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CONSTITUTIONAL LAW

I. USE AND SALES TAX EXEMPTION FOR RELIGIOUS PUBLICATIONS UNCONSTITUTIONAL

In *Thayer v. South Carolina Tax Commission*¹ the South Carolina Supreme Court held that South Carolina's use and sales tax exemption for religious publications² violated the Establishment Clause of the First Amendment.³ The court found the exemption unconstitutional under the first two prongs of the *Lemon v. Kurtzman*⁴ Establishment Clause test.⁵

Catherine Thayer, the appellant, purchased copies of a real estate guide, *The Real Estate Book*, which she planned to distribute free of charge in local stores. Because the guide was printed and published in Georgia, however, the South Carolina Tax Commission assessed a use tax on the publication.⁶ Thayer paid one month's tax under protest and challenged the constitutionality of the tax exemption given to newspapers and religious publications.⁷

The supreme court held that the exemption for newspapers was constitutional, but that the exemption for religious publications failed the *Lemon* test.⁸ The court concluded that the religious exemption did not

1. 413 S.E.2d 810 (S.C. 1992) (per curiam).

2. S.C. CODE ANN. § 12-35-550(7) (Law. Co-op. 1976) (current version at S.C. CODE ANN. § 12-36-2120(8) (Law. Co-op. Supp. 1991)). The purpose of a use tax is to ensure "that the local use of an item purchased outside the state is taxed in the same amount it would be if it were purchased locally." *Thayer*, 413 S.E.2d at 813 (citing *State ex rel. Roddey v. Byrnes*, 219 S.C. 485, 517, 66 S.E.2d 33, 46 (1951)).

3. *Thayer*, 413 S.E.2d at 814. The Establishment Clause prohibits a state from making any "law respecting an establishment of religion." U.S. CONST. amend. I.

4. 403 U.S. 602 (1971). The *Lemon* Court developed a three-part test to determine whether an enactment complies with the Establishment Clause: First, the law must have a secular legislative purpose; second, its primary effect must neither advance nor inhibit religion; and, third, the law must not foster "excessive government entanglement with religion." *Id.* at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

5. *Thayer*, 413 S.E.2d at 814.

6. *Id.* at 812. The tax assessed for the period from May 1, 1985 to December 31, 1988 equalled \$39,727.80 plus interest and penalties. *Id.*

7. *Id.* Thayer argued that the newspaper exemption violated the Free Press Clause by exempting newspapers but not all publications. The court quickly disposed of this argument under *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (holding that differential taxation is constitutional as long as it is not an attempt to restrain particular ideas). *Thayer*, 413 S.E.2d at 813.

8. *Thayer*, 413 S.E.2d at 813. For a discussion of the *Lemon* test, see *supra* note 4.

have a secular purpose because it did not apply to “a broad class of nonsectarian groups.”⁹ In *Texas Monthly v. Bullock*¹⁰ the United States Supreme Court held that a Texas statute which solely exempted religious publications from taxation¹¹ violated the Establishment Clause.¹² The *Thayer* court concluded that the South Carolina statute was unconstitutional because it, like the Texas exemption, was “confined impermissibly to publications advancing the tenets of a religious faith.”¹³

The court also held that the exemption failed the second prong of the *Lemon* test because the statute’s primary effect was to advance religion.¹⁴ Again relying on *Texas Monthly*, the court stated: “A statute cannot stand when its primary effect is to endorse the communication of religious messages.”¹⁵ The court emphasized that the statute “clearly

9. *Thayer*, 413 S.E.2d at 814 (citing *Texas Monthly v. Bullock*, 489 U.S. 1 (1989)).

10. 489 U.S. 1 (1989).

11. TEX. TAX CODE ANN. § 151.312 (West 1982) (“Periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith are exempted from the taxes imposed by this chapter.”) (superseded).

12. *Texas Monthly*, 489 U.S. at 5. The Court invalidated the Texas statute despite the apparent applicability of *Walz v. Tax Commission*, 397 U.S. 664 (1970) (upholding a New York property tax exemption for religious organizations). The *Texas Monthly* Court distinguished *Walz* by stating that the *Walz* exemption applied to both religious and other nonprofit organizations. *Texas Monthly*, 489 U.S. at 12. However, the dissent in *Texas Monthly* noted:

[T]he *Walz* Court did discuss the fact that the New York tax exemption applied not just to religions but to certain other “nonprofit” groups, including “hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.” The finding of valid legislative purpose was not rested upon that, however, but upon the more direct proposition that “exemption constitutes a reasonable and balanced attempt to guard against” the “latent dangers” of governmental hostility towards religion “inherent in the imposition of property taxes.” The venerable federal legislation that the Court cited to support its holding was not legislation that exempted religion along with other things, but legislation that exempted *religion alone*.

Id. at 36 (Scalia, J., dissenting) (citations omitted).

13. *Thayer*, 413 S.E.2d at 813.

14. *Id.* at 814. The court declined to examine the third prong of the *Lemon* test because the court concluded that the exemption failed the first two prongs. *Id.* at 814 n.1.

15. *Id.* at 814 (citing *Texas Monthly*, 489 U.S. at 28).

singles out 'religious proselytizing as an activity deserving of public assistance.'"¹⁶

Although the *Thayer* court recognized the similarity between the Texas statute and the South Carolina statute, the South Carolina exemption is distinguishable because it also exempted newspapers.¹⁷ The Court in *Texas Monthly* held that an exemption violates the Establishment Clause when it is "confined exclusively to publications advancing the tenets of a religious faith."¹⁸ Because South Carolina's statute also exempted newspapers, it was not "confined exclusively" to religious publications; therefore, the exemption arguably did not come within the scope of *Texas Monthly*. However, the *Thayer* court did not view the exemption so broadly. The court stated that other tax exemptions granted for secular purposes do not validate a tax exemption granted solely for religious purposes.¹⁹

Upon concluding that the tax exemption for religious publications was unconstitutional, the court severed the invalid exemption language from the statute, leaving the remainder of the statute in place.²⁰ The court stated that "the test for severability is whether the constitutional portion of the statute remains 'complete in itself, [sic] wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution.'"²¹ Although the court severed the invalid religious publications exemption, the court disagreed with *Thayer's* requested remedy.²²

Thayer argued that, under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*,²³ her \$39,000 tax assessment should be forgiven

16. *Id.* (quoting *Texas Monthly*, 489 U.S. at 15 n.5).

17. See S.C. CODE ANN. § 12-35-550(7) (Law. Co-op. 1976) (current version at S.C. CODE ANN. § 12-36-2120(8) (Law. Co-op. Supp. 1991)).

18. *Texas Monthly*, 489 U.S. at 5 (emphasis added).

19. *Thayer*, 413 S.E.2d at 814.

20. *Id.* at 815. The court noted that a statute may be partially constitutional and partially unconstitutional. *Id.* at 814 (citing *Strom v. Amvets*, 280 S.C. 146, 311 S.E.2d 721 (1984)).

21. *Id.* at 815 (quoting *Shumpert v. South Carolina Dep't of Highways & Pub. Transp.*, 306 S.C. 64, 69, 409 S.E.2d 771, 774 (1991)).

22. *Id.*

23. 496 U.S. 18 (1990). For analyses of *McKesson*, see Russell A. Hollrah, *Refund of Unconstitutional State Taxes: Taxpayer's Right or State's Prerogative*, 42 TAX EXECUTIVE 215 (1990), and James M. Ervin, Jr. & Katherine E. Giddings, *Supreme Court Distinguishes Remedy and Retroactivity Issues Affecting State Taxes*, 73 J. TAX'N 296 (1990).

because the tax was authorized by an unconstitutional tax scheme.²⁴ *McKesson* involved Florida's tax scheme that provided a lower excise tax rate on distributors of liquor manufactured from Florida agricultural products. Although the Supreme Court of Florida held the Florida tax unconstitutional, the court did not allow retrospective relief for *McKesson*, a wholesale liquor distributor.²⁵ On appeal, the United States Supreme Court held:

[I]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.²⁶

The Court stated that Florida could revise and apply the liquor tax for the challenged tax period, provided the reformulated tax treats the petitioner and competing distributors "in a manner consistent with the dictates of the Commerce Clause."²⁷

The *Thayer* court viewed *McKesson* as inapposite, stating that "*McKesson* requires relief . . . only when taxpayers involuntarily pay a tax that is unconstitutional under existing precedents."²⁸ The court concluded that *Thayer*'s tax burden was constitutional despite the unconstitutional religious publication exemption.²⁹

The *Thayer* decision is a correct analysis of the requirements of *Texas Monthly*. An exemption statute cannot primarily target religion as the beneficiary. Nevertheless, neither *Texas Monthly* nor *Thayer* poses a significant barrier to a state that wishes to grant a tax exemption for religious publications; state legislatures can simply draft around the problem by including in the exemption a broad class of nonreligious organizations. In fact, within six months of the *Texas Monthly* decision, the Texas legislature redrafted the Texas statute to include an exemption for not only religious publications, but also "philanthropic, charitable, historical, scientific, or other similar organization that is not operated for

24. *Thayer*, 413 S.E.2d at 815.

25. *McKesson*, 496 U.S. at 25. The Florida court relied on *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (invalidating a similar tax scheme used by Hawaii because the tax violated the Commerce Clause). *McKesson*, 496 U.S. at 23.

26. *McKesson*, 496 U.S. at 31.

27. *Id.* at 40.

28. *Thayer*, 413 S.E.2d at 815.

29. *Id.*

profit.”³⁰ Assuming this approach rectifies the Establishment Clause violation, the importance of *Texas Monthly* and *Thayer* is largely academic.³¹

Russell A. DeMott

II. CIVIL FORFEITURE STATUTE CONSTITUTIONAL, BUT ACTUAL SCOPE UNDEFINED

In *Myers v. 1518 Holmes Street*³² the South Carolina Supreme Court held that a seizure of real property pursuant to the civil forfeiture statute³³ does not violate the takings clause of the South Carolina Constitution³⁴ because the seizure represents a valid exercise of police power.³⁵ Although the court upheld the civil forfeiture statute, the court failed to define the proper scope of the statute’s application.

In late 1989 the Lexington County Sheriff’s Department began an undercover narcotics investigation in the West Columbia area known as “Happy Town.” Narcotics investigators subsequently filed affidavits for seizure alleging drug trafficking on the property and in the residences around 1518 Holmes Street. Thereafter, the circuit court issued *ex parte* notices and seizure warrants, and the sheriff confiscated the Holmes Street property pursuant to the civil forfeiture statute. The owners of the property moved to quash the seizures, claiming that the civil forfeiture statute violates both the due process and takings clauses of the South Carolina Constitution.³⁶

30. TEX. TAX CODE ANN. § 151.312 (West Supp. 1990).

31. Notably, the South Carolina General Assembly recently passed a joint resolution to stop the South Carolina Tax Commission from retroactively collecting taxes not paid by religious retailers because of the unconstitutional exemption. H.R.J. Res. 4463; 109th Leg., 2d Sess., 1992 S.C. Acts __. The action was probably motivated by the Tax Commission’s intention to tax retroactively religious retailers as of the date of the *Texas Monthly* decision. S.C. Tax Comm’n Information Letter #92-8 (ordered February 19, 1992).

32. 411 S.E.2d 209 (S.C. 1991).

33. S.C. CODE ANN. § 44-53-520 (Law. Co-op. Supp. 1991).

34. S.C. CONST. art. I, § 13 (“[P]rivate property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor.”).

35. *1518 Holmes St.*, 411 S.E.2d at 211. The court also held that the civil forfeiture statute does not violate the due process clause of the state constitution, S.C. CONST. art. I, § 3, even though the statute affords neither pre-seizure notice nor an opportunity to be heard. *1518 Holmes St.*, 411 S.E.2d at 212.

36. *1518 Holmes St.*, 411 S.E.2d at 211.

The circuit court held that the forfeiture statute does not violate the due process clause, but that the seizure constituted a taking without just compensation.³⁷ On appeal, the supreme court agreed that the forfeiture provisions do not offend due process.³⁸ However, the supreme court held that the seizure of property was not a taking that would require just compensation.³⁹

In *1518 Holmes Street* the court reiterated the settled principle that the exercise of eminent domain requires just compensation, whereas the constitutional exercise of the state's police power does not.⁴⁰ The supreme court specifically held that, because civil forfeitures are directed toward the prevention of serious public harm and are within the legitimate exercise of the police power, no taking occurs when the State enforces a civil forfeiture statute.⁴¹ However, the court did not examine the application of the statute to the facts of the case; rather, the court simply upheld the statute as constitutional.⁴²

Justice Finney dissented, taking issue with the majority's overly generalized reasoning.⁴³ Justice Finney reviewed the record and determined that the seizure in this case was an unconstitutional taking because the State exercised its police power in an impermissibly arbitrary

37. *Id.*

38. *Id.* at 212.

39. *Id.* at 211-12.

40. *Id.* at 211 (citing *South Carolina Highway Dep't v. Wilson*, 254 S.C. 360, 175 S.E.2d 391 (1970)); *see also Edens v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956) (generally discussing difference between eminent domain and police power); *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955) (holding that order to destroy uninhabitable houses was legitimate exercise of police power).

41. *1518 Holmes St.*, 411 S.E.2d at 211. The court also noted that the United States Supreme Court has recognized a distinction between exercises of eminent domain power and police power. *Id.* (citing *Van Oster v. Kansas*, 272 U.S. 465 (1926) (upholding use of state police power to seize a car that had been used to transport illegal liquor); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (upholding Puerto Rican forfeiture statute despite fact that seized property had been rented from an innocent owner)).

The court's reliance on federal precedent is not surprising because the South Carolina statute is modeled after the federal civil forfeiture statute, 21 U.S.C. § 881(a)(7) (1988), which has been upheld repeatedly. *See, e.g., United States v. 916 Douglas Ave.*, 903 F.2d 490 (7th Cir. 1990) (applying § 881(a)(7) without questioning its constitutionality), *cert. denied*, 111 S. Ct. 1090 (1991); *United States v. Schifferli*, 895 F.2d 987 (4th Cir. 1990) (same); *United States v. 3639 2nd St., N.E.*, 869 F.2d 1093 (8th Cir. 1989) (same).

42. *1518 Holmes St.*, 411 S.E.2d at 211.

43. *Id.* at 212-14 (Finney, J., concurring in part and dissenting in part).

manner.⁴⁴ Notably, however, Justice Finney did not comment on the constitutionality of the statute itself.

Justice Finney's opinion apparently advocates the "substantial connection" test adopted by the Fourth Circuit to determine whether the illegal activities have a sufficient nexus to the property to justify a seizure.⁴⁵ Justice Finney noted that the only connection between the property and the criminal activity was the proximity of the activity to the property and the fact that in one instance a suspect gave 1518 Holmes Street as his address.⁴⁶ Justice Finney obviously believes that the mere proximity of property to an illegal activity is insufficient to subject the property to forfeiture.

It is unclear whether the South Carolina Supreme Court would adopt the substantial connection test because the majority of the court did not review the facts of this case. However, most people probably would agree with Justice Finney that it is disturbing that the State can effect a forfeiture of property based solely on the property's close proximity to an illegal activity.

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III. PROSECUTOR MUST MEET HEIGHTENED BURDEN IN DEMONSTRATING RACIALLY NEUTRAL EXPLANATION FOR USE OF PEREMPTORY STRIKES

In *State v. Grandy*⁴⁷ the South Carolina Supreme Court held that under *Batson v. Kentucky*,⁴⁸ a prosecutor's unexplained desire to seat a different venireperson on a petit jury does not justify exercising a peremptory strike upon a black venireperson.⁴⁹ Although the court's

44. *Id.* at 214.

45. See *Schifferli*, 895 F.2d at 990 ("[T]he property must have more than an incidental or fortuitous connection to criminal activity."); see also *3639 2nd St., N.E.*, 869 F.2d at 1097 (applying "substantial connection" test). But see *916 Douglas Ave.*, 903 F.2d at 494 ("A 'substantial connection' is not required between the property and the related drug offense for forfeiture of real estate under 21 U.S.C. § 881(a)(7).").

46. *1518 Holmes St.*, 411 S.E.2d at 214 (Finney, J., concurring in part and dissenting in part).

47. 411 S.E.2d 207 (S.C. 1991).

48. 476 U.S. 79 (1986) (holding that the Equal Protection Clause forbids prosecutors from challenging potential jurors solely on account of their race).

49. *Grandy*, 411 S.E.2d at 208-09.

analysis was minimal, the *Grandy* opinion further defines the current contours of the application of *Batson* in South Carolina.

Harvey Lee Grandy, a black man, was convicted of trafficking in cocaine. The court sentenced him to twenty-five years imprisonment and fined him \$200,000. Before trial, the prosecutor struck the only black member of the venire who was presented, resulting in an all-white jury.⁵⁰ The defendant's counsel challenged this peremptory strike under *Batson*,⁵¹ but the trial judge found that the prosecutor's reason for the strike was racially neutral.⁵² Although Grandy raised two other issues

50. *Id.* at 208. However, a black man was seated as an alternate. Record at 8.

51. Counsel for defendant alleged that the all-white jury formed the basis for a prima facie case. *Grandy*, 411 S.E.2d at 208. To establish a prima facie case of purposeful discrimination in the selection of the petit jury, the defendant must show: (1) that he is a member of a cognizable racial group; (2) that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's racial group; and (3) that the facts and relevant circumstances raise an inference that the prosecutor used the challenge to exclude potential jurors on the basis of race. *Batson*, 476 U.S. at 96.

52. Record at 8-10. Although not quoted in the court's opinion, the prosecutor's explanation for striking Blake, the black venireperson, from the jury is critical to an analysis of the scope of the *Grandy* holding. The prosecutor explained:

Your Honor, at that time I had two strikes, I had three left. Mr. Blake, I just had a gut feeling on him and I didn't think that he would make a good juror, but mainly I struck him — I had about four or five jurors — if I'm not mistaken there were only two seats vacant at the time, two or three, but I think two. I had two strikes. As I recall it [defense attorney] had four. What I was trying to do was to get Mr. James Maye, Mrs. Elmira Coleman, Mr. Robert or Bo Youngblood and James Beatty; there was a Van Pressley who I wanted on the jury, even though I found out after the selection that it wasn't the same Van Pressley that I thought it was. I made my third strike hoping to get one of those knowing that she was out or would be out and in fact Mr. James Beatty [sic] was called which worked for me and she took her fifth strike on him. After that I was left with only two strikes, I had two people on the jury who I could not take and I was not about to take a chance on that. I took my chance early and after that, I could not take a fourth strike because there were two jurors that I could not take. It was certainly not done by race, it was persons that I wanted to try to get on there.

on appeal,⁵³ the supreme court reversed solely on the *Batson* challenge.⁵⁴

The supreme court found that the solicitor's explanation for the peremptory strike was entirely deficient.⁵⁵ In order to survive constitutional scrutiny, the explanation must be "neutral, related to the case to be tried, clear, reasonably specific and legitimate."⁵⁶ The *Grandy* court concluded that "the solicitor failed to articulate a racially neutral explanation in his assertion that he excluded the prospective black juror because he wanted to seat other venirepersons."⁵⁷ The court also noted that the effect of this insufficient explanation was the same as giving no explanation at all.⁵⁸

The court's opinion, although brief, accords with *Batson* and its progeny. The *Batson* Court emphasized "that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause";⁵⁹ however, prosecutors no longer have a true peremptory challenge.⁶⁰ The *Grandy* decision reflects the tension between the

53. In addition to the *Batson* argument, the defendant contended that the trial court denied him a reasonable amount of time to find a private attorney. *Grandy*, 411 S.E.2d at 207-08. The supreme court rejected this argument, noting that the defendant had five months to obtain a private attorney and that the defendant was not denied the assistance of counsel. *Id.* at 208. *Grandy* also argued on appeal that the trial court erred in refusing to charge the lesser included offense of possession with intent to distribute. *Id.* The supreme court held that, because there was no dispute in the evidence that the amount of cocaine in question exceeded the amount required for trafficking, the trial court did not err by refusing to charge the lesser included offense. *Id.* (citing *Matthews v. State*, 300 S.C. 238, 387 S.E.2d 258 (1990)).

54. *Id.* at 208-09.

55. *Id.* The court reasoned that the defendant had established "a prima facie case [of racial discrimination] by showing that he was [sic] black and that the solicitor used a peremptory challenge to obtain an all-white jury." *Id.* at 208. Once the defendant establishes a prima facie case, the burden of proof shifts to the prosecutor, who must rebut the presumption of discrimination by providing a racially neutral explanation for the strike. *Id.* (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

56. *Id.* (citing *State v. Tomlin*, 299 S.C. 294, 384 S.E.2d 707 (1989)).

57. *Id.*

58. *Id.* at 209.

59. *Batson*, 476 U.S. at 97.

60. The extent to which prosecutors continue to have a peremptory challenge varies from state to state because the *Batson* Court declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Id.* at 99. The South Carolina Supreme Court has recommended a bright-line test that directs a *Batson* hearing on the defendant's request "whenever the defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of defendant's race from the venire." *State v. Jones*, 293 S.C. 54, 57, 358 S.E.2d 701, 703 (1987).

prosecution's right to peremptory strikes and a defendant's right to equal protection.

Although "[t]he peremptory challenge has very old credentials,"⁶¹ it is not mandated by the Sixth Amendment's guarantee of an impartial jury. The source of the protection provided by *Batson* is the Equal Protection Clause of the Fourteenth Amendment.⁶² A "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.'"⁶³ The protection afforded a defendant by the Fourteenth Amendment must prevail over a prosecutor's interest in a peremptory challenge.

Grandy, while attempting to delineate the limits of the Supreme Court's holding in *Batson*, seriously undermines the existence of the prosecutor's peremptory challenge without expressly eliminating it.⁶⁴ Recognizing the uncertainties of this kind of approach, Justice Marshall in *Batson* advocated the abolition of peremptory challenges in criminal trials.⁶⁵ Although the current Supreme Court is unlikely to consider explicitly abolishing peremptory challenges, states may implicitly abolish

61. *Swain v. Alabama*, 380 U.S. 202, 212 (1964), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986). Although the *Swain* Court acknowledged that "purposeful or deliberate denial to Negroes on account of race . . . violates the Equal Protection Clause," *id.* at 203-04, the Court found neither purposeful discrimination, nor even a prima facie case of discrimination, despite a history of total exclusion of black veniremen from petit juries since about 1950. *Id.* at 226-27. Of course, *Batson* overruled *Swain* as to the burden of proof required. *See Batson*, 476 U.S. at 92.

62. *See Batson*, 476 U.S. at 89.

63. *Jones*, 293 S.C. at 56, 358 S.E.2d at 702 (quoting *Batson*, 476 U.S. at 96). In *State v. Tomlin*, 299 S.C. 294, 299, 384 S.E.2d 707, 710 (1989), the supreme court found that "the prosecutor's explanation that the juror was struck because he 'shucked and jived'" constituted the use of a racial stereotype that clearly violated *Batson*. *Tomlin*, which the supreme court referred to in *Grandy*, illustrates the persistence of racial discrimination, whether purposeful or otherwise.

64. The *Grandy* court makes clear that a prosecutor's peremptory strike of a member of a cognizable racial group must have an actual basis that is specific as to the venireperson struck and must be able to survive statistical comparison with other venirepersons who were seated. *See Grandy*, 411 S.E.2d at 208-09.

65. *Batson*, 476 U.S. at 102-07 (Marshall, J., concurring). Justice Marshall noted:

A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.

the prosecutor's peremptory challenge as they continue to refine the contours of *Batson*.

After *Grandy*, prosecutors can no longer arbitrarily use peremptory strikes to exclude venirepersons of cognizable racial groups, and trial judges must look at the factors listed in *Tomlin* when hearing a *Batson* motion.⁶⁶ Because the threshold defined in *State v. Jones*⁶⁷ is easily met, and because the burden immediately shifts to the prosecution to come forward with a racially neutral explanation, defense counsel should make a *Batson* motion whenever the prosecution exercises a peremptory strike upon a member of a cognizable racial group.

Tara S. Taggart

66. See *supra* text accompanying note 56 (discussing the test of *Tomlin*).

67. 293 S.C. 54, 358 S.E.2d 701 (1987).