

5/15/01

SUPREME COURT OF LOUISIANA

No. 99-KA-0991

STATE OF LOUISIANA

Versus

CEDRIC JACOBS

JOHNSON, J., dissenting

I am troubled by this decision which allows the state to exercise peremptory challenges to exclude African-Americans from the jury. I believe that by doing so, the state has deprived this defendant of his right to a trial by a jury of his peers which is guaranteed by the Sixth Amendment to the United States Constitution.

In this case, the prosecutor used his first four peremptory challenges to exclude four African-American prospective jurors. In my mind, this clearly gave rise to an inference of discrimination. Pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the prosecutor was then required to articulate a race-neutral explanation for striking the African-American jurors.

The trial judge accepted the prosecutor's explanation for striking one of the prospective jurors based upon her inattentiveness and because the prosecutor believed the juror was "very weak on the death penalty." The majority, giving deference to the trial judge's decision, found no abuse of discretion. However, the trial judge then allowed the prosecutor to escape his duty to provide a race-neutral explanation for striking the other three prospective jurors with the excuse that "he did not have his notes in court regarding the other three." Slip op. at 4.

The majority of this court compounded the trial court's error by reviewing the jury questionnaires of the four African-American prospective jurors and ultimately

providing a litany of purely speculative reasons on the prosecutor's behalf. Without an evidentiary hearing regarding the prosecutor's reasons, it is impossible to determine whether those reasons were race neutral.

Moreover, as the majority recognizes, this case is similar to *State v. Snyder*, 98-1078 (La. 4/14/99), 750 So.2d 832. In that case, the prosecutor accepted one African-American juror, but used peremptory challenges to exclude four others. Subsequently, the prosecutor exercised a peremptory challenge to "back-strike" the sole African-American that he had initially accepted, resulting in an all white jury. Although defense counsel did not initially object to the prosecutor's use of its peremptory challenges to strike three of the prospective jurors, he noted their race for the record. This court held that by failing to object properly, the defendant waived any claim under *Batson*.

In this case, the majority discussed the holding in *Snyder*, but circumvented the problem of fashioning a remedy for cases where the defendant raises a *Batson* objection to jurors who have been previously excused before the jury is impaneled. The court should use this opportunity to repudiate the holding in *Snyder*. Since we allow parties to use peremptory challenges to "back-strike" jurors pursuant to LSA-Cr.P. art. 795, we must allow criminal defendants to assert a *Batson* objection to previously excused jurors. It is impossible to see the pattern of racial discrimination until after several African-Americans have been excluded. The prosecution should be required to provide a race-neutral reason for each peremptory challenge.

Accordingly, I would remand this case to the trial court for an evidentiary hearing to determine the prosecutor's reasons for using peremptory challenges to strike the first three African-American jurors.