachusetts Appeals Court and in his ALOFAR he argued that the government's use of peremptory challenges was unconstitutional toward "persons of color," and did not expressly argue that the government excluded members based on their status as young African-American men. It is unclear to this Court whether petitioner fairly presented his argument **[*8]** concerning African-Americans to the state courts for exhaustion purposes. Respondent did not, however, raise any such argument in his opposition. The Court, therefore, will not consider the exhaustion issue.

applies that principle to the facts of the prisoner's case." *Jackson v. Coalter, 337 F.3d 74, 81 (1st Cir. 2003)*. The "unreasonable application" determination must be decided primarily on the basis of Supreme Court holdings that were clearly established at the time of the court proceedings. *Id.* Nevertheless, factually similar cases from the lower **[*9]** federal courts "may inform such a determination, providing a valuable reference point when the relevant Supreme Court rule is broad and applies to a kaleidoscope array of fact patterns." *Rashad v. Walsh, 300 F.3d 27, 35 (1st Cir. 2002)*.

If a claim was not "adjudicated on the merits in State court proceedings," then the claim should be reviewed *de novo* by the district court. *Clements v. Clarke, 592 F.3d 45, 52 (1st Cir. 2010)*. In determining whether a claim was adjudicated on the merits in state court, the Court looks to whether the state court decision resolved the parties' claims, with *res judicata* effect, based on the substance of the claim advanced, rather than on a procedural, or other, ground. *Id.* Furthermore, to garner the protection of deferential review, the claim must not only be adjudicated on the merits, but, specifically, the merits of the *federal* claim at issue, which is complicated by the fact that determining precisely which "substance" a state court relied on may be difficult to ascertain. *Id. at 53*.

Petitioner contends that his claim was not adjudicated on the merits in state court proceedings, and, therefore, he is entitled to *de novo* review.

A.State Adjudication

The **[*10]** Massachusetts Appeals Court affirmed the trial court's finding that petitioner could not rebut the presumption of propriety in the prosecutor's use of peremptory challenges. *See Sanchez, 79 Mass. App. Ct. at 191*. In doing so, the Appeals Court reiterated the Massachusetts standard: "Peremptory challenges are presumed to be proper, but that presumption may be rebutted on a showing that '(1) there is a pattern of excluding members of a discrete group and (2) it is likely that individuals are being excluded on the basis of their membership' in that group." *Commonwealth v. Soares, 377 Mass. 461, 490, 387 N.E.2d 499 (1979)*.

The corresponding federal standard was established in *Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1979)*. To make a *prima facie* showing under *Batson*, a defendant must merely raise an inference that the prosecutor struck a juror because of race or other protected status. *See Johnson v. California, 545 U.S. 162, 169, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005)*. To make a *prima facie* showing under the Massachusetts standard, however, it must be shown that it is "likely" that the venireperson was excluded because of his protected group membership. *Maldonado, 439 Mass. at 463*. The Massachusetts "likely" standard is thus more stringent than **[*11]** the federal standard. *Aspen v. Bissonnette, 480 F.3d 571, 575 (1st Cir. 2007)*. The Appeals Court therefore held petitioner to a higher standard than federal law required.

Where, as here, it is clear that the state court analyzed a petitioner's claim under a higher standard than federal law requires, the Court can interpret the holding in two ways, both of which lead to *de novo* review of the federal claim. The Court can interpret the state court's analysis as equating the federal and state standards, and thereby resulting in the application of a standard contrary to clearly established federal law. *See Aspen, 480 F.3d at 576*. In such a situation, the Court must "consider de novo whether [petitioner] is entitled to relief under the correct *Batson* standard." *Id.* Alternatively, the Court could interpret the state court's holding as resting entirely on substantive state law grounds, which would indicate that petitioner's federal claim had not been adjudicated on the merits within the meaning of *28 U.S.C. § 2254(d)*. *See Clements, 592 F.3d at 53* ("Were we to find that the state court had relied solely on state standards that did not implicate federal constitutional issues, we would review

[*12] the matter de novo."). Accordingly, this Court will review the merits of the federal constitutional claim *de novo.*

III.Analysis

Petitioner contends that his Equal Protection rights were violated when the government used four peremptory challenges to remove three African-American men, ages 24, 25, and 18, respectively, and one dark-skinned Hispanic man, age 41, from the jury. He contends that the government violated the *Fourteenth Amendment* because it discriminated against these individuals because of their status as young men "of color." He argues that because race and gender are impermissible reasons for exclusion of jurors under federal law, the Massachusetts Appeals Court erred in affirming his conviction because it should have recognized the combination of age, gender, and race as a *Batson* violation.

For the reasons set forth below, this Court finds that the Massachusetts Appeals Court correctly applied the law in accordance with federal precedent.

A.*Prima Facie*Standard

When a defendant asserts that a prosecutor has used a peremptory challenge in a discriminatory manner, *Batson* instructs the trial judge to follow a three-step inquiry. *476 U.S. at 96-98*. The moving party bears the initial **[*13]** burden of demonstrating a *prima facie* case of discrimination. *Aspen, 480 F.3d at 574* (citing *Batson, 476 U.S. at 96-98*). If this burden is met, the non-moving party must then offer a non-discriminatory reason for striking the potential juror. *Id.* The trial court must then determine if the moving party has met its ultimate burden of persuasion that the peremptory challenge was exercised for a discriminatory reason. *Id.*

"While the *prima facie* case requirement is not onerous, neither can it be taken for granted." *United States v. Bergodere, 40 F.3d 512, 516 (1st Cir. 1994)*. To surmount this initial hurdle, the defendant must present evidence sufficient to raise an inference that the prosecutor struck the venireperson because of race. *Johnson, 545 U.S. at 169*. In determining whether a *prima facie* showing has been made, the judge should consider all relevant facts and circumstances, including the composition of the jury pool when the strikes were made. *See, e.g., Batson, 476 U.S. at 97*; *United States v. Escobar-de Jesus, 187 F.3d 148, 164-65 (1st Cir. 1999)*; *Chakouian v. Moran, 975 F.2d 931, 934 (1st Cir. 1992)*.

Status as a "minority" is not a cognizable group under *Batson. Gray v. Brady, 592 F.3d 296, 302 (1st Cir. 2010)*. **[*14]** Likewise, "young adults do not constitute a 'cognizable group' for the purpose of an Equal Protection challenge to the composition of a petit jury." *United States v. Cresta, 825 F.2d 538, 545 (1st Cir. 1987)* (citing *Barber v. Ponte, 772 F.2d 982, 996-1000 (1st Cir. 1985)* (en banc)).

B.Merits of the Claim

Petitioner argues that the government improperly discriminated against young African-American males or young men "of color," which he defines as "dark-skinned." Reviewed *de novo*, even with the benefit of the correct *Batson* standard, petitioner's *Fourteenth Amendment* claim fails.[4]

First, persons "of color" are not a cognizable group under *Batson. Id.* To prove that a prospective juror was a member of such a cognizable group, petitioner must show that "(1) the group is identifiable and limited by some clearly identifiable factor, (2) a common thread of attitudes, ideas, or experiences runs through the group, and (3) a community of interests exists among the group's members, such that the group's **[*15]** interest cannot be adequately represented if the group is excluded" from the jury. *Gray, 592 F.3d at 305-06*

[4] As noted, the jury that heard the case had at least five African-American members. Petitioner does not contend that the jury that heard his case did not represent a fair cross-section of the community.

(citing *Murchu v. United States, 926 F.2d 50, 54 (1st Cir. 1991)*). Although African-Americans and Hispanics are each a distinct cognizable group, when combined they lack the necessary characteristics, definable qualities, common thread of attitudes, or interests to be considered a cognizable "group." *Accord Gray, 592 F.3d at 306* (refusing to assume that "'minorities' possess these necessary characteristics of a 'cognizable group'"); *see also United States v. Suttiswad, 696 F.2d 645, 649 (9th Cir. 1982)* ("Any group which might casually referred to as 'non-whites' would have no internal cohesion . . . . Certainly, the members of such a group would have diverse attitudes and characteristics which would defy classification."). Simply put, status as a "dark-skinned" person is not indicative of membership in a protected group with distinct cognizable rights for purposes of a *Batson* challenge.

Second, and for similar reasons, "age" is not a cognizable group under federal law. It is noteworthy that petitioner does not consistently or clearly define the age group that he contends was the **[*16]** target of unconstitutional discrimination, alternatively describing the group as "apparently young," "every dark-skinned man under thirty," and "black men [under] forty." (Docket No. 2, at 7, 9). Such broad categories, consisting of every person between the ages of 18 and 30 (or 40), cannot constitute *Batson*-cognizable groups. *See Barber v. Ponte, 772 F.2d at 998* ("Without much effort we can point to various significant social indicators that would seem to punctuate clear differences in the attitudes, values, ideas, and experiences of 18 year olds vis-a-vis 34 year olds . . . .").

Finally, petitioner cannot establish a *prima facie* case of discrimination by cobbling together cognizable groups. Petitioner argues that the government discriminated against either young men "of color" or young African-American men.[5] Recognizing that age and status as a "minority" are not acceptable grounds for a *Fourteenth Amendment* challenge, petitioner's challenge boils down to a combination of race, gender, and age. Petitioner has essentially taken two cognizable groups (African-Americans and men) and joined them together with a third undefined category (age or a juror's "apparently young" appearance) **[*17]** in an attempt to create a cognizable subclass.

Even without the dubiously broad skin-color reference, the category advanced by petitioner ("young African-American males") fails to meet the requirements of a cognizable group set forth in *Murchu. 926 F.2d at 50*. The group lacks a clearly definable factor that separates it from other groups. In particular, it is unclear how young black men would be distinguished from older black men with respect to the common identifying characteristics necessary to establish a cognizable group under *Batson*. Indeed, petitioner himself fails to define the term "young" consistently throughout his petition. Presumably, this is, at least in part, due to the fact that the sub-category **[*18]** is to a large extent indistinguishable from the general population of African-American males. In short, petitioner has not shown that a "common thread of attitudes, ideas, or experiences runs through the group." *Murchu, 926 F.2d at 50*.

Accordingly, the Court finds that the Massachusetts Appeals Court reached a conclusion that was consistent with federal law, and the petition for a writ of habeas corpus will therefore be denied.

IV. Conclusion

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED.

So Ordered.

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[5] Even if petitioner were successful in establishing that men "of color" merited constitutional protection, it is doubtful that he would be able to show that the government followed a pattern of challenging jurors within the allegedly protected group because of their status in that group. For example, petitioner would have difficulty raising the necessary inference where the government did not challenge a 34-year-old black man, but did challenge a 41-year-old dark-skinned Hispanic man.

/s/ F. Dennis Saylor

F. Dennis Saylor IV

United States District Judge

Dated: February 14, 2013

End of Document

Sanchez v. Roden

United States District Court for the District of Massachusetts

February 4, 2015, Decided; February 4, 2015, Filed

Civil Action No. 12-10931-FDS

Reporter
2015 U.S. Dist. LEXIS 13207 *; 2015 WL 461917

DAGOBERTO SANCHEZ, Petitioner, v. GARY RODEN, Respondent.

Subsequent History: Affirmed by *Sanchez v. Roden, 2015 U.S. App. LEXIS 21176 (1st Cir. Mass., Dec. 7, 2015)*

Prior History: *Sanchez v. Roden, 2013 U.S. Dist. LEXIS 19914 (D. Mass., Feb. 14, 2013)*

Counsel: **[*1]** For Dagoberto Sanchez, Petitioner: John H. Cunha, Jr., LEAD ATTORNEY, Cunha & Holcomb, PC, Boston, MA; Ruth Greenberg, LEAD ATTORNEY, Swampscott, MA.

For Gary Roden, Superintendent - MCI Norfolk, Respondent: Jennifer L. Sullivan, LEAD ATTORNEY, Office of the Attorney General (MA), Worcester, MA; Thomas E. Bocian, LEAD ATTORNEY, Office of the Attorney General Martha Coakley, Boston, MA; Cara L. Krysil, Office of the Attorney General, Boston, MA.

Judges: F. Dennis Saylor IV, United States District Judge.

Opinion by: F. Dennis Saylor IV

Opinion

MEMORANDUM AND ORDER ON PETITION FOR A WRIT OF HABEAS CORPUS

SAYLOR, J.

This is an action by a state prisoner seeking a writ of habeas corpus pursuant to *28 U.S.C. § 2254*. Petitioner Dagoberto Sanchez was convicted in Suffolk County of second-degree murder and unlawful possession of a firearm. He was sentenced to a term of life imprisonment (with the possibility of parole after 15 years) on the murder conviction and a concurrent two-year term on the firearm conviction. Sanchez now seeks habeas relief, contending that the prosecution deliberately exercised peremptory challenges to strike young men on the basis of race in violation of his constitutional rights.

For the reasons set forth below, the **[*2]** petition will be denied.

I. Background

A. Procedural Background

This matter is on remand from the Court of Appeals. Petitioner initially sought a writ of habeas corpus in this Court, alleging that the Commonwealth impermissibly exercised multiple peremptory challenges on the basis of race. On appeal from this Court's denial of the petition, the Court of Appeals found that petitioner had made out a *prima face* case of discrimination. *Sanchez v. Roden, 753 F.3d at 307*. Specifically, it held that petitioner had satisfied his burden under *Batson v. Kentucky* in raising an inference of possible racial discrimination in the prosecution's exercise of a peremptory challenge against juror 261, an African-American male. *Id.*; *see Batson v. Kentucky, 476*

U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)].[1] It directed the Court to conduct an evidentiary hearing and complete the inquiry under Batson. Sanchez, 753 F.3d at 308 (1st Cir. 2014); *see* Batson, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69. Specifically, it directed as follows:

> [The district] court should attempt to conduct the second and third *Batson* steps. It should require the prosecutor to explain his challenge[]. If the prosecutor offers a race-neutral explanation, the court must try to evaluate that explanation and decide whether defendant has proved purposeful racial discrimination. If the court finds that, due to the passage of time or any **[*3]** other reason, it cannot adequately address the issues at this stage or make a reliable determination, or if it determines that the prosecutor exercised his peremptory challenges improperly, it should set the case for a new trial. If it finds the prosecutor exercised his peremptory challenge[] in a permissible fashion, it should [affirm] the judgment.

Sanchez v. Roden, 753 F.3d at 308 (alteration in original) (quoting People v. Johnson, 38 Cal. 4th 1096, 45 Cal. Rptr. 3d 1, 136 P.3d 804 (Cal. 2006)).

On September 8, 2014, the Court held an evidentiary hearing. The only witness at the hearing was Suffolk County Assistant District Attorney Mark Lee, who was the lead prosecutor at Sanchez's trial.

B. Factual Background

Unless otherwise stated, the following facts are taken from transcripts and juror questionnaires from Sanchez's trial or Lee's testimony at the September 8, 2014 hearing.

The facts surrounding the crime that led to Sanchez's conviction are set out in the decision of the Massachusetts Appeals Court on the his direct appeal, and only the facts that are relevant to this opinion bear repetition. **[*4]** *See* Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 944 N.E.2d 625 (2011).

Dagoberto Sanchez was charged with second-degree murder and unlawful possession of a firearm. Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 189, 944 N.E.2d 625 (2011). Sanchez contended that he had acted in self-defense and in the defense of another. *Id*.

Jury empanelment for the trial began on September 25, 2006. Judge Thomas E. Connolly of the Massachusetts Superior Court was the presiding judge. Prior to the voir dire, the prosecution and defense were given copies of one-page written questionnaires that had been completed by each prospective juror. The juror questionnaires included basic information such as the juror's name, age, city or town of residence, marital status, occupation, spouse's occupation, and whether the juror had children. The questionnaires also included three or four discrete questions concerning a juror's past experiences with, and connections to, the criminal justice system.

Assistant District Attorney Mark Lee was the chief prosecutor for the Commonwealth. Lee testified that once he receives the questionnaires, it is his practice, "at least as is practicable, to look through every questionnaire and make sort of a preliminary indication." (E.R. at 10). Lee explained that he looks at these questionnaires before the judge calls the court **[*5]** to order and during any preliminary remarks. (E.R. at 11). More specifically, he testified that "almost the first demographic I look at on that questionnaire is the age of the individual." (E.R. at 30).

Judge Connolly began the empanelment process with a series of questions to the entire venire that

[1] The court also found that Sanchez had waived any objection to the challenges uses against other jurors, including jurors 201 and 227, by failing to object to those challenges at the time they were made. Sanchez, 753 F.3d at 295 n.10.

were intended to address possible biases. (Tr. Sep. 25, 2006 at 64-82). Once that voir dire was completed, jurors were brought forward one by one, in ascending numerical order, and examined individually. Judge Connolly then either excused the juror for cause or determined that no such cause existed. If the juror was not excused for cause, the judge gave both attorneys an opportunity to exercise a peremptory challenge. The prosecution and the defense were granted 16 challenges each. The prosecutor was always asked for his decision first; if the prosecutor did not exercise a challenge, defense counsel was then given an opportunity to do so. If both sides chose not to exercise a challenge, the juror was immediately seated and there was no further opportunity to strike the juror.

Lee testified that during such a process, it is his practice to "always monitor[] how many peremptory challenges [he has] left versus **[*6]** how many peremptory challenges defense counsel has left" and also to consider "what [he] understand[s] to be upcoming based upon the questionnaires." (E.R. at 15). If a juror questionnaire includes a response that concerns him, it is his practice to ask the judge to follow up on that response. (E.R. at 28-29). He also testified that he challenges young jurors "as a general practice." (E.R. at 28).

Lee exercised his fifth peremptory challenge on juror 201, a 25-year-old male named L.D.[2] L.D. indicated on his questionnaire that he was born in Trinidad. (E.R. at 14, 33; S.A. at 281). His race is not clearly indicated in the record, although he appears to have been dark-skinned. The questionnaire further indicated that he was employed part-time as a computer technician. (S.A. at 281). The only other pieces of information on the questionnaire were his address and that he was single with no children. (*Id.*). He responded in the negative to all of the judge's inquiries as to whether he would have any difficulty being a fair and impartial juror. (Tr. Sep. 25, 2006 at 165-70). Lee testified that he challenged L.D. due to his age. (E.R. at 14).

Lee exercised his seventh challenge on juror 227, a 24-year-old black male named P.M. (E.R. at 14, 36, 38; S.A. at 282). P.M. indicated on his questionnaire that he was an employee of City Year Inc. in Boston and that his highest academic degree was a G.E.D. (S.A. at 282). He also disclosed that he had once been arrested for a "[t]raffic violation that went unpaid." (*Id.*). He responded in the negative to all of the judge's inquiries as to whether he would have any difficulty being a fair and impartial juror. (Tr. Sep. 26, 2006 at 13-16). Lee testified that he challenged P.M. due to his age. (E.R. at 14-15, 37).

Lee exercised his eighth challenge on juror 229, a white male named R.C. who was a sophomore at Boston University. (E.R. at 38-39). His exact age is not reflected in the record, but presumably he was approximately 19 years old. R.C. responded in the negative to all of the judge's inquiries as to whether he would have any difficulty being a fair and impartial juror. (Tr. Sep. 26, 2006 at 19-23). Lee could not specifically **[*8]** recall his reasoning behind challenging R.C.; however, he testified that based on his general practice, he believes he challenged R.C. "because he was in college and because of his age." (E.R. at 38). He further testified that he "could tell you with almost 100 percent certainty if he was in college and he was young, I was going to strike him, and I did strike him." (E.R. at 38-39).

Lee did not challenge juror 243, a 21-year-old white male of Russian descent named I.R. (E.R. at 43; S.A. at 293). I.R.'s questionnaire specifically indicated that he had been born in Moscow, Russia. (S.A. at 293). It further indicated that he was a student at Boston University and that he worked

[2] Lee's first four challenges were exercised on jurors 174, 183, 192, and 193. (Tr. Sep. 25, 2006 at 131-35, 145-49, 152-56, 156-59). The questionnaires filled **[*7]** out by these jurors are not part of the record, and these challenges do not appear to be directly relevant to the *Batson* analysis. The same applies to the challenges exercised by Lee on jurors 223, 237, 241, 284, and 310. (Tr. Sep. 26, 2006 at 6-10, 39-46, 49-53, 147-50, 180-85).

part-time for a non-profit organization. (*Id.*). Lee testified that he did not challenge I.R., "despite not wanting to take him," in part because he was "running out of challenges at that point," in part due to some of I.R.'s characteristics that "barely" overcame his youth, and in part "based upon an examination of who remained in the venire." (E.R. at 13, 43, 45). Lee specifically testified:

> I took him, despite not wanting to take him, but I was—there are a number of young jurors who I will take based upon what I consider to be indications on their questionnaire that might make them not fit their chronological **[*9]** age, which is to say that he was 21 years old, but I noted he was born in Moscow, I noted that he came here on his own to begin his own education, and so I thought if I had to take a young juror, that would be somebody who might be a better candidate than most.

(E.R. at 13). He further explained that his "inclination was to strike him":

> It was more of a hold-your-nose situation and take him because I thought somebody who came to this country to go to school at the age of 21 may have been chronologically a little bit older than someone else in terms of life experiences, and that's really what I'm looking at that somebody who has some level of maturity and life experience.

(E.R. at 44). He later clarified that "[I] didn't mean that I knew his life history. I knew he was 21, and I knew that he was here attending school and he was born in another country." At the time, Lee had six challenges remaining and defense counsel had twelve. (E.R. at 45). When defense counsel also chose not to challenge I.R., he became the ninth juror seated.

Lee exercised his eleventh challenge on juror 246, a 41-year-old man born in Guatemala named M.C. (E.R. at 52-53; S.A. at 283). During his individual voir dire, M.C. responded to a portion of Judge Connolly's questioning **[*10]** as follows:

> Q Is there any reason you can think of that you, as a juror, might not be able to be fair and impartial to the Commonwealth and to the defendant, Mr. Sanchez, and to decide this case solely on the law and the evidence as given in this case?
> A I hope I could be fair.
> Q Well, is there any question in your mind whether you could be fair?
> A No.
> Q Consciously?
> A Just that the responsibility—I mean, no, no.
> Q There isn't?
> A No.

(Tr. Sep. 26, 2006 at 73-74). At sidebar, Lee asked Judge Connolly to inquire further on that subject, because Lee was "concerned about whether he's daunted at the responsibility of returning a verdict in this case." (*Id.* at 74). That led to the following exchange between Judge Connolly and M.C.:

> Q Sir; in response to one of my questions you indicated concerning the responsibility; something like that, do you remember that?
> A You said do you feel like you can do a good job, so at the end—I understood the—So what I understood as, in terms of judging somebody, do you have anything that would make you believe you can do a fair job; but the way I see it is, what makes you believe you can do a good job? Or to anybody, I guess, so it's more after—
>
> Q Let me back up a little bit. **[*11]** Your job, as a juror, is to follow the law as I instruct you and to decide the questions of fact that are presented to the jury, and you're asked to do the best you can after you've observed and heard and examined the exhibits, you're asked to do the best you can. No one can ask any human being to do better than they can; that's all anyone can ask of us, do you have any problems with that?
> A No, given that I agree; I think too.

(*Id.* at 75). After that exchange, Lee exercised a challenge on M.C.

At the hearing on September 8, 2014, Lee testified:

"I exercised a challenge against [M.C.] because in response to one of the questions, he expressed concern about the responsibility of being a juror. That is, what I consider—what he suggested was an overwhelming responsibility or a responsibility that he didn't know whether he could meet." (E.R. at 53). Lee was then asked the following question and gave the following response:

> Q Is it your testimony that every time some juror expressed a concern about the weight of the responsibility that you would challenge them?
>
> A Every single time, no, but probably most times. If somebody came up there and said, I'm concerned about the level of responsibility that being a juror **[*12]** entails, having anybody agree unanimously on a first-degree murder conviction is extraordinarily difficult, and anybody who expresses doubt about their ability to do something like that is going to be a cause of concern for me. Now, is it every single juror that I exercise a peremptory challenge on? I couldn't possibly tell you that, but more times than not, I would.

(E.R. at 54).

With five challenges remaining, Lee did not exercise a challenge on juror 255, a 27-year-old female named J.O. (Tr. Sep. 26, 2006 at 109-13; S.A. at 300). J.O.'s questionnaire indicated that she worked in project management for Beacon Hill Staffing in Boston. (S.A. at 300). Lee testified: "I think when that person or that prospective juror came up, I was down to, I believe, either four or five challenges. She was 27 years old, which I didn't consider to be overly young. She was working. I don't recall what her job was at the time, but I was—probably may have been somebody I might have taken anyway but certainly was going to take given the number of peremptory challenges I had remaining." (E.R. at 15).[3]

Lee exercised his twelfth challenge on juror 261, a 19-year-old **[*13]** black male named A.D. (Tr. Sep. 26, 2006 at 120; S.A. at 284). Eleven of sixteen jurors had been seated at that point. (S.A. at 285-300). According to his questionnaire, A.D. worked for Home Depot and was in his first year of college. (S.A. at 284). During his individual voir dire, A.D. stated that he attended Northeastern University. (Tr. Sep. 26, 2006 at 119). He answered "no" to all of the judge's inquiries as to whether he would have any difficulty being a fair and impartial juror. (*Id*. at 116-19). (*Id*. at 116). Lee exercised a challenge directly after the individual voir dire. (*Id*. at 120).

After Lee indicated his intent to challenge A.D. at sidebar, defense counsel objected on the basis that "Mr. Lee has, now, exercised [per]emptory challenges against a large number of African American [jurors]." (Tr. Sep. 26, 2006 at 120). Following a discussion, defense counsel specified that he was referring to jurors 201, 227, and 246—L.D., P.M., and M.C.—as establishing a pattern of discrimination. (*Id*. at 129).[4]

In response, Judge Connolly first stated that M.C. should be excluded from consideration, because "under no circumstances could this man be considered a man of color. In my opinion, he's a Guatemalan; he's from Central America." (*Id*.). Defense counsel then argued that even excluding M.C., Judge Connolly should still find a pattern of discrimination based on the fact that A.D. "would

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[3] At one point, Lee mistakenly testified that he "was down to I believe four peremptory challenges" when he chose not to strike J.O. (E.R. at 63).

[4] As noted above, L.D.'s questionnaire indicates that he was born in Trinidad. During the discussion among Lee, Judge Connolly, and defense counsel, defense counsel characterized L.D. as a "person of color." (Tr. Sep. 26, 2006 at 122). Neither Judge Connolly nor Lee **[*14]** disputed the characterization. (*Id*. at 122-33). There is, however, some question as to whether he was black, as opposed to (for example) a dark-skinned South Asian or person of mixed race. A substantial majority of the population of Trinidad is of South Asian, African, or mixed African-Asian background. GOV'T OF THE REPUBLIC OF TRINIDAD & TOBAGO, MINISTRY OF PLANNING AND SUSTAINABLE DEVELOPMENT CENTRAL STATISTICAL OFFICE, TRINIDAD & TOBAGO 2011 POPULATION AND HOUSING CENSUS DEMOGRAPHIC REPORT 15 (2012). At the September 2014 hearing, Lee stated that he had no memory as to whether L.D. was in fact dark-skinned. (E.R. at 34-35). For purposes of this opinion, the Court will assume that L.D. was black.

be the third black man challenged out of a total of eight who have been questioned, so far. So we have three out of a total of eight; **[*15]** which, I say, is a significant percentage." (*Id.* at 132).[5] Judge Connolly then stated: "I just find, after determination and having discussions with counsel, I make a determination that there has not been shown a pattern of discrimination in this case, under the *Soares* case, at this time." (*Id.*)[6]

At the September 2014 hearing, Lee was asked directly about his reasoning behind challenging A.D.:

> Q I want to direct your attention, Mr. Lee, to Juror Number 261. That was the 19-year-old black male juror who attended Northeastern and worked at Home Depot. Do you recall that juror?
> A Yes.
> Q And did you challenge that juror?
> A I did challenge him.
> Q What was the basis? What is the basis for that challenge?
> A His age.

(E.R. at 11). He later added: "I struck [A.D.] because he was age 19, and I didn't see anything else on his questionnaire that would give me reason to believe that he had a maturity level greater than that of an age 19-year-old person." (E.R. at 62). Speaking to his decision to challenge the 19-year-old A.D. after not challenging the 21-year-old I.R., Lee stated:

> I don't even know what [A.D.'s] race was, to be perfectly truthful, I just know that at age 19, if I was going to draw a distinction between **[*17]** him and [I.R.], that was the distinction I was going to draw, and, as I said, I didn't see anything on his questionnaire that would allow me to distinguish him in any way, and so, therefore, I, out of concern for, again, the number of jurors that still needed to be selected, by the time I got to Mr. [A.D.] , I was down to four challenges, and I thought that I should exercise a challenge against him at that point.

(E.R. at 61).[7]

With three remaining challenges, Lee did not challenge a 26-year-old woman named J.F. (juror 293). (*Id.* at 155; S.A. at 295). J.F. indicated on her questionnaire that she was a college graduate and that she worked as a "provider account manager" for Tufts Health Plan in Watertown. (S.A. at 295). At the September 2014 hearing, Lee was asked why he did not strike J.F. He responded: "I believe that woman was a college graduate, and I believe that at that point I was down to three peremptory challenges, and based up on what I was seeing coming up, I felt I needed to preserve what few peremptory challenges I had." (E.R. at 16).

With two challenges remaining, Lee did not challenge a 23-year-old (apparently Hispanic) woman named M.P. (juror **[*18]** 333). (Tr. Sep. 26, 2006 at 206; S.A. at 299). M.P.'s questionnaire indicated that she had completed college and was employed as a secretary for the Venezuelan consulate in Boston. (S.A. at 299). It further

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[5] On the present record, there is no way to verify defense counsel's statement that exactly eight black men had undergone the individual voir dire process to that point. The record contains only a small selection of juror questionnaires, and the questionnaires do not directly report a juror's race. However, the jury did ultimately include at least five African-Americans (three women and two men), so it is safe to conclude that Lee chose not to challenge at least five potential jurors who were African-American.

[6] Judge Connolly was referring to *Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979)*, which the Court of Appeals referred to as "the bedrock Massachusetts case in this area." *Sanchez, 753 F.3d at 287 n.5*. In *Soares* (which predated *Batson*), the Massachusetts high court held that the Massachusetts Constitution proscribes "the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular, defined groupings in **[*16]** the community" and later specified that "blacks constitute a discrete group" for purposes of that proscription. *Id. at 486, 488*. The court considered this rule to be necessary in order to effectuate the right of the accused to be subject only to "the judgment of his peers." *Id. at 477* (quoting *Mass. Const. pt. 1, art. XII*).

[7] As this was Lee's twelfth challenge, he in fact had five challenges remaining as of the time he challenged A.D. *See Sanchez, 753 F.3d at 286*.

indicated that she had worked for the probation department of the Suffolk Superior Court in high school. (*Id*.). As to his reasoning in allowing M.P. to remain on the jury, Lee testified: "It was the same reason, which I believe I was down to three challenges at that point as well."[8] (E.R. at 16-17). He further testified that, while he could not specifically recall how many challenges defense counsel had remaining, the number "did play a role" in his thinking. (*Id*. at 17). M.P. was the sixteenth and final juror seated. (Tr. Sep. 26, 2006 at 207-09).

The jury included at least five African-Americans, two of whom were men; one was 51 and the other was 34. (S.A. at 25).

At the conclusion of Lee's testimony at the September 2014 hearing, he was asked by the Court whether he remembered anything else about the prospective jurors, such as their "physical appearance, clothing, demeanor, what they were holding in their hands, **[*19]** anything like that." (E.R. at 65-66). Lee responded that he did not. (*Id*.).

The jury empanelment took place in September 2006. The evidentiary hearing took place nearly eight years later, in September 2014. The evidence was thus subject to "the usual risks of imprecision and distortion from the passage of time." *Miller-El v. Cockrell, 537 U.S. 322, 343, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*. Nonetheless, the Court found Lee to be credible in all respects. His demeanor was professional and credible throughout. His testimony was based in part on memory and in part on his routine empanelment practices, and he endeavored to distinguish between the two as he testified. His testimony was subject to extensive cross-examination. Petitioner did not call any witnesses. Jonathan Shapiro, the defense counsel who had represented Sanchez at the trial, did not testify.

[8] Lee had challenged one other juror between J.F. and M.P., so in fact he had only two challenges remaining. (Tr. Sep. 26, 2006 at 185).

II. Analysis

A. The *Batson* Standard

The *Equal Protection Clause of the Fourteenth Amendment* prohibits discrimination against certain cognizable groups in the process of jury selection. "Indeed, the Constitution forbids striking . . . even a single prospective juror for a discriminatory purpose." *Sanchez, 753 F.3d at 284* (internal quotation marks omitted) (citing *Snyder v. Louisiana, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008)*). Factors that prosecutors may not consider in exercising their peremptory challenges include gender and race. *J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994)*; *Batson v. Kentucky, 476 U.S. 79, 86-87, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)*.

"Although the *Fourteenth Amendment* does not provide **[*20]** a defendant with a 'right to a petit jury composed in whole or in part of persons of his own race . . . [a] defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.'" *Sanchez, 753 F.3d at 290* (quoting *Batson, 476 U.S. at 85-86* (internal quotation marks omitted)). Accordingly, a criminal defendant has standing to raise an equal-protection issue where a juror may have been the subject of a discriminatory challenge. *See Campbell v. Louisiana, 523 U.S. 392, 118 S. Ct. 1419, 140 L. Ed. 2d 551 (1998)*.

When a defendant asserts that a prosecutor has used a peremptory challenge in a racially discriminatory manner, *Batson* instructs the trial judge to follow a three-step inquiry. *476 U.S. at 96-98*. "The moving party bears the initial burden of demonstrating a *prima facie* case of discrimination. If this burden is met, the non-moving party must then offer a non-discriminatory reason for striking the potential juror." *Aspen v. Bissonnette, 480 F.3d 571, 574 (1st Cir. 2007)* (citing *Batson, 476 U.S. at 96-98*). The

trial court must then determine "if the moving party has met its ultimate burden of persuasion that the peremptory challenge was exercised for a discriminatory reason." *Id*.

"[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." **[*21]** *Snyder v. Louisiana, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008)* (citing *Miller-El v. Dretke, 545 U.S. 231, 239, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)*. Ultimately, the "critical question" is whether the trial court finds "the prosecutor's race-neutral explanations to be credible." *Miller-El, 537 U.S. at 338-39*. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id. at 339*.

A *Batson* violation may be established if race forms any part of the reason for a peremptory challenge. As the Court of Appeals noted, "the use of a constitutionally neutral characteristic—such as age—in a racially discriminatory manner constitutes race-based discrimination." *Sanchez, 753 F.3d at 306*. Thus, if a prosecutor strikes a juror because he was young *and* black (or young, male, *and* black), as opposed to simply striking him because he was young, a constitutional violation has occurred.

B. The First and Second Steps under *Batson*

The Court of Appeals held that petitioner met his initial burden of demonstrating a *prima facie* case of discrimination. It then directed this Court as follows:

> [The district] court should attempt to conduct the second and third *Batson* steps. It should require the prosecutor to explain his challenge[]. If the prosecutor **[*22]** offers a race-neutral explanation, the court must try to evaluate that explanation and decide whether defendant has proved purposeful racial discrimination. If the court finds that, due to the passage of time or any other reason, it cannot adequately address the issues at this stage or make a reliable determination, or if it determines that the prosecutor exercised his peremptory challenges improperly, it should set the case for a new trial. If it finds the prosecutor exercised his peremptory challenge[] in a permissible fashion, it should [affirm] the judgment.

Sanchez v. Roden, 753 F.3d at 308 (alteration in original) (quoting *People v. Johnson, 38 Cal. 4th 1096, 45 Cal. Rptr. 3d 1, 136 P.3d 804 (Cal. 2006))*. The Court of Appeals also found that "Sanchez waived any objection to the Commonwealth's peremptory strikes against Jurors No. 201 and 227 by failing to object to those strikes at the time they were exercised." *Sanchez, 753 F.3d at 295 n.10*. Thus, the specific peremptory challenge to be evaluated is that exercised by Lee on juror 261.

The second *Batson* step is relatively easy to resolve. "The second step of th[e *Batson*] process does not demand an explanation that is persuasive, or even plausible. At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory **[*23]** intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett v. Elem, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995)* (alteration in original) (quoting *Hernandez v. New York, 500 U.S. 352, 360, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)* (internal quotation marks omitted). At the motion hearing of September 8, 2014, Lee offered a non-discriminatory, race-neutral explanation for challenging A.D.: "[h]is age." (E.R. at 11). Lee testified on multiple occasions that he struck A.D. due to his age, and because he "didn't see anything else on his questionnaire that would give me reason to believe that he had a maturity level greater than that of an

age 19-year-old person." (E.R. at 62). Age is a facially valid, race-neutral consideration and a permissible ground on which to exercise a peremptory challenge under *Batson*. *See, e.g.*, *United States v. Helmstetter, 479 F.3d 750, 753-54 (10th Cir. 2007)* (noting that "every other circuit to address the issue has rejected the argument that jury-selection procedures discriminating on the basis of age violate equal protection"); *Cresta, 825 F.2d at 544-45*. Accordingly, this explanation satisfies the government's burden under the second step of *Batson*.

C. The Third Step under *Batson*

The third step of the *Batson* test requires this Court to evaluate the race-neutral explanation and determine whether the petitioner has "met [his] ultimate burden of persuasion that the peremptory **[*24]** challenge was exercised for a discriminatory reason." *Aspen, 480 F.3d at 574*. Making that determination involves "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" and consideration of "all relevant circumstances." *United States v. Mensah, 737 F.3d 789, 797 (1st Cir. 2013)* (quoting *Batson, 476 U.S. at 93, 96)*. Ultimately, the "critical question" is whether the trial court finds "the prosecutor's race-neutral explanations to be credible." *Miller-El, 537 U.S. at 338-39*. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id. at 339*.

Lee stated unequivocally at the September 2014 hearing that he struck juror 261 as a result of his age. He gave no alternate justification, although he did supplement his reasoning by explaining that he also evaluated juror 261's questionnaire and found no "reason to believe that he had a maturity level greater than that of an age 19-year-old person." (E.R. at 62). Thus, the "critical question" is whether Lee's explanation is credible—that is, whether he indeed struck juror 261 due to his youth, or whether he impermissibly struck him, in whole or in part, due to his race.

1. Discrimination on the [*25] Basis of Youth in Jury Selection

As a general matter, discrimination on the basis of race is prohibited, but discrimination on the basis of youth is not.[9] Our legal system and our society routinely discriminate against individuals on the basis of their youth. For example, persons under a certain age, typically 16, cannot drive automobiles. *E.g.*, *Mass. Gen. Laws ch. 90, § 10*. Persons under the age of 18 generally cannot vote. *E.g.*, *Mass. Gen. Laws ch. 51, § 1*; *see Oregon v. Mitchell, 400 U.S. 112, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970)*. They also cannot serve as jurors. *See 28 U.S.C. § 1865*. Persons under the age of 21 cannot purchase alcoholic beverages. 26 U.S.C. § 158. Persons under the age of 25 seeking to rent a car are commonly forced to pay a substantial surcharge, and are often blocked from renting one at all. *See* Lisa Fritscher, *Age Requirement to Rent a Car*, USA TODAY, *http://traveltips.usatoday.com/age-requirement-rent-car-62294.html*. Indeed, the Constitution itself includes a form of youth discrimination: it requires that representatives be 25 years of age, senators 30, and presidents 35. U.S. CONST. art. I, §§ 2, 3; art. II, § 1.

Of course, those restrictions are based on generalizations that may be false in specific instances. A 17-year-old could well prove to be an excellent juror, just as a 24-year-old could be an excellent driver. Nonetheless, those generalizations are deeply rooted in experience and common sense, particularly the basic proposition that as people grow older they are more likely to mature and gain

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[9] Referring to the issue as "age" discrimination somewhat clouds the inquiry, as that term also applies to discrimination against older persons. *See, e.g.*, the Age Discrimination in Employment Act, *29 U.S.C. § 621 et. seq.* (prohibiting discrimination against persons over the age of 40). **[*26]** For that reason, this opinion will generally use the term "youth" rather than "age."

experience, and that with maturity and experience they are more likely to exercise their duties and privileges responsibly.

Moreover, age is not a binary metric. A person is not "young" at one point and suddenly "not young" at another. While it is common to use somewhat arbitrary age cut-offs in a variety of contexts, in reality no such bright lines exist. Perhaps more importantly, there is commonly a vast gulf between the experience and maturity levels of very young adults and those even a few years older. Most people change and mature considerably from 18 to 21, and the difference between 18-year-olds and 27-year-olds is usually even more stark. Again, generalizations are always subject to exceptions, and without **[*27]** question there are mature 18-year-olds and immature 27-year-olds. But the distinction between very young adults and slightly older ones—which, again, the law recognizes in multiple respects—is nonetheless perfectly sensible and practical, and one that is routinely observed in a variety of contexts.

For those reasons, among others, prosecutors have frequently sought to exercise peremptory challenges against youthful jurors on the ground that they may not have the necessary maturity and experience to make a difficult decision wisely. *See, e.g., Phase 2 of Jury Selection Set to Begin in Boston Marathon Bombing Trial*, FOX NEWS (Jan. 15, 2015), http://www.foxnews.com/us/2015/01/15/judge-to-question-prospective-jurors-for-trial-boston-marathon-bombing-suspect/ (quoting a former federal prosecutor and current criminal defense attorney on the subject of jury empanelment in the Boston Marathon bombing trial: "As a prosecutor, you want to have somebody who is adult, grown-up, had some experience in life, perhaps has some ups and downs, someone who understands that actions have consequences, and they've had exposure to making tough decisions."). The sheer number of courts to have been faced with the issue of youth-based peremptory challenges by prosecutors is evidence that the strategy **[*28]** is commonplace. *See Helmstetter, 479 F.3d at 754* (listing cases).

That strategy has also withstood multiple legal challenges. Every Court of Appeals to have considered the question has held that age is an acceptable race-neutral justification for exercising a peremptory challenge. *See Helmstetter, 479 F.3d at 753-54* (collecting cases). Many of those cases have specifically upheld peremptory challenges based on the youth of the potential jurors. *See, e.g., United States v. Bryce, 208 F.3d 346, 350 n.3 (2d Cir. 2000)* (upholding challenge of prospective juror who was the only African-American in the pool, but also its youngest member; the prosecutor alleged that his primary motivation for the strike was the juror's age and "lack of life experience"); *United States v. Maxwell, 160 F.3d 1071, 1075-76 (6th Cir. 1998)*; *United States v. Pichay, 986 F.2d 1259, 1260 (9th Cir. 1993)*. The First Circuit has specifically held that Batson does not prohibit the systematic exclusion of "young adults," which the defendants in that case had defined as persons between the ages of 18 and 34. *United States v. Cresta, 825 F.2d 538, 544-45 (1st Cir. 1987)*; *see Barber v. Ponte, 772 F. 2d 982, 996-1000 (1st Cir. 1985)* (en banc).

2. The Dynamic of Exercising Peremptory Challenges

A prosecutor's strategy in selecting jurors is also affected by the manner in which courts permit the exercise of peremptory challenges.[10] Here, the trial

[10] Peremptory challenges permit the parties some limited ability to exercise a veto over prospective jurors, without having to articulate their reasons for doing so. They are often criticized on the ground that they tend to be based on generalizations or even stereotypes (subject, of course, to the restrictions of *Batson*). But the proposition that all potential jurors who (1) meet the minimum qualifications and (2) are not struck for cause will perform their duties wisely and responsibly is itself based on a generalization, **[*30]** and an inaccurate one at that. Peremptory challenges permit both parties an opportunity to strike a handful of potential jurors that they believe will be least helpful or sympathetic to their cause. Among their many virtues is that they substantially increase the likelihood that the jury will be fair, impartial, and responsible, both in reality and in the

court required peremptory challenges to be exercised one by one, as each prospective juror was called forward. Both sides were limited to **[*29]** 16 challenges. Both sides had a limited amount of information as to each prospective juror; counsel relied substantially on the one-page questionnaires and the responses to the statutory and voir dire questions.[11] Furthermore, it is fair to assume that each challenge had to be exercised in a limited amount of time and that the prosecutor and defense counsel were generally working at cross-purposes. The record also indicates that both sets of counsel knew relatively little about the prospective jurors in the pipeline—that is, the candidates who would be next up if a challenge were exercised. It appears that counsel had the questionnaire for each juror and little else.[12]

The peremptory challenges in this case were thus exercised under dynamic and fluid circumstances. Every time a challenge was exercised, at least two things happened: a new prospective juror was called forward, and one side lost one of its sixteen challenges. The number of remaining challenges was thus constantly dwindling, but no new information as to the prospective jurors in the pipeline was provided. Each side therefore had an incentive to use each succeeding challenge more carefully, or even hold challenges in reserve, in order to **[*32]** ensure that challenges would remain available to use against the later (largely unknown) candidates. Moreover, the ease with which challenges were exercised was necessarily affected by the number of jurors seated and the number of challenges that had been used by opposing counsel. Typically, counsel might choose to be more free with the exercising of challenges at the outset, but less so over time if many seats remain open and opposing counsel has many challenges remaining.

3. Whether the Prosecutor Impermissibly Discriminated on the Basis of Race

The Court turns next to the dispositive issue in this case: whether Lee struck juror 261, a 19-year-old black male, because of his youth, and not (even in part) because of his race. Again, the "critical question" is whether the Court finds "the prosecutor's race-neutral explanations to be credible." *Miller-El, 537 U.S. at 338-39*. In making that determination, the Court may consider, among other things, the prosecutor's demeanor, the reasonableness or unreasonableness of his explanations, and "whether the proffered rationale has some basis in accepted trial strategy." *Id. at 339*. The overall percentage of eligible black jurors who were struck by the prosecutor is also

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perception of the parties.

[11] During the September 2014 hearing, both counsel for petitioner and Lee referred to the questionnaires as containing "bare bones" information. (E.R. at 21). Counsel for petitioner and Lee then had the following exchange:

> Q And is it also fair to say that the statutory questions also are relatively bare bones, that is, the statutory questions that are used to weed out the most obvious prejudices?
>
> A The jury [e]mpanelment questions that are asked by statute, yes, I don't consider them to be particularly detailed.

(E.R. at 21-22).

[12] During the September 2014 hearing, counsel for petitioner and Lee had the following exchange in reference to his practice while conducting the individual voir dire:

> Q As you're turning around and looking at who's seated in the venire, actually you can't see who's seated in the venire at that point?
>
> A Right. I don't even know **[*31]** if they are in there. . . . I'm not 100 percent certain, but what I do know is I had the stack of questionnaires in front of me of jurors who had not yet been brought to the sidebar.
>
> Q And you told us, you've already told us that you don't get a lot of time to look at those questionnaires?
>
> A Correct.
>
> . . .
>
> Q So the questionnaires only gives [sic] you the roughest possible sense of who somebody is and what they might be like as a juror?
>
> A Yes. I mean, it gives—it gives you what it gives you. There's a limited number of questions on the questionnaire. It's one page long, and you try to draw as many conclusions as you can from the information you're given.

(E.R. at 46-47).

relevant **[*33]** to that determination. *Id. at 331* (stating that the percentage of black jurors removed by peremptory strikes is "relevant" to the credibility inquiry).

Petitioner contends that Lee could not have struck juror 261 on the basis of youth because he chose not to strike other young jurors. In particular, petitioner points to the fact that Lee did not strike juror 243 (the 21-year-old white male born in Russia) and jurors 255, 293, and 333 (three white or Hispanic females aged 27, 26, and 23, respectively). In addition, petitioner notes that Lee struck two other dark-skinned young men: juror 201, the 25-year-old from Trinidad, and juror 227, the 24-year-old black male. Petitioner contends that this inconsistency proves that Lee challenged juror 261 not simply because he was young, but because he was a young, black male.

Petitioner's claim of racial bias thus depends almost entirely on the alleged inconsistency: if Lee were telling the truth, the argument goes, he would have struck the 21-year-old Russian-American, and indeed struck all the youngest jurors. The Court is satisfied, however, that Lee's explanation for his challenges is entirely credible and that the claimed inconsistency does not prove **[*34]** otherwise.

First, and as noted, every person under the age of 30 should not be swept into a category called "young," without accounting for the huge distinctions between members of that group. A 19-year-old and a 27-year-old may both qualify as "young" for some purposes, but to a lawyer exercising a peremptory challenge, the 27-year-old is far more likely to be mature, experienced, and responsible than the 19-year-old. Here, there were two prospective jurors under the age of 20: juror 229 (a 19-year-old white male) and juror 261 (a 19-year-old black male). Lee struck them both. There were also two prospective "young" jurors over the age of 25: juror 255 (a 27-year-old white female) and juror 293 (a 26-year-old white female). Lee kept them both.[13]

Second, every potential juror presented for questioning at a different time and under different circumstances. Again, when exercising a challenge, an attorney must consider not just the individual characteristics of each potential juror, but also factors such as the number of challenges remaining (both for oneself and for one's opponent), the **[*35]** number of jury seats to be filled, and the list of jurors to come. A juror who presents early in the process, when a prosecutor is holding more challenges, may be struck more readily than one with the same profile who presents at a time when the prosecutor has few challenges remaining. Under the circumstances, at least some minor inconsistencies are to be expected.

Viewed in that light, Lee's explanation for his decision to challenge jurors 201 and 227 (the 25-year-old male from Trinidad and the 24-year-old black male), and not to challenge jurors 293 and 333 (the 26-year-old white female and 23-year-old Hispanic female), is reasonable and race-neutral. Lee still had twelve peremptory challenges when he challenged juror 201 and ten when he challenged juror 227.[14] By contrast, he had just three challenges when he chose not to challenge juror 293 and only two when he chose not to challenge juror 333. For that reason, he had substantially more flexibility when considering jurors 201 and 227 than when considering jurors 293 and 333.[15]

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[13] As to juror 255, Lee testified: "She was 27 years old, which I didn't consider to be overly young." (E.R. at 15).

[14] After using his seventh challenge to strike juror 227 (the 24-year-old black male), Lee used his eighth challenge to strike juror 229 (the 19-year-old white college **[*36]** student) (juror 228 was excused for cause). Lee thus considered two "young" males in close succession—one black, one white—and reached the same decision on both.

[15] There were additional factors at work, as well, in choosing among those four jurors. The two jurors who were struck appeared to have less formal education than the two who were kept. Lee testified that he chose not to challenge juror 293 in part because her questionnaire indicated that she was a college graduate. (E.R. at 16). Juror 333 also completed college. (S.A. at 299). By contrast, juror 227's highest level of education was a GED. Juror 201 did not indicate his level of

Third, while chronological age is a proxy for maturity and experience, it need not be treated as a rigid requirement that trumps all other factors. The principal instance in which Lee allegedly acted inconsistently came with respect to jurors 243 (the 21-year-old white male college student who had been born in Russia, whom he kept) and 261 (the 19-year-old black male college student, whom he struck). Petitioner contends that the *only* meaningful difference between these two potential jurors is their race. Indeed, the Court of Appeals specifically **[*37]** relied on Lee's apparently differential treatment of these two jurors to find *prima facie* evidence of racial discrimination. *Sanchez, 753 F.3d at 304*.

Lee testified at the September 2014 hearing that while his "inclination was to strike" juror 243, he ultimately chose not to due to "indications on [his] questionnaire that might make [h]im not fit [his] chronological age." (E.R. at 13). He testified that because juror 243 was born in Moscow and had moved to the United States prior to starting his college education, he thought he "may have been chronologically a little bit older than someone else in terms of life experiences, and that's really what I'm looking at that somebody who has some level of maturity and life experience." (E.R. at 44). He also testified: "I thought if I had to take a young juror, that would be somebody who might be a better candidate than most." (E.R. at 13). By contrast, he testified that as to juror 261, he "didn't see anything else on his questionnaire that would give me reason to believe that he had a maturity level greater than that of an age 19-year-old person." (E.R. at 62).

That race-neutral explanation, under the circumstances presented here, is reasonable and credible. Again, a prosecutor who seeks to exclude jurors on **[*38]** the basis of youth is likely using age as a proxy for two things: maturity and life experience. Those are exactly the two factors referred to by Lee in his testimony. Juror 243 was two years older than juror 261, and had experience living in two different countries, including one with a different language and culture than the United States. Lee plausibly assumed—perhaps correctly, perhaps not— that Juror 243 came to the United States "on his own" and "to begin his education." It was not unreasonable for Lee to infer that an individual in juror 243's position was likely to have greater life experience and maturity than an individual in juror 261's position.

That does not, of course, mean that Lee's assumptions are factually correct; the 21-year-old Russian-American immigrant might well prove to be less mature than the 19-year-old African-American. There was no way for Lee to know for certain either way. And another person might have drawn a different conclusion. But the issue is neither the accuracy nor the universality of the assumption; it is the credibility of the prosecutor's explanation. *See Aleman v. Uribe, 723 F.3d 976, 982 (9th Cir. 2013)* (" . . . the court need not believe that the stated reason represents a sound strategic **[*39]** judgment to find the prosecutor's rational persuasive; rather, it need be convinced only that the justification should be believed."). That explanation was credible, and petitioner has not shown otherwise.

Petitioner further contends that Lee should have been more likely to strike juror 243 than 261, because Lee had more challenges remaining when he considered juror 243 than when he considered juror 261. But the number of challenges remaining is not the only relevant consideration; the number of jurors left to be seated necessarily plays a role as well. For example, an attorney with four challenges remaining and only one juror left to be seated has more flexibility than one with five challenges remaining and twelve jurors left to be seated. Here, Lee had six challenges remaining with eight jurors left to be seated when he considered juror 243. When he considered juror 261, he had five challenges remaining with five jurors left to be

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education on his questionnaire.

seated.[16] Thus, his ratio of challenges remaining to open jury seats was actually slightly better when he considered juror 261 than when he considered juror 243. Regardless, the numbers are close, and that factor is not dispositive in either direction.

Finally, because the ultimate question is whether the prosecutor's intent (in whole or in part) was racially motivated, his actions as to other African-American prospective jurors are also relevant. *Miller-El, 537 U.S. at 331* (stating that the percentage of black jurors removed by prosecutor by peremptory strikes is "relevant" to the credibility inquiry). Defense counsel stated during his initial *Batson* challenge that Lee had challenged three out of the first eight black men questioned.[13] This statement is not fully verifiable on the record, but it implies that Lee had chosen not to challenge five black men to that point.[16] (The record is silent as to how many black women were questioned.) Furthermore, the jury ultimately included three black women and two black men. Lee thus apparently did not strike at least eight of eleven potential jurors who were black: the three black women on the jury plus the five black men who defense counsel said that **[*41]** Lee had not challenged. Indeed, even if defense counsel's statement is ignored as unverifiable, Lee necessarily did not challenge the five African-Americans who ended up on the jury.

Again, the fact that Lee did not challenge some black jury members is not by itself dispositive. *Batson* prohibits prosecutors from exercising even a single challenge on the basis of race. *476 U.S. at 86-88*; *United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987)*. But just as Lee's decision not to challenge some white jurors is relevant circumstantial evidence to the question of his intent in striking juror 261, so is his decision not to challenge at least five black jurors. *See United States v. Briscoe, 896 F.2d 1476, 1489 (7th Cir. 1990)*.

Petitioner also cites Lee's challenge of juror 246, the **[*42]** 41-year-old Guatemalan-American man, as further evidence of his tendency to strike jurors based on race. There is no evidence, however, that juror 246 was black; Judge Connolly observed that "under no circumstances could [he] be considered a man of color." Status as a "minority" is not a cognizable group under Batson. *Gray v. Brady, 592 F.3d 296, 302 (1st Cir. 2010)*. Furthermore, and in any event, juror 246 was far more equivocal than the other jurors in responding to the judge's questions about whether he could be fair as a juror. When asked if there was any question in his mind as to whether he could be fair, juror 246 responded: "Just that the responsibility—I mean, no, no." (Tr. Sep. 26, 2006 at 73-74). The transcript reflects that Lee immediately asked Judge Connolly (at sidebar) to follow up on that line of questioning, and that after further questioning he exercised a challenge. (*Id*. at 74-76). At the September 2014 hearing, Lee testified: "I exercised a challenge against [juror 246] because in response to one of the questions, he expressed concern about the responsibility of being a juror. That is, what I consider—what he suggested was an overwhelming responsibility that he didn't know what he could meet." (E.R. at 53). On the record, Lee's rationale **[*43]** behind striking juror 246 seems clearly related to his hesitation in agreeing that he could be fair and not any race-based consideration. Moreover, juror 246 was 41 years old. He is thus outside the category of

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[16] During **[*40]** the motion hearing of September 8, 2014, counsel for petitioner asked a question implying that no jurors had been seated between juror 243 and juror 261. (E.R. at 61). In fact, jurors 250 and 255 had been seated in between. (Tr. Sep. 26, 2006 at 89-93, 109-14).

[13] Defense counsel excluded juror 246 (the 41-year-old Guatemalan-American male) from consideration; during a sidebar conference that took place during the questioning of juror 261, he stated as follows: "[E]ven if you take out [juror 246], the Guatemalan, this gentlemen in the box, now, would be the third black man challenged out of a total of eight who have been questioned, so far." (Tr. Sep. 26, 2006 at 132).

[16] The statement was made by the proponent of the *Batson* challenge, so there is no reason to believe that the number cited was overly generous to Lee.

"young, black men" regardless of his race.[17] Lee's challenge of juror 246 thus adds little, if any, weight to petitioner's argument.

In sum, petitioner's *Batson* claim falls short at the third step of the analysis. Petitioner has not met its burden of persuasion that the government used its peremptory challenge on juror 261 on a discriminatory basis. The Court credits Lee's testimony that he struck juror 261 (and other young jurors, both black and white) for appropriate, race-neutral reasons based largely on age, and that he chose not to strike some young jurors for similarly appropriate reasons. Accordingly, the petition for habeas relief will be denied.

III. Conclusion

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED.

So Ordered.

/s/ F. Dennis Saylor

F. Dennis Saylor IV

United States District Judge

Dated: February **[*44]** 4, 2015

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[17] Lee also kept juror 333, a 23-year-old apparently Hispanic female, on the jury. It is unclear whether any other Hispanic jurors were questioned.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT
No. 0584CR10545

COMMONWEALTH

v.

DAGOBERTO SANCHEZ

COMMONWEALTH'S OBJECTION TO RESENTENCING

The Commonwealth respectfully objects to this Court's resentencing of the defendant as a consequence of this Court's reduction of the verdict of guilt, from murder in the second degree to manslaughter, pursuant to Mass. R. Crim. P. 25. The Commonwealth emphasizes that it objects to this resentencing notwithstanding that it is participating in the resentencing.[1]

The Commonwealth objects to the application of Rule 25 and resentencing first because this Court has followed the erroneous legal analysis of *Commonwealth v. Jones*, 477 Mass. 307 (2017), and its progeny, in which the Supreme Judicial Court has misread, misinterpreted, and misapplied its own precedent, and in the process has equated a trial judge's error in the first step of the *Baton-Soares* framework with a constitutional violation amounting to structural error (which violation is only conclusively determined upon completion of all three steps of that framework). *See, e.g.*, *Commonwealth v. Soares*, 377 Mass. 461, 489-490 (1979) (determination that first-step *Batson-Soares* error occurred is only a rebuttal of the presumption that a particular peremptory challenge was proper); *Sanchez v. Roden*, 753 F.3d 279, 307 (1st Cir. 2014) (constitutional violation occurs when a peremptory challenge was in fact exercised discriminatorily).

[1] It would be unfair to present the Commonwealth with the dilemma of selecting between preservation of its appellate rights and meaningful participation by both it and the victim's family in the resentencing.

Second, the doctrine of estoppel applies to any claim that the peremptory challenge at issue here was exercised discriminatorily. Another court has already competed steps two and three of the *Batson-Soares* framework by conducting an evidentiary hearing, assessing the credibility of a witness subject to direct and cross-examination, and determining that the challenge was *not* exercised discriminatorily. *Sanchez v. Roden*, No. 12-10931-FDS, 2015 U.S. Dist. LEXIS 13207, at *3, *23-25, *43 (D. Mass. 2015). This Court is estopped from reaching a contrary conclusion. *See, e.g.*, *Fidler v. E.M. Parker Co.*, 394 Mass. 534, 540-547 (1985).

Finally, the error that this Court has identified is outside the scope of Rule 25 relief. While this Court's power under Rule 25 has been compared to that granted to the Supreme Judicial Court under G.L. c. 278, § 33E, that power is not limitless.[2] *Commonwealth v. Almeida*, 452 Mass. 601, 613-614 (2008). "Reduction to a lesser verdict is not justified, however, when the reduction 'would be inconsistent with the weight of the evidence, or . . . based solely on factors irrelevant to the level of offense proved.'" *Id.* at 614 (quoting *Commonwealth v. Rolon*, 438 Mass. 808, 822 (2003)). "If . . . the weight of the evidence is entirely consistent [with that of the convicted conduct], it is an abuse of discretion to reduce the verdict solely on factors unrelated to the weight of the evidence." *Rolon*, 438 Mass. at 822. Here, the Court has reduced a jury's verdict of murder in the second degree to manslaughter based solely upon a purported error during jury empanelment, a factor unquestionably wholly disconnected from the weight of the evidence, and in so doing has plainly abused its discretion. That Rule 25 relief is inapposite should be evident from this Court's reliance on *Jones*: if in fact a first-step *Batson-Soares* error occurred, and if in fact that first-step error constituted structural error, then the defendant's trial was

[2] Not to mention the comparative constitutionality of the legislature's grant of power to the Supreme Judicial Court via G.L. c. 278, § 33E, versus the Supreme Judicial Court's apparent bestowal of that power upon the inferior courts via issuance of a rule of criminal procedure.

constitutionally incapable of supporting *any* conviction, whether second-degree murder or manslaughter.

For those reasons, the Commonwealth objects to the resentencing hearing, notwithstanding its participation in that hearing.

Respectfully submitted
For The Commonwealth,

JOHN P. PAPPAS
DISTRICT ATTORNEY

_____
NICHOLAS BRANDT
Assistant District Attorney
BBO No. 670808
One Bulfinch Place
Boston, MA 02114
(617) 619-4070

December 10, 2018

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the pains and penalties of perjury that I have today made service on the defendant by delivering a copy of the attached in-hand to defense counsel Ruth Greenberg, Esq.

_____
Nicholas Brandt
Assistant District Attorney

December 10, 2018

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT
No. 0584CR10545

COMMONWEALTH

v.

DAGOBERTO SANCHEZ

COMMONWEALTH'S NOTICE OF APPEAL

Now comes the Commonwealth hereby gives notice of its appeal of this Court's Order (Wilkins, J.), dated August 30, 2018, granting the defendant's motion for new trial and reducing the verdict.

Respectfully submitted
FOR THE COMMONWEALTH,

DANIEL F. CONLEY
District Attorney
For the Suffolk District

NICHOLAS BRANDT
Assistant District Attorney
BBO# 670808
One Bulfinch Place
Boston, MA 02114
(617) 619-4070

September 17, 2018

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the pains and penalties of perjury that I have today made service on the defendant by directing that a copy of the attached Motion to Enlarge be sent by first-class mail, postage prepaid, to his counsel:

Ruth Greenberg, Esq.
450B Paradise Road, #166
Swampscott, MA 01907

_____
Nicholas Brandt
Assistant District Attorney

September 17, 2018

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT
No. 0584CR10545

COMMONWEALTH

v.

DAGOBERTO SANCHEZ

COMMONWEALTH'S NOTICE OF APPEAL

Now comes the Commonwealth hereby gives notice of its appeal of this Court's orders (Wilkins, J.), of November 30, 2018, and December 10, 2018, reducing the verdict pursuant to Mass. R. Crim. P. Rule 25(b)(2), and resentencing the defendant.

Respectfully submitted
FOR THE COMMONWEALTH,

JOHN P. PAPPAS
District Attorney
For the Suffolk District

NICHOLAS BRANDT
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December 21, 2018

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the pains and penalties of perjury that I have today made service on the defendant by directing that a copy of the attached Motion to Enlarge be sent by first-class mail, postage prepaid, to his counsel:

Ruth Greenberg, Esq.
450B Paradise Road, #166
Swampscott, MA 01907

_____
Nicholas Brandt
Assistant District Attorney

December 21, 2018

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2019-P-0146

COMMONWEALTH OF MASSACHUSETTS,
Appellant

v.

DAGOBERTO SANCHEZ,
Defendant-Appellee

RECORD APPENDIX FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY
