THE STATE OF OHIO, APPELLANT, *v.* STALDER, APPELLEE.

[Cite as *State v. Stalder*, 173 Ohio St.3d 203, 2023-Ohio-2359.]

Criminal law—Equal Protection Clause of Fourteenth Amendment to United States Constitution—Purposeful gender discrimination—Jury selection—Peremptory challenges—When a party objects to a peremptory challenge during jury selection and offers a bare allegation of gender discrimination without offering any other relevant facts and circumstances to support an inference of gender discrimination, that party fails to establish a prima facie case of purposeful gender discrimination—Judgment reversed and cause remanded.

(No. 2022-0707—Submitted March 21, 2023—Decided July 13, 2023.)

APPEAL from the Court of Appeals for Fairfield County,

No. 21-CA-26, 2022-Ohio-1386.

KENNEDY, C.J.

{¶ 1} In this discretionary appeal from a judgment of the Fifth District Court of Appeals, we consider whether a defendant who objected to a prosecutor's peremptory challenges during jury selection set forth sufficient facts and circumstances to establish a prima facie case of purposeful gender discrimination.

{¶ 2} The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits purposeful discrimination in the form of a prosecutor's use of a peremptory challenge to excuse a prospective juror based on his or her race or gender. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (applying *Batson* to purposeful discrimination based on gender). When a defendant objects to a prosecutor's peremptory challenge of a

prospective juror on these grounds, the trial court must apply a three-step analysis. The first step requires the objecting party to establish a prima facie case of purposeful discrimination. *Batson* at 93-94. If the objecting party fails to meet this burden, there is no equal-protection violation.

{¶ 3} Appellee, Glen Stalder, was tried for sexual imposition. During jury selection, appellant, the state of Ohio, exercised peremptory challenges on two male prospective jurors. Stalder's counsel objected to both challenges under *Batson*, alleging that the prosecutor sought to exclude male jurors because they would tend to sympathize with Stalder. Stalder's counsel did not offer any other facts or circumstances to support his claim. The trial-court judge determined that *Batson* did not apply and excused both jurors. The jury convicted Stalder of the charged offense.

{¶ 4} On appeal, the Fifth District reversed, holding that Stalder had established a prima facie case of purposeful gender discrimination based on the state's exercise of its first peremptory challenge. 2022-Ohio-1386, ¶ 18. The court of appeals vacated Stalder's conviction and remanded the matter to the trial court for a new trial. *Id.* at ¶ 24.

{¶ 5} We disagree with the Fifth District's determination and hold that when a party objecting to a peremptory challenge offers a bare allegation of gender discrimination without offering any other relevant facts and circumstances to support an inference of gender discrimination, that party fails to establish a prima facie case of purposeful gender discrimination. Based on the record here, we conclude that Stalder failed to establish a prima facie case of gender discrimination and therefore the state did not violate Stalder's right to equal protection.

{¶ 6} We therefore reverse the judgment of the Fifth District and remand the case to that court for consideration of Stalder's remaining assignments of error.

I. Facts and Procedural History

{¶ 7} Stalder was charged with the crime of sexual imposition. The jury pool for Stalder's case consisted of 26 prospective jurors. Of those, 23 were available for jury selection. And of those 23 prospective jurors, 12 were female and 11 were male.

{¶ 8} During jury selection, Stalder and the state each had three peremptory challenges to exercise. *See* Crim.R. 24(D). But because the jury would include an alternate juror, the parties had the opportunity to exercise a fourth peremptory challenge against a prospective alternate juror. *See* Crim.R. 24(G)(1).

{¶ 9} Stalder's counsel exercised his first three peremptory challenges on female prospective jurors. At that time, prospective juror C.H., a female, was set to be the alternate juror. Stalder's counsel then exercised his alternate-juror peremptory challenge—his fourth peremptory challenge—on C.H.

{¶ 10} The state exercised two peremptory challenges, both on male prospective jurors. When the state exercised its first peremptory challenge on prospective juror F.B., Stalder's counsel requested that the prosecutor explain the basis of his challenge; Stalder's counsel alleged that the state wanted to remove prospective juror F.B. "simply because he [was] a male and would tend to sympathize with [Stalder]." Stalder's counsel also stated that he believed the state was "choosing to exclude jurors based on gender." The prosecutor refuted that allegation, explaining: "They've all indicate[d] that they'd be able to be fair and impartial. They answered questions that I asked satisfactorily. It's just a matter of elimination on which jurors I think are most appropriate for this case."

{¶ 11} Stalder's counsel then argued that the United States Supreme Court's decision in *Batson*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, applied and therefore the state had to give a reason for the challenge beyond the prospective juror's gender. The trial-court judge disagreed. Finding that *Batson* did not apply,

the judge did not require the prosecutor to give a gender-neutral reason for the state's challenge of prospective juror F.B., and he excused that prospective juror.

{¶ 12} The state used its second peremptory challenge on prospective juror J.C., who was also male. Stalder's counsel renewed his previous objection, and although the court did not require the prosecutor to provide an explanation for the state's request to excuse that prospective juror, he proffered one. The prosecutor explained that the state wished to exclude prospective juror J.C. because of his responses during jury selection "and how he would react in a stressful situation." The court excused prospective juror J.C. The state did not use two of its available peremptory challenges, and the final jury consisted of five female jurors (S.G., T.C., T.T., S.M., and K.C.) and three male jurors (R.M., J.H., and C.D.), plus one alternate juror who was male (J.G.).

{¶ 13} The parties' briefs and the Fifth District's decision indicate that the final jury, including the alternate juror, consisted of six females and three males. A review of the record, however, reveals that this is incorrect. According to the transcript of jury selection, the trial-court judge, the prosecutor, and the court reporter all referred to juror C.D. as a male. This explains the discrepancy in the parties' and court of appeals' calculation of the number of female jurors.

{¶ 14} The jury found Stalder guilty. Stalder appealed to the Fifth District. Among other assignments of error, Stalder argued that the trial court erred in summarily denying his " '*Batson*' challenge." 2022-Ohio-1386 at ¶ 8. The Fifth District agreed. *Id.* at ¶ 22. The court of appeals held that Stalder's counsel "established a prima facie case of purposeful discrimination" when the state exercised its peremptory challenge on prospective juror F.B. and did not provide a gender-neutral explanation for its challenge. *Id.*

{¶ 15} The Fifth District concluded that the trial court erred in two ways. First, it "erred as a matter of law in finding the requirements of *Batson*[, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69,] inapplicable to instances of alleged gender

discrimination." 2022-Ohio-1386 at ¶ 22. Second, it erred "by further failing to require the state to provide a gender-neutral explanation for the exclusion of two male prospective jurors." *Id.* The Fifth District reversed the trial court's judgment, vacated Stalder's conviction, and remanded the case for a new trial. *Id.* at ¶ 24. The state appealed, and we unanimously accepted jurisdiction over this case on two propositions of law:

> [1.] To establish a prima facie case of gender discrimination concerning the exercise of a peremptory challenge, there must be facts and relevant circumstances presented by the objecting party to raise an inference of intentional discrimination by the striking party.
>
> [2.] In instances where the objecting party has established a prima facie case of purposeful discrimination and the trial court fails to follow the procedure set forth in *Batson*, by summarily dismissing an objection without requiring the striking party to articulate a gender-neutral explanation and then failing to determine whether the challenging party has proved purposeful discrimination, the proper remedy is to remand the case back to the trial court for the limited purpose of conducting a hearing on the challenging party's objection.

See 167 Ohio St.3d 1516, 2022-Ohio-3214, 195 N.E.3d 141.

II. Law and Analysis

{¶ 16} The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits purposeful discrimination in the form of a prosecutor's use of a peremptory challenge to excuse a prospective juror based on his or her race or gender. *Batson* at 89; *J.E.B.*, 511 U.S. at 129, 114 S.Ct. 1419, 128 L.Ed.2d 89. When a defendant objects to a prosecutor's peremptory challenge

on these grounds, the trial court must apply a three-step analysis. First, the court must determine whether the defendant has established a prima facie case of purposeful discrimination. *Batson* at 93. If the defendant has established a prima facie case of purposeful discrimination, then the burden shifts to the prosecutor to present a race- or gender-neutral explanation for the challenge. *Id.* at 94. Finally, the trial court must decide, based on all the relevant circumstances, whether the defendant has proved purposeful discrimination. *Id.* at 98.

{¶ 17} To establish a prima facie case of purposeful discrimination, "the defendant must demonstrate (1) that members of a cognizable [gender] group were peremptorily challenged, and (2) that the facts and any other relevant circumstances raise an inference that the prosecutor used the peremptory challenges to exclude jurors on account of their [gender]." *State v. Johnson*, 88 Ohio St.3d 95, 116, 723 N.E.2d 1054 (2000). "The trial court should consider all relevant circumstances in determining whether a prima-facie case exists, including statements by counsel exercising the peremptory challenge, counsel's questions during [jury selection], and whether a pattern of strikes against [a cognizable gender group of jury-panel] members is present." *Hicks v. Westinghouse Materials Co.*, 78 Ohio St.3d 95, 98, 676 N.E.2d 872 (1997); *see also Batson* at 96-97. In establishing a prima facie case of purposeful discrimination, defendants may also present statistical evidence about the prosecutor's use of peremptory challenges, side-by-side comparisons of prospective jurors who were struck from the jury and of those who were not, any misrepresentations of the record by the prosecutor when defending the peremptory challenges, and historical evidence of the state's use of peremptory challenges in past cases. *Flowers v. Mississippi*, 588 U.S. __, 139 S.Ct. 2228, 2243, 204 L.Ed.2d 638 (2019). Additionally, when a prosecutor does not exercise all of his or her peremptory challenges and there are still members of the cognizable gender group on the jury, that is a factor that tends to refute a claim of purposeful discrimination. *See United States v. Sangineto-Miranda*, 859 F.2d 1501, 1522 (6th Cir.1988).

{¶ 18} We agree with the appellate court that the trial court erred as a matter of law when it determined that the requirements of *Batson* were inapplicable to instances of alleged gender discrimination. But we disagree with the appellate court that based on the record here, Stalder established a prima facie case of gender discrimination by the prosecutor based on the prosecutor's exercise of preemptory challenges.

{¶ 19} There is no question that prospective juror F.B., a male, was a member of a cognizable gender group. The question here is whether, considering all relevant facts and circumstances, Stalder's claim supports an inference that the state exercised a peremptory challenge to have prospective juror F.B. excluded from the jury because he is a male. It does not.

{¶ 20} Several federal-circuit-court cases are illustrative of when a prima facie case of gender discrimination has, or more often has not, been established. In *United States v. Grant*, 563 F.3d 385, 387 (8th Cir.2009), Grant, a female, was charged with murder. During jury selection, Grant used 10 of her 11 peremptory challenges against females. *Id.* at 389. At the end of jury selection, the prosecutor objected to Grant's peremptory challenges, arguing that they established a pattern of striking jurors based on gender. *Id.* The federal district court sustained the prosecutor's objections to Grant's challenges against three of the women, and those three women were the only women seated on the jury. *Id.* at 388. The jury found Grant guilty, and Grant appealed, arguing that the district court erred when it sustained the prosecutor's objection to her challenges against the three women who were seated on the jury. *Id.* The United States Court of Appeals for the Eighth Circuit performed a gender-discrimination analysis under *J.E.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89, and held that "the government made a prima facie showing of a *J.E.B.* gender violation when [it] offered its objection to the pattern of Grant's strikes and told the district court [that] Grant exercised ten of her eleven strikes on females." *Grant* at 388.

{¶ 21} In a more common subset of cases, federal circuit courts have given guidance about when a defendant fails to establish a prima facie case of gender discrimination. In *United States v. Martinez*, 621 F.3d 101, 102 (2d Cir.2010), Dennis Paris, a male, was a defendant in a sex-trafficking case. During jury selection, the government used its first four peremptory challenges against male prospective jurors, and Paris objected citing *Batson*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69. *Martinez* at 103. The Second Circuit Court of Appeals concluded that Paris failed to establish a prima facie case of purposeful gender discrimination because his objection to the government's peremptory challenges "was based on nothing more than the Government's exercise of its first four peremptory challenges against men." *Id.* at 110.

{¶ 22} In *United States v. Ervin*, 266 Fed.Appx. 428, 432 (6th Cir.2008), Ervin, a male facing conspiracy-to-commit-robbery and firearms charges, made a gender-discrimination claim under *Batson* based on the fact that 56 percent of the jury pool was women while only 50 percent of the final jury was women. The Sixth Circuit Court of Appeals stated, "We do not see this difference as constitutionally significant * * *." *Ervin* at 432. It held that because Ervin failed to present other relevant circumstances to raise an inference of discrimination, he did not establish a prima facie case of purposeful discrimination. *Id.*

{¶ 23} This case is distinguishable from *Grant*, 563 F.3d 385; the facts here are in the same vein as those presented in *Martinez* and *Ervin*. When Stalder's counsel objected to the state's peremptory challenge of prospective juror F.B., his only reason for doing so was "simply because [F.B. was] a male and would tend to sympathize with [his] client." Aside from this comment, Stalder's counsel presented no evidence to establish a prima facie case of purposeful gender discrimination. Counsel did not point to any of the prosecutor's questions during jury selection. *See Batson* at 96. There was no proof of a pattern of strikes against male prospective jurors in this case or historically by the prosecutor in other cases,

which, while not required, could give rise to an inference of discrimination. *See id.* at 97; *see also Flowers*, 588 U.S. at __, 139 S.Ct. at 2245, 204 L.Ed.2d 638. Further, none of the prosecutor's statements during jury selection in this case indicate discrimination. *See Batson* at 97. The prosecutor explained that it was "just a matter of elimination [of] which jurors [he thought were] most appropriate for [the] case." Stalder's counsel did not provide any statistical evidence relating to the prosecutor's peremptory challenges, side-by-side comparisons of the prospective jurors who were struck from the jury and of those who were not, or evidence of any misrepresentations of the record by the prosecutor when defending the state's peremptory challenges. *See Flowers* at __, 139 S.Ct. at 2243.

{¶ 24} We also cannot ignore that the final jury included four males—three regular jurors plus one alternate juror—and that the state did not exercise its final peremptory challenge under Crim.R. 24(D), nor did it exercise its alternate-juror peremptory challenge under Crim.R. 24(G)(1) against alternate juror J.G., who was a male. These are facts that cut against a finding of discrimination. *See Sangineto-Miranda*, 859 F.2d at 1522.

{¶ 25} Finally, the jury pool here was 52 percent female and 48 percent male. The final jury, including the alternate juror, was 56 percent female and 44 percent male—resulting in a 4 percent variation between the female makeup of the jury pool and the final jury. This is less than the 6 percent variation that the Sixth Circuit found not to be constitutionally significant in *Ervin*, 266 Fed.Appx. at 432. Stalder's counsel could have proffered supporting evidence of purposeful discrimination but did not; instead, he made only the bare allegation that purposeful gender discrimination had occurred. The record is devoid of any relevant facts or circumstances that give "rise to an inference of discriminatory purpose," *Batson*, 476 U.S. at 94, 106 S.Ct. 1712, 90 L.Ed.2d 69. *See also Johnson*, 88 Ohio St.3d at 116, 723 N.E.2d 1054.

{¶ 26} We hold that when a party objecting to a peremptory challenge offers a bare allegation of gender discrimination and fails to set forth any other relevant facts and circumstances to raise an inference of gender discrimination, that party fails to establish a prima facie case of purposeful gender discrimination.

{¶ 27} There is no doubt that the trial court erred when it failed to recognize that *Batson* applied to Stalder's objections to the state's peremptory challenges, but that error is immaterial because Stalder failed to establish a prima facie case of discrimination, which is a prerequisite for establishing an equal-protection violation. Because we conclude that the state prevails on its first proposition of law, the state's second proposition of law is moot and we need not address it.

III. Conclusion

{¶ 28} The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees defendants the equal protection of the laws during jury selection. *Batson*, 476 U.S. at 89, 106 S.Ct. 1712, 90 L.Ed.2d 69. And that guarantee is put in jeopardy when a party seeks to remove a prospective juror based solely on his or her gender. But when a party alleges purposeful gender discrimination during the jury-selection process, that party must present the court with something more than a bare allegation. This court, and various federal courts, have provided defendants with numerous factors they can use to show purposeful discrimination. But here, Stalder did not utilize, or attempt to utilize, any of those factors. Stalder's bare allegation does not meet the threshold required to establish a prima facie case of purposeful gender discrimination. Finding otherwise would render the "prima facie case" requirement useless.

{¶ 29} Therefore, we reverse the judgment of the Fifth District Court of Appeals and remand this case to that court for consideration of Stalder's remaining assignments of error.

Judgment reversed
and cause remanded.

FISCHER, DEWINE, and DETERS, JJ., concur.

DONNELLY, J., dissents, with an opinion joined by STEWART and BRUNNER, JJ.

DONNELLY, J., dissenting.

{¶ 30} The majority holds that "when a party objecting to a peremptory challenge offers a bare allegation of gender discrimination without offering any other relevant facts and circumstances to support an inference of gender discrimination, that party fails to establish a prima facie case of purposeful gender discrimination." Majority opinion, ¶ 5. In reaching this holding, the majority sidesteps the true issue in this case and places an undue evidentiary burden on a party objecting under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Because I believe the majority answers the wrong question at the wrong time and in the wrong way, I respectfully dissent.

The Fourteenth Amendment

{¶ 31} Discrimination in jury selection, whether based on the jurors' race or gender, harms the parties' rights to a fair trial, the community's perception of the jury system, and the jurors who are wrongfully excluded from participation in the judicial process. *See Miller-El v. Dretke*, 545 U.S. 231, 237, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). Because jury selection is the primary means by which a trial court may enforce a defendant's right to a fair trial, the adequacy of voir dire and the proper use of juror challenges require the trial court to exercise considerable care when reviewing a claim of an equal-protection violation during voir dire. *See State v. Bates*, 159 Ohio St.3d 156, 2020-Ohio-634, 149 N.E.3d 475, ¶ 30-31; *Hicks v. Westinghouse Materials Co.*, 78 Ohio St.3d 95, 99, 676 N.E.2d 872 (1997).

{¶ 32} Peremptory challenges are used to ensure an impartial jury and a fair trial. They may be exercised for any reason, unless the opposing party makes a prima facie showing that the challenge is being used to discriminate, including on the basis of race or gender, which is prohibited by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, *J.E.B.* at 128-131, 144-145. Since the seminal case of *Batson*, the prohibition on such purposeful discrimination has been vigorously enforced, reinforced, and closely guarded against any backsliding. *See Flowers v. Mississippi*, 588 U.S.__, 139 S.Ct. 2228, 2243, 204 L.Ed.2d 638 (2019) (collecting cases). But I fear that the majority's misguided decision here will start a backward slide and an unraveling of this sacrosanct constitutional right.

The Batson *framework*

{¶ 33} *Batson*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, established a three-part test for evaluating whether a party's use of peremptory challenges violates the Equal Protection Clause. Under this analysis, (1) the party opposing the challenge must first demonstrate a prima facie case of purposeful discrimination in the exercise of the challenge; (2) if a prima facie case has been shown, the burden then shifts to the proponent of the challenge to tender a neutral, nondiscriminatory explanation for the challenge; and (3) the trial court must then determine whether the party opposing the challenge has carried its burden of proving purposeful discrimination. *Id.* at 96-98; *see also State v. Hernandez*, 63 Ohio St.3d 577, 581-582, 589 N.E.2d 1310 (1992).

{¶ 34} The responsibility of enforcing the *Batson* protections rests first and foremost with the trial court. *Flowers* at __, 139 S.Ct. at 2243. In its role as diligent gatekeeper in that regard, a court should make clear, on the record, that it understands and has carefully applied the *Batson* test. Unfortunately, this did not happen here. Instead, the trial court incorrectly determined that because the challenges by appellant, the state of Ohio, were to male potential jurors, no *Batson*

issue was present and appellee Glen Stalder's objections need not be addressed. In other words, the trial court did not even begin the *Batson* analysis.

Relevant facts

{¶ 35} This case concerns the state's use of peremptory challenges to remove two male prospective jurors, F.B. and J.C. During voir dire, the prospective jurors were not questioned individually. Instead, the venire was asked general questions and if a prospective juror raised his or her hand in response to a question, he or she was asked follow-up questions. The record does not indicate whether prospective juror F.B., the subject of the state's first peremptory challenge, offered answers to any questions. The subject of the second peremptory challenge, prospective juror J.C., did offer an answer to one question asking how the prospective jurors would react if someone broke into their homes at night. In exercising its second peremptory challenge on J.C., the state cited J.C.'s answer to that question as its reason for the challenge.

{¶ 36} The parties' discussion with the trial court regarding peremptory challenges included the following:

> The Court: Very well. Both parties have passed on challenges for cause. Let's begin with peremptory challenges. On behalf of the State?
>
> [The state]: Your Honor, the State would excuse Juror no. 1296, [F.B.]
>
> The Court: All right, Juror 1296, [F.B.] would be excused.
>
> [Counsel for Stalder]: Your Honor, at this time we'd ask the State to explain that challenge. We believe that they are doing it simply because he is a male and would tend to sympathize with my client.

The Court: * * * Well, you're raising that simply because he is a male. I mean—

[Counsel for Stalder]: Your Honor, I have a feeling that every one of the State's peremptory challenges is going to be a man * * * in this case. I'm asking out of the box that they start justifying that before we get too far along this road.

The Court: I don't know that any—that [F.B.] or any other man indicated any type of bias in favor of men.

[Counsel for Stalder]: Hence my point, Your Honor. I think the government—

The Court: Or in favor of women or—

[Counsel for Stalder]: I think the government is choosing to exclude jurors based on gender.

The Court: [Counsel for the state], what's your position?

[Counsel for the state]: No, Your Honor, there is no reason to do so. They've all indicate[d] that they'd be able to be fair and impartial. They answered questions that I asked satisfactorily. It's just a matter of elimination [of] which jurors I think are most appropriate for this case. I don't believe that all the jurors that I would excuse are going to be male.

[Counsel for Stalder]: Judge, *Batson* requires them to be able to demonstrate that there is a reason beyond the fact that he's male and they haven't justified that at all.

The Court: First of all, doesn't it have to be a protected class, [counsel for Stalder?]

[Counsel for Stalder]: Yeah, gender is a protected class.

The Court: And when you talk about gender being a protected class, simply I don't believe he indicated he was in

anyway binary or anything else that would—I'm not buying your argument here. I'm granting the peremptory challenge. I don't think there is a *Batson* issue in this matter and I think prolonging that is not going to make this trial go away.

[Counsel for Stalder]: I'm not asking that this trial go away, Your Honor.

The Court: Well, I understand that, but it's not a basis—In this Court's opinion there is not a *Batson* issue. This is not a situation where [F.B.] is in a protected class that would be subject to a *Batson* decision. Period.

[Counsel for Stalder]: I understand, Your Honor.

The Court: Okay. Just so we're all on the same page. Alright. Peremptory challenge on behalf of the Defense?

[Counsel for Stalder]: I'm going to excuse [J.N.], 1307, Your Honor.

The Court: Very well. Juror no. 1307, [J.N.] will be excused. Peremptory challenge on behalf of the State?

* * *

[Counsel for the state]: Your Honor, the State would excuse Juror no. 1297, [J.C.]

[Counsel for Stalder]: Renew the same objection, Your Honor.

The Court: Very well.

[Counsel for the state]: I can provide an explanation, Your Honor.

* * *

The Court: Well, I don't know that one is necessary, but if you wish to provide one, you may.

> [Counsel for the state]: Just in terms [of] his response and how he would react in a stressful situation.
>
> The Court: All right. But regardless, Juror no. 1297, [J.C.] will be excused.
>
> * * *
>
> [Counsel for Stalder]: Yes, Your Honor, and I would proffer on the record that both of the peremptory challenges by the government were male.
>
> The Court: And I recognize they were both male. I'm also believing that a peremptory challenge, they are not traditionally a class of individuals—white males are not traditionally a class of individuals who have been in some way, shape, or form excluded from juries because of their status as a white male. So your objection previously was overruled and it remains overruled.

{¶ 37} Because the trial court did not know the law pertaining to *Batson*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, Stalder was prevented from offering any facts to support his argument beyond the fact that F.B. was a male. And based on the record, there was nothing else to go on besides the fact that F.B. was a male. Because there were no questions directly posed to F.B. and because he did not offer any answers to the questions asked of the group, the state had no information about F.B. when it exercised its peremptory challenge against him other than that he was a male. Therefore, it was reasonable to conclude that F.B. was being challenged solely because he was a male. The same can be said about the state's peremptory challenge against prospective juror J.C. because no *Batson* analysis occurred regarding that challenge.

{¶ 38} Based on this record, the Fifth District Court of Appeals correctly held that the trial court erred in determining that *Batson* is inapplicable to

challenges to jurors who are white males. *See* 2022-Ohio-1386, ¶ 20-22. We should affirm the court of appeals' judgment. Period.

{¶ 39} However, the majority fails to end the matter where the constitutional error occurred. Instead, the majority proceeds to impose an unreasonable evidentiary burden on the party objecting under *Batson* to show a prima facie case of purposeful discrimination.

Prima facie case

{¶ 40} Well-established law provides that to prove a prima facie case of purposeful discrimination under *Batson*, the objecting party must show that he or she is a member of a cognizable protected group, that the peremptory challenge will remove a member of the protected group from the venire, and that those facts and any other relevant circumstances raise an inference of purposeful discrimination. *See Hernandez*, 63 Ohio St.3d at 581-582, 589 N.E.2d 1310. The objecting party 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.' " *Id.*at 582, quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 97 L.Ed. 1244 (1953). In determining whether a prima facie case has been shown, a trial court should consider these facts and all relevant circumstances, including statements and questions by counsel exercising the peremptory challenge and whether there is a pattern of strikes against protected-group venire members. *Batson*, 476 U.S. at 96-97, 106 S.Ct. 1712, 90 L.Ed.2d 69; *Hicks*, 78 Ohio St.3d at 98, 676 N.E.2d 872.

{¶ 41} In *Batson*, the United States Supreme Court reexamined and overruled its holding in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), "concerning 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." *Batson* at 82. In *Swain*, the Supreme Court held that a black defendant would have to show

a pattern of discrimination by the prosecutor over a number of cases in order to establish a prima facie case of purposeful discrimination. *Id.* at 223; *see also Batson* at 91-93. And while the defendant in *Swain* had "showed that prosecutors in the jurisdiction had exercised their strikes to exclude blacks from the jury, he offered no proof of the circumstances under which prosecutors were responsible for striking black jurors beyond the facts of his own case." *Batson* at 92, citing *Swain* at 224-228. The court in *Batson* determined that *Swain* had placed a "crippling burden of proof" on defendants and rejected its holding. *Batson* at 92-93. I fear that the majority's decision today is a retreat to the status of the law before *Batson*.

***The majority offers new ways to establish a prima facie case under* Batson**

{¶ 42} Instead of applying this well-established law, the majority offers new ways to show a prima facie case of purposeful discrimination. Such ways include (1) "present[ing] statistical evidence about the prosecutor's use of peremptory challenges," (2) using "side-by-side comparisons of prospective jurors who were struck from the jury and those who were not," (3) pointing out "any misrepresentations of the record by the prosecutor when defending the peremptory challenges," and (4) presenting "historical evidence of the state's use of peremptory challenges in past cases." Majority opinion at ¶ 17, citing *Flowers*, 588 U.S. at __, 139 S.Ct. at 2243, 204 L.Ed.2d 638. Additionally, the majority refers to several purportedly illustrative cases in which a prima facie case was not established. However, *Flowers* is clearly distinguishable, and the other cases relied on by the majority are irrelevant.

{¶ 43} In *Flowers*, the defendant had been tried six times for capital murder. The same prosecutor represented the state in all six trials. *Id.* at __, 139 S.Ct. at 2234. The state had engaged in a persistent pattern of striking black prospective jurors from at least five of the trials, so the peremptory-challenge issue was raised and argued on multiple occasions. *See id.* at __, 139 S.Ct. at 2245-2246. Based on

the record in *Flowers*, it was easy for the Supreme Court to rattle off multiple evidentiary factors to apply in that "highly unusual * * * [and] likely one of a kind" case. *Id.* at __, 139 S.Ct. at 2251 (Alito, J., concurring). But when will the defendant in the average case have such extraordinary facts and evidence at his or her fingertips?

{¶ 44} The majority cites several federal cases that purportedly give guidance about when an objecting party fails to establish a prima facie case. A close reading of these cases reveals that they have little precedential value here.

{¶ 45} In *United States v. Martinez*, 621 F.3d 101, 110 (2d Cir.2010), the federal court determined that the defendant failed to establish a prima facie case of purposeful gender discrimination, because his objection to the government's peremptory challenges "was based on nothing more than the Government's exercise of its first four challenges against men." But *Martinez* misreads the *Batson* analysis and appears to jump right to the last step of that analysis. *See Martinez* at 109-110.

{¶ 46} *United States v. Ervin*, 266 Fed.Appx. 428 (6th Cir.2008), suffers a similar fate. In *Ervin*, the federal court determined that the defendant had not established a prima case of purposeful discrimination by showing that 56 percent of the jury pool was women while only 50 percent of the final jury was women. *Id.* at 432. But the United States Constitution forbids striking even a single prospective juror for a discriminatory purpose. *See Flowers*, 588 U.S. at __, 139 S.Ct. at 2242, 204 L.Ed.2d 638. So it does not matter what percentage of males or females ultimately are seated on the jury. *Ervin* therefore offers little guidance to the question before us.

{¶ 47} Instead, this case presents a set of circumstances indistinguishable from that considered in *J.E.B.*, 511 U.S. 127, 129, 114 S.Ct. 1419, 128 L.Ed.2d 89—that of a male defendant having objected to the state's exclusion of male jurors. And the trial courts in both *J.E.B.* and this case determined that males are not a

protected class and that a male may not challenge the exclusion of a male juror based solely on the juror's gender.

{¶ 48} In this case, when asked to provide the reason for its challenge to prospective juror F.B., the state said: "[T]hey all indicate[d] that they'd be able to be fair and impartial. They answered questions that [the state] asked satisfactorily. It's just a matter of elimination on which jurors [the state] think[s] are most appropriate for this case." In other words, the state said that the prospective jurors were not challenged based on their answers or any inability to be fair and impartial but were challenged based on the state's determination that they were somehow still inappropriate for the jury. In my view, the record supports the conclusion that the state removed male jurors on the false assumption that they were not qualified to serve.

Other considerations

{¶ 49} In reaching its conclusion, the majority also emphasizes the final gender composition of the jury, which was five females and four males (three male regular jurors and one male alternate juror).[1] However, the existence of a pattern of discriminatory strikes is not a prerequisite to finding a prima facie case of purposeful discrimination, *State v. White*, 85 Ohio St.3d 433, 436, 709 N.E.2d 140 (1999). "Such a rule would license prosecutors to exercise one illegal peremptory strike per trial. The law of equal protection does not allow 'one free bite.' " *Id.*

{¶ 50} Finally, the majority makes sure to mention that Stalder used all of his peremptory challenges to exclude female prospective jurors. But the record reflects that none of his challenges were discriminatory.

1. It is unclear whether prospective juror C.D. was male or female. The majority says the record reveals that that person was male, and the voir dire transcript does refer to C.D. as "Mr." However, it is curious that the same prosecutor and defense counsel represented the parties in the trial court, in the court of appeals, and in this court and have consistently included C.D. in the count of females on the jury. Further, the appellate court also included C.D. in the female count, *see* 2022-Ohio-1386 at ¶ 17, and neither party has attempted to correct the record.

{¶ 51} The record shows that before the parties began exercising their peremptory challenges, the trial court dismissed prospective juror A.C., a female, for cause at Stalder's request. A.C. had explained that she had "personally been involved in sexual harassment and assault" and that it would be uncomfortable for her to sit as a juror in a matter involving an alleged sex offense. A.C. had also stated that she thought she would be biased against the accused. Prospective juror J.N., a female, had concerns similar to those of A.C. and said that she would side with the alleged victim. Stalder attempted to have J.N. removed for cause, but that challenge was overruled. Stalder used his first peremptory challenge to remove J.N. Stalder used his second peremptory challenge to remove prospective juror S.S., a female, who had shared that she previously served on a drunk-driving case, was surprised by "how everything progressed," and "learned a lot about how to get out of drunk driving." Stalder used his third peremptory challenge against prospective juror W.S., a female, who had said that she would not expect a witness to have perfect recall, because of trauma. Stalder used his final peremptory challenge against prospective alternate juror C.H., who was married to seated juror J.H.

{¶ 52} In a criminal trial, both sides strive to select jurors amenable to their version of the facts, and peremptory challenges are a perfect vehicle by which to do so. Here, Stalder's use of his peremptory challenges was strategic and did not violate the United States Constitution.

Conclusion

{¶ 53} There are some errors that always result in fundamental unfairness, such that reversal of the defendant's conviction is automatic. *Weaver v. Massachusetts*, 582 U.S. 286, 294-296, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017). These are known as structural errors. *Id.* "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Id.* at 294-295. We have

recognized that a trial court's failure to properly apply *Batson* is structural error. *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 53.

{¶ 54} The majority faults Stalder for having offered what it calls a "bare allegation" of purposeful gender discrimination. Majority opinion at ¶ 25. But the trial court shut down the conversation on the issue. The record contains no evidence of anything objectionable about the prospective jurors that the state peremptorily challenged, other than that they were male. Because the trial court failed to know the law under *Batson*, short-circuited the *Batson* process, and dismissed Stalder's *Batson* claims out of hand, it failed in its essential role as gatekeeper against discrimination. The error was structural.

{¶ 55} The majority rightly recognizes that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits purposeful discrimination in the form of exercising a peremptory challenge on a prospective juror based on his or her race or gender. The majority also acknowledges that the trial court erred as a matter of law in failing to understand this well-established principle of law. Where I part ways with the majority is with its dilution of Fourteenth Amendment protections and its prescription of a solution to a problem that did not take place.

{¶ 56} I would affirm the unanimous decision of the Fifth District Court of Appeals. I respectfully dissent.

STEWART and BRUNNER, JJ., concur in the foregoing opinion.

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