SJC-11517
SJC-11518

COMMONWEALTH vs. ANTWAN CARTER
(and three companion cases[1]).

Suffolk. May 7, 2021. - August 16, 2021.

Present: Budd, C.J., Lowy, Cypher, Kafker, & Georges, JJ.

Homicide. Firearms. Joint Enterprise. Jury and Jurors. Constitutional Law, Jury, Sex discrimination, Equal protection of laws. Practice, Criminal, Jury and jurors, Challenge to jurors, Capital case. Evidence, Prior misconduct, Relevancy and materiality, Inflammatory evidence, Joint enterprise, Statement of codefendant, Acts and declarations of conspirator.

Indictments found and returned in the Superior Court Department on November 16, 2007.

The cases were tried before Linda E. Giles, J.

David J. Nathanson for Antwan Carter.
Donald A. Harwood for Daniel Pinckney.
Shane T. O'Sullivan, Assistant District Attorney (David D. McGowan, Assistant District Attorney, also present) for the Commonwealth.
Ethan Rice & Richard Saenz, of New York, Katharine Naples-Mitchell, Mary L. Bonauto, Gary D. Buseck, Chris Erchull, &

[1] One against Antwan Carter, and two against Daniel Pinckney.

Anthony Lombardi, for Charles Hamilton Houston Institute for Race and Justice & others, amici curiae, submitted a brief.

GEORGES, J. Following two mistrials, a Superior Court jury convicted the defendants, Antwan Carter and Daniel Pinckney, of murder in the first degree on a theory of joint venture.[2] On appeal, the defendants assert reversible error by the judge in allowing the Commonwealth's peremptory challenges of five prospective jurors over the defendants' objections pursuant to Batson v. Kentucky, 476 U.S. 79, 95 (1986), and Commonwealth v. Soares, 377 Mass. 461, 486, cert. denied, 444 U.S. 881 (1979) -- four based on the prospective jurors' race and one based on a juror's sexual orientation. The defendants also assert numerous errors in the trial proceedings.

We conclude that it was an abuse of discretion for the judge not to require the Commonwealth to provide a race-neutral reason for its challenge of at least one African-American juror. Because the judge's decision constitutes structural error for which prejudice is presumed, see Commonwealth v. Sanchez, 485 Mass. 491, 514 (2020), we vacate the defendants' convictions and remand their cases for further proceedings consistent with this opinion. We also conclude that sexual orientation is a protected class for purposes of a Batson-Soares challenge,

[2] The defendants also were convicted of possessing firearms without a license.

although the defendants did not satisfy their burden of production under the first step of the Batson-Soares inquiry with respect to that particular challenge. See Commonwealth v. Jones, 477 Mass. 307, 321-322 (2017). Finally, we address other claimed errors insofar as they may recur at any new trial.[3]

Background. 1. Facts. We summarize the relevant facts as the jury could have found them, reserving certain details for discussion of specific issues.

In late February 2007, Rashawn Hills, a friend of Carter and Pinckney, was shot and wounded. Carter was present at the time but could not identify the shooter. Subsequently, in conversations overheard by Pinckney's girlfriend, Latoya Thomas-Dickson, Pinckney and Carter discussed the idea of retaliating against "the Highland Street kids," whom they believed were responsible for shooting Hills.

On March 14, 2007, Thomas-Dickson overheard Carter and Pinckney speaking with a third person about "get[ting] one of them Highland Street kids." The men appeared "amped" and "riled up." Pinckney then asked Thomas-Dickson to join them on a drive in his vehicle, a black Pontiac; Pinckney drove while Thomas-Dickson sat in the front passenger's seat and Carter in the back

[3] We acknowledge the amicus brief submitted by the Charles Hamilton Houston Institute for Race and Justice, Black and Pink Massachusetts, GLBTQ Legal Advocates & Defenders, and Lambda Legal Defense and Education Fund, Inc.

seat. The trio first stopped on Dorr Street, where Pinckney left the vehicle and walked along the street until he was shot at by someone described only as a "dark skinned chubby dude." Unhurt but "pissed off," Pinckney got back into the vehicle and quickly drove toward Centre Street.

The trio then stopped at the corner of Centre and Highland Streets, where a man and two women were standing. One of the women recognized Thomas-Dickson and knew the driver, Pinckney, by the name of "D." Pinckney asked the man, Jermaine Davis, whether he was "from Highland Street," to which Davis responded, "No." Pinckney then drove away. Davis and the two women, in turn, walked toward a local convenience store (market) located on Highland Street.

Pinckney drove back to Centre Street and parked in an alley, where he told Carter to "get [his gun] ready so when [he is] ready to shoot there's no complications." Pinckney further instructed Carter to "hit anybody, just shoot, hit anybody." At Pinckney's direction, Thomas-Dickson gave Carter her black cotton gloves, after which Carter got out of the vehicle and Pinckney drove along Highland Street, turned onto Norfolk Street, and parked.

Meanwhile, the victim, Cedric Steele, mistakenly had locked his keys inside his car, which was outside the market. Davis and his two female companions approached Steele, who "looked

nervous" and expressed a desire to get away from Highland Street. As Davis and a manager at the market helped Steele try to get into his locked vehicle, gunfire erupted. The manager saw a young man wearing blue jeans and a green hooded sweatshirt running on Highland Street with a gray pistol. Davis, who had seen a black Pontiac being driven by moments earlier, saw an individual wearing a "dark colored hoodie" run along Highland Street, firing off several shots in quick succession, and then turn onto Norfolk Street.[4] Steele was shot eight times by a nine millimeter handgun and died at the scene.

As the shooting was unfolding, Pinckney and Thomas-Dickson remained in the black Pontiac on Norfolk Street. After hearing gunshots nearby, Thomas-Dickson saw Carter running with a silver handgun from Highland Street onto Norfolk Street. As he ran, Carter took off the green hooded sweatshirt and black gloves he was wearing and threw them underneath a nearby car. Carter then

[4] Neither of Jermaine Davis's female companions directly witnessed the shooting. One ran into the market after seeing a young man wearing a navy hooded sweatshirt, black sweater cap, and gloves pass by and take out a silver handgun. The other also ran into the market after seeing what she believed to be the same black car that had stopped in front of her and Davis earlier being driven by the market and an individual wearing a green hooded sweatshirt and holding a silver gun approach Steele. Meanwhile, two nearby residents heard gunshots and observed an individual wearing a forest green or dark-colored hooded sweatshirt run or quickly walk along Highland Street with a silver gun; one of them then saw the individual turn onto Norfolk Street.

got into the vehicle, whereupon Pinckney attempted to get Thomas-Dickson to take control of the gun, but she refused and asked Pinckney to drop her off at her mother's house a few blocks away. Later, Thomas-Dickson called Pinckney to express her anger for involving her in the situation, to which Pinckney replied that he "wanted to see if [she] was a ride or die chick," meaning whether she was willing to go to jail for him. A few days later, she overheard the defendants discussing the shooting, during which the defendants stated, "We got one of them Highland Street kids."

2. Procedural history. The defendants were indicted for murder in the first degree, G. L. c. 265 § 1; and possession of a firearm without a license, G. L. c. 269, § 10 (h).[5] After two mistrials, on both occasions due to deadlocked juries, the defendants were convicted at a third joint jury trial on both indictments. The present appeals followed.

Discussion. 1. Race-based peremptory challenges. During jury selection in the third trial, the judge, relying on the racial composition of the then-seated jury, concluded that the defendants could not establish the necessary prima facie case of racial discrimination to warrant requiring the prosecutor to

[5] Carter also was indicted for intimidation of a witness, G. L. c. 268, § 13B, but his motion for a required finding of not guilty as to that charge was allowed during the first trial.

account for exercising peremptory challenges of four African-American prospective jurors. The defendants contend that this was an abuse of discretion. For context, we summarize the relevant proceedings.

a. Background. Carter first raised a race-based Batson-Soares challenge when he objected to the Commonwealth striking juror no. 165, an African-American female. By then, the Commonwealth had exercised fourteen peremptory challenges, including three to strike other African-Americans. After noting that the Commonwealth's prior two challenges were of Caucasian females and that two African-American females already were seated on the jury, the judge determined that Carter had not established a prima facie case of racial discrimination as to juror no. 165.

Carter again objected when the Commonwealth struck juror no. 171, another African-American female. As the judge acknowledged, by that point the Commonwealth had used four of seventeen challenges to strike African-Americans. After further noting that five of the ten seated members of the jury were African-American, however, the judge again concluded that Carter had failed to make a prima facie showing of irregularity as to the Commonwealth's challenge.

Subsequently, Carter objected to the Commonwealth's challenge to juror no. 187, an African-American male in his

twenties. This time, Pinckney also objected and noted that the juror was one of few considered by that point who would qualify as a "peer" of the defendants and thus potentially could relate to their life experiences in a way the other seated African-American jurors, all in their fifties, could not. The judge, however, was unpersuaded, noting that six of the twelve seated jurors were African-Americans, that Batson-Soares objections are "not extended to age," and that there were four Caucasians in their twenties already on the panel. Accordingly, the judge declined to inquire into the prosecutor's strike of juror no. 187.

Finally, the defendants objected to the Commonwealth's challenge to juror no. 227, another African-American female. Once again, however, the judge declined to inquire of the prosecutor, having concluded that she did not discern any pattern of impermissible use of peremptory challenges by the Commonwealth given that five of the fourteen seated jurors were African-American.

b. Analysis. "The Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights prohibit a party from exercising a peremptory challenge on the basis of race." Jones, 477 Mass. at 319. See Batson, 476 U.S. at 95; Soares, 377 Mass. at 486. "A challenge to a peremptory strike, whether framed under State or Federal

law, is evaluated using a burden-shifting analysis." Commonwealth v. Ortega, 480 Mass. 603, 606 (2018), quoting Jones, supra. "First, the burden is on the objecting party to establish a 'prima facie showing of impropriety' sufficient to 'overcome[] the presumption of regularity afforded to peremptory challenges.'" Commonwealth v. Henderson, 486 Mass. 296, 311 (2020), quoting Commonwealth v. Robertson, 480 Mass. 383, 390-391 (2018). A single challenge can be sufficient to establish a prima facie case. See Sanchez, 485 Mass. at 511, quoting Flowers v. Mississippi, 139 S. Ct. 2228, 2244 (2019) ("The [Federal] Constitution forbids striking even a single prospective juror for a discriminatory purpose"). If the judge finds that a prima facie case has been established, "the burden shifts to the party attempting to strike the prospective juror to provide a group-neutral reason for doing so." Jones, supra. Finally, the judge must evaluate whether the proffered reason is "adequate" and "genuine" (citation omitted). Robertson, supra at 391. The issue here is whether the judge abused her discretion by concluding that the defendants had not made a prima facie showing of racial discrimination as to one or more of the peremptory challenges of jurors nos. 165, 171, 187, and 227. See Jones, supra at 320.

As to the first step of the Batson-Soares inquiry, "the presumption of propriety is rebutted when 'the totality of the

relevant facts gives rise to an inference of discriminatory purpose.'" Sanchez, 485 Mass. at 511, quoting Johnson v. California, 545 U.S. 162, 168 (2005). Specifically, the inquiry is "merely a burden of production, not persuasion." Jones, 477 Mass. at 321, citing Sanchez v. Roden, 753 F.3d 279, 306 (1st Cir. 2014) (Sanchez V). Because establishing a prima facie case of impropriety "is not an onerous task," Jones, supra, we have long cautioned that judges should "think long and hard before they decide to require no explanation from the prosecutor for the challenge and make no findings of fact." Sanchez, supra at 514, quoting Commonwealth v. Issa, 466 Mass. 1, 11 n.14 (2013).

In determining whether a prima facie case of discriminatory purpose has been established, a judge may consider all relevant circumstances, see Batson, 476 U.S. at 96-97, including

> "(1) 'the number and percentage of group members who have been excluded'; (2) 'the possibility of an objective group-neutral explanation for the strike or strikes'; (3) 'any similarities between excluded jurors and those, not members of the allegedly targeted group, who have been struck'; (4) 'differences among the various members of the allegedly targeted group who were struck'; (5) 'whether those excluded are members of the same protected group as the defendant or the victim'; and (6) 'the composition of the jurors already seated.'"

Henderson, 486 Mass. at 311–312, quoting Jones, 477 Mass. at 322. We review the judge's decisions on the peremptory challenges for an abuse of discretion. Ortega, 480 Mass. at 606-607.

The Commonwealth contends that the judge did not err because she tracked the race and gender of each challenged juror; there was "no . . . dearth" of African-American jurors on the panel at the time of the subject challenges; and, at most, only twenty-seven percent of its challenges were used against African-Americans. We are not persuaded.

In concluding that the defendants failed to establish a prima facie case of discrimination as to any of the four jurors, the judge relied all but exclusively on the racial composition of the previously seated jurors.[6] We have stressed, however, that "[w]hile the composition of seated jurors provides a prism through which to determine discriminatory intent, 'that is only one factor among many, and must be assessed in context.'"

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[6] Although the judge noted that she also took into account the gender of the challenged jurors, the jurors' race was the dispositive factor the judge considered in overruling the defendants' Batson-Soares challenges. For example, with respect to the Commonwealth's challenge of juror no. 227, the record indicates the following exchange:

> The judge: "So how many African[-]Americans do we have on the Jury still?"
>
> The clerk: "Five."
>
> The judge: "Out of?"
>
> The clerk: "Fourteen."
>
> The judge: "Fourteen. All right. [Defense counsel], again, I will note your objection. But I can't determine that you've made a prima facie showing [of racial discrimination]." (Emphasis added.)

Ortega, 480 Mass. at 607, quoting Jones, 477 Mass. at 325. We have cautioned judges not to rely heavily on composition, as "[t]he bare fact that some members of a protected group were seated on a jury does not immunize future peremptory challenges from constitutional scrutiny." Sanchez, 485 Mass. at 512 n.16. Placing "undue weight on this factor not only would run counter to the mandate to consider all relevant circumstances . . . but also would send the 'unmistakable message that a prosecutor can get away with discriminating against some African-Americans . . . so long as a prosecutor does not discriminate against all such individuals.'" Ortega, supra, quoting Jones, supra. For this reason, in Sanchez V, 753 F.3d at 303-307, the United States Court of Appeals for the First Circuit concluded that, notwithstanding the fact that five African-American jurors had already been seated in that case, a prima facie case of racial discrimination had been established, and the prosecutor should have been required to articulate a race-neutral reason for his peremptory strike. This underscores our exhortation that the aforementioned factors are "neither mandatory nor exhaustive; a trial judge and a reviewing court must consider 'all relevant circumstances' for each challenged strike'" (footnote omitted). Sanchez, supra at 513, quoting Jones, supra at 322 n.24.

Of particular concern here was the judge's decision not to require an explanation for striking juror no. 187. At the time,

the Commonwealth had exercised five out of nineteen challenges against African-Americans, a rate in excess of twenty-five percent. The rate at which the Commonwealth struck either African-American or Caucasian jurors relative to the entire jury pool is not evident from the record, and in any event, the rate challenges were used against African-American members of the venire, alone, does not establish a prima facie case. Contrast Commonwealth v. Hamilton, 411 Mass. 313, 316-317 (1991) (prima facie showing made solely on basis that sixty-seven percent of African-American members of venire struck compared to fourteen percent of Caucasian members). Importantly, however, juror no. 187 was the first prospective juror to share both the same race and approximate age as the defendants. See Robertson, 480 Mass. at 393, citing Issa, 466 Mass. at 9 (emphasizing need to keep "keen eye" out for challenges of members of same protected class as defendant).[7]

In addition, "[w]hen reviewing a judge's decision not to inquire about a party's reason for exercising a peremptory challenge, we may consider the absence of a neutral reason

[7] We acknowledge, as did the judge during jury selection, that age is not a protected class for purposes of a Batson-Soares challenge. We note juror no. 187's age only to demonstrate that because no other individual juror shared the defendants' race, approximate age, and gender, juror no. 187 uniquely could be deemed a "peer" of the defendants suited for jury service.

apparent in the record." Robertson, 480 Mass. at 392–393. Juror no. 187 did not give any answers during voir dire to raise concerns. When questioned by the judge, he affirmed that the nature of the charges would not impair his ability to be impartial and that the estimated length of the trial would not impose a hardship. So, too, unlike with other jurors, the prosecutor did not find anything in juror no. 187's questionnaire that warranted further questioning. Nonetheless, and notwithstanding having found juror no. 187 indifferent, the judge did not require the prosecutor to give a race-neutral reason for his peremptory challenge.

Furthermore, the concern that juror no. 187 was struck because of his race only grows when compared to another juror seated over another Commonwealth challenge. On the third and final day of jury selection, the Commonwealth challenged juror no. 252, an African-American female who, like juror no. 187, was twenty-six years old. As with juror no. 187, the judge had found juror no. 252 to be indifferent based on answers provided during voir dire. After noting that the Commonwealth had challenged two African-American females consecutively, however, the judge determined that a prima facie case of impropriety had been established and inquired of the Commonwealth. The prosecutor stated that he challenged juror no. 252 due to her age and the possibility she may not have "roots in the

community." Noting that there already were five seated jurors in their twenties, the judge was not persuaded and permitted juror no. 252 to be seated as the sixteenth and final juror.

The similarities between jurors nos. 187 and 252 are striking. Had the judge required the prosecutor to account for challenging the former, as she had with the latter, "the prosecutor might well have proffered an adequate and genuine race-neutral reason."[8] Jones, 477 Mass. at 325. Such was not the case, however, and thus we are compelled to conclude that the defendants made the limited showing necessary to make a prima facie case of racial discrimination with respect to the challenge of juror no. 187.[9] Accordingly, "the defendants'

[8] With respect to another one of the four jurors on which the defendants focus, juror no. 171, the Commonwealth asserts in its brief that it struck this juror because she previously sat on a criminal jury that returned a not guilty verdict, as it had with eighty percent of the prospective jurors who expressed a similar past juror experience. This post hoc assertion, however, only reinforces our conclusion that the judge should have required the Commonwealth to explain the basis for its strike at the time the defendants raised their Batson-Soares challenge. We also note that the Commonwealth's brief does not provide an explanation for its challenge of juror no. 187.

[9] Because we conclude that the judge erred in not inquiring into the Commonwealth's challenge to juror no. 187, we need not address further the Commonwealth's challenges of jurors nos. 165, 171, and 227.

convictions must be reversed."[10] Ortega, 480 Mass. at 607-608. See Jones, supra at 325-326.[11]

2. Peremptory challenge based on sexual orientation. The defendants also contend that the judge abused her discretion by declining to require the prosecutor to provide an explanation for striking a potentially gay person from the jury. The parties agree that, albeit an issue of first impression, see Commonwealth v. Smith, 450 Mass. 395, 405, cert. denied, 555 U.S. 893 (2008), sexual orientation is a protected class for purposes of a Batson-Soares objection. The Commonwealth contends, however, that the judge did not err because there was insufficient certainty as to the juror's sexual orientation to

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[10] The Commonwealth argues that there is a constitutionally permissible option available of remanding the case for an evidentiary hearing, at which it would bear the burden of establishing race-neutral justifications for its challenges that would render the errors harmless. See Commonwealth v. Jones, 477 Mass. 307, 326 n.31 (2017), citing Sanchez v. Roden, 753 F.3d 279, 307 (1st Cir. 2014). This argument is misguided because "[i]n Massachusetts, . . . we essentially have rejected remand as a remedy when a judge erroneously fails to find a prima facie showing at the first stage of the Batson-Soares inquiry." Commonwealth v. Sanchez, 485 Mass. 491, 502 (2020). In addition, "[t]he possibility of a remand also conflicts with those cases where we have determined that prematurely terminating a Batson-Soares inquiry is structural error, the defining feature of which is a conclusive presumption of prejudice." Id. at 503 n.7, citing Commonwealth v. Robertson, 480 Mass. 383, 397 (2018).

[11] Although our conclusion above is dispositive and warrants reversal, we discuss some of the issues raised by the defendants that may arise at a new trial. See Commonwealth v. Ortega, 480 Mass. 603, 608 n.11 (2018).

warrant further inquiry. Once again, we start by briefly reciting the relevant facts.

a. Background. At the request of the defense during the first day of jury selection, the judge asked juror no. 202, a sixty-four year old female, to clarify her household status and listed the options of "single, married, domestic partner, separated, divorced or widowed," to which the juror answered, "domestic partner." After the judge found the juror to be indifferent, the Commonwealth exercised a peremptory challenge. Carter's trial counsel then raised a Batson-Soares objection, asserting that the challenge was against a person who "may be considered gay."[12] After noting that the phrase "domestic partner" could refer to both heterosexual and gay persons, the judge chose not to engage in any further Batson-Soares inquiry because this court has only required as much in instances

[12] At the time of the objection to the striking of juror no. 202, Carter's trial counsel also objected to the Commonwealth's prior successful challenge of juror no. 176, a male juror, on the ground that it, too, was motivated by that juror's perceived gay sexual orientation. Even if we were to assume (without deciding) that the objection was timely, however, the Commonwealth contends that it challenged juror no. 176 because he disclosed during voir dire that he was a litigation attorney. Because a neutral justification "evident from the record" may render a peremptory challenge permissible, see Commonwealth v. Lopes, 478 Mass. 593, 601 (2018), we focus on the challenge to juror no. 202. We also note that the defendants do not cite, and we are unable to discern, any factual support in the record for trial counsel's assertion that juror no. 176 was gay.

involving "gender and race," and "sexual orientation is not one of those suspect classifications."

b. Sexual orientation as protected class. "Article 12 . . . proscribes the use of peremptory challenges 'to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular, defined groupings in the community.'" Smith, 450 Mass. at 405, quoting Soares, 377 Mass. at 486. These groupings are defined by art. 1 of the Massachusetts Declaration of Rights, as amended by art. 106 of the Amendments (Equal Rights Amendment), which protects against discrimination based on sex, race, color, creed, or national origin. See Soares, supra at 488-489. Since then, we have recognized that the scope of these protections has expanded, see Commonwealth v. Prunty, 462 Mass. 295, 305 n.13 (2012), as "[e]qual protection of the laws is a concept that permeates the Massachusetts Constitution," Finch v. Commonwealth Health Ins. Connector Auth., 459 Mass. 655, 667 (2011). See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994) (extending Federal Batson procedure to peremptory challenges based on gender). We now conclude that a peremptory challenge based on a prospective juror's sexual orientation is prohibited by arts. 1 and 12 and the equal protection clause of the Fourteenth Amendment. Three important considerations mandate this conclusion.

First, it cannot be doubted that gay individuals historically have faced pernicious discrimination, including by the State, solely because of their sexual orientation. As the United States Supreme Court has recognized, throughout our history, "[g]ays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate," not to mention that "[f]or much of the [Twentieth] [C]entury . . . homosexuality was treated as an illness." Obergefell v. Hodges, 576 U.S. 644, 661 (2015). This discrimination is rooted in the fact that, "for centuries[,] there have been powerful voices to condemn homosexual conduct as immoral." Lawrence v. Texas, 539 U.S. 558, 571 (2003).

Such discrimination is not only historical; its cultural and societal effects continue in modern times. In Massachusetts, specifically, gay partners were not permitted to partake in the civil institution of marriage until a landmark decision by this court fewer than twenty years ago. See Goodridge v. Department of Pub. Health, 440 Mass. 309, 344 (2003) ("barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts

Constitution").[13] And recently, in Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1737-1738 (2020), the Supreme Court considered the case of a long-time, distinguished Georgia county employee who was abruptly discharged after it was discovered he had joined a gay recreational softball league. Given this painful history of discrimination, there is no question that gay people constitute a "discrete group" as contemplated by art. 12 and as protected by the equal protection clause of the Fourteenth Amendment. See SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir. 2014) ("we are required by [United States v. Windsor, 570 U.S. 744 (2013),] to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection" under Fourteenth Amendment). Cf. Soares, 377 Mass. at 488 ("Further discussion is hardly required to establish that [African-Americans] constitute a discrete group" for equal protection purposes).

Second, a person's sexual orientation is "inextricably bound up with sex." Bostock, 140 S. Ct. at 1742. As the

[13] As testament to the still-nascent nature of our society's progress in the area of gay and lesbian discrimination, we note that as recent as this court's decision in Goodridge v. Department of Pub. Health, 440 Mass. 309 (2003), is, it still predates by nearly twelve years the Supreme Court's decision in Obergefell v. Hodges, 576 U.S. 644, 675 (2015), wherein the Court first declared that same-sex couples have a fundamental right to marry safeguarded by the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Supreme Court recognized in the context of employment protections under Title VII of the Civil Rights Act of 1964, "it is impossible to discriminate against a person for being homosexual . . . without discriminating against that individual based on sex," id. at 1741, because "[w]hen an employer fires an employee for being homosexual . . . , it necessarily and intentionally discriminates against that individual in part because of sex." Id. at 1744. The same dynamics apply in the jury selection context: for a prospective juror to be challenged based on sexual orientation, the challenging party must inherently rely on the person's perceived sex and the gender norms associated therewith.

Third, and most simply, a prospective juror's sexual orientation is not at all relevant to whether that person is able to serve as an impartial juror; on the contrary, "[s]trikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals." SmithKline Beecham Corp., 740 F.3d at 485. See Morgan v. State, 134 Nev. 200, 212 (2018), quoting SmithKline Beecham Corp., supra at 486 (Batson challenges extend to sexual orientation, based on "[t]he history of exclusion of gays and lesbians from democratic institutions and the pervasiveness of stereotypes"). Indeed, "the exclusion of

prospective jurors 'solely by virtue of their membership in, or affiliation with, particular, defined groupings in the community' . . . violates a defendant's constitutional right to a fair and impartial jury." Commonwealth v. Williams, 481 Mass. 443, 457 (2019), quoting Soares, 377 Mass. at 486.

The constitutional harm is not limited just to the defendant, however. "While injustice to any individual is intolerable under our system of justice, and denial of the rights of a cognizable group is unconstitutional, in the long run, the greatest threat of failure to guarantee the right of gays and lesbians to serve on juries is to the [C]ommonwealth," People v. Garcia, 77 Cal. App. 4th 1269, 1279 (2000), as "[t]he diverse and representative character of the jury must be maintained 'partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility" (quotation omitted), id., quoting J.E.B., 511 U.S. at 134.[14]

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[14] We emphasize that it is neither appropriate nor encouraged for judges or parties to ask prospective jurors their sexual orientation. "No one should be 'outed' in order to take part in the civic enterprise which is jury duty." People v. Garcia, 77 Cal. App. 4th 1269, 1280 (2000). As the United States Court of Appeals for the Ninth Circuit aptly explained:

> "For some [gay] individuals, being forced to announce their sexuality risks intruding into the intimate process of self-discovery that is 'coming out,' a process that can be at once affirming and emotionally fraught. Equally important, coming out for many gays and lesbians is a life-

While we now hold that sexual orientation is a protected class for purposes of a Batson-Soares challenge, we conclude that there were insufficient facts in the record to reasonably establish juror no. 202's sexual orientation, and thus the defense did not satisfy its burden of production under the first step of the Batson-Soares inquiry with respect to that particular challenge. See Jones, 477 Mass. at 321. Accordingly, we need not address this issue further.[15]

> defining moment of celebrating one's dignity and identity. Deciding when, and how, and to whom one comes out is a vital part of this process, and it should not be co-opted in the name of affording a group that has long been discriminated against the constitutional rights to which it is entitled."

SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 487 (9th Cir. 2014).

[15] We acknowledge that "[f]or gays and lesbians, keeping one's sexual orientation private has long been a strategy for avoiding the ramifications -- job loss, being disowned by friends and family, or even potential physical danger -- that accompanied open acknowledgment of one's sexual orientation for most of the [T]wentieth [C]entury and sometimes even today." SmithKline Beecham Corp., 740 F.3d at 486–487. See Yoshino, Covering, 111 Yale L.J. 769, 814 (2002). These privacy concerns, coupled with the fact that sexual orientation is "concealable" in ways unlike race or gender, see post at , could potentially complicate application of the first step of the Batson-Soares inquiry to challenges based on sexual orientation. Although the concurrence asserts that this court should abandon the first step of the Batson-Soares inquiry, see post at , "a determination to do so unquestionably is a decision we cannot reach here, without full briefing and input from the bar," Sanchez, 485 Mass. at 513 n.19. See id. at 518 (Gants, C.J., concurring) ("if we were to announce such a departure from our current [Batson-Soares] jurisprudence, we should do so in a case where the question is squarely presented

3. Prior bad acts. The defendants also challenge the admission of various prior bad acts evidence, including (1) Carter's prior arrest for unlawful possession of a firearm; (2) various evidence of both defendants' contacts with law enforcement and alleged gang affiliation; and (3) testimony from a witness regarding an unresolved shooting near Highland Street three days before Steele's murder. We briefly discuss each in turn.

a. Carter's prior firearm arrest. The Commonwealth introduced, over objection, evidence that Carter was arrested in August 2006 for unlawful possession of a loaded nine millimeter handgun, found in a bureau in his home. The evidence was admitted subject to a limiting instruction that the jury could consider the prior arrest only as it related to Carter's knowledge of and access to firearms generally. The defendants argue that the unduly prejudicial nature of the evidence outweighed any such probative value because the firearm had been seized and could not have been used to murder Steele. They also contend that the Commonwealth urged the jury to draw an improper inference from the prior arrest when, during closing argument, the prosecutor suggested it was proof of Carter's role in a gang as the provider of guns.

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and where we have the benefit of briefing by the parties and amici").

The Commonwealth maintains that the evidence was properly admitted and that the prior arrest contextualized global positioning system (GPS) evidence from Carter's ankle monitoring bracelet on the day of Steele's murder, which showed that he returned to his home briefly before joining Pinckney at Pinckney's residence, where they would plot revenge for Hills's shooting. More to the point, the Commonwealth suggests that it is reasonable to infer from the combination of the prior firearm arrest and the GPS evidence that Carter retrieved the eventual murder weapon during that brief visit to his home.

"Evidence of previous possession of a firearm other than the one used to commit the crime . . . may be admissible 'to show that the defendant had access to or knowledge of firearms.'" Commonwealth v. Pierre, 486 Mass. 418, 424 (2020), quoting Commonwealth v. McGee, 467 Mass. 141, 157 (2014). Even if evidence is relevant to this purpose, however, it will not be admitted if its probative value is outweighed by the risk of unfair prejudice to the defendant. Commonwealth v. Crayton, 470 Mass. 228, 249 (2014). "Where a weapon definitively could not have been used in the commission of the crime, we have generally cautioned against admission of evidence related to it." Commonwealth v. Collazo, 481 Mass. 498, 501 (2019), quoting Commonwealth v. Imbert, 479 Mass. 575, 585 (2018). "This is because the prejudicial impact on the jury is likely to outweigh

the 'tenuous relevancy of evidence of a person's general acquaintance with weapons.'" Pierre, supra at 425, quoting Commonwealth v. Toro, 395 Mass. 354, 358 (1985). Such was the case here.

There was, at best, a tenuous connection between Carter's prior firearm arrest and Steele's murder. While the firearms from both incidents were nine millimeter handguns, the firearm from 2006 had been seized and thus "definitively" was not used in Steele's murder in 2007; indeed, the parties stipulated as much at trial. As for the GPS evidence, it indicated only that Carter was present in his home "for a minute" before he went to Pinckney's residence on the day of the murder. The Commonwealth does not cite, nor are we aware of, any other evidence to support an inference that Carter retrieved the murder weapon during that time.

Furthermore, while the prior arrest evidence may have established Carter's familiarity with the kind of firearm used in Steele's murder, it ultimately was used for an improper purpose when the prosecutor urged the jury during closing argument to conclude, based on the prior arrest, that it was Carter's larger responsibility to "hav[e] access to those guns" and his "role" to supply gang members with firearms. Carter's arrest for unlawful possession of a firearm, without more, does not reasonably support such an inference. Contrast Pierre, 486

Mass. at 426 (admission of prior arrest for firearm similar to murder weapon not error where prosecutor did not dwell on it either during evidentiary portion of trial or at closing argument). Accordingly, the admission of the evidence constituted prejudicial error.

b. Gang evidence. The Commonwealth introduced evidence, over the defendants' objections, of the defendants' alleged gang affiliation, which included, among other things, the defendants' prior contacts with probation officers and the youth violence strike force of the Boston police department; several traffic stops by police in April 2007; and testimony from Thomas-Dickson about various imagery on Pinckney's social media account suggesting he was the leader of the Mass. Ave. Hornets gang. The defendants contend that the judge improperly admitted evidence of their gang affiliation because there was insufficient evidence to support the Commonwealth's theory that Steele's murder was part of a feud between the Mass. Ave. Hornets gang and a rival Highland Street gang. Thus, the defendants contend that the gang evidence, coupled with testimony about their prior contacts with law enforcement, served to prejudice them in the eyes of the jury. The Commonwealth disagrees, arguing that the evidence was admissible to show the defendants' motive and participation in Steele's

murder as joint venturers, specifically to exact revenge against a rival gang they believed was responsible for shooting Hills.

"Gang evidence may be admissible to show motive or to establish joint venture." Commonwealth v. Akara, 465 Mass. 245, 267 (2013). Specifically, "[w]e have most often allowed gang evidence to be admitted for the purpose of establishing joint venture in cases where the evidence showed that the offense involved retaliation or conflict between rival gang members, and that the defendants therefore shared a common motive." Id. at 268. "We [also] have, however, urged caution in admitting gang-related evidence because of the risk of suggesting that the defendant may have a propensity for criminality or violence." Commonwealth v. Lopes, 478 Mass. 593, 604 (2018). This is because, "[a]lthough not all gangs are the same and not all gang affiliations are the same, community attitudes towards gang violence are likely to color [the] evidence" (quotation and citation omitted). Akara, supra at 267-268. Thus, the proffered gang evidence must not only be relevant to motive, but also be more probative than unduly prejudicial. See Commonwealth v. Gray, 463 Mass. 731, 753 (2012); Mass. G. Evid. § 404(b) (2021).

We conclude that the probative value of the gang evidence was outweighed by its prejudicial unfairness. Here, the judge noted multiple times that the various pieces of gang affiliation

evidence would be admitted subject to the expectation that Thomas-Dickson's testimony (or that of another witness) would establish the existence of a rival gang and "hostilities" between the defendants and that rival gang.[16] The record, however, does not provide sufficient foundation for this theory. Thomas-Dickson testified simply that the defendants believed one of "the Highland Street kids" was responsible for shooting Hills; she did not testify to the existence of a rival gang, let alone a feud or state of hostilities. Nor is there any other evidence in the record establishing such a gang feud or rivalry.

Furthermore, gang membership was not "essential to understanding the motivation behind the crimes." Commonwealth v. Maldonado, 429 Mass. 502, 504 (1999). Given Thomas-Dickson's testimony that the defendants believed Hills had been shot by someone from the Highland Street neighborhood, and Pinckney's later instruction to Carter to "hit anybody, just shoot, hit anybody," the evidence establishes that the defendants intended to exact revenge for Hills's shooting by retaliating against someone on Highland Street. Evidence of the defendants' gang affiliation was not necessary for the jury to understand that

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[16] Specifically, the judge told the prosecutor: "I'm going to allow the motion only insofar . . . [as] that you may call a person with a proper foundation who can testify as to what is meant by a Highland kid. In other words, if he's a member of a gang called Highland Street or whatever they're called."

the defendants were motivated by revenge, and unlike in other cases we have considered, the record does not establish that Steele was, or likely could have been, a member of a rival gang. Contrast Commonwealth v. Wardsworth, 482 Mass. 454, 471-472 (2019) (gang evidence admissible to show motive where witness had personal knowledge of gang rivalry and knew specific members of both gangs who were shot in months leading up to killing); Commonwealth v. Phim, 462 Mass. 470, 477-478 (2012) (gang affiliation admissible to explain why defendant fired into crowded residence where members of rival gang had gathered). Accordingly, the repeated references to the defendants' alleged gang affiliation, coupled with the witnesses' repeated references to the defendants' prior contacts with law enforcement, rendered the evidence more unduly prejudicial than probative.

c. Unresolved shooting. Over the defendants' objection, a witness testified that, three days before Steele's murder, he observed a "black male in a . . . hoodie" fire a gun near Dorr and Highland Streets and flee in a dark-colored vehicle. The defendants contend that the judge erred in admitting this testimony and that its influence on the jury was heightened by the fact that the Commonwealth referenced the shooting during closing argument to suggest there were "problems up on Dorr Street." The Commonwealth contends the evidence was relevant to

establishing "hostilities" on Highland Street leading up to Steele's murder.

This evidence was irrelevant and unduly prejudicial. The witness could not identify the earlier shooter and the testimony did not in any way tie the prior shooting to either of the defendants or Steele's murder three days later. Moreover, the identification of the earlier shooter as a "black male in a hoodie" could have led the jury to infer, without adequate foundation, that it was one of the defendants. Accordingly, the testimony regarding the earlier shooting should not have been admitted.

4. Joint venturer statements. Following Steele's murder on March 14, 2007, and while in custody on an unrelated charge, Carter made a series of telephone calls between May and July 2007 in which he urged others, in graphic terms, to "take care" of Thomas-Dickson. At trial, the statements were admitted against Pinckney, over objection, as statements of a joint venturer. Pinckney argues that this was error because there was insufficient evidence of a joint venture when Carter's statements were made. We disagree.

"[O]ut-of-court statements by joint venturers are admissible against the others if the statements are made during the pendency of the criminal enterprise and in furtherance of it." Commonwealth v. Lopez, 485 Mass. 471, 474–475 (2020),

quoting Commonwealth v. Winquist, 474 Mass. 517, 520-521 (2016). "Statements made in an effort to conceal a crime, made after the crime has been completed, may be admissible under the joint venture [exemption] because the joint venture is then ongoing, with a purpose to ensure that the joint venture itself remains concealed." Commonwealth v. Carriere, 470 Mass. 1, 11 (2014). We review the decision to admit such statements for abuse of discretion, and we view the evidence of the existence of the joint venture in the light most favorable to the Commonwealth, recognizing that it may be proved by circumstantial evidence. Lopez, supra at 475.

The record does not indicate whether Carter and Pinckney were in contact between May and July of 2007. However, they simultaneously engaged in efforts to prevent Thomas-Dickson from implicating them in Steele's murder. Through telephone calls and letters to Thomas-Dickson between May and June of 2007, while he too was in custody on charges unrelated to Steele's murder, Pinckney instructed Thomas-Dickson to lie to the police about their whereabouts on the day of the murder. He told her, "You already know what to do. Just keep your mouth closed and don't say anything at all[!] You hear me[???]," and threatened her should she fail to comply.[17] Thomas-Dickson understood

[17] During the second trial, Thomas-Dickson recanted her inculpatory testimony from the first trial and, as Pinckney had

Pinckney's threats as an effort to keep her from implicating him and Carter in Steele's murder.

"Absent some affirmative indication that the venture had terminated, or that the defendant had withdrawn from it, we do not treat attempts to conceal the criminal actions and purposes of a pre-existing joint venture as constituting a new venture requiring a separate evidentiary foundation" (footnote omitted). Commonwealth v. Bright, 463 Mass. 421, 437 (2012). Although both defendants were in custody separately at the time Carter's statements were made, neither defendant was in custody for charges related to Steele's murder. Contrast Commonwealth v. Drew, 397 Mass. 65, 70-71 (1986), S.C., 447 Mass. 635 (2006), cert. denied, 550 U.S. 943 (2007) (coconspirator statements not admissible under joint venture exemption to hearsay rule where defendant and declarant accomplice already arrested for crimes charged). Thus, while the defendants may not have acted together to conceal their criminal behavior at the time Carter made the statements, his statements, like Pinckney's, were

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instructed her, falsely testified that the two of them were at his mother's house in another town on the day of the murder. The Commonwealth then held her as a material witness and immunized her for perjuring herself. Nonetheless, Thomas-Dickson continued to testify falsely at the second trial as to her and Pinckney's whereabouts on the day of the murder. Subsequently, she was charged with perjury and pleaded guilty. At the third trial, conducted while she was awaiting sentencing, Thomas-Dickson again provided inculpatory testimony, as she did in the first trial.

nevertheless "part and parcel of their ongoing joint venture to murder [Steele], to conceal their involvement in the crimes, and to avoid detection and arrest by eliminating a potential witness who knew too much about their activities." Winquist, 474 Mass. at 525. Accordingly, the judge did not abuse her discretion by admitting Carter's statements against Pinckney under the joint venture exemption to the hearsay rule.

Conclusion. The defendants' convictions are vacated, and the cases are remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

LOWY, J. (concurring). I agree with the court that the Batson-Soares test (Batson test) protects against discriminatory peremptory challenges based on sexual orientation. See Batson v. Kentucky, 476 U.S. 79, 93-94 (1986); Commonwealth v. Soares, 377 Mass. 461, 489-490, cert. denied, 444 U.S. 881 (1979). Although the issue need not be decided because the defendants' convictions are reversed on other grounds, I write separately out of a concern that the first step of the Batson test -- which requires that the party objecting to a peremptory challenge make a prima facie showing of discrimination -- is unworkable when applied to cases of discrimination based on sexual orientation. To illustrate the point, I consider three possible approaches discussed by commentators that would retain the first step as applied to sexual orientation discrimination. None of these approaches is well suited to guarantee in practice the protections announced by the court. Consequently, today's opinion leads me to reaffirm my view that "upon timely objection to a peremptory challenge made on the basis of [a] protected class, we should conclude that that party has met the first prong of the Batson-Soares test." Commonwealth v. Sanchez, 485 Mass. 491, 515 (2020) (Lowy, J., concurring).

1. Application of Batson to discrimination based on sexual orientation. As commentators have noted, "[t]he extension of Batson to sexual orientation is primarily complicated by the

difficulty of demonstrating the first prong." Last, Peremptory Challenges to Jurors Based on Sexual Orientation: Preempting Discrimination by Court Rule, 48 Ind. L. Rev. 313, 332 (2014). See, e.g., Note, Beyond Comparison: Practical Limitations of Implementing Comparative Juror Analysis in the Context of Sexual Orientation, 84 Geo. Wash. L. Rev. 1075, 1089-1091 (2016) (Beyond Comparison) (cataloging difficulties of applying Batson to sexual orientation without modifying first step); Young, Outing Batson: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire, 48 Willamette L. Rev. 243, 261 (2011) ("applying Batson in its current form to sexual orientation . . . would be glaringly inadequate to safeguard these jurors' equal protection rights").

The reason behind this difficulty is that "[s]exual orientation, unlike race and gender, is concealable," or at least more readily so. Note, Extending Batson to Sexual Orientation: A Look at SmithKline Beecham Corp. v. Abbott Labs, 2015 U. Ill. L. Rev. 1681, 1705 (2015). As a result, when a party objects to a peremptory challenge based on sexual orientation, the first step places that party at a unique disadvantage. See Note, Looking Beyond Batson: A Different Method of Combating Bias Against Queer Jurors, 61 Wm. & Mary L. Rev. 1759, 1777 (2020) ("Batson's failure to address both pretense and implicit bias makes it difficult to apply in a

racial context and nearly impossible to apply to invisible identities").

To see how, consider members of the venire who provide no information about their sexual orientation. Even though their orientation has not been volunteered, "an attorney may still strike with discriminatory animus based on stereotypes about sexual orientation, including: vocal pitch, hairstyle, and clothing." Beyond Comparison, 84 Geo. Wash. L. Rev. at 1090. See Comment, Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories, 46 UCLA L. Rev. 231, 243, 246-247 (1998) (detailing how attorneys find ways to target members of venire based on sexual orientation despite this attribute not being "readily identifiable").

Because of this continued possibility of discrimination, commentators have discussed three options for making out a prima facie case if the first step is preserved unmodified. See Young, 48 Willamette L. Rev. at 256-261. Those options are (1) inquiring directly into jurors' sexual orientation, (2) allowing the objecting party to use stereotypes to meet the first step, and (3) only allowing a first step challenge based on explicit information offered by jurors that illustrates their sexual orientation. None of these approaches adequately protects against discrimination in this context.

a. Inquiring into the sexual orientation of members of the venire. The first option -- inquiring directly into the sexual orientation of members of the venire, either through the jury form, in camera, or via some other way -- can be rejected outright as an intolerable intrusion into privacy interests that courts ought to respect. See Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 514 (1984) (Blackmun, J., concurring) ("Certainly, a juror has a valid interest in not being required to disclose to all the world highly personal . . . information simply because he is called to do his public duty"); Brandborg v. Lucas, 891 F. Supp. 352, 360 (E.D. Tex. 1995) ("[A person] should not lose [his or] her expectation of privacy merely by becoming a prospective juror").[1]

Even if the impact on privacy interests were bearable, this approach misconstrues the analysis, focusing on how members of the venire identify instead of how the striking party perceives them. See generally Shay, In the Box: Voir Dire on LGBT Issues in Changing Times, 37 Harv. J.L. & Gender 407, 456 (2014) ("It should not matter whether the prospective juror identifies as a

[1] Privacy interests may be particularly salient in the context of sexual orientation. See Young, Outing Batson: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire, 48 Willamette L. Rev. 243, 258 (2011) ("depending on the juror's circumstance, public questioning could subject him or her to professional, personal, or physical harm -- in addition to discomfort, embarrassment, and irritation at having a roomful of strangers speculate about the sex of her romantic partners").

transgender woman or a gay man; it is unacceptable for the state to strike a juror because the prosecutor reads the venireperson as gender non-conforming or transgender"). Given that it both invades the privacy of the member of the venire and, in the process, misplaces the focus of analysis, this option must be discarded.

b. Condoning use of stereotypes. The second option would be to allow the objecting party to employ stereotypes to make out a prima facie case of discrimination. While, unlike the previous approach, this one would appropriately frame the analysis around the striking party's perceptions of the juror's sexual orientation, it would also do more harm than good. This approach would be tantamount to judicial sanctioning of the very prejudices that Batson is meant to purge from the jury selection process. See Young, 48 Willamette L. Rev. at 258 (detailing how this option would "saddle[]" judges "with the task of separating the traits which contribute to the juror's 'seeming' homosexuality from those which do not -- an uncomfortable proposition fraught with guesswork and prejudice, in addition to extreme disrespect to the juror"). As such, it, too, must be rejected.

c. Limiting the basis for a first step challenge to explicit information offered by the juror. Finally, one could limit the information that an objecting party may draw upon to

that freely given by the prospective jurors themselves that either states or implies their sexual orientation. Although this option avoids prying into the personal lives of members of the venire and sidesteps equally disrespectful colloquies, it still does not adequately protect against discrimination. See Young, 48 Willamette L. Rev. at 260 ("If Batson was applied to sexual orientation, but attorneys were neither permitted to inquire about jurors' sexual orientation directly, nor permitted to engage in the bizarre [and disrespectful speculations about a juror's possible sexual orientation] . . . , Batson would offer protection only to jurors who happened to state, in the course of answering other questions, that they are gay or lesbian"). Whole swaths of members of the venire would not be protected against discrimination based on sexual orientation under this approach.

Specifically, challengers under this approach may rely, albeit furtively, on a host of stereotypes that they perceive when exercising a peremptory. See Miller-El v. Dretke, 545 U.S. 231, 267 (2005) (Breyer, J., concurring) ("At Batson's first step, litigants remain free to misuse peremptory challenges as long as the strikes fall below the prima facie threshold level"). Objectors, however, will only be able to rely on the information explicitly provided by members of the venire about their sexual orientation -- assuming any relevant information is

provided -- in mounting a prima facie case against the challenge. When applied to sexual orientation, this option skews the information asymmetry inherent in Batson further in favor of the party exercising an improper peremptory challenge.[2]

2. Alternative solution. Each of the three possible approaches to retaining the first step unmodified in this context is replete with problems. These inadequacies, among other reasons, see generally Sanchez, 485 Mass. at 514-518 (Lowy, J., concurring), are why I believe that upon timely objection to a peremptory challenge based on sexual orientation, we should conclude that that party has met the first prong of the Batson test.

Proceeding to the second step upon a timely objection to a peremptory challenge based on a protected class avoids many of the problems presented by the options above: it would respect jurors' privacy interests, properly place the focus of the analysis on the intentions of the party using the preemptory

[2] Putting the onus on members of the venire also presents them with a dilemma: either they must explicitly provide their sexual orientation to the court and thus give information that may form the basis of both a discriminatory peremptory challenge and an objection to it, or they must remain silent and thus risk being discriminated against without the objecting party having much recourse. In short, rather than judges making the difficult decision of how best to protect the jury selection process from discrimination, the third option outsources a crucial aspect of this task to the very people whom courts are bound to protect.

challenge, and better safeguard against discriminatory exercises of peremptory strikes when members of the venire do not provide information concerning their sexual orientation. As an additional benefit, proceeding to the second step upon a timely objection would create a record on a Batson issue for appellate review, lessening the possibility of a reversal -- as happened yet again here -- with its attendant prospect of a costly retrial. See Sanchez, 485 Mass. at 515-516 (Lowy, J., concurring) (cataloging cases where ending inquiry at first step resulted in reversal). See also People v. Rhoades, 8 Cal. 5th 393, 469-470 (2019) (Liu, J., dissenting), cert. denied, 414 S. Ct. 659 (2020) (advancing to second step upon timely objection "would serve the important goals of promoting transparency, creating a record for appellate review, and ensuring public confidence in our justice system, while imposing 'the comparatively low cost of requiring a party to state its actual reasons for striking a minority prospective juror'" [citation omitted]).

Admittedly, the changes I suggest represent a notable shift in practice. See Sanchez, 485 Mass. at 513 n.19. However, other jurisdictions have already charted similar courses. See, e.g., United States v. Moore, 28 M.J. 366, 368 (C.M.A. 1989) (elimination of prima facie requirement in military courts); State v. King, 249 Conn. 645, 658 n.18 (1999) ("the party

objecting to the exercise of the peremptory challenge satisfies step one of the tripartite process simply by raising the objection" [citation omitted]); Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996) (first prong met upon timely objection, upon showing that struck "venireperson is a member of a distinct" group, and upon request that court ask challenging party for reason for challenge); State v. Meeks, 495 S.W.3d 168, 173 (Mo. 2016) (en banc) (first prong satisfied where defendant raises Batson objection and identifies protected group to which member of venire belongs); Wash. Gen. R. 37(d) ("Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised").

In each of those jurisdictions, the bar has adapted to changes to the first step akin to what I recommend. See, e.g., State v. Whitby, 975 So. 2d 1124, 1126 (Fla. 2008) (Pariente, J., concurring) ("Since Melbourne, we have repeatedly reaffirmed the viability and value of the simplified procedure set forth in that decision"); Conn. Judicial Branch, Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson, at 21 (Dec. 31, 2020) (reporting how, after adoption of rule 37(d) in Washington, "lawyers [there] -- including prosecutors -- have adapted to [the elimination of the first step] and accept it as part of a changed legal landscape"). Moreover, there has not

been an "explosion" of frivolous or bad faith objections to preemptory strikes in these jurisdictions.[3] See Whitby, supra at 1127 n.2 (Pariente, J., concurring) ("In my years both as a trial attorney and an appellate judge I have not witnessed an explosion of abuses based on Melbourne and I note that the brief of the Florida Prosecuting Attorneys Association does not cite to a single case or authority for the assertion that there has been a 'proliferation of totally frivolous Melbourne objections'").

Lawyers and judges in Massachusetts could likewise adapt. Given that we have consistently "exhort[ed]" judges to "think long and hard before they decide to require no explanation from the prosecutor for the challenge and make no findings of fact," Sanchez, 485 Mass. at 514, quoting Commonwealth v. Issa, 466 Mass. 1, 11 n.14 (2013), our own approach to the Batson test has

[3] Notably, should the first step be eliminated, lawyers would still have a duty to avoid frivolous objections to peremptory challenges. See Mass. R. Prof. C. 3.1, as appearing in 471 Mass. 1414 (2015) ("A lawyer shall not bring, continue, or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law"). See also State v. Whitby, 975 So. 2d 1124, 1127 (Fla. 2008) (Pariente, J., concurring) ("We must rely on attorneys' good faith obligations as officers of the court to refrain from making frivolous, dilatory objections").

already been trending towards eliminating the first step for some time.[4]

3. Conclusion. "[T]he evil meant to be prevented by the whole Batson-Soares schema is the discriminatory use of peremptory challenges." Sanchez, 485 Mass. at 501. With this in mind, we must develop mechanisms that will check this evil both in theory and in practice.

Advancing to the second step of the Batson test upon timely objection balances the traditional use of peremptory challenges with the need to protect from discrimination against persons whose identities may not be readily apparent. "So long as a challenging party can provide the court with a group-neutral reason, the Batson inquiry will continue." Id. at 518 (Lowy, J., concurring). "And if the challenging party cannot, then the second prong will have accomplished exactly what the courts intended the Batson inquiry to accomplish -- discovering and eradicating discriminatory use of peremptory challenges, whether

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[4] See, e.g., Commonwealth v. Ortega, 480 Mass. 603, 607 n.9 (2018) (urging judges to proceed to second step); Commonwealth v. Robertson, 480 Mass. 383, 396 n.10 (2018) (judges have broad discretion to move to second prong without having to decide that defendant met first prong); Commonwealth v. Jones, 477 Mass. 307, 325 (2017) ("Had the judge allowed the inquiry to go forward, the prosecutor might well have proffered an adequate and genuine race-neutral reason for her strike . . ."); Commonwealth v. Issa, 466 Mass. 1, 11 n.14 (2013) ("the judge created a significant and needless risk of reversal by failing to require the prosecutor to explain her reasons for challenging [the] juror").

implicit or purposeful." Id. Because applying the first step to instances of alleged discrimination based on sexual orientation is unworkable, I continue to advocate for this approach.