

IN THE COURT OF APPEALS OF MARYLAND

NO. 16

SEPTEMBER TERM, 1994

MICHAEL WHITTLESEY

V.

STATE OF MARYLAND

Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker
*McAuliffe, John F. (Retired &
specially assigned)

JJ.

CONCURRING AND DISSENTING OPINION
BY Bell, J.

FILED: September 28, 1995

The majority vacates the death penalty sentence imposed upon Michael Whittlesey, the petitioner, and orders a new sentencing hearing, holding that the trial court erred in excluding, as hearsay, certain mitigating evidence offered by the petitioner during the sentencing proceeding. It rejected each and every one of the petitioner's other challenges it considered. While I agree that the ruling was error and, thus, the petitioner is entitled to a new sentencing hearing on that account, I also find merit in several of the other challenges, among them the double jeopardy argument and the Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) contention. Because resolution of the double jeopardy issue implicates the propriety of the capital proceedings themselves and the Batson challenge implicates the integrity of the petitioner's conviction, even if the capital proceedings were appropriate, which I do not believe to be so, I would, nevertheless, reverse the petitioner's convictions.

I.

This is the second time this case has reached this Court. In the first case, Whittlesey v. State, 326 Md. 502, 606 A.2d 225 (1992) (Whittlesey I), the issue was "whether the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States prohibits the prosecution of Michael Whittlesey for the murder of James Rowan Griffin, known as Jamie." Id. at 504, 606 A.2d at 226 (footnote omitted). This Court held that it did not. To reach that conclusion, the majority formulated a "reasonable

prosecutor" test, under which

a subsequent indictment on a second offense, otherwise barred by the Double Jeopardy Clause of the Fifth Amendment, is not barred if, at the time of prosecution for the earlier offense a reasonable prosecutor, having full knowledge of the facts which were known and in the exercise of due diligence should have been known to the police and prosecutor at that time, would not be satisfied that he or she would be able to establish the suspect's guilt beyond a reasonable doubt.

Id. at 525, 606 A.2d at 236. The majority did not separately consider the propriety of the State's trying the petitioner on a premeditated murder theory. Instead, it adopted the assumption that the prosecution of premeditated murder, "although not barred under Blockburger [v. United States], 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932)], is barred under [Grady v. Corbin] [495 U.S. 508, 510, 110 S.Ct. 2084, 2087, 109 L.Ed.2d 548, 557 (1990)]. Whittlesey I, 326 Md. at 526, 606 A.2d at 237.

In a concurring and dissenting opinion, Judge Eldridge specifically opined that a prosecution premised on the murder being premeditated was not barred by double jeopardy. He reasoned that robbery and premeditated murder are not the same offense under the Blockburger test: "It is equally well-established, however, that a felony such as robbery, rape, or kidnapping, and a wilful, deliberate and premeditated murder (or any species of murder other than felony murder), both arising out of the same transaction, are not deemed the same offense for double jeopardy purposes." Whittlesey I, 326 Md. at 537, 606 A.2d at 242 (Eldridge, J.,

concurring and dissenting), citing, among others, State v. Frye, 283 Md. 709, 716, 393 A.2d 1372, 1376 (1978), Newton v. State, 280 Md. 260, 269, 373 A.2d 262, 267 (1977). Judge Eldridge did not share the majority's view with respect to felony murder, however. That offense, he believed, was the same offense as the underlying felony. Whittlesey I, 326 Md. at 537, 606 A.2d at 242. Therefore, he concluded, in the case before the Court, the prior conviction for robbery precluded a subsequent prosecution for felony murder. Id. at 542, 606 A.2d at 244-45. He also rejected the majority's reasonable prosecutor test as an appropriate interpretation or extension of the double jeopardy exception recognized in Diaz v. United States, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912).¹ Whittlesey I, 326 Md. at 548, 606 A.2d at 248. He pointed out that "[t]he Diaz rationale is that the subsequent prosecution for the greater offense is not barred when a necessary element of the greater offense had not occurred at the time of the earlier prosecution." Id. at 543, 606 A.2d at 245 (Eldridge, J., concurring and dissenting).

In a dissenting opinion, joined by Judge Chasanow, I, like Judge Eldridge, took the position that felony murder was the same offense as the underlying felony. Thus, where the underlying felony has been charged and tried, under the Blockburger test, a

¹The majority conceded that the Supreme Court has not "announce[d] how the applicability of the Diaz exception is to be tested." Whittlesey v. State, 326 Md. 502, 525, 606 A.2d 225, 236 (1992).

later prosecution for the greater offense is barred. Id. at 551, 606 A.2d at 249 (Bell, J., dissenting). I, too, decried as unwarranted, the majority's expansion of the Diaz exception to cover the situation in which a "reasonable prosecutor" elects to delay prosecution for a greater offense because the "reasonable prosecutor" does not believe that he or she will be able to obtain a conviction. Id. at 564-66, 606 A.2d at 256-57. The Diaz exception, I believed, applied in the narrow situation in which the greater offense could not have been prosecuted prior to the prosecution of the lesser offense because the facts either did not exist or had not been completed or discovered at that time, despite the exercise of due diligence. Id. at 564, 606 A.2d at 256. It was clear from my dissenting opinion that I believed that the Diaz exception was not intended to permit the prosecutor to enhance the strength of his or her case; rather, it was intended to ensure that the State had at least one opportunity to prosecute the case. I continue to adhere to those views.

In my dissenting opinion, I neither indulged the majority's assumption concerning the Grady exception to the Blockburger test,²

²As I noted in my Whittlesey I dissent, "[t]he majority has `assumed for purposes of decision in this case' that the test announced in Grady, 495 U.S. at 510, 110 S.Ct. at 2087, 109 L.Ed.2d at 557, namely [that]:

`the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been

nor adopted Judge Eldridge's conclusion that premeditated murder did not fall within the Blockburger test. The majority, however, has now concluded, as Judge Eldridge previously had done, see ___ Md. ___ & n. ___, ___ A.2d ___ & n. ___ (1995) [Slip op. at 47-48 & n.14] that a premeditated murder prosecution is not barred by the prior robbery conviction. Thus, the time has come for me to assess whether the majority's assumption based on the Grady exception to the Blockburger test is sound or whether Judge Eldridge's analysis is correct. I conclude that the Whittlesey I majority's assumption was well-founded, although not for the reason it gave.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person "shall ... be subject for the same offence to be twice put in jeopardy of life or limb." Federal double jeopardy principles, therefore, are binding in Maryland when determining whether a defendant has been twice placed in jeopardy, Benton v. Maryland, 395 U.S. 784, 794, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707, 716 (1969); State v. Griffiths, 338 Md. 485, 489, 659 A.2d 876, 878 (1995); Newton v. State, 280 Md. 260, 263, 373 A.2d 262, 264 (1977); Thomas v. State, 277 Md. 257, 267 n.5, 353 A.2d 240, 246 n.5 (1976); Jourdan v. State, 275 Md. 495, 506, 341 A.2d 388, 395 (1975); and see Middleton v. State, 318 Md. 749, 756-57, 569 A.2d 1276, 1279 (1990), which makes clear that the

prosecuted,' (footnote omitted)

bars any murder prosecution. I make no such assumption." 326 Md. at 555-56 n.9, 606 A.2d at 251 n.9.

Maryland common law of double jeopardy provides similar protection. In addition, the Double Jeopardy Clause proscribes both successive prosecution and multiple punishment for the same offense. Department of Revenue of Montana v. Kurth Ranch, ___ U.S. ___, 114 S.Ct. 1937, 1941 n.1, 128 L.Ed.2d 767, 773 n.1 (1994); United States v. Halper, 490 U.S. 435, 440, 109 S.Ct. 1892, 1897, 104 L.Ed.2d 487, 496 (1989); United States v. Wilson, 420 U.S. 332, 342-43, 95 S.Ct. 1013, 1021, 43 L.Ed.2d 232, 241 (1975); North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656, 664-65 (1969). It is the former prohibition, rather than the latter, which is at issue in this case. The petitioner was charged in 1982 and convicted in 1984 of the robbery of James Rowan Griffin, the victim. When the victim's body was discovered in 1990,³ the petitioner was indicted for premeditated murder. To avoid trial on that charge, the petitioner filed a motion to dismiss the indictment on the grounds of double jeopardy. Thus, the petitioner's then immediate concern was the avoidance of a successive prosecution.

When confronting the issue of whether the subsequent trial is a successive trial for the same offense, the question to be

³Notwithstanding that the victim's body was not recovered until 1990, there is no doubt that everyone believed the victim to be dead. Indeed, as I pointed out in my dissenting opinion, the robbery case was tried as if the victim were dead. Whittlesey I, 326 Md. at 557-60, 606 A.2d at 252-53. Even the trial judge expressed his belief that the victim was dead in passing sentence for the robbery case. Id. at 551, 606 A.2d at 249.

resolved is whether the offense for which the defendant previously has been tried and convicted and the offense for which it is proposed that he or she subsequently be tried would merge upon conviction, i.e., whether they are deemed the same offense under double jeopardy principles. Newton, 280 Md. at 265, 373 A.2d at 265. See also Bynum v. State, 277 Md. 703, 707-08, 357 A.2d 339, 341-42, cert. denied, 429 U.S. 899, 97 S.Ct. 264, 50 L.Ed.2d 183 (1976).

It is well settled in this State, indeed, it was even conceded by the majority in Whittlesey I, 326 Md. at 526, 606 A.2d at 236-37, that felony murder and the underlying felony must be deemed the same offense for double jeopardy purposes. See Newton, 280 Md. at 268, 373 A.2d at 266. The rationale underlying that conclusion was discussed in Newton, supra. Addressing the required evidence test, the Court explained:

[U]nder both federal double jeopardy principles and Maryland merger law, the test for determining the identity of offenses is the required evidence test. If each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one offense requires proof of a fact which the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited.

Id. at 268, 373 A.2d at 266. See Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L.Ed. 306, 309 (1932).

Applying that test, the Court stated:

Therefore, to secure a conviction for first degree murder under the felony murder

doctrine, the State is required to prove the underlying felony and the death occurring in the perpetration of the felony. The felony is an essential ingredient of the murder conviction. The only additional fact necessary to secure the first degree murder conviction, which is not necessary to secure a conviction for the underlying felony, is proof of the death. The evidence required to secure a first degree murder conviction is, absent the proof of death, the same evidence required to establish the underlying felony. Therefore, as only one offense requires proof of a fact which the other does not, under the required evidence test the underlying felony and the murder merge.

Newton, 280 Md. at 269, 373 A.2d at 267.

Having been previously convicted of robbery, one of the enumerated felonies in Maryland Code (1957, 1992 Repl. Vol.), Art. 27, § 410,⁴ the petitioner subsequently could not have been charged with first degree murder under a felony murder theory. Whether he

⁴Maryland Code (1957, 1992 Repl. Vol.), Art. 27 § 410 provides:

All murder which shall be committed in the perpetration of, or attempt to perpetrate, any rape in any degree, sexual offense in the first or second degree, sodomy, mayhem, robbery, carjacking or armed carjacking, burglary in the first, second, or third degree, kidnapping as defined in §§ 337 and 338 of this article, or in the escape or attempt to escape from the Maryland Penitentiary, the house of correction, the Baltimore City Detention Center, or from any jail or penal institution in any of the counties of this State, shall be murder in the first degree.

is nevertheless chargeable with first degree murder under a premeditated murder theory is a matter which must be resolved by reference to the nature of the crime of murder.

Murder is a single offense. Ross v. State, 308 Md. 337, 346, 519 A.2d 735, 739 (1987). See Art. 27, §§ 407-411 (1957, 1992 Repl. Vol.); Hook v. State, 315 Md. 25, 27-28, 553 A.2d 233, 234-35 (1989); Huffington v. State, 302 Md. 184, 188, 486 A.2d 200, 202 (1985), cert. denied, 478 U.S. 1023, 106 S.Ct. 3315, 92 L.Ed.2d 745 (1986); Gladden v. State, 273 Md. 383, 389-90, 330 A.2d 176, 180 (1974); Stansbury v. State, 218 Md. 255, 260, 146 A.2d 17, 20 (1958). In Hook, we pointed out:

Homicide is the killing of a human being by a human being. It is culpable when it is felonious. It is felonious when it is not legally justifiable or excusable. Felonious homicide is either murder or manslaughter. Murder is in the first degree or in the second degree. In Maryland, all murder perpetrated by means of poison, or lying in wait, or by any kind of wilful, deliberate and premeditated killing or committed in the perpetration of, or attempt to perpetrate certain felonies (of which robbery is one) is murder in the first degree. All other kinds of murder are murder in the second degree.

315 Md. at 27-28, 553 A.2d at 234-35. Article 27, §§ 407-410 provide for and define the types of murder that comprise murder in the first degree. Section 407, for example, provides inter alia, that "[a]ll murder which shall be perpetrated ... by any kind of wilful, deliberate and premeditated killing shall be murder in the first degree." Similarly, § 410 provides that murder committed in

the perpetration of [certain enumerated felonies] is murder in the first degree. Section 411, on the other hand, provides that all murder not provided for in §§ 407-410 is murder in the second degree.

In Whittlesey I, the majority pointed out that the aforementioned statutes do not create new crimes; they only divide the common law crime of murder into degrees for the purpose of punishment, 326 Md. at 520, 606 A.2d at 234 (citing Bruce v. State, 317 Md. 642, 645, 566 A.2d 103, 104 (1989)). Conversely, murder and manslaughter, are not degrees of felonious homicide; they are distinct offenses, distinguished by the presence of malice aforethought in murder and the absence of malice aforethought in manslaughter. State v. Ward, 284 Md. 189, 195, 396 A.2d 1041, 1045 (1978).

An indictment for first degree murder need not specifically allege the theory under which the State is proceeding.⁵ Ross, 308 Md. at 344, 519 A.2d at 738. It is sufficient if the indictment charges murder in the first degree. Id. See also Art. 27 §616;⁶

⁵The Court in Ross stated: "As we have pointed out, murder in the first degree may be proved in more than one way. There is no requirement, however, that a charging document must inform the accused of the specific theory on which the State will rely." 308 Md. at 344, 519 A.2d at 738.

⁶Section 616 of Art. 27 provides:

In any indictment for murder or manslaughter, or for being an accessory thereto, it shall not be necessary to set forth the manner or means of death. It shall be sufficient to use a formula substantially to the

State v. Williamson, 282 Md. 100, 107-08, 382 A.2d 588, 592-93 (1978), appeal after remand, 284 Md. 212, 395 A.2d 496 (1979).

Moreover, such an appraisal comports with due process requirements. Ross, 308 Md. at 345, 519 A.2d at 739. Indeed, it has been held that under a murder indictment, four verdicts can be returned: guilty of murder in the first degree; guilty of murder in the second degree; guilty of manslaughter; not guilty. Brown v. State, 44 Md. App. 71, 78 & n.5, 410 A.2d 17, 22 & n.5 (1979). See also Whittlesey I, 326 Md. at 520, 606 A.2d at 234. In Ross, supra, 308 Md. at 346, 519 A.2d at 739, we stated that the State ordinarily must proceed on all available theories in a single prosecution for murder and may not bring seriatim prosecutions for the same offense by alleging separate legal theories. See Huffington, supra, 302 Md. at 189 n.4, 486 A.2d at 203 n.4 ("In Maryland the homicide of one person ordinarily gives rise to a single homicide offense, and multiple prosecutions or punishments for different homicide offenses, based on the slaying of one person, are generally precluded.").

I repeat, there is only one crime of murder, which, of course,

follow-

ing effect. "That A.B., on the day of nineteen hundred and, at the county aforesaid, feloniously (wilfully and of deliberately premeditated

malice

aforethought) did kill (and murder) C.D. against the peace, government and dignity of the State.

encompasses first degree murder. To be sure, that offense may be proven in several different ways,⁷ but they are simply theories of proof; each theory is not itself a separate offense. Consequently, whatever theory the State might have proceeded on, if successful, the defendant will have been convicted of first degree murder. That defendant may not thereafter be tried for, and convicted of, first degree murder again, even under a different theory. See Ross, 308 Md. at 346, 519 A.2d at 739.

Because felony murder is the same offense as the underlying felony, and because, in this case, the underlying felony is robbery, it is clear that when he was tried for robbery, the petitioner was placed in jeopardy not only for the robbery, but for

⁷An analogous situation is also found in Maryland's Consolidated Theft Offense Statute, Article 27 §§ 340-349 (1957, Repl. Vol. 1992), where there is a "single statutory crime encompassing various common law theft-type offenses in order to eliminate the confusing and fine-line common law distinctions between particular forms of larceny." Jones v. State, 303 Md. 323, 333, 493 A.2d 1062, 1067 (1985) (emphasis added); see also State v. Burroughs, 333 Md. 614, 619, 636 A.2d 1009, 1012 (1994).

Ironically, this Court, in Jones, recognized the very principle in the theft context it has failed to grasp in the murder context. In that case we said:

As § 342 comprises the single crime of theft, Jones is protected from further prosecution for stealing the property particularized in the indictment. Consequently, the State cannot retry him for another violation of § 342 with regard to the same property. Should the State attempt a second prosecution, Jones could effectively bar retrial by simply producing the indictment and verdict in his first trial.

303 Md. at 341, 493 A.2d at 1071.

felony murder as well. He was, in other words, placed in jeopardy for first degree murder on a felony murder theory. The State is, therefore, prohibited by the Double Jeopardy Clause of the Fifth Amendment from once again placing him in jeopardy, even using another first degree murder theory.

When there is but one prosecution and trial, the State may proceed on both the felony murder theory and the premeditated murder theory. Frye, 283 Md. at 717, 393 A.2d at 1376. If the jury finds the murder to have been premeditated as well as committed during the course of a felony, separate punishment may be imposed for both murder in the first degree, under the premeditated murder theory, and the underlying felony. See id. at 716, 393 A.2d at 1376; Newton, 280 Md. at 269, 373 A.2d at 267. This principle governs because the interest to be vindicated is successive punishment, not successive prosecution. So long as the theory under which the prosecution proceeds and on which it is successful provides a basis for distinguishing the felony and the murder, separate punishments are permissible. It is only when the underlying felony necessarily is the basis for the murder conviction that successive punishments are unwarranted. Id. at 269, 373 A.2d at 267.

A different consideration obtains, however, when the issue is successive prosecutions. Simply put, if the act or acts the State seeks to prosecute the defendant for in a successive trial fall within the ambit of that which has been excluded based on the

outcome of a prior trial - there can be no subsequent trial.

Indeed, the double jeopardy safeguards against successive prosecutions provide a bulwark against such prosecutorial overreaching. Consequently, the State cannot force a defendant "to defend against the same charge again and again ... in which the [State] may perfect its presentation with dress rehearsal after dress rehearsal...." United States v. Dixon, ___ U.S. ___, 113 S. Ct. 2849, 2884, 125 L.Ed.2d 556, 602 (1993) (Souter, J., and Stevens, J., concurring in the judgment and dissenting in part). Thus, as a matter of both law and of pure logic, when there has been a prior conviction for an underlying felony, there necessarily has been a prior prosecution for first degree murder. While the prosecution may desire to proceed later on a different murder theory, it is precluded from doing so.

The cases upon which Judge Eldridge relied for the proposition that a subsequent prosecution for first degree murder on the basis of premeditated murder may be brought notwithstanding the prior felony conviction are inapposite. In each of those cases there was a single prosecution and the issue to be resolved was whether successive punishment was being imposed for the same offense. There was no issue concerning successive trials for the same offense. Newton, 280 Md. at 265, 373 A.2d at 265 ("[i]n the instant case, there has been but one prosecution and trial for the felony murder and the underlying felony so that no issue concerning successive trials for the same offense is presented"); Robinson v.

State, 249 Md. 200, 238 A.2d 875, cert. denied, 393 U.S. 928, 89 S.Ct. 259, 21 L.Ed.2d 265 (1968) (single prosecution); Swafford v. State, 498 N.E.2d 1188 (Ind. 1986) (same); Commonwealth v. Harper, 499 A.2d 331, 337 (Pa. Super. Ct. 1985), appeal denied, 528 A.2d 955 (Pa. 1987) (same); State v. Adams, 418 N.W.2d 618 (S.D. 1988) (same); Simpson v. Commonwealth, 267 S.E.2d 134 (Va. 1980) (same); Williams v. Smith, 888 F.2d 28 (5th Cir. 1989) (same). Moreover, in Simpson the court pointed out the significance of the indictment, as I have done, and the fact that it need not specify the theory upon which the State is proceeding.⁸ Id. at 138-39.⁹

⁸ The Simpson court stated: "While the indictment must describe to the defendant the offense charged against him, Code § 19.2-220, provides that in executing this function the indictment may `state so much of the common law or statutory definition of the offense as is sufficient to advise what offense is charged.'" 267 S.E.2d at 138.

⁹The majority, in an effort to justify its adoption of Judge Eldridge's position in Whittlesey I that a premeditated murder prosecution is not barred by the petitioner's prior robbery conviction, points to Bowers v. State, 298 Md. 115, 468 A.2d 101 (1983), cert. denied 479 U.S. 890, 107 S.Ct. 292, 93 L.Ed.2d 265 (1986) ,as did Judge Eldridge, as proof that "the double jeopardy prohibition does not bar the prosecution of a defendant for an intentional homicide, even though the defendant was earlier prosecuted and convicted for robbing, raping, or kidnapping the same victim." ___ Md. ___ n. ___, ___ A.2d ___ n. ___ (1995)

Although United States v. Dixon, which sounded the death knell of Grady v. Corbin¹⁰ and which was decided after Whittlesey I, is a successive prosecution case, it is distinguishable from the instant case. Whereas in this case, applying the required evidence test, the defendant clearly had been previously placed in jeopardy for first degree murder, via the robbery prosecution, therefore precluding the State from seeking another murder prosecution, the critical question to be resolved in Dixon was whether the defendants,¹¹ in fact, previously had been prosecuted for the

[Slip Op. at 48-49 n.15 (quoting Whittlesey I, 326 Md. at 538, 606 A.2d at 242) (Eldridge, J., concurring and dissenting).

The majority's attempt is unavailing. Bowers is not persuasive in the successive prosecution context. It relies upon State v. Frye, 283 Md. 709, 393 A.2d 1372 (1978), which, as we have already demonstrated, deals with the cumulative punishment strand of the Double Jeopardy Clause. Clearly, therefore, Bowers is no stronger authority than the foundation on which it is built. Ultimately, however, what is more troubling is the majority's continued muddying of the distinction between successive punishment cases and successive prosecution cases in the context of double jeopardy jurisprudence. That distinction is not, nor was it meant to be, a slight one. Indeed, for the petitioner, it has caused his life to hang in the balance.

¹⁰ The Court, in Dixon, concluded that Grady had to be overruled because it proved to be unworkable, adding little to the Court's double jeopardy jurisprudence. ___ U.S. ___, 113 S.Ct. 2849, 2864, 125 L.Ed.2d 556, 577-78 (1993).

¹¹ Dixon involved two separate defendants. Both defendants, Dixon and Foster, had been found guilty of criminal contempt and were subsequently indicted for substantive crimes arising out of the same conduct involved in the contempt proceedings. 113 S.Ct. at 2853-54, 125 L.Ed.2d at 565-66. Dixon and Foster raised double jeopardy claims. The cases were consolidated by the District of Columbia Court of Appeals. Id. at 2854, 125 L.Ed.2d at 566.

offenses for which they were subsequently indicted. Specifically, the double jeopardy issue in Dixon was "whether prosecution for criminal contempt based on violation of a criminal law incorporated into a court order bars a subsequent prosecution for the criminal offense." 113 S.Ct. at 2855, 125 L.Ed.2d at 567. Indeed, Justice Scalia, writing for the Court, noted that this issue represented a recent development in American case law. Id.

Because he previously had been placed in jeopardy for first degree murder, via his robbery prosecution and conviction, and the extension of the Diaz exception was unwarranted, see Whittlesey I, 326 Md. at 555-56, 606 A.2d at 251-52 (Bell, J., dissenting), the petitioner should never have been tried for first degree murder on any theory. Accordingly, I would reverse the judgment, and dismiss the charges, with prejudice.

II.

I agree with the petitioner that the trial court erred in permitting the State to exercise a peremptory challenge to strike a black woman from the venire because of her race. See Batson, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Contrary to the State's and the majority's position, it is at best unclear whether the trial court ruled that the petitioner failed to establish, as Batson requires, a prima facie case of purposeful and racially discriminatory use of challenges by the State, although it is perfectly clear that it did not effectively do so.

A.

The Supreme Court, in Batson, departed from the standard articulated in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), and held:

[A] defendant may establish a prima facie case of purposeful discrimination in [the] selection of the petit jury [based] solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.

Batson, 476 U.S. at 96, 106 S.Ct. at 1723, 90 L.Ed.2d at 87. To establish such a case, the defendant must show that the prosecutor exercised peremptory challenges to remove from the venire members of a cognizable racial or ethnic group, whether or not the defendant is a member of that racial or ethnic group. See Gorman v. State, 499 U.S. 971, 111 S.Ct. 1613, 113 L.Ed.2d 712 (1991); Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); Mejia v. State, 328 Md. 522, 529, n.3, 616 A.2d 356, 358-359 n.3 (1992).

As this Court noted in Stanley v. State, 313 Md. 50, 59, 542 A.2d 1267, 1271 (1988), establishing a prima facie case is but the first step of the three step process prescribed by Batson for determining whether the State's use of peremptory challenges is constitutionally permissible. The other two steps involve requiring the State to offer a neutral explanation for its strikes once a prima facie case of racial discrimination has been made out, id. at 61, 542 A.2d at 1272, and the trial court's ultimate determination whether the defendant has proven purposeful

discrimination. Hernandez v. New York, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395, 402 (1991) (plurality opinion, Kennedy, J.); Mejia, 328 Md. at 533, 616 A.2d at 361; Stanley, 313 Md. at 61, 542 A.2d at 1272.

Once the defendant has established a prima facie case, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." Batson, 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88. Although the State's explanation need not meet the standard for justifying the exercise of a challenge for cause, the prosecutor is required to give a clear and reasonably specific explanation, constituting legitimate reasons for exercising the challenges, Stanley, 313 Md. at 78, 542 A.2d at 1280 (quoting Batson, 476 at 98 n.20, 106 S.Ct. at 1723 n.20, 90 L.Ed.2d at 88 n.20), and the explanation must be sufficient to establish that the exclusion does not constitute purposeful and racially discriminatory exclusion of venirepersons. McCray v. Abrams, 750 F.2d 1113, 1132 (2nd Cir. 1984); Booker v. Jabe, 775 F.2d 762, 773 (6th Cir. 1985).

Finally, the trial court is required to undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" to determine whether the defendant has satisfied his or her ultimate burden of persuasion. Batson, 476 U.S. at 93, 106 S.Ct. at 1721, 90 L.Ed.2d at 85 (quoting Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977)). In Batson the Court pointed to the

existence of a pattern of strikes against black jurors included in the particular venire and statements made by the prosecutor, in exercising his challenges, as illustrative of the types of considerations upon which a court may properly base that determination. See also Hernandez, 500 U.S. at 359, 111 S.Ct. at 1866, 114 L.Ed.2d at 402 (plurality opinion, Kennedy, J.); Mejia, 328 Md. at 533, 616 A.2d at 361 (quoting Stanley, 313 Md. at 60-61, 542 A.2d at 1272).

B.

In establishing a prima facie case,

[t]he 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. This combination of factors in the impaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

Batson, 476 U.S. at 96, 106 S.Ct. at 1723, 90 L.Ed.2d at 1723, 90 L.Ed.2d at 87-88 (quoting Avery v. Georgia, 345 U.S. 559, 562, 73 S.Ct. 891, 892, 97 L.Ed.2d 1244, 1247-1248 (1953))(citations omitted). Moreover, in Stanley, we opined,

the prima facie showing threshold is not an extremely high one - not an onerous burden to establish.... It simply requires the defendant to prove by a preponderance of the evidence that the peremptory challenges were exercised in a way that shifts the burden of

production to the State and requires it to respond to the rebuttable presumption of purposeful discrimination that arises under certain circumstances.

Id. 313 Md. at 71, 542 A.2d at 1277, citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207, 215 (1981).

We made clear in Stanley that the trial court may not merely state a conclusion that the defendant has failed to make out a prima facie case; it must make specific findings in that regard. Id. at 71, 542 A.2d at 1277. In that case, we held that the trial court had not made the necessary finding. Id. at 70, 542 A.2d at 1277. We noted, in that regard, that the trial court "did not enumerate the Batson criteria, what matters [it] had observed during jury selection, were there apparent reasons (based on those observations) for striking certain blacks on nonracial grounds, and the like?" Id. In a footnote, we observed:

We emphasize here the need for the record to contain not only specific findings by the judge, but also information to support those findings; information such as the numbers of blacks and whites on the venire, the numbers of each stricken for various reasons, the reasons underlying strikes for cause, pertinent characteristics of jurors excluded and retained, relevant information about the race of the defendant, the defendant, the victim, and potential witnesses, and so forth.

Id. n.11. The relevant circumstances that "might give rise to or support or refute" the prima facie case finding, include "a 'pattern' of strikes against ... jurors [of the cognizable group]

in the particular venire, or the prosecutor's questions and statements during the voir dire examination in the exercise of peremptory challenges...." Id. at 60, 542 A.2d at 1272. Again, we announced in Stanley that "the prima facie showing threshold is not an extremely high one - not an onerous burden to establish." Id. at 71, 542 A.2d at 1277, citing Burdine, 450 U.S. at 253, 101 S.Ct. at 1094, 67 L.Ed.2d at 215. Furthermore, although it is the defendant's burden to establish a prima facie case, "[w]hether the prerequisite prima facie showing has been made is the trial judge's call, ... which must be made in light of all of the relevant circumstances." Mejia, 328 Md. at 533, 616 A.2d at 361, citing Stanley, 313 Md. at 60, 542 A.2d at 1272 (quoting Batson, 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88).

C.

With these principles in mind we consider the colloquy which gave rise to the issue sub judice:

[APPELLANT'S COUNSEL]: Your Honor, we would be objecting to the State challenging Ms. Wright at this time. I would note that they previously exercised one of the peremptory challenges to strike Ms. Brummell, who's an African-American. Ms. Wright is an African-American. The State uses its second strike to strike her ... (inaudible) ... There are four (4) remaining African-Americans remaining in the panel today. I think the State has raised a prima facie case ... (inaudible) ... using its peremptory challenges ... (unintelligible.)

THE COURT: Wouldn't he have to be a member of the same class, white male?

[APPELLANT'S COUNSEL]: No Your Honor. The Supreme Court has decided that ... (unintelligible) ... in favor of the defendants.

THE COURT: Okay, I also noticed that all the State's strikes are female. Where does that leave me with regards to future challenges whether they be African-American or not?

[APPELLANT'S COUNSEL]: Again Your Honor, I would raise the same objection as ... (inaudible.)

THE COURT: I'm thinking a larger class though. That means that they have to come up here and explain every female challenge. If he's not a member of the that female, he's not a member of any identifiable group, they've got to explain. I'm not clear, I'm not playing with you but I'm not sure what I've got to get them to defend. Anyway, you know the rules and you can put on the record whatever you want as to any or all of the challenges that you've exercised so far.

[PROSECUTOR]: Well of course Your Honor, I would ask for a decision with regard to question of whether we have, by our strikes, placed ourselves in position with the Court, is going to require that some showing be made that we are not striking jurors for what could be race control (sic) reasons.

THE COURT: Okay, I'm not going to require you to but I think, because we never know what's going to happen from Monday to Monday in Washington, it wouldn't hurt if there is a reason that has nothing to do with race or sex, that you put it on there, but I'm not going to require you to do that and I don't think that I have to.

[PROSECUTOR]: The question is ... I think I understand your ruling but, it's as if you are allowing us to make an explanation but you're not binding, my ... our question is, have you found as a matter of fact that there

is a condition to using your strikes for reasons other than the special reasons is the crux of the initial inquiry that would need to be made?

THE COURT: Well as I say, I didn't state it but my question is, why should I conclude that they, the State is using the strikes only against black females when the statistical evidence is that they've used them against females and therefore, that is why I said, I've got to know what I'm asking the State to justify and if I'm asking them, I'm discriminating if I only ask them to justify their excuses ... their peremptory challenges to black females. If I'm going to do something like this I guess I really have to ask them for anything ... white males, which ironically is the one group he could identify with.

[APPELLANT'S COUNSEL]: Your Honor, I disagree. I think there is an addition that there is a ... (unintelligible).

THE COURT: You have to talk about an identifiable group first. You have selected African-American females. I'm saying ...

[APPELLANT'S COUNSEL]: We have not selected African-American females.

THE COURT: (Unintelligible)

[APPELLANT'S COUNSEL]: ... (Unintelligible) ... African-Americans, there is a difference.

THE COURT: Well ...

[APPELLANT'S COUNSEL]: We include the female ... (inaudible).

THE COURT: Well that's because that's what he said when he came up here. He said that I want to call the Court's attention to the fact that there ... two of the State's strikes have been black females and then he looked around the courtroom and came up with

four or something, I don't really know who he's looking at ...

[APPELLANT'S COUNSEL] We mean African-American, not African-American females.

THE COURT: Okay, well, you've cut the cloth out, I don't care how you cut it out, but if that's your criteria...

[APPELLANT'S COUNSEL]: Yeah, that is our criteria, African-Americans Your Honor, under the ... (inaudible) ... and I think you know, the reason that I pointed out other people in the courtroom, is that to preserve an issue like this, the Courts say that I'm required to give .. to make the record as to the racial composition of the panel and ah, I think I have at this point. We have a situation here Your Honor, there is a very small number of African-Americans contained in this panel and the State has used two (2) of it's four (4) peremptory challenges thus far to strike African-Americans and I think that raises a prima facie case using an impermissible pattern as to ... (inaudible).

THE COURT: Well, I don't find any racial issue that the State has to explain at all, but if you want, under Batson or something, theory of law that hasn't been decided yet.

[PROSECUTOR]: With that invitation from the Court, I will put the following comments on the record. First I would note that the State has used only four (4) challenges at this point and that two (2) were directed against African-Americans and two (2) were not. At this point, the Defense has used eleven (11) challenges or strikes. With regard to Ms. Brummell I will ... who was juror number 3, I will put on the record that during death qualification she indicated that she does not want someone's fate in her hand. When she approached the box this morning and was advised that she was acceptable by both parties, she rolled her eyes and said "Oh no," and then took her seat, clearing indicating that she doesn't want to be on this jury.

With regard to Ms. Wright, the basis for our striking her has nothing to do with her sex or her race, but rather her employment. Umm, that's all I have on her.

[APPELLANT'S COUNSEL]: Your Honor, with regard to Ms. Brummell, the State says that they only struck her because she seemed reluctant to serve, well then my question to her was why didn't they strike Ms. Ross if that was the reason, since she was up here and explained to the Court time and time again that she doesn't want to serve.

THE COURT: You beat her to it.

[APPELLANT'S COUNSEL]: No we didn't.

[PROSECUTOR]: Yes you did.

[APPELLANT'S COUNSEL]: Yes we did.

THE COURT: (Inaudible.)

[APPELLANT'S COUNSEL]: With regards to Ms. Wright Your Honor, the State has said employment and I would ask the Court to direct an inquiry as to what employment she is in that the State finds so objectionable and to as whether any other people that they did find acceptable has similar ...

THE COURT: Okay, well I entirely agree with Judge Moreland in ... (unintelligible) ... You just never end and after a while, they're not peremptory challenges but they are his judicially approved challenges. In other words, if I think the reasons are good enough that somebody uses, or tells me they did something for, then it's okay, it's not racially discriminatory or sexually discriminatory, and I, I don't find the law or the facts in this situation. If we ... let me give you a (unintelligible) situation. If the State packed this jury with nothing but females, particularly if they were white females let's say and I was in the totally opposite group, as your client is, then maybe there maybe ought to be law that would require

them to explain that but we haven't even come close to that happening and it's practically impossible since ... in fact our ... (unintelligible) ... shows, are more women than men on our jury panels because they register to vote and they live longer. I can't do anything about either of those things. Anyhow ... (inaudible) ...

[APPELLANT'S COUNSEL]:

THE COURT: Okay, as the auctioneer says, going once, going twice. You want a minute? The jury is satisfactory? Main panel and alternates to both sides?

[PROSECUTOR]: They are to the State, Your Honor.

[APPELLANT'S COUNSEL]: With the exception of the objections already noted, Your Honor.

THE COURT: That's noted.

The majority asserts that the trial court concluded that the appellant did not make out a prima facie case of race discrimination, but nevertheless permitted the State to provide race neutral reasons for its peremptory strikes. By stating that "[a]lthough it would have been preferable for the trial judge to state the reasons for his rulings expressly," the majority recognized that the trial court did not state its reasons for the ruling, as Stanley requires. The majority then presumes that the trial court knew the law and properly applied it. ___ Md. at ___, ___ A.2d at ___ [Slip op. at 13)]. See also Beales v. State, 329 Md. 263, 273, 619 A.2d 105, 110 (1993). I cannot agree.

First of all, it is far from clear that the trial court knew

the law and properly applied it. Logically, that presumption can apply only if the record does not negate it; if the record reflects that the court did not know the law or did not properly apply it, the presumption may not be indulged. Quinn v. Quinn, 83 Md. App. 460, 466-467, 575 A.2d 764, 767 (1989); Campolattaro v. Campolattaro, 66 Md. App. 68, 80-81, 502 A.2d 1068, 1074-1075 (1986). In this case, the trial court made statements indicating that it did not know the law. The trial court, in 1994, apparently was unaware that it was no longer a requirement of the Batson rule that the excluded juror be a member of the same cognizable group as the defendant, an issue resolved by the Supreme Court as early as 1992, see Gorman, 499 U.S. 971, 111 S.Ct. 1613, 113 L.Ed.2d 712 (holding that a white defendant had standing to challenge, under Batson, the strike of black venirepersons); Powers, 499 U.S. at 416, 111 S.Ct. at 1373, 113 L.Ed.2d at 429 (same), and acknowledged by this Court in 1991, see State v. Gorman, 324 Md. 124, 596 A.2d 629 (1991). See also Mejia, 328 Md. at 529 n.3, 616 A.2d at 358-359 n.3. Thus, in this case, the record clearly contains information that would suggest that the trial court did not know the law. From this information, it can be concluded that it did not properly apply the law. Moreover, the trial court's discussion of the Batson issue, particularly its focus throughout the colloquy, on gender and race, even after the petitioner made clear that race, and not gender, was the basis of his objection provides another reason for not applying the presumption.

Nor is it even clear that the trial court ruled that the petitioner had not made out a prima facie case. The circumstances of this case are akin to those in Stanley. There, after defense counsel had argued that the defendant was entitled to have the State explain the basis for its strikes and after a dispute arose as to the race of one of the jurors, the trial court asserted:

You see the problem is Ms. Lewis may well have been black. The problem is we in Prince George's County gave up keeping track of people's color 17 years ago. We don't keep a record of people's race. The computer doesn't have the racial designation on it when it selects people.

Somebody will be in trouble if this issue is appealed trying to figure out what color this list was because by law we may not keep racial designation. So the Supreme Court in its efforts in the Batson case has really put the rest of the world in trouble. They had been telling us 30 years don't make any decisions predicated upon race, creed, color, religious, national origin, and Article 46 says sex. So we stopped doing all of that. The next thing they want to know is what color is everybody. You can't have it both ways.

I will tell you at this point I am the lowly trial judge, and I'm at a loss as to what to do except to tell you, [defense counsel] I perceive no more indication of striking blacks on the part of the State than I do on your part. I notice that your very

first strike, second strike - now, your very first strike was Mr. Ronald Dendy. Then it was Mrs. Shirley Thomas. You can go on through like that.

I don't perceive it as trying to find out who is more white or black. God forbid we go back to those days.

I just see no racially motivated evidence of - evidence of racially motivated exercise of the strikes in this court. I deny your motion.

Maybe at some later date someone will tell me how to do it. They will have [a] real problem, a real problem. I am not sure about the rest of Maryland, but they have a real problem in Prince George's County because we haven't kept racial designation since 1969. I guess next we will go back to seeing the name in the newspaper, John Smith, colored.

That ruling is completed. Gentlemen.

Stanley, 313 Md. at 67-68, 542 A.2d at 1276.

This Court observed, "[i]t is impossible to tell from these remarks whether the judge was attempting to make a Batson prima facie case ruling or whether he was philosophizing in a general way about racial matters . . .," Stanley, 313 Md. at 70, 542 A.2d at 1277; it was not at all clear that the trial court had ruled that there was a lack of a prima facie case. Similarly, in the instant case, it is possible that the trial court was "philosophizing" as to whether black women should be classified primarily according to their race or their gender, or that it was attempting to make a reasoned determination regarding the petitioner's attempt to make out a Batson prima facie case. Whatever its intent, as in Stanley,

the trial court "did not enumerate the Batson criteria or articulate any specific bases for finding lack of a prima facie showing." Id.

D.

I am not at all convinced that the petitioner failed to make out a prima facie case. The threshold which must be met is not an exacting one, and the prima facie case determination must take into account all of the relevant facts and circumstances, including the fact that peremptory challenges may be used discriminatorily by those who are of a mind to discriminate. Batson, 476 U.S. at 96, 106 S.Ct. at 1723, 90 L.Ed.2d at 87-88 (quoting Avery, 345 U.S. at 562, 73 S.Ct. at 892, 97 L.Ed.2d at 1247-1248).

When challenged, the State had used four peremptory challenges, two of which were used to exclude blacks from the panel. This fact takes on greater significance when considered in light of the additional fact that only six of the fifty-five venirepersons remaining after voir dire were black. Although one may argue that it would have been better had the petitioner's objection come after the State had exercised all of its peremptory challenges, the use of two of four challenges to exclude black venirepersons, comprising less than twelve percent of the entire venire, I believe, is sufficient to establish a prima facie case. Stated differently, while it may have been a clearer case, one way or the other, had the Batson challenge come later in the process, after it was clear what had happened to the other four blacks, that

is not required. A party is not required to wait until all of the other party's peremptory strikes have been exercised before objecting. Indeed, the striking of a single black juror for racial reasons constitutes a violation of the equal protection clause, Stanley, 313 Md. at 88, 542 A.2d 1286 (quoting U.S. v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987), and "any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor." State v. Slappy, 522 So.2d 18, 20 (Fla. 1988). See Stanley, 313 Md. at 69-70, 542 A.2d at 1276. Essentially, the objecting party is only required to produce evidence sufficient to necessitate a response from the other party. Clearly, in the instant case, this requirement has been satisfied.

III.

The petitioner does not contend that the tape of the victim playing the piano was "unduly inflammatory," the limitation placed on the admission of victim impact evidence. Evans v. State, 333 Md. 660, 688, 637 A.2d 117, 131 (1994). He argues, instead that, given the victim's mother's testimony, the evidence was cumulative. The majority holds that the videotape provided the jury with relevant information not already in evidence, such as the victim's skill as a pianist and his appearance at the time of death, which could not be captured by a still photograph. ___ Md. at ___, ___ A.2d at ___ [Slip op. at 63]. I disagree.

It is now a well established principle of law that the introduction of victim impact evidence is constitutionally

permissible, Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); Evans, 333 Md. at 684-685, 637 A.2d at 129, and includes any evidence which the court deems probative and relevant to sentencing. Lodowski v. State, 302 Md. 691, 738-739, 490 A.2d 1228, 1252 (1985), vacated on other grounds, 475 U.S. 1078, 106 S.Ct. 1452, 89 L.Ed.2d 711 (1986). Nevertheless, such evidence is dangerous because of its tendency to act as a super - aggravating factor. I believe, therefore, that great care must be taken to insure that such evidence does not have that effect; it should not be characterized, or be used in such a way as to trump any mitigating circumstance proven by the appellant. It ought not, in other words, be the decisive factor in determining an accused's fate. Evans, 333 Md. at 713-714, 637 A.2d at 143 (Bell, J. dissenting).

The purpose of victim impact evidence is to show the uniqueness of the victim and the impact of the offense on family members. Id. (quoting Payne, 501 U.S. at ____, 111 S. Ct. at 2607 115 L.Ed.2d at 734).

The determination whether the admission of victim impact evidence in a capital sentencing procedure offends due process involves an analysis of whether its introduction will cause the proceedings to be fundamentally unfair ... [which], in turn, involves a consideration of the impact of that evidence on the exercise of discretion by the trier of fact.... Whether the fact finder's discretion is suitably directed and limited necessarily must depend upon the purpose for which the evidence is offered and its relevance to the issue to be decided, that is, whether it is

admitted for a legitimate purpose and it actually performs that purpose.

Evans, 333 Md. at 713, 637 A.2d at 143. The videotape of the victim playing the piano is not relevant to show the impact that Mr. Griffin's death has had on his family members; statements made by his mother, were sufficient to establish both his unique abilities and the impact of his murder on his family. The only effect of the videotape, I believe, was to show the impact of the victim's death on society at large, to show that because of his special talents and abilities, society has suffered a greater loss than it would have, had the victim not been a nationally renowned pianist.

Society suffers a loss whenever any one of its citizens is murdered, regardless of his or her accomplishments, talents or abilities. Although the death of certain citizens may be more publicized, we must not view their worth and the detriment to society resulting from their deaths, to be more or less than for any other citizen. The victim impact evidence in this case suggests that it is appropriate for society to place a higher premium on some lives than on others. Its admission is an open invitation to the jury to so view the victim in this case and to act accordingly in determining the petitioner's fate.