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COMMENT

The Reverse-*Batson*: Wrestling with the Habeas Remedy

Since the landmark case *Batson v. Kentucky*,[1] the use of *Batson* challenges has become very popular in criminal cases to prevent prosecutors from systematically excluding jurors based on race. Far less attention has been paid to reverse-*Batson* challenges, where *defense* attorneys are challenged for excluding jurors for race-based reasons.[2] *Batson* is generally considered a pro-defense doctrine in that it prevents overzealous prosecutors from appealing to racial biases instead of evidence to obtain a guilty verdict. Yet in an ironic extension of *Batson*,[3] reverse-*Batson* challenges put defendants at risk when a trial judge erroneously believes the defense counsel's use of peremptory challenges is racially motivated. An improper granting of a reverse-*Batson* challenge allows an individual who should have been excluded to sit on a jury and evaluate a defendant's fate. What remedies are afforded to a defendant convicted by a jury in a trial that contained an improperly granted reverse-*Batson* challenge?

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1. 476 U.S. 79 (1986).

2. *Batson* itself never mentioned the reverse-*Batson* challenge, but alluded to it. *See Batson*, 476 U.S. at 108 ("The potential for racial prejudice, further, inheres in the defendant's challenge as well."). For a thorough discussion of why defendants' discriminatory use of peremptory challenges is harmful, see Audrey M. Fried, *Fulfilling the Promise of* Batson*: Protecting Jurors from the Use of Race-Based Peremptory Challenges by Defense Counsel*, 64 U. CHI. L. REV. 1311 (1997) (addressing a circuit split and arguing that a defendant should not be afforded a new trial because his *own* attorney used peremptory challenges in a racially discriminatory manner).

3. The irony is that *Batson*'s reach has become divorced from the social context that gave rise to its holding. *See* Brown v. North Carolina, 479 U.S. 940, 942 (1986) (O'Connor, J., concurring) (describing *Batson*'s burden-shifting rule as a "product of the unique history of racial discrimination in this country [that] should not be divorced from that context").

The Supreme Court addressed a related issue last Term in *Rivera v. Illinois*,[4] which held that a denial of a defendant's peremptory challenge does not constitute a structural error requiring automatic reversal. The holding relied on precedent that peremptory challenges are not constitutionally mandated[5] and are not necessary for a fair trial.[6] The Court concluded that when "a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern."[7]

Still at issue is whether criminal defendants can obtain habeas corpus relief when they are denied peremptory strikes by a trial court's misapplication of *Batson* and its progeny. This question is especially relevant for defendants who have exhausted their state appeals and seek recourse at the federal level. Only two circuit courts have addressed the issue and have come to completely opposite conclusions. Petitioners convicted by jurors improperly included on the jury as a result of a misapplication of *Batson* have no recourse to the writ in the Second Circuit, whereas completely similarly situated petitioners in the Seventh Circuit do. As the recent *Rivera* decision has taken automatic reversal off the table, defendants convicted by improperly seated jurors may increasingly look to the writ as a remedy.

This Comment argues that a trial court's violation of the clearly established procedure for contesting peremptory strikes set down in *Batson* is cognizable on habeas review and merits habeas relief. An improper granting of a prosecution's reverse-*Batson* challenge is a denial of protections promised by the Supreme Court of the United States. The Second Circuit overlooks the substantive difference between being denied the exercise of peremptory challenges and being denied the protection of well-settled federal law concerning the use of those challenges. The Supreme Court should provide guidance so that lower courts do not erroneously believe they lack subject matter jurisdiction to review the claims. Not only do federal courts have such jurisdiction, but when presented with evidence that a defendant suffered a

4. 129 S. Ct. 1446 (2009).

5. *Id.* at 1448. The Supreme Court has commented on occasion that peremptory challenges, although a "means to achieve the constitutionally required end of an impartial jury," are not themselves "of constitutional dimension." United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000) (quoting Ross v. Oklahoma, 487 U.S. 81, 88 (1988)).

6. While proper application of *Batson* may "have resulted in a jury panel different from that which would otherwise have decided [defendant's] case," there is no Sixth Amendment violation because no member of the jury as finally composed was removable for cause. *Ross*, 487 U.S. at 87.

7. *Rivera*, 129 S. Ct. at 1453.

reverse-*Batson* violation, the Antiterrorism and Effective Death Penalty Act (AEDPA) enables them to grant habeas relief.[8]

This Comment proceeds as follows. Part I will introduce *Batson* and its progeny and explore the requirements for post-conviction habeas relief in light of the AEDPA. Part II will describe the Second Circuit and Seventh Circuit split about whether reverse-*Batson* violations are cognizable for habeas review. Part III will argue that the improper granting of a reverse-*Batson* motion sufficiently violates "clearly established federal law" so that it merits habeas review and relief.

I. *BATSON* AND ITS PROGENY: CLEARLY ESTABLISHED FEDERAL LAW

Habeas corpus review shall be available where a petitioner is in custody in violation of the Constitution, laws, or treaties of the United States.[9] In 1996, after Congress passed and the President signed the AEDPA, the availability of habeas review for post-conviction relief was greatly limited.[10] Even more significant for reverse-*Batson* purposes were the new limitations on habeas relief. Under 28 U.S.C. § 2254(d)(1), the writ shall not be granted unless the adjudication of a claim's merits in state court "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."[11] Additionally, state court decisions can be set aside under § 2254(d)(2) when they have "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."[12]

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8. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at scattered sections of 8, 15, 18, 22, 28, 40, 42, & 50 U.S.C.) [hereinafter AEDPA]. The author would like to thank Adir Waldman for his invaluable help developing the arguments in this Comment.

9. *See* Smith v. Phillips, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.").

10. *See* Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 352-86 (1997) (discussing how the AEDPA amends federal habeas corpus). For example, the AEDPA imposed a statute of limitations on habeas petitions, modified law regarding exhaustion of state remedies, and curtailed the ability of a petitioner to file a second or successive petition. *See* 28 U.S.C. §§ 2244(d), 2254(b)(2)-(3), 2244(b) (2006).

11. AEDPA, § 104(3) (codified as amended at 28 U.S.C. § 2254(d)(1)) (emphasis added).

12. 28 U.S.C. § 2254(d)(2).

The *Batson* line of cases is the exemplar of such clearly established federal law.[13] In its most basic formulation, *Batson* forbids prosecutors from exercising peremptory challenges to strike prospective jurors on account of their race. If the defense makes a *Batson* challenge, the trial judge must then apply *Batson*'s three-step framework.

In Step One, the trial judge must evaluate whether the defense has made a prima facie showing of racial discrimination. To establish a prima facie case of purposeful discrimination under *Batson*, the defendant must show: (1) that he is a member of a cognizable racial group; (2) that peremptory challenges have been used to remove members of the defendant's race from the jury; and (3) that the facts and other relevant circumstances raise an inference that the prosecutor used peremptory challenges in a racially discriminatory manner.[14] If that showing is made, Step Two requires that the burden shift to the prosecutor to present a race-neutral explanation for the strike.[15] In *Purkett v. Elem*, a key holding in the *Batson* line of cases, the Supreme Court held that a race-neutral explanation need not be persuasive, or even plausible, to advance *Batson* analysis to the ultimate question of purposeful discrimination.[16] The reason offered will be considered race neutral in the absence of inherent discriminatory intent in the prosecutor's explanation. The court then moves to Step Three and determines whether the moving party has carried the burden of proving purposeful discrimination. The trial court makes a credibility judgment in light of both parties' submissions, where credibility is "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."[17] Under *Purkett*, it is an error to combine *Batson*'s second and third steps into one by "requiring that the

13. *See, e.g.*, Rice v. Collins, 546 U.S. 333, 342 (2006) ("In this case there is no demonstration that either the trial court or the California Court of Appeal acted contrary to clearly established federal law in recognizing and applying *Batson*'s burden-framework."); Brinson v. Vaughn, 398 F.3d 225, 235 (3d Cir. 2005) ("We hold that the state courts' rejection of Brinson's *Batson* claim without proceeding to the second step of the *Batson* analysis cannot be sustained under 28 U.S.C. § 2254(d)(1).").

14. *See* Batson v. Kentucky, 476 U.S. 79, 96-97 (1986). In deciding whether a prima facie case has been raised, the trial judge is to consider such evidence as a prosecutor's voir dire questions and statements, as well as the pattern of strikes against black jurors. *See generally* Stephen R. DiPrima, Note, *Selecting a Jury in Federal Criminal Trials After* Batson *and* McCollum, 95 COLUM. L. REV. 888 (1995) (discussing the application of *Batson* and *McCollum* by the federal courts).

15. *See Batson*, 476 U.S. at 97-98.

16. 514 U.S. 765 (1995) (per curiam).

17. Miller-El v. Cockrell, 537 U.S. 322, 324 (2003).

justification tendered at the second step be not just neutral but also . . . a plausible basis for believing that the person's ability to perform his or her duties as a juror will be affected."[18] A *Batson* violation has occurred if the court discredits the prosecutor's explanation, or if the defendant can show the race-neutral explanation to be pretextual.[19] While *Batson* itself does not offer a remedy for *Batson* violations, one common approach judges take is to seat an improperly stricken juror.[20]

In its first reverse-*Batson* case, *Georgia v. McCollum*,[21] the Supreme Court explicitly rejected the discriminatory use of peremptory strikes by criminal defendants. In *McCollum*, three white defendants were charged with the assault of two African-Americans. Fearing that the defense would strike African-American veniremen, the prosecution raised a *Batson* challenge. The Court held that there was sufficient state action to entitle prosecutors to raise a *Batson* claim, primarily because the state oversees and administers the jury system and criminal defendants invoke state law to exercise their peremptory challenges. In accepting the prosecution's challenge, the *McCollum* Court concluded that the rights of a criminal defendant do not outweigh the interests articulated in *Batson*, specifically "that a fair trial" does not include "the right to discriminate against a group of citizens based upon their race."[22]

While various aspects of *Batson* have been refined through subsequent Supreme Court cases,[23] *Batson*—and correspondingly *McCollum*—have only

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18. 514 U.S. at 768 (internal quotation marks omitted).

19. *See id.*; Williams v. Groose, 77 F.3d 259, 261 (8th Cir. 1996) (allowing defendant to show that prosecutor's race-neutral reason was pretextual).

20. *Batson*, 476 U.S. at 99 n.24 ("In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today."); Meagen R. Sleeper, *Recent Decisions: The Maryland Court of Appeals—Maryland's Unfortunate Attempt To Define a* Batson *Remedy*, 57 MD. L. REV. 773, 779-80 (1998) ("[I]n most states, the trial judge has a choice between reseating the improperly challenged juror or striking the venire and beginning jury selection anew.").

21. 505 U.S. 42 (1992).

22. *McCollum*, 505 U.S. at 57-59. *But see id.* at 62 (Thomas, J., concurring) ("[W]e have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death.").

23. In the decades following *Batson*, the Supreme Court decided several cases that clarified the *Batson* framework. *See, e.g.*, Snyder v. Louisiana, 128 S. Ct. 1203 (2008); Johnson v. California, 545 U.S. 162 (2005); Miller-El v. Dretke, 545 U.S. 231 (2005); *Purkett*, 514 U.S. at 766; Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991). Moreover, other groups were brought under *Batson*'s protection against discriminatory peremptory challenges. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T. B., 511 U.S. 127 (1994) (women); Hernandez v. New York, 500 U.S. 352 (1991) (Hispanics). *Batson* was ultimately expanded to allow litigants of any race to make a *Batson* claim. *See* Powers v. Ohio, 499 U.S. 400 (1991).

become more deeply entrenched as guarantors of a fair trial. Thus, an erroneous application of the clearly established law of *Batson* is deserving of habeas relief.

II. THE SECOND CIRCUIT CREATES A SPLIT: *HAYES* & *AKI-KHUAM*

To date, only two circuits have ruled on whether trial errors concerning the application of *Batson* in a reverse-*Batson* challenge are even cognizable for habeas review. Before *Hayes v. Conway*,[24] courts could sidestep the question by simply finding there was no misapplication of *Batson*'s three-step process in the state court proceeding. The facts in *Hayes* were such that it was difficult for the court to deny there was a clear misapplication of the *Batson* test. Accordingly, the error's cognizability for habeas review was put at issue.

On September 25, 2000, Petitioner Garney Hayes was arrested and charged with several counts of robbery.[25] When Petitioner Hayes was convicted of the crimes, he filed a timely habeas petition in the Southern District of New York, pursuant to 28 U.S.C. § 2254.[26] He claimed that the state trial court unreasonably applied the analysis set forth in *Batson*.[27] By doing so, the trial court erroneously denied defendant's exercise of peremptory challenges against several jurors, who consequently were seated on the jury that decided Petitioner Hayes's fate.

Hayes argued that at Step Two of the *Batson* analysis, the trial court required defense counsel to present nonpretextual reasons for his peremptory strikes and then rejected them as discriminatory.[28] In doing so, Hayes argued, the judge effectively shifted the burden to the defense to prove that its reasons were not discriminatory; this was in contravention of *Purkett*, which makes clear that Step Two simply requires a party exercising the peremptory strike to come forward with a race-neutral explanation. It is "not until the *third* step that the persuasiveness of the justification becomes relevant."[29] Moreover, the "ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."[30] Hayes argued that by shifting to him the burden of persuading that the peremptory strikes were not racially

24. No. 07-3656-pr, 2009 WL 320188, at *1 (2d Cir. Feb. 10, 2009).

25. Hayes v. Conway, No. 05 Civ. 4088, 2007 WL 2265151, at *1 (S.D.N.Y. Aug. 2, 2007).

26. *Id.*

27. *Id.*

28. *Id.* at *3.

29. Purkett v. Elem, 514 U.S. 765, 768 (1995).

30. *Id.*

motivated, the trial court acted contrary to the Supreme Court's clearly established precedent in *Batson* and its progeny.[31]

The federal district court denied Hayes's petition, giving deference to the trial court's *Batson* determinations. The district judge concluded "the state trial court adequately followed *Batson*'s three steps," fulfilling the requirements of "step three" by "hear[ing] again from the prosecutor before making her ruling."[32] The district court went on to say that "*even if . . . the state court misapplied Batson*, the result would only be the denial of a state-created right to exercise peremptory strikes . . . [which] does not rise to the level of constitutional error."[33] Hayes appealed to the Second Circuit raising similar arguments and was again denied habeas relief. In denying Hayes's habeas petition, the court relied on *United States v. Martinez-Salazar*,[34] which held that the right to peremptory challenges is not a federal constitutional right. The Second Circuit reasoned that "absent allegations that [Hayes] was denied his right to an impartial jury, the loss of a peremptory challenge alone does not implicate his Sixth Amendment rights."[35] Ultimately, the Second Circuit held that because "there is no clearly established federal law as determined by the Supreme Court regarding whether . . . the erroneous denial of peremptory challenges constitutes a due process violation . . . denial of two of Hayes's peremptory challenges cannot provide a basis for federal habeas relief."[36]

The holding and reasoning in *Hayes* directly conflict with the Seventh Circuit's opinion in *Aki-Khuam* v. *Davis*.[37] In the face of virtually identical facts, the Seventh Circuit reached the opposite conclusion on the question of whether the improper reversal of peremptory strikes is a cognizable claim on federal habeas review. In *Aki-Khuam*, the Seventh Circuit granted habeas relief for a petitioner who claimed he was denied his peremptory strikes because the Indiana state trial court had misapplied the *Batson* test.[38] Like the state trial court in *Hayes*, the trial court in *Aki-Khuam* placed the burden on the defense to disprove discriminatory intent. The state judge demanded a "plausible reason that is nonracial, non-gender, nonreligious, non-body language," for

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31. *Hayes*, 2007 WL 2265151, at *1.

32. *Id.* at *3.

33. *Id.* at *4 (emphasis added) (internal quotation marks omitted).

34. 528 U.S. 304, 311 (2000).

35. Hayes v. Conway, No. 07-3656-pr, 2009 WL 320188, at *1 (2d Cir. Feb. 10, 2009) (citing Ross v. Oklahoma, 487 U.S. 81, 88 (1988)).

36. *Hayes*, 2009 WL 320188, at *2.

37. 339 F.3d 521 (7th Cir. 2003).

38. *Id.* at 529.

every peremptory strike used during jury selection.[39] The Seventh Circuit held that the trial court had effectively converted the peremptory challenges to "challenges for cause, which [it] then denied *not* explicitly because they appeared to be racially motivated, but rather because [it] was generally dissatisfied with Petitioner's stated reasons for challenging."[40] The court issued the writ for habeas relief under § 2254(d)(1), without even entertaining the possibility there was no habeas jurisdiction under § 2254(a).

Thus the split between the Second and Seventh Circuits has left open two questions: (1) whether improper granting of reverse-*Batson* challenges is cognizable on habeas review and (2) if so, whether the error merits habeas relief.

III. JUSTIFYING HABEAS RELIEF FOR REVERSE-*BATSON* ERRORS

In its holding, the *Hayes* court reasoned "[b]ecause there is no clearly established federal law as determined by the Supreme Court regarding whether . . . erroneous denial of peremptory challenges constitutes a due process violation, the state court's denial of two of Hayes's peremptory challenges cannot provide a basis for federal habeas relief."[41] The opinion cited 28 U.S.C. § 2254 for that proposition without specifying the relevant subsection. The key limitation to the Second Circuit's approach in *Hayes* is that it conflates the jurisdictional standards for a cognizable claim in habeas proceedings, 28 U.S.C. § 2254(a), with the standards for granting the writ, 28 U.S.C. § 2254(d). In simply citing to "§ 2254," without distinguishing between subsections (a) and (d), the court erroneously imports the constraints of the latter into the former.

Under the AEDPA, if a petitioner can show that he or she is in custody in violation of the Constitution *or laws* or treaties of the United States, courts "shall" entertain his or her application for a writ of habeas corpus.[42] At that point, habeas relief "shall not be granted" for a state court judgment unless the determination "was contrary to, or involved an unreasonable application of,

39. *Id.* at 523.

40. *Id.* at 529 n.6.

41. *Hayes*, 2009 WL 320188, at *3-4. *Contra Aki-Khuam*, 339 F.3d at 529 ("Petitioner was deprived of his liberty by a jury whose very creation involved a denial of his statutory and constitutional rights. Consequently, Petitioner was denied due process and equal protection of the law . . . .").

42. 28 U.S.C. § 2254(a) (2006).

clearly established Federal law."[43] Deviating from the clear text of the AEDPA is not justified by the argument in the *Hayes* decision that peremptory challenges are not a constitutional right. Under § 2254(a), there is no indication that habeas jurisdiction is available only for constitutionally protected rights; rather, jurisdiction is available when a prisoner is in "custody in violation of the Constitution *or laws* or treaties of the United States."[44] Nor does § 2254(a) say that a claim is only cognizable if it violates clearly established federal law; that phrase is used only in § 2254(d), which dictates when habeas relief should be granted. Thus, *Hayes* uses the standard for granting the writ to decide whether or not a defendant's claim is even cognizable, thereby imposing an undue burden on the defendant to prove the merits of his claim simply to obtain review. If the Second Circuit had applied the correct test for cognizability, it would have found that Hayes's detention was in violation of *Batson*, and thus the laws of the United States, warranting habeas review.

Notwithstanding that conflation, the *Hayes* decision entirely fails to recognize that the procedure established in *Batson* and its progeny *qualifies* as clearly established federal law for the purposes of § 2254(d)(1). To be "contrary to" clearly established federal law, a state court decision must "arrive[] at a conclusion opposite to that reached by [the Supreme Court] on a question of law or . . . decide[] the case differently than [the Supreme Court] has on a set of materially indistinguishable facts."[45] The phrase "clearly established Federal law, as determined by the Supreme Court of the United States," limits the law governing a habeas petitioner's claim to the holdings of the Supreme Court as they were at the time the relevant state court decision became final.[46] This limits access to federal habeas in that it does not permit a circuit court to review habeas petitions based on trial court proceedings that violated the law in its own circuit, unless the Supreme Court had adopted the circuit's law. The *Batson* test was established by the Supreme Court, thereby satisfying the requirement in § 2254(d)(1) that the Supreme Court, and not the lower courts, determine the law. In a situation such as *Hayes* or *Aki-Khuam*, where the trial court rejects defense counsel's race-neutral explanations not because they demonstrate a discriminatory motive, but rather because they are unreasonable

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43. *Id.* § 2254(d)(1)-(2).

44. *Id.* § 2254(a) (emphasis added). In relevant part, 28 U.S.C. § 2254(a) provides: "(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."

45. Williams v. Taylor, 529 U.S. 362, 413 (2000).

46. *Id.* at 381.

or implausible, it applies precisely the standard that *Purkett* rejects. Thus, when the trial court plainly misapplies the *Batson* steps, the result is a decision "contrary to" clearly established federal law.

As an alternative to § 2254(d)(1) relief, a court could grant habeas relief under § 2254(d)(2) if it finds the trial court's factual determination to be an unreasonable determination of facts. The AEDPA provides that for a state court decision to be based on "unreasonable application" of Supreme Court precedent, it must correctly identify the governing legal rule but apply it in an unreasonable manner to the particular facts of that case.[47] The standard is for the state court's application to be "objectively unreasonable," irrespective of whether the court's application of the governing law was correct.[48] Where a trial judge irrationally attributes discriminatory motive to the defense in granting a reverse-*Batson* challenge, there may be grounds to grant habeas relief under § 2254(d)(2) as well as (d)(1).

Thus *Hayes* does not accord with the clear language of the AEDPA, which allows habeas petitions to be granted based on claims relating to "clearly established" decisions by the Supreme Court. While the AEDPA is acknowledged to have meaningfully curtailed habeas jurisdiction, it elevated in significance the law of the Supreme Court. *Batson*, its progeny, and the procedures they establish are considered "clearly established federal law." An improper application of the *Batson* test in the reverse-*Batson* context is a violation that is not only cognizable for habeas review, but as *Aki-Khuam* found, meets the standards for granting the writ.

CONCLUSION

District courts routinely entertain habeas petitions seeking relief on the grounds that the trial court improperly denied the petitioner defendant's peremptory strikes.[49] If, as *Hayes* held, these claims are not cognizable on habeas, then district courts are being unnecessarily inundated with these claims

47. *Id.* at 413.

48. *Id.* at 409-10; *see also* Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) ("[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding . . . ." (citing § 2254(d)(2))).

49. *See, e.g.*, Reynoso v. Scribner, No. CV 08-3554-VAP, 2008 WL 4962863, at *9-11 (C.D. Cal. Nov. 17, 2008) (reviewing a habeas petition arguing that the trial judge wrongfully denied defense peremptories through misapplication of *Batson*); Long v. Norris, No. 5:06CV00238, 2007 WL 2021839, at *9-11 (E.D. Ark. July 10, 2007) (same); Dotson v. Ercole, No. 06 Civ. 7823, 2007 WL 1982730, at *5-6 (S.D.N.Y. July 10, 2007) (same).

over which they lack subject matter jurisdiction. Conversely, if these claims are cognizable, then district courts are applying clearly established federal law in divergent and unreasonable ways. Either alternative necessitates clear guidance on the cognizability question. This Comment has argued that such claims are entitled to habeas review.

Additionally, even if there is no constitutional right to peremptory strikes, *Batson* and its progeny serve as the clearly established federal law that allow habeas relief under § 2254(d). The Second Circuit's opinion erroneously denies such relief from a trial court's gross distortions of the *Batson* procedure. Although the split between the Second and Seventh Circuits sends mixed signals to lower courts about whether a misapplication of *Batson* triggers habeas relief, the language of the AEDPA is clear that it does.

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