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Batson Revisited: Discriminatory Venue Transfer and the Scope of Supreme Court Precedent

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A. Introduction

Since 1986, the Supreme Court has recognized that prosecutors are prohibited from employing peremptory challenges to exclude would-be jurors on the basis of their race.[1] In *Batson v. Kentucky*, a seven-member majority of the Court held that such "purposeful racial discrimination" constitutes an impermissible violation of a defendant's "right to equal protection."[2]

Twenty-two years after *Batson*, Gordon House asked the Tenth Circuit Court of Appeals to find that *Batson* stands for the general proposition that the Equal Protection Clause ("EPC") applies to all stages of a criminal proceeding.[3] House, a member of the Navajo nation, proffered the argument that the trial court's transfer of venue effectively excluded all members of his race from his venire and thus "ran afoul of the Supreme Court's *Batson* decision."[4]

In denying House's habeas petition, the Tenth Circuit concluded that *Batson* did not constitute "clearly established law" on the issue of the EPC's application to venue transfers.[5] Relying heavily on the Supreme Court's recent decision in *Carey v. Musladin*[6], which the Tenth Circuit interpreted as a "noticeably more restrictive" rule for determinations of "clearly established federal law,"[7] the Court concluded that the issue before it was an "open question" under Supreme Court

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[1] Batson v. Kentucky, 476 U.S. 79 (1986).

[2] *Id.* at 86.

[3] House v. Hatch, 527 F.3d 1010 (10th Cir. 2008).

[4] *Id.* at 1020.

[5] *Id.* at 1022.

[6] Carey v. Musladin, 549 U.S. 70 (2006).

[7] *House*, 527 F.3d at 1016.

jurisprudence.[8] As such, habeas relief was unavailable under the mandate of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[9]

This note posits that *Batson* should be interpreted in a broader scope than that afforded by the Tenth Circuit. This note will demonstrate that *Musladin* did not require the *House* Court to employ such an improperly narrow interpretation to the general principle established in *Batson*.

B. The Scope of *Batson*

On the first day of James Batson's trial on charges of burglary and receipt of stolen goods, the prosecutor employed his preemptory challenges to remove the only four black jurors from an otherwise white jury.[10] After defense counsel moved to discharge the jury on the grounds that this removal violated Batson's rights under the Sixth and Fourteenth Amendments, the judge stated that parties had the right to "strike anybody they want to" and denied the motion.[11] Batson was convicted on both counts and, on appeal, the Supreme Court of Kentucky affirmed. Applying *Swain v. Alabama*,[12] the court determined that Batson had failed to demonstrate the "systematic exclusion" of jurors necessary to prevail on an equal protection claim.[13]

In reversing, the Supreme Court rejected the evidentiary burden imposed on the defendant under the *Swain* framework, and concluded instead that a defendant should be permitted to demonstrate purposeful discriminatory preemptive challenges on the facts of his case alone.[14] Writing for the Court, Justice Powell noted the Court's "unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn."[15] Such discrimination inflicts harm not only on the defendant, reasoned the Court, but on the entire community.[16] Purposefully discriminatory selective procedures "undermine public confidence in the fairness of our system of justice,"[17] and as such, "public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."[18] The Court concluded that the State's privilege to exercise preemptory challenges must be "subject to the commands of the *Equal Protection Clause*."[19]

The *Batson* decision articulated a burden-shifting process for claims of discriminatory venire selection.

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges

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[8] *Id.* at 1021.
[9] 28 U.S.C. § 2254(d)(1) (2006).
[10] *Batson*, 476 U.S. at 82-83.
[11] *Id.* at 83.
[12] Swain v. Alabama, 380 U.S. 202, 224. (1965). In *Swain*, the Court held that a defendant claiming purposeful discrimination in the use of preemptory challenges would be required to show that the system itself was "being perverted" in the manner alleged.
[13] *Batson*, 476 U.S. at 83-84.
[14] *Id.* at 95.
[15] *Id.* at 85.
[16] *Id.* at 87.
[17] *Id.*
[18] *Id.* at 99.
[19] *Id.* at 89.

> to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.[20]

Upon this requisite showing, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."[21] The Court specifically rejected the State of Kentucky's argument that its holding would "create serious administrative difficulties."[22]

In separate concurring opinions, Justice White and Justice Marshall looked ahead to the application of *Batson* in the lower courts. "Much litigation will be required to spell out the contours of the Court's equal protection holding today," observed Justice White.[23] Justice Marshall articulated his concern that *Batson* would not go far enough toward "end[ing] the racial discrimination that peremptories inject into the jury-selection process."[24] For that reason, Justice Marshall urged complete elimination of the preemptory challenge system.[25]

In dissent, Chief Justice Burger and Justice Rehnquist criticized the majority's rejection of *Swain*[26] and defended the preemptory challenge as an "essential" tool "in use without scrutiny into its basis for nearly as long as juries have existed."[27] The equal protection analysis employed by the majority, argued the dissenters, "is simply inapplicable to peremptory challenges exercised in any particular case."[28] Taken to its inevitable conclusion, the dissent argued, *Batson* created a probability

> that every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristic not shared by the remaining members of the venire, it constituted a "classification" subject to equal protection scrutiny.[29]

C. The Venue Transfers of *House v. Hatch*

On Christmas Eve 1992, while driving the wrong way on Interstate 20 in New Mexico, Gordon House collided head-on with another vehicle.[30] The accident resulted in the death of Melanie Cravens and her three daughters and serious injury to Melanie's husband, Paul Cravens.[31] House, a member of the Navajo nation and the director of a counseling center for Indian teens,[32] admitted to consuming seven and one-half beers and his blood-alcohol concentration was measured

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[20] *Id.* at 96 (citation omitted).
[21] *Id.* at 97.
[22] *Id.* at 99.
[23] *Id.* at 102.
[24] *Id.* at 102-103.
[25] *Id.* at 103.
[26] *Id.* at 112.
[27] *Id.* at 119-120.
[28] *Id.* at 123.
[29] *Id.* at 124.
[30] *House*, 527 F.3d at 1013.
[31] *Id.*
[32] *'Bright Star' of Navajo Nation Gets Prison Term in Fatal Crash*, N.Y. TIMES, July 26, 1995, at 17.

at 0.18%.[33] Owing in part to the tragic nature of the crime and in part to hurtful stereotypes relating to Indians and drinking problems, New Mexico's subsequent prosecution of House triggered significant attention in the media and "polarized the community."[34] The announcement by the district attorney that the State planned to charge House with first-degree, depraved-mind murder sparked allegations of racial bias.[35] The first-degree charges were eventually dropped, however, and the final ten counts against House consisted of vehicular homicide and grave bodily injury charges premised on DWI and reckless driving theories.[36]

In light of the surrounding publicity, the trial court in Bernalillo County granted House's unopposed motion for transfer of venue from Bernalillo to Taos County.[37] When the Taos County jury deadlocked on all counts but for the misdemeanor DWI charge, the State moved for venue transfer.[38] The Taos County court denied this motion, and following a second trial, a new Taos County jury again deadlocked on the vehicular homicide charges.[39] The State moved again for venue transfer, and the court acceded, transferring House's case to Dona Ana County.[40] Whereas the adult Native American population in Taos County was 6.5% at the time, the corresponding demographic in Dona Ana County was 0.8%.[41] The Dona Ana jury convicted House on all charges.[42] The prosecution of Gordon House marked the first time in New Mexico history that an individual was tried three times on the same charges.[43]

D. Venue Transfer within the Scope of *Batson*

In asking the Tenth Circuit to apply the Equal Protection Clause to venue transfers, House was asking the court to recognize that *Batson* should stand for the principle that the EPC "applies to all stages of a criminal proceeding."[44] House's contention was that the State had utilized venue transfer procedure "offensively" against him by selecting a venue "largely devoid of Native Americans."[45] As this section will demonstrate, there are a number of compelling reasons to conclude that venue transfer is in fact within the scope of the *Batson* holding.

First, though proffering different arguments on the issue at hand, each of the *Batson* opinions discussed above share one crucial commonality. Each recognized that *Batson* would stand for an equal protection principal broader than the literal holding of the case. While *Batson* dealt specifically with the use of peremptory challenges, the majority's language spoke more broadly of eradicating discrimination in the "procedures used to select the venire."[46] Justice White's concurring opinion

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[33] *House*, 527 F.3d at 1013.
[34] *Repeat Trials of Navajo in Fatal Crash Polarize New Mexico Residents*, N.Y. TIMES, April 22, 1995, at 6.
[35] *House*, 527 F.3d at 1013.
[36] *Id* at 1013-14.
[37] *Id* at 1013.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 1014.
[41] *Id.* at 1027.
[42] *Id.* at 1014.
[43] *'Bright Star' of Navajo Nation Gets Prison Term in Fatal Crash*, N.Y. TIMES, July 26, 1995, at 6.
[44] *House*, 527 F.3d at 1020.
[45] State v. House, 978 P.2d 967, 991 (N.M. 1999).
[46] *Batson*, 476 U.S. at 85. While this language is concededly not a component of the *Batson* Court's actual holding, it is nonetheless dictum describing the Supreme Court's general goal in its jury discrimination jurisprudence. As such, it is instructive in the consideration of the proper scope of the *Batson* holding.

expressly acknowledged that the full "contours" of the *Batson* principle would not be found within the pages of the opinion itself, but would instead require further litigation.[47] Finally, while *Batson* dealt specifically with the manifestation of racial discrimination, the dissent anticipated application of the *Batson* holding to different types of discrimination including that based on gender, religious affiliation, or mental capacity.[48]

Second, to accept the argument that venue transfer falls within the general scope of *Batson* requires only that venue transfer be categorized as a "procedure[] used to select the venire from which individual jurors are drawn."[49] Some procedures involved in the selection of the venire take place long before the first day of trial. These procedures include the initial random selection of prospective jurors, the actual process of summoning prospective jurors, and the process whereby jurors may be excused after demonstrating sufficient hardships.[50] Of course, since the pool of prospective jurors will consist of the residents of the specific geographic location in which the trial will convene,[51] the very first procedure that will affect the selection of the venire is the determination of venue. Further, it is not difficult to imagine how this procedure could be contravened for racially discriminatory effect.[52] It is thus apparent that subjecting venue transfer to the commands of the EPC would be entirely consistent with *Batson*'s goal of eradicating racial discrimination from the procedures of jury selection.

Finally, the principle that prosecutors should not be permitted to utilize venue transfer to circumvent *Batson* and "accomplish the same result by another means" was recognized by Justice Marshall in *Mallett v. Missouri*.[53] Although the majority of the Court voted to deny certiorari, Justice Marshall's dissent made a clear and compelling case for including venue transfer within the scope of *Batson*.[54] In *Mallet*, the murder trial of an African-American defendant was transferred from Perry County, with an African-American population of approximately 6.6%, to Schuyler County, where that population was approximately .06%.[55] In applying *Batson* to these facts, Justice Marshall found that a "prima facie case of purposeful discrimination" had been demonstrated.[56] Consistent with *Batson* guidelines, Justice Marshall concluded that the case required "an examination of the trial court's justification for transferring venue in a manner that discriminated against potential Afro-American jurors."[57]

E. The AEDPA, *Williams*, and the *Musladin* Rule

The Antiterrorism and Effective Death Penalty Act of 1996 was enacted by the 104th Congress as legislation intended "[t]o deter terrorism, provide justice for victims, provide for an effective death penalty, and other purposes."[58] Title I of the AEDPA, entitled "Habeas Corpus

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[47] *Id.* at 102.
[48] *Id.* at 105-06.
[49] *Id.* at 85.
[50] *See generally* 28 U.S.C. § 1863 (2006).
[51] 28 U.S.C. § 1863(b)(3).
[52] For instance, in *House*, while the motivations of the prosecutors who requested a transfer out of Taos County are not known, it is certainly conceivable that they hoped to decrease the number of Native Americans in the venire.
[53] Mallett v. Missouri, 494 U.S. 1009, 1009 (1990) (Marshall, J., dissenting).
[54] *Id.*
[55] *Id.*
[56] *Id.* at 1010.
[57] *Id.* at 1011.
[58] 110 Stat. 1219.

Reform," establishes new guidelines controlling the circumstances under which applications for writs of habeas corpus are to be granted.[59] Writs of habeas corpus entitle both state and federal prisoners to challenge their convictions and thus serve as safeguards against unlawful imprisonment.[60] The AEDPA provision applicable to Gordon House's application for habeas relief states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.[61]

As a result of this language, the Supreme Court was soon required to address the issue of what qualifies as "clearly established Federal law."

In *Williams v. Taylor*, the Supreme Court held that the Virginia Supreme Court's determination that the defendant's right to effective assistance of counsel had not been violated constituted a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law."[62] Justice Stevens announced the judgment of the Court, but his primary discussion of the AEDPA failed to command a majority.[63] In Justice Stevens' view, the scope of federal courts' jurisdictional grant to provide habeas relief "remains the same" following the enactment of the AEDPA.[64] Justice O'Connor, however, wrote for the majority of the Court in rejecting this view on the basis that it gives "no effect whatsoever" to the amendments introduced under the AEDPA.[65] In the majority's view, these amendments represented a clear intent on the part of Congress to achieve "habeas reform."[66] On the specific question of the proper meaning of the phrase, "clearly established Federal law, as determined by the Supreme Court," Justice O'Connor opined that this phrase "refers to the holdings, as opposed to the dicta, of this Court's decisions."[67]

Six years later, in *Carey v. Musladin*, the Supreme Court was presented with the issue of whether a criminal defendant was denied a fair trial by the courtroom presence of members of the victim's family wearing buttons displaying the victim's image.[68] The Court of Appeals for the Ninth Circuit held that the defendant was entitled to a writ of habeas corpus under the AEDPA.[69] This holding was based on the Ninth Circuit's conclusion that the state court's application of a test for inherent prejudice that differed from a test articulated by the Supreme Court was "contrary to, or

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[59] *Id.*
[60] Deborah L. Stahlkopf, *A Dark Day for Habeas Corpus: Successive Petitions Under the AntiTerrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115, 1118-19 (1998).
[61] 28 U.S.C. § 2254(d)(1) (2006).
[62] Williams v. Taylor, 529 U.S. 362, 398-99 (2000).
[63] *See id.* at 367.
[64] *Id.* at 375.
[65] *Id.* at 403 (O'Connor, J. concurring).
[66] *Id.* at 404.
[67] *Id.* at 412.
[68] *Musladin*, 594 U.S. 70.
[69] *Id.* at 73-74.

involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[70] Reversing the Ninth Circuit, the *Musladin* Court cited Justice O'Connor's explanation of "clearly established Federal law" from the *Williams* opinion.[71] Since the Court had never specifically addressed "a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial," it could not be said that the state court's application of federal law was unreasonable.[72]

In a concurring opinion, Justice Stevens criticized the application of Justice O'Connor's "ironic dictum" in regard to "clearly established Federal law:"[73]

> Because I am persuaded that Justice O'Connor's dictum about dicta represents an incorrect interpretation of [the AEDPA's] text, and because its repetition today is wholly unnecessary, I do not join the Court's opinion.
>
> Virtually every one of the Court's opinions announcing a new application of a constitutional principal contains some explanatory language that is intended to provide guidance to lawyers and judges in future cases. [74]

Justice Stevens's sentiments were echoed somewhat in Justice Kennedy's concurring opinion, which noted that the, "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied."[75]

This language by Justice Kennedy was cited the following year in *Panetti v. Quaterman*, where a majority of the Court took a significant step in softening the rigid rule that *Musladin* seemed to create.[76] In *Panetti*, the Court held that although it had never articulated a "precise standard"[77] for state-court competency proceedings, the procedures employed by the state court to determine competency nonetheless violated the "controlling standard" created by the Court.[78] In regard to the AEDPA, the Court explained that the, "statute recognizes . . . that even a general standard may be applied in an unreasonable manner."[79] Justice Thomas, the author of *Musladin*, dissented along with Chief Justice Roberts and Justices Alito and Scalia.[80] The dissent sharply criticized the majority for "cobbl[ing] together stray language" from the Court's decision in *Ford v. Wainright*[81] in support of its conclusion that the state court's competency proceedings constituted an unreasonable application of federal law.[82]

F. Application of *Batson* to Venue Transfer within the *Musladin* Rule

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[70] *Id.*
[71] *Id.* at 74-75.
[72] *Id.* at 76.
[73] *Id.* at 78 (Stevens, J. concurring).
[74] *Id.* at 78-79 (citations omitted).
[75] *Id.* at 81 (Kennedy, J. concurring) (citations omitted).
[76] Pannetti v. Quaterman, 51 U.S. 930 (2007).
[77] *Id.* at 957.
[78] *Id.* at 953.
[79] *Id.*
[80] *Id.* at 962.
[81] Ford v. Wainright, 477 U.S. 399 (1986).
[82] *Pannetti*, 551 U.S. 930 at 980.

In order to satisfy *Musladin*, the Tenth Circuit needed only to conclude that it is well-settled precedent that the EPC applies to all stages of a criminal trial. Proceeding from that point, the court could have considered whether the trial court's transfer of venue to Dona Ana County constituted a purposeful exclusion of Native Americans from Gordon House's jury in violation of *Batson*. If it did, then the Supreme Court of New Mexico's conclusion to the contrary would represent an unreasonable application of federal law and thus entitle Gordon House to federal habeas relief under the provisions of the AEDPA. This general approach to the *Musladin* rule has already been taken by the Sixth, Seventh, and Ninth Circuits. While the ultimate fate of this approach is still unclear, the chronology is instructive.

In 2006, the Seventh Circuit granted Joseph Van Patten's petition for habeas relief based on a finding that the Wisconsin Supreme Court had unreasonably applied Supreme Court precedent regarding the right to counsel.[83] Specifically, the Seventh Circuit held that Van Patten's counsel's appearance via speakerphone at a critical hearing created a "presumption of prejudice" as analyzed under *United States v. Cronic*.[84] The State filed a petition for certiorari, and the Supreme Court decided *Musladin* while this petition was still pending.[85] The Supreme Court remanded the case back to the Seventh Circuit for further consideration in light of *Musladin* and the Seventh Circuit reinstated its opinion granting habeas relief.[86] The Seventh Circuit concluded that "nothing in *Musladin*" required a reversal of its earlier opinion because a defendant's right to effective legal counsel is not "an open constitutional question."[87]

Three months later, the Ninth Circuit took the same approach in *Smith v. Patrick*.[88] The Ninth Circuit granted Shirley Ree Smith's habeas petition in 2006 based on its conclusion that the California Court of Appeals' affirmance of her conviction constituted an unreasonable application of applicable Supreme Court precedent.[89] The State appealed, and as in *Van Patten*, the Supreme Court decided *Musladin* while the appeal was pending. When the Supreme Court remanded to the Ninth Circuit for reconsideration in light of *Musladin*, the Ninth Circuit concluded that its earlier decision was "unaffected by *Musladin*."[90] The court relied on the Supreme Court's holding in *Panetti* as well as the Seventh Circuit's holding in *Van Patten* to conclude that the Supreme Court does not interpret the AEDPA "to require a Supreme Court decision to be factually identical to the case in issue before habeas can be granted."[91]

The following year, however, the Supreme Court reversed the Seventh Circuit's reinstatement of habeas relief in *Van Patten* on the basis that no Supreme Court decision had "squarely address[ed] the issue" of counsel's participation by speaker phone as "denial of counsel."[92] The Court's decision in *Van Patten* prompted the California prosecutors to immediately petition the Ninth Circuit for panel and en banc rehearing of its decision in *Smith v. Patrick*.[93] The Ninth Circuit

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[83] Van Patten v. Deppisch, 434 F.3d 1038, 1046 (9th Cir. 2006).
[84] *Id.* at 1045.
[85] Van Patten v. Endicott, 489 F.3d 827, 828 (9th Cir. 2007)
[86] *Id.*
[87] *Id.*
[88] Smith v. Patrick, 508 F.3d 1256 (9th Cir. 2007).
[89] *Id.* at 1257.
[90] *Id.*
[91] *Id.* at 1259.
[92] Wright v. Van Patten, 522 U.S. 120 (2008).
[93] Smith v. Patrick, 508 F.3d 900, 900 (9th Cir. 2008).

denied the petition, however, finding that nothing in the Supreme Court's *Van Patten* decision affected its earlier ruling.[94]

In *Spisak v. Hudson*, the Sixth Circuit revisited a prior grant of habeas relief in light of *Musladin* and determined that the new rule did not require reversal of its prior holding.[95] In 2006, prior to the Supreme Court's holding in *Musladin*, the Sixth Circuit granted partial habeas relief to Frank Spisak after finding that his conviction "resulted from an unreasonable application of federal law as announced by the Supreme Court."[96] Specifically, the Sixth Circuit concluded that the state court's holding in regard to the ineffective assistance of Spisak's counsel and improper jury instructions were inconsistent with Supreme Court jurisprudence in those areas.[97] The Supreme Court granted certiorari in 2007 and remanded the case to the Sixth Circuit "for further consideration in light of *Carey v. Musladin*."[98] Upon remand, however, the Sixth Circuit determined that *Musladin* was readily distinguishable from the case before it because the principle of federal law applied in *Spisak* was "well-settled Supreme Court precedent regarding ineffective assistance of counsel at the sentencing phase of trials."[99] Relying partly on *Panetti*, the Sixth Circuit reasoned as follows:

> . . . [T]he fact that the Supreme Court has not squarely addressed a situation involving a counsel's deficient performance during closing arguments of the mitigation phase of a trial or the specific type of instruction given here does not preclude this Court's finding that the state court unreasonably applied federal law.[100]

The court thus reinstated its previous opinion in the matter.[101]

These cases demonstrate that the full implications of the *Musladin* rule remain unclear, and more importantly for the purposes of this note, that the Tenth Circuit had a viable alternative approach to avoiding *Musladin*'s constraints in determining whether venue transfer is within the scope of *Batson*.

G. Conclusion

In sum, the Supreme Court's decision in *Batson v. Kentucky* marked a milestone in the pursuit of equal protection in criminal trials but it did not mark an end to that pursuit. As Justice White correctly acknowledged in his concurring opinion, the full contours of the *Batson* holding would require further litigation before being fully understood.[102] In *House v. Hatch*, the Tenth Circuit was presented with the opportunity to consider whether the protection *Batson* presently affords to the process of venire selection should be afforded to venue transfers as well.[103] In turning down this opportunity based on an arguably flawed understanding of the Supreme Court's holding in *Musladin*, the Tenth Circuit left the work of *Batson* regretfully unfinished.

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[94] *Id.* at 901.
[95] Spisak v. Hudson, No. 03-4034, slip op. at 4 (6th Cir. April 11, 2008).
[96] *Id.* at 7-8.
[97] *Id.*
[98] *Id.* at 1.
[99] *Id.* at 6.
[100] *Id.* at 7.
[101] *Id.* at 11.
[102] *Batson*, 476 U.S. at 102.
[103] *House,* 527 F.3d at 1020.