

A05-2515

STATE OF MINNESOTA

IN SUPREME COURT

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State of Minnesota,

Respondent,

vs.

Billy Daymond Bailey,

Appellant.

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**APPELLANT'S BRIEF**

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
PROCEDURAL HISTORY	1
LEGAL ISSUES	3
STATEMENT OF THE CASE	5
STATEMENT OF FACTS	6
ARGUMENTS	
I.    THE TRIAL COURT VIOLATED BAILEY’S EQUAL PROTECTION RIGHTS, AS WELL AS THOSE OF THE EXCLUDED JUROR, WHEN IT ACCEPTED THE STATE’S PRETEXTUAL REASONS FOR EXCLUDING A NATIVE AMERICAN JUROR AND DENIED BAILEY’S <i>BATSON</i> CHALLENGE.	14
II.   THE TRIAL COURT ERRED IN FINDING THAT THE DEFENSE OPENED THE DOOR TO TESTIMONY THAT THE BCA USES SUB-150 RFU PEAKS FOR THE PURPOSE OF EXCLUSION AND THAT THE SUB-150 RFU PEAKS IN THE QUESTION SAMPLE DID NOT EXCLUDE BAILEY.	24
III.  THE TRIAL COURT DEPRIVED BAILEY OF HIS RIGHT TO PRESENT A COMPLETE DEFENSE BY INAPPROPRIATELY LIMITING THE TESTIMONY OF BAILEY’S EXPERT WITNESS.	31
CONCLUSION	36

TABLE OF AUTHORITIES

Page

**MINNESOTA STATUTES:**

Minn. Stat. § 609.185 .....1

**MINNESOTA DECISIONS:**

Angus v. State,  
695 N.W.2d 109 (Minn. 2005)..... 15

Goeb v. Tharaldson,  
615 N.W.2d 800 (Minn. 2000).....32

State v. Buggs,  
581 N.W.2d 329 (Minn. 1998).....23

State v. Hannon,  
703 N.W.2d 498 (Minn. 2005).....31

State v. Jones,  
678 N.W.2d 1 (Minn. 2004).....4, 33

State v. Koskela,  
563 N.W.2d 625 (Minn. 1995).....31

State v. McRae,  
494 N.W.2d 252 (Minn. 1992).....3, 20, 22, 23

State v. Reese,  
692 N.W.2d 736 (Minn. 2005).....4, 31

State v. Reiners,  
664 N.W.2d 826 (Minn. 2003).....3, 14, 15, 16

State v. Taylor,  
650 N.W.2d 190 (Minn. 2002)..... 14

State v. Traylor,  
656 N.W.2d 885 (Minn. 2003).....4, 33, 34

State v. Valtierra,  
718 N.W.2d 425 (Minn. 2006).....3, 24, 27, 28

**FEDERAL DECISIONS:**

Batson v. Kentucky,  
476 U.S. 79 (1986)..... Passim

Chambers of Mississippi,  
410 U.S. 284 (1973).....31

Chapman v. California,  
 386 U.S. 18 (1967).....31  
 Miller-El v. Dretke,  
 125 S. Ct. 2317 (2005)..... Passim

**CONSTITUTIONAL PROVISIONS:**

Minnesota Constitution,  
 Article 1, § 2..... 14  
 Article I, § 6 ..... 14  
 Article I, § 7 ..... 14  
 United States Constitution,  
 Amendment VI..... 14  
 Amendment XIV ..... 14

**OTHER:**

8 Henry W. McCarr & Jack S. Nordby,  
*Minnesota Practice – Criminal Law and Procedure* § 32.54 (3d ed. 2005) 3, 27, 28

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**PROCEDURAL HISTORY**

- May 16, 1984: Approximate date of offense.
- June 5, 1984: Grand jury indicted Bailey.
- Nov. 27, 1984: State dismissed grand jury indictment.
- Dec. 5, 2000: Second grand jury indicted Bailey for first-degree murder during the course of a sexual assault, in violation of Minn. Stat. § 609.185(2) (1983).<sup>1</sup>
- Feb. 19, 2002: Jury trial commenced, the Honorable Andrew W. Danielson presiding.
- Feb. 28, 2002: Jury found Bailey guilty. Judge Danielson sentenced Bailey to a term of life imprisonment consecutive to a federal sentence he was serving on an unrelated offense.
- May 20, 2002: Bailey appealed from the judgment of conviction.

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<sup>1</sup> As noted by this Court in the first *Bailey* opinion, Minn. Stat. § 609.185 has been amended several times since 1983 and the same crime would currently be charged under Minn. Stat. § 609.185(a)(2)(2005).

March 18, 2004: Minnesota Supreme Court reversed Bailey's conviction and remanded the case for a new trial. The Court specifically instructed the trial court to conduct a hearing to determine whether the state could satisfy the second prong of the *Frye-Mack* standard for admissibility of scientific evidence.

Jan. 31,  
Feb. 1-3, 2005: Trial court conducted a second-prong *Frye-Mack* hearing.

July 22, 2005: Trial court issued order finding that the state had met the second prong of the *Frye-Mack* standard and admitting the DNA evidence.

Sept. 6-21, 2005: Jury trial held, the Honorable George F. McGunnigle presiding.

Sept. 21, 2005: Jury found Bailey guilty.

Oct. 4, 2005: Judge McGunnigle sentenced Bailey to a term of life imprisonment consecutive to the federal sentence he was already serving on an unrelated offense.

Dec. 21, 2005: Bailey appealed from the judgment of conviction.

March 27, 2006: Complete transcripts sent to Office of State Public Defender.

May 25, 2006: Bailey requested sixty day extension on the deadline to file and serve his brief.

May 31, 2006: Supreme Court granted Bailey's request for an extension.

July 12, 2006: Bailey requested second thirty day extension on the deadline to file and serve his brief.

July 17, 2006: Supreme Court granted Bailey's request for a second extension.

August 28, 2006: Bailey's brief is filed and served.

## LEGAL ISSUES

- I. Did the trial court deprive Bailey of his constitutional right to an impartial jury of his peers when it allowed the state to exercise a peremptory strike against a Native American juror who clearly expressed her ability and willingness to be fair and to reserve judgment?

*Ruling Below:*

The trial court denied Bailey's challenge to the prosecutor's peremptory strike and Juror C was excluded from the jury.

*Apposite Authority:*

*Miller-El v. Dretke*, 125 S. Ct. 2317 (2005).  
*Batson v. Kentucky*, 476 U.S. 79 (1986).  
*State v. Reiners*, 664 N.W.2d 826 (Minn. 2003).  
*State v. McRae*, 494 N.W.2d 252 (Minn. 1992).

- II. Did the trial court err in finding that the defense opened the door to testimony that the BCA uses sub-150 RFU peaks for the purposes of exclusion and that nothing about these peaks excluded Bailey?

*Ruling Below:*

The trial court ruled the defense opened the door to this testimony.

*Apposite Authority:*

*State v. Valtierra*, 718 N.W.2d 425 (Minn. 2006).  
8 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice -- Criminal Law and Procedure* § 32.54 (3d ed. 2005).

- III. Did the trial court deprive Bailey of his right to present a complete defense by significantly limiting defense expert Shields' testimony?

*Ruling Below:*

The trial court refused to let Shields testify that in his opinion the BCA should have conducted a validation study prior to testing the DNA sample.

*Apposite Authority:*

*State v. Reese*, 692 N.W.2d 736 (Minn. 2005).

*State v. Jones*, 678 N.W.2d 1 (Minn. 2004).

*State v. Traylor*, 656 N.W.2d 885 (Minn. 2003).

## STATEMENT OF THE CASE

In June of 1984, appellant, Billy Daymond Bailey, was indicted by a Hennepin County Grand Jury for first-degree murder in connection with the May 1984 death of A [REDACTED] F [REDACTED]. The state voluntarily dismissed the indictment six months later. Over sixteen years later, in December 2000, a second grand jury indicted Bailey for the same offense. Bailey was subsequently convicted after a jury trial, the Honorable Andrew W. Danielson presiding, and sentenced to a consecutive term of life imprisonment. Bailey appealed from the judgment of conviction and this Court reversed his conviction and remanded his case for a new trial. Bailey's case was retried by a jury in September 2005, the Honorable George F. McGunnigle presiding, and Bailey was again convicted. Judge McGunnigle sentenced Bailey to a consecutive term of life imprisonment. Bailey appeals from this judgment of conviction.

## STATEMENT OF FACTS

On Sunday, May 20, 1984, Richard and Virginia Golden found the body of their 69-year old mother, A ██████ F ██████, under a blanket on the living room floor of her Minneapolis home. (T. at 2181, 2370, 2395).<sup>2</sup> F ██████'s clothing had been partially removed and her bra straps appeared to have been cut. (T. at 2254, 2460). The house had been ransacked and F ██████'s checkbook was missing. (T. at 2183, 2244, 2267). Other than F ██████'s checkbook, little of value had been stolen. Lieutenant Thomas Hanson was surprised that neither jewelry nor silverware had been taken and Lieutenant Ronald Snobeck testified that he found approximately \$6000 in cash hidden in the house. (T. at 2199, 2335). Hanson, Snobeck and homicide detective Robert Nelson discovered a broken bedroom window at the back of the house, which they assumed was how the assailant entered F ██████'s house. (T. at 2185, 2234). They found F ██████'s car, with the keys in the ignition, in a parking lot a block away from her house. (T. at 2202, 2231).

The next day, Dr. Robert Ackerson performed an autopsy. (T. at 2446). Ackerson did not testify at trial; instead, his supervisor, Hennepin County Medical Examiner Garry Peterson, testified about Ackerson's work. Peterson said that Ackerson found blood on F ██████'s thigh from a vaginal cut that had occurred before death and a small cut on her buttocks that occurred after death. (T. at 2457-59). Lab tests detected sperm on samples taken from F ██████'s vaginal and thigh areas. (T. at 2509, 2514, 2550, 2646,

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<sup>2</sup> The transcripts for the hearings and trial in this case are consecutively paginated. "T" refers to the entire transcript.

2648). Peterson concluded that F ██████ had died from heart failure during a sexual assault.<sup>3</sup> (T. at 2447-48). He could not specify exactly when F ██████ had died, but believed it was approximately three days before she was found. (T. at 2461). This estimate was consistent with the investigators' conclusion that F ██████ most likely died on Wednesday, May 16, 1984. (T. at 3232).<sup>4</sup> Peterson noted that F ██████'s body had begun to decompose by the time she was discovered. (T. at 2453). Peterson further testified that the autopsy suggested F ██████ had been lying on her back when she died and was turned onto her stomach at least 12 hours after her death. (T. at 2463).

Snobeck and Nelson were assigned to investigate the case. (T. at 2229, 3228). On May 22, 1984, the detectives learned that two of F ██████'s checks had recently cleared her bank. (T. at 2271). One of the checks, dated May 17, 1984, was made out to Bill Vollmar Bailey for \$230. (T. at 2272). The check had been cashed at a liquor store near F ██████' house and across the street from Bailey's apartment. (T. at 2273). Snobeck and Nelson went to the liquor store and talked to one of the owners, Phyllis Gideo. (T. at 2273). Gideo testified at trial that she cashed a check made out to Bailey from F ██████ on May 18, 1984. (T. at 2362). Gideo stated that she was familiar with both Bailey and F ██████ but did not know either of them well. (T. at 2359-61). Gideo recalled that

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<sup>3</sup> Peterson testified that heart disease and myocarditis caused F ██████'s heart to be particularly weak. (T. at 2447, 2538).

<sup>4</sup> Nelson and Snobeck based their belief that F ██████ died on May 16, 1984 on a variety of evidence, including when F ██████'s watch stopped, the page to which her TV Guide was opened, the last paper she received and the fact that her garbage was prepared to go out for a Thursday pick-up. (T. at 2194, 2238, 2246, 2270, 3229-32).

Bailey waited while she called the bank to be sure that F ██████'s check would clear and that Bailey told her he had done some work for F ██████. (T. at 2363-64).

While the officers were at the liquor store, Gideo identified Bailey walking through a nearby parking lot. (T. at 2274). The officers approached Bailey and arrested him. (T. at 2274). Snobeck and Nelson obtained a search warrant and searched Bailey's apartment. (T. at 2276). Although the search warrant only authorized the investigators to look for papers and personal effects, they also took a jacket with a black flashlight in its pocket. (T. at 2324-28). In addition, the officers seized \$230 in cash, a receipt for a state identification card and a letter. (T. at 2278). Bailey's wife, who was present during the search, gave the investigators permission to take the jacket and the cash they found during the search. (T. at 2357). After the search, the detectives showed the flashlight to F ██████'s daughter, who claimed that it belonged to her mother. (T. at 2279, 2398).

At trial, F ██████'s children, Richard and Virginia Golden, testified that relatives took care of F ██████'s lawn and car and that F ██████ would not have hired a stranger to do chores for her. (T. at 2374-75, 2387-88). They testified that F ██████ would not have asked Bailey to paint her house because it was owned by the state and slated for demolition. (T. at 2386). In Virginia Golden's initial statement to police in 1984 she identified the flashlight as belonging to her mother but did not say anything about where the flashlight was kept in the house. (T. at 3224-25). At trial, Virginia Golden not only testified that she recognized the flashlight, but also said that the flashlight was kept in one of the kitchen drawers that had been ransacked. (T. at 2398).

The prosecutor also elicited testimony about whether F ██████ could have written the check to Bailey. Richard and Virginia Golden testified that the handwriting on photocopies of the check did not belong to their mother. (T. at 2378, 2400). Karen Runyon, a BCA document examiner, compared photocopies of the check to handwriting samples from Bailey and F ██████. (T. at 2580). Runyon found “indications” that F ██████ did not author the check. (T. at 2590). She was unable to determine whether Bailey wrote the check but could not “exclude” that possibility. (T. at 2603). Runyon acknowledged that her analysis was hampered by the limited handwriting samples she had from F ██████ and by not having the original check. (T. at 2609-14).

Evidence gathered during the investigation was sent to the Bureau of Criminal Apprehension (“BCA”) for analysis. (T. at 2298, 2635). Ron Enzenauer, a BCA forensic scientist, compared the shoes Bailey was wearing when he was arrested to a shoe print found on the windowsill and siding near the broken bedroom window at the back of F ██████’s house. (T. at 2637). He concluded that the patterns were “grossly similar,” meaning he could not eliminate Bailey’s shoes as the source of the prints. (T. at 2637, 2671). Enzenauer agreed, however, that the pattern of the shoe print was very general and many different types of shoes could have made it. (T. at 2671). Furthermore, Enzenauer could not find any individual wear marks, nicks or scratches that would suggest Bailey’s shoes left the print. (T. at 2670).

Enzenauer also conducted blood typing and PGM enzyme tests on some of the evidence. (T. at 2639). Enzenauer was unable to eliminate Bailey, a non-secretor, as the source of sperm and saliva in the vaginal and thigh samples taken from F ██████. (T. at

2647-48). He was also unable to eliminate Bailey as a source of saliva on several cigarette butts from F ██████'s house. (T. at 2649). Enzenauer clarified that his opinion was not that Bailey was the source of the sperm or saliva found on F ██████'s samples, only that Bailey, along with many other people, could not be eliminated. (T. at 2657). Enzenauer examined twelve cigarette butts and found multiple cigarettes that had been smoked by a non-secretor. (T. at 2654). Enzenauer could not identify which cigarettes, if any, had been smoked by F ██████ or Bailey. (T. at 2664-65). Enzenauer testified that F ██████ may also have been a non-secretor. (T. at 2659). One cigarette butt found in the house could not have been smoked by either Bailey or F ██████. (T. at 2662).

In June of 1984, a Hennepin County Grand Jury indicted Bailey for first-degree murder. The following November, the state decided not to pursue the prosecution and voluntarily dismissed the indictment. In 2000, the case was reopened and assigned to homicide investigator Barbara Moe. (T. at 2567). Moe contacted the medical examiner's office and learned that a vaginal smear slide purportedly obtained during F ██████'s autopsy was in storage at the Hennepin County Medical Center (HCMC). (T. at 2554, 2567). Moe obtained the slide and submitted it to the BCA for DNA testing. (T. at 2570, 2807-08).<sup>5</sup>

Catherine Knutson, a forensic scientist at the BCA, testified that a slide was a very unusual substrate for DNA and that the BCA's only standard operating procedures for removing a cover slip from a slide were to freeze the slide or wash it with xylene. (T. at

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<sup>5</sup> An oral smear slide was also retrieved from the storage room at HCMC, but only the vaginal smear slide had a sufficient amount of DNA for testing. (T. at 2707).

2756, 2837). Knutson chose not to follow either of these procedures. (T. at 2756). After discussing the situation with her supervisor, she decided to heat the slide with a Bunsen Burner until the mounting adhesive bubbled and softened. (T. at 2747, 2755). Although Knutson knew her testing would consume the entire sample and that heat degrades DNA, she chose not to conduct a validation study on the use of a Bunsen Burner to remove a cover slip before she began her testing. (T. at 2745, 2759, 2796).

Knutson then extracted DNA from the slide and performed PCR-STR DNA testing using the Profiler Plus kit. (T. at 2714). Knutson testified that she would normally also use a kit called the Cofiler to test a DNA sample, but she could not in this case because the DNA sample was too small. (T. at 2745). Had Knutson been able to run both of the standard kits, she may have obtained results at thirteen different loci. (T. at 2744). As it was, Knutson obtained interpretable results at five of the nine loci tested, and she determined that this partial profile was consistent with Bailey's DNA profile. (T. at 2709). Knutson acknowledged that errors and contamination had occurred at the BCA in the past, despite the many precautions taken by the staff. (T. at 2820-25).

Knutson next used the Product Rule to calculate the frequency with which she would expect to see Bailey's profile in the general population by searching databases of four different ethnic groups. (T. at 2709). Knutson explained that the BCA's protocol is to report the most conservative result, which in this case came from the Hispanic database. (T. at 2710). According to Knutson's calculations, the chance of a randomly selected person having a DNA profile that matched all five loci for which interpretable results were obtained was one in 15 million. (T. at 2711). She testified this meant

99.9999763% of the general population could be excluded as being a possible contributor to the DNA question sample. (T. at 2712).

Knutson explained that the BCA only considers allelic peaks that exceed 150 relative fluorescent units (RFUs) to be valid for reporting purposes. (T. at 2707). Despite Knutson's assertion during direct examination that the BCA does not report results for sub-150 RFU peaks, she later testified on redirect examination that sub-150 RFU peaks are used for exclusionary purposes. (T. at 2707, 2922). Knutson went on to testify that the sub-150 RFU peaks in Bailey's case provided no basis for exclusion. (T. at 2924).

Due to scheduling conflicts, the defense presented its two expert witnesses before the state rested. (T. at 2942). The defense first called William Shields, a professor of behavioral ecology and population genetics at the State University of New York. (T. at 2942-43). Shields explained the purpose of validation studies to the jury, but the court refused to allow him to offer an opinion about whether Knutson should have performed a validation study prior to conducting the DNA testing in this case. (T. at 2952-54, 3172). Shields disagreed with Knutson's decision to place the slide over a Bunsen Burner because he believed the heat could have denatured the DNA or degraded it to the point that even a small amount of contamination could have overwhelmed it. (T. at 2960, 3021). Shields emphasized that had the DNA not been degraded, Bailey might have been excluded at one of the four loci for which reportable results were not obtained. (T. at 3015). Shields also testified, however, that the loci containing sub-150 RFU peaks did not provide a basis to exclude Bailey. (T. at 3008-13).

Next, the defense called Dr. Lawrence Mueller, a professor of ecology and evolutionary biology at the University of California-Irvine. (T. at 3032). He testified that, in his professional opinion, using the Product Rule to calculate random match probability statistics was inappropriate and potentially misleading. (T. at 3043). Mueller recalculated the probability of a random match using the Counting Method. Mueller found no DNA profiles that matched at all five loci after checking more than 16,000 DNA profiles. (T. at 3047). According to Mueller, this made it about “95 percent certain that the true frequency [of a random match] is one in about fifty-five hundred or less.” (T. at 3048).

Immediately before closing arguments, the state sought to present *Spreigl* evidence that in 1985 Bailey had, on three separate occasions, entered the homes of older women who lived near him and robbed or attempted to rob them. (T. at 3213). Despite the strength of the state’s case, the court ruled this evidence was admissible to show a pattern and identity. (T. at 3220-21). The jury found Bailey guilty on the sole count of the indictment. (T. at 3371).

## ARGUMENT

I. THE TRIAL COURT VIOLATED BAILEY'S EQUAL PROTECTION RIGHTS, AS WELL AS THOSE OF THE EXCLUDED JUROR, WHEN IT ACCEPTED THE STATE'S PRETEXTUAL REASONS FOR EXCLUDING A NATIVE AMERICAN JUROR AND DENIED BAILEY'S *BATSON* CHALLENGE.

A. Standard of Review

Whether a peremptory challenge was the product of racial discrimination is a factual determination for the trial court and, as such, is entitled to deference on review. *State v. Reiners*, 664 N.W.2d 826, 830 (Minn. 2003). Therefore, a reviewing court will not reverse a district court's ruling on a *Batson* challenge unless it was clearly erroneous. *Id.* at 830-31 (citing *State v. Taylor*, 650 N.W.2d 190, 200-01 (Minn. 2002)). The United States Supreme Court recently observed that this standard is "demanding, but not insatiable; ... deference does not by definition preclude relief." *Miller-El v. Dretke*, 125 S. Ct. 2317, 2325 (2005).

B. Racial Discrimination in Jury Selection is Constitutionally Prohibited.

Both the United States and Minnesota constitutions provide all criminal defendants with the right to a fair trial by an impartial jury of their peers. U.S. Const. amend. VI; Minn. Const. art. I, secs. 2, 6 and 7. Additionally, the Equal Protection Clauses of the United States and Minnesota constitutions bar any party from exercising a peremptory strike on the basis of a prospective juror's race. U.S. Const. amend. XIV; Minn. Const. art. I, sec. 2; *see also Batson v. Kentucky*, 476 U.S. 79, 86 (1986); *Taylor*, 650 N.W.2d at 201 n. 7 (noting that the state equal protection test is the same as the federal test).

Racial discrimination in the jury selection process constitutes a denial of equal protection for two reasons. First, it deprives the defendant of his right to be tried by a jury whose members are selected based on “nondiscriminatory criteria” and may result in a defendant being put on trial before a jury from which members of his own race have been “purposefully excluded.” *Reiners*, 664 N.W.2d at 831 (quoting *Batson*, 476 U.S. at 85-86). Second, it deprives the prospective juror of his or her right to participate in jury service. *Angus v State*, 695 N.W.2d 109, 115 (Minn. 2005). Furthermore, the effects of a discriminatory jury selection process extend out beyond the defendant and the potential juror to the entire community because such discrimination “invites cynicism respecting the jury’s neutrality,” and “undermines public confidence in adjudication.” *Miller-El*, 125 S. Ct. at 2323-24 (internal citations omitted).

When one party believes that the opposing party has struck a juror for racial reasons, the court must engage in a three-part test to determine whether the strike was appropriate:

[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

*Reiners*, 664 N.W.2d at 831.

The United States Supreme Court recently reaffirmed *Batson*'s finding that the requirement of a race-neutral explanation is not necessarily satisfied just because a

prosecutor comes up with an apparently neutral reason for striking a minority juror.<sup>6</sup> *Miller-El*, 125 S. Ct. at 2324-25. The Court observed, “[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*.” *Id.* Instead, the Court found that the prosecutor “must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challeng[e].” *Id.* (quoting *Batson*, 476 U.S. at 98, n. 20 (emphasis added)). Moreover, a defendant is not limited in the evidence he may present in support of a *Batson* challenge; he may rely on “all relevant circumstances” to raise an inference of purposeful discrimination. *Id.* (quoting *Batson*, 476 U.S. at 96-97).

In this case, Bailey made a *Batson* challenge after the prosecutor struck the first minority panelist interviewed. (T. at 1085). Both on her jury questionnaire and during her voir dire testimony Juror C identified herself as a minority. (*Id.*) Although the prosecutor argued that Bailey had not satisfied the first part of the *Batson* test, the trial court ruled that Bailey had established a prima facie case of discrimination and asked the prosecutor to provide a race-neutral explanation for his use of a peremptory. (T. at 1094). In response, the prosecutor indicated he had two reasons for striking Juror C. (T. at 1095). First, the prosecutor characterized Juror C’s testimony regarding her brother-in-law’s prior criminal record as inconsistent. (T. at 1095). Second, the prosecutor stated that he believed that one of Juror C’s answers exhibited a kinship with Bailey. (T. at

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<sup>6</sup> To the extent that *Reiners* suggests that any, even implausible, race neutral reason will be acceptable, it should be overruled.

1096). Because both of these reasons are pretextual, Bailey's equal protection rights were violated and he is entitled to a new trial.

C. The Prosecutor's Reasons for Striking Juror C Were Pretextual.

During voir dire, the trial court asked Juror C about her disclosure that her brother-in-law had spent time in jail for domestic abuse. (T. at 1056). Juror C explained that this incident occurred before her sister became involved with her brother-in-law and Juror C had no personal knowledge about what happened. (T. at 1057). Juror C stated that she had not talked about the incident with her sister, but had talked about it with her own husband and her other sister. (T. at 1058). Juror C said that those conversations involved "just wondering if he was found guilty. But, you know, knowing him now, if he did it or not." (T. at 1058). Juror C told the court that her brother-in-law had been found guilty and that there was nothing about this incident that might affect her ability to be a juror in Bailey's case. (T. at 1058).

During its questioning, the defense had the following exchange with Juror C:

Juror C: I guess I grew up as a minority and there are many people who would judge me right away when they first saw me. And it used to make me, and it still makes me, mad. So I try not to judge things on the first thing I hear about it or the first time I see something. I kind of wait and sit back and watch.

Defense: And you raised a really good point there. When I read through the questionnaire some people made comments about Mr. Bailey's appearance. What do you think about those types of comments based on someone's appearance? I mean, I'm not telling you what they said, but just the fact that someone would comment without knowing Mr. Bailey?

Juror C: Makes me mad.

Defense: Why?

Juror C: Like I've said I've went through it. People would see me and/or see me and my twin sister and, you know, either yell things or put us down without even knowing us. Just going by the color of our skin or that the fact that they knew that we were minorities. I would have rather had them wait and know us or learn something about us before they put us down.

(T. at 1064-65).

The prosecutor revisited both these topics immediately prior to striking Juror C.

(T. at 1082). Juror C explained that she did not know many details about her brother-in-law's offense other than that he went to the victim's place of work and beat her up. (T. at 1082). The prosecutor followed up with these questions:

Prosecutor: And you've wondered whether or not that was a fair verdict since then?

Juror C: I don't know whether I wonder it's [sic] a fair verdict. Sometimes I wonder if he'd do it again, or if he would never do it.

Prosecutor: That's not – correct me if I'm wrong, but I thought you had indicated that you had conversations with your husband, not with your sister, but with your other, I believe sisters is what you said. And your husband. And you wondered whether or not he in fact did that crime?

Juror C: I think I don't know to what extent he did it. But I do believe he did it. But I don't know to what extent, because I don't know all the things. I don't know when someone says they beat her up. I've heard that there was an altercation and she hit him and he hit her. Or if he beat her up so she was hospitalized. I don't know those examples or exactly what happened.

Prosecutor: Okay. Now in response to a couple of counsel's questions, she had indicated that there were some responses in the questionnaire about the defendant's appearance. And the implication was that these responses in the questionnaire were negative with respect to the defendant's appearance. Is that the way you took the question to be?

Juror C: That is how I took it, yes.

Prosecutor: Okay. And you said that when asked for your reaction you said it makes you mad.

Juror C: Yes.

Prosecutor: All right. Thank you ma'am, that's all I have. We'll exercise a preemptory [sic].

(T. at 1083-84).

The defense promptly objected to this preemptory strike and argued that the context of the questions the prosecutor asked right before striking Juror C demonstrated a prima facie case of racial discrimination. (T. at 1090). The defense noted that the last questions asked by the prosecutor directly referenced Juror C's feelings about being a minority. (T. at 1090). The trial court agreed that Juror C's minority status coupled with the nature of the prosecutor's questions before the strike established a prima facie case of discrimination and asked the prosecutor to provide a race-neutral explanation. (T. at 1095). The prosecutor claimed that Juror C had been inconsistent in her testimony about the incident involving her brother-in-law and exhibited a kinship with Bailey. (T. at 1095-96). Although the defense argued strongly that both these reasons were pretextual, the trial court accepted them as race-neutral and denied the defense's *Batson* challenge. (T. at 1101-02).

The trial court erred in finding either of the prosecutor's reasons sufficiently race-neutral to justify dismissing the first minority jury candidate interviewed. First, the trial court's conclusion that Juror C was inconsistent in her description of the incident involving her brother-in-law is clearly erroneous. (T. at 1101). A review of Juror C's testimony reveals not that she was inconsistent, but that she was attempting to honestly answer the questions put to her. She expanded upon and clarified her earlier, shorter

responses to the trial court's questions, but her testimony was not fundamentally different.<sup>7</sup>

Although the prosecutor professed to be concerned that Juror C's opinion of the criminal justice system had been negatively impacted by the incident with her brother-in-law, he did not ask her a single question on this topic. (T. at 1096). What is more, Juror C specifically told the trial court that nothing about this incident would in any way affect her ability to serve on Bailey's jury. (T. at 1058). The prosecutor's description of Juror C as inconsistent mischaracterized her testimony. *See State v. McRae*, 494 N.W.2d 252, 257 (Minn. 1992) (new trial required where prosecutor's reasons for striking African-American juror involved mischaracterization of potential juror's testimony). Therefore, although inconsistency may be a facially neutral reason to dismiss a juror, a review of "all relevant circumstances" demonstrates that Juror C's alleged inconsistency was merely a pretext to dismiss a minority juror. *Miller-El*, 125 S. Ct. at 2325 (quoting *Batson*, 476 U.S. at 96-97).

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<sup>7</sup> The trial court asked some compound questions of Juror C that made it necessary for her to later clarify her responses. For example, the trial court asked:

Court:            You mentioned that the case that you sat on a jury for you thought involved a domestic of some kind. Domestic case of some kind. And you also in answer to question 43 said that your brother-in-law spent time in jail for domestic abuse. You weren't sure of the time but it was over one to two years – say over one to two years ago. Is that what you're saying?

Juror C:        Yes.

(T. at 1056-57). Later, during the prosecutor's questions, Juror C explained that her brother-in-law was in jail for at least one to two years, not that the incident happened one to two years ago.

The prosecutor's second reason for excluding Juror C is even more troubling because it so clearly related to her status as, and feelings about, being a minority. Juror C expressed that, as a minority, she had experienced being judged on the basis of her appearance and she believed that making judgments on such a basis was wrong and made her angry. (T. at 1065). Juror C responded to the defense's question in the same way a large number of fair-minded people of any race might respond. *See McRae*, 494 N.W.2d at 257. Indeed, Juror C responded in the way that all jurors should respond; it is wrong to judge a person, whether criminal defendant or otherwise, on the basis of his or her appearance.

In *McRae*, the state exercised a peremptory to strike a black juror who expressed some reservations about the fairness of the criminal justice system. *Id.* This Court held that these reservations could not constitute a race-neutral reason to strike her from the jury because to hold otherwise would "allow a prosecutor to strike any fair-minded, reasonable black person from the jury panel who expressed any doubt that 'the system' is perfect." *Id.* By allowing the state to strike Juror C, the trial court found it acceptable to strike any minority juror who had a problem with someone being judged solely on the basis of his appearance. This is an absurd result given that jurors are explicitly instructed not to judge a defendant on anything other than the evidence presented at trial.

In addition, the trial court's finding that "it is a legitimate race neutral reason to challenge a juror peremptorily if counsel believes...that the questioning concerning attitudes -- discriminatory attitudes either because of race or appearance could have established a kinship" flies in the face of established constitutional law. (T. at 1101-02).

As an initial matter, it is not at all clear that Juror C's frustration that someone would judge Bailey based on his appearance in any way evidenced a discriminatory attitude or a kinship between her and Bailey. Juror C and Bailey are not of the same race and there is no other evidence on the record that they have anything at all in common. Even if they were of the same race, however, both the United States Supreme Court and this Court have expressly forbidden striking a juror based on a prosecutor's "assumption – or his intuitive judgment – that [the juror] would be partial to the defendant because of their shared race." *McRae*, 494 N.W.2d at 257 (quoting *Batson*, 476 U.S. at 97)). Absolutely nothing on the record suggests that Juror C would have been partial to Bailey simply because she disapproved of people being judged on the basis of their appearance.

Finally, as the defense emphasized, there was nothing about Juror C that differed significantly from the other two jurors who had already been selected to serve on the jury. (T. at 1090). Like the first juror chosen, Juror C had served on a previous criminal jury, an experience she described very positively. (T. at 821-22, 1055-56). Additionally, the first juror chosen had expressed similar disapproval for judging a person on the basis of their appearance:

Oh, because I think you have to get to know people. You can't – first impressions aren't always right, and I think once you get beneath the surface of a lot of people you find some with a lot of good things and some with a lot of bad. And you have to learn to do that to find out what that is.

(T. at 834). Other than the fact that Juror C spoke from personal experience about the importance of not judging based on appearances, there is little difference between what the first juror said and what Juror C said. The *Miller-El* Court noted that "if a

prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller-El*, 125 S. Ct. at 2325.

The record shows that Juror C was a "fair-minded reasonable person who was ready and willing to serve fairly, impartially and with an open mind." *McRae*, 494 N.W.2d at 257-58. Indeed, she had been found to be such in a previous criminal case.<sup>8</sup> The defense met its burden to show that the prosecutor's race-neutral reasons for striking Juror C were pretextual and the trial court erred in denying the defense's *Batson* challenge. Because the prosecutor had a discriminatory intent when he struck Juror C from service, Bailey is automatically entitled to a new trial; harmless error analysis does not apply to cases that involve racial discrimination in jury selection. *State v. Buggs*, 581 N.W.2d 329, 339 (Minn. 1998)(quoting *McRae*, 494 N.W.2d at 260).

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<sup>8</sup> Presumably Juror C would have been equally against prejudging someone on the basis of their appearance when she served on this previous jury and yet she was not disqualified for having a "kinship" with the defendant.

II. THE TRIAL COURT ERRED IN FINDING THAT THE DEFENSE OPENED THE DOOR TO TESTIMONY THAT THE BCA USES SUB-150 RFU PEAKS FOR THE PURPOSE OF EXCLUSION AND THAT THE SUB-150 RFU PEAKS IN THE QUESTION SAMPLE DID NOT EXCLUDE BAILEY.

The trial court erred when it permitted the prosecutor to elicit testimony from Catherine Knutson and William Shields that 1) allelic peaks under 150 RFUs (relative fluorescent peaks) could be used for the purpose of exclusion and 2) that the sub-150 RFU peaks in the question sample in this case did not provide any basis to exclude Bailey. (T. at 2922-24; 3007-3015). Evidentiary rulings rest within the sound discretion of the trial court and will not be overturned absent an abuse of discretion. *State v Valtierra*, 718 N.W.2d 425, 434 (Minn. 2006).

Prior to trial, the court ruled that there was inadequate foundation to allow the state to present evidence about sub-150 RFU peaks during its case in chief. *See Frye-Mack* Order, attached at Appendix A at 24. The court noted that Knutson testified that the BCA considers only peaks above 150 RFUs to be “reportable.” *Id.* Although Knutson also said that the BCA considers sub-150 RFU peaks for the purposes of exclusion, the court worried that this evidence could prejudice or mislead the jury. *Id.* at 27. The court concluded that “it is a very short step from the assertion that ‘the evidence does not exclude the defendant’ to the inference of ‘therefore it must implicate the defendant.’” *Id.* For this reason, the court ruled the evidence inadmissible during the state’s case in chief, but stated that it might be admissible on redirect examination depending on the scope of the defense’s cross-examination. *Id.* at 28.

Following the defense's cross-examination of Knutson, the state requested permission to elicit testimony that the BCA considered allelic peaks under 150 RFUs for the purpose of exclusion and that nothing about the four loci with sub-150 RFU peaks in the question sample excluded Bailey. (T. at 2876). The defense strongly objected to this request and argued that it had deliberately structured its cross-examination of Knutson to avoid the topic of sub-150 RFU peaks because it did not wish to open the door to this testimony:

What have I done to open up the question and I was scrupulous and even wrote down all my questions so I would not even accidentally ask anyone about alleles, or 150 RFUs, and my only questions on the Bunsen burner involved the fact that they did this procedure without really giving it any thought.

(T. at 2878). In response, the trial court referenced this Court's opinion in Bailey's first appeal. (T. at 2879-81). The court relied on this Court's statement that, in the first trial, the judge's ruling allowing testimony regarding sub-150 RFU peaks on redirect was "likely ... within the court's discretion." (T. at 2881).

What the trial court failed to acknowledge, however, was that the defense deliberately questioned Knutson differently during the second trial to avoid the admission of this evidence. In the first trial, the defense elicited testimony that Knutson had not "answered the question" for the other eight locations on the gene that could potentially yield results had she used the Cofiler kit in addition to the Profiler Plus kit. (T. at 2879). In the second trial, the defense took great care not to suggest that any of the unreported or untested loci would have excluded Bailey. The defense only brought up the topic of exclusion by way of introducing how DNA evidence is interpreted generally:

Knutson: That's correct. They are nine different areas of DNA that we look at, yes.

Defense: And they are called loci?

Knutson: That is what they are referred to as, yes.

Defense: But they are areas of DNA that you look at to see if a person might be excluded, is that correct?

Knutson: They are areas of DNA that have been shown to differ between individuals.

Defense: And you look at them to see if a person might be excluded?

Knutson: We look at them to compare them to known samples to see whether either inclusion or exclusions can be made.

Defense: Okay. And here, I believe you testified, you got results out of five of the nine in terms of doing the calculation that you did; is that correct?

Knutson: Yes, we received, I obtained reportable results for five of the areas.

(T. at 2742-43). Based solely on this series of questions, the trial court ruled that the defense had opened the door to testimony that peaks below 150 RFUs may be used for exclusion, and even more damaging to the defense, that nothing in the sub-150 RFU peaks in the question sample excluded Bailey. (T. at 3076-77).

The trial court's ruling not only permitted the prosecutor to elicit testimony from Knutson that Bailey could not be excluded based on the unreportable loci, but also allowed the prosecutor to elicit the same testimony from defense expert, William Shields. (T. at 3007-3013). Indeed, the trial court permitted the prosecutor to question Shields at length and in great detail about each of the four unreportable loci; for each of the four loci, Shields testified that Bailey could not be excluded as a possible contributor. (T. at 3008-3013).

Later that day, the defense renewed its objection to the admission of this evidence and specified the harm it did to Bailey's case:

that single question that I asked did not open the door to anything. And as the court is well aware we changed everything that we did to make sure that our witnesses didn't discuss or make any remarks or try to identify any kind of exclusion because of peeks [sic] below 150 RFUs.

So the court's ruling coming as it did in the middle of the trial caused us to change our entire – not to change our strategy, but if we would have known that these things would come in and there would be all these questions we would have considered changing our strategy.

(T. at 3078-79). The trial court did not directly respond to defense counsel's concerns, but did acknowledge that during the middle of trial it had reconsidered its decision to keep this evidence out and that it had based its new ruling on the defense's initial questions of Knutson. (T. at 3082, 3084).

While the defense's introductory questions of Knutson might have been more artfully worded, they did not suggest that Bailey could have been excluded at one of the four unreportable loci. This Court recently explained that “ ‘opening the door’ occurs when ‘one party by introducing certain material \*\*\* creates in the opponent a right to respond with material that would otherwise have been inadmissible.’” *Valtierra*, 718 N.W.2d at 436 (quoting 8 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice – Criminal Law and Procedure* § 32.54 (3d ed. 2001)). The *Valtierra* Court went on to observe that the “opening the door doctrine ‘is essentially one of fairness and common sense, based on the proposition that one party should not have an unfair advantage \*\*\* and that the factfinder should not be presented with a misleading or distorted representation of reality.’” *Id.*

The trial court abused its discretion in finding that the defense's questions to Knutson gave the defense an unfair advantage or presented the jury with a misleading

representation of reality. Informing the jury that forensic scientists compare individual loci in a question sample to that of a known sample to determine whether the known sample can be excluded is not in any way misleading; this is exactly how forensic scientists interpret DNA evidence. These questions did not imply to the jury that the unreportable loci actually excluded Bailey and that is the only implication that could have legitimately opened the door to Knutson and Shield's testimony about the sub-150 RFU peaks.

Moreover, the defense was abundantly clear that it made every effort to comply with the trial court's pretrial order and had no intention of opening the door to this type of testimony. The *Minnesota Practice* article cited by this Court in *Valtierra* highlights multiple factors that may "open the door" to otherwise inadmissible evidence. McCarr & Nordby, *supra*. The action may be "intentional and unprofessional, a deliberate interjection of obviously improper matter." *Id.* It may also be "negligent" on the attorney's part or caused by a witness's "unresponsive answer or unprompted remark." *Id.* Finally, the authors note that it might be done "intentionally but appropriately." *Id.* None of these factors support a finding that the defense opened the door in this case. Far from doing so intentionally, the defense did not even negligently open the door to testimony regarding sub-150 RFU peaks. Indeed, on two separate occasions the defense highlighted just how carefully it had constructed its cross-examination to avoid eliciting any testimony that touched on this topic.

The trial court's error in allowing this testimony was affirmatively harmful to Bailey's case. Indeed, the trial court recognized the harm inherent in this testimony in its *Frye-Mack* order preventing its use in the state's case in chief. The court explained:

The State, by seeking introduction in its case in chief of the portion of the profile that does not exclude Bailey is, in effect, trying to get the jury to infer something from the evidence that the forensic scientists are not willing to say on the witness stand – that the profile does in fact *include* Bailey, even though the sub-150 RFU readings cannot be used for that purpose by the BCA.

*Frye-Mack* Order, Appendix A at 27 (emphasis in original). Although the trial court was referring to this evidence being presented during the state's case in chief, its prejudice is in no way lessened by the fact that the jury did not hear it until redirect examination. The chances are great that this evidence misled the jury into believing that the sub-150 RFU peaks "are something that the BCA does not purport they are" – namely, further evidence that Bailey's DNA sample matched the question sample, even at the unreportable loci. *Id.* at 28.

While the harm would have been significant enough if the jury simply heard Knutson's opinion that nothing in the four unreportable loci excluded Bailey, the prosecutor's questioning of defense expert Shields made it exponentially worse. If the jury retained any doubt about what the four unreportable loci showed after Knutson's testimony, it was completely erased by the prosecutor's exhaustive cross-examination of Shields. In response to the prosecutor's questions, Shields evaluated each individual locus and stated that it did not provide a basis for excluding Bailey. (T. at 3008-3013). After hearing Shields' testimony on this topic, the jury had no reason to believe anything

other than that the four unreportable loci were entirely consistent with Bailey's guilt and very likely included Bailey. This testimony no doubt strengthened the jury's faith that the DNA evidence was fundamentally reliable and convinced them that this evidence proved Bailey was guilty. Because the trial court abused its discretion in finding that the defense opened the door to this incredibly damaging testimony, Bailey is entitled to a new trial.

III. THE TRIAL COURT DEPRIVED BAILEY OF HIS RIGHT TO PRESENT A COMPLETE DEFENSE BY INAPPROPRIATELY LIMITING THE TESTIMONY OF BAILEY'S EXPERT WITNESS.

A. Standard of Review

This Court has deemed it “well established that a criminal defendant has a constitutional due process right to present a meaningful defense.” *State v. Reese*, 692 N.W.2d 736, 740 (Minn. 2005)(citing *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)). At a minimum, this right consists of the right to examine witnesses against the defendant, to offer testimony and to be represented by counsel. *Id.* The admission of expert testimony is within the trial court’s discretion and the court’s ruling will not be reversed unless the court has clearly erred. *Id.* (citing *State v. Koskela*, 563 N.W.2d 625, 629 (Minn. 1995)). If, however, the court “unconstitutionally precludes a defense witness’s testimony, thereby depriving defendant of his right to present a defense, the reviewing court must remand unless the state proves its burden of showing that the error was harmless.” *State v. Hannon*, 703 N.W.2d 498, 505 (Minn. 2005)(citing *Chapman v. California*, 386 U.S. 18, 23-24 (1967)).

B. The Trial Court Erred in Refusing to Allow Shields to Give His Opinion About When the BCA Should Have Conducted a Validation Study Because this Testimony Went to the Weight of the Evidence.

During the direct examination of defense expert William Shields, the attorneys participated in a bench conference. (T. at 2953). After Shields finished testifying, the defense indicated on the record that it had intended to ask Shields for his expert opinion about whether Knutson should have conducted a validation study prior to using a Bunsen

Burner to remove the cover slip from the slide containing the DNA sample. (T. at 3172). The trial court sustained the prosecutor's objection to this testimony, holding that the timing of the validation study was irrelevant. (T. at 3173-74). The court deemed the timing of a validation study irrelevant because it had already decided, based on evidence presented at the *Frye-Mack* hearing, that convincing validation studies were conducted after Knutson completed her testing. (T. at 3173-74). Although the court seemed to agree that its *Frye-Mack* determinations were findings of fact, its ruling effectively and erroneously treated them as conclusions of law. (T. at 3174-75).

The defense pointed out this discrepancy to the trial court, arguing that the purpose of the prong-two *Frye-Mack* hearing was for the court to make a threshold determination that the evidence had a scientifically reliable foundation. (T. at 3175). The defense maintained that this determination "does not preclude the defendant from introducing evidence to the trier of fact." (T. at 3175). After the trial court reaffirmed its ruling, the defense emphasized:

I just wanted to point out that I guess it would be our position that that's – the reliability is closely tied to the validation study. That was a key theory of our defense, and I don't think the Supreme Court by ordering the prong two *Frye* hearing was saying that Mr. Bailey would give up his right to a jury trial on the key issue of whether it was reliable.

And I think he also has a due process right to present evidence on whether it was reliable. (T. at 3176).

As this Court recognized in *Goeb v. Tharaldson*, the *Frye-Mack* test is an admissibility test. 615 N.W.2d 800, 810 (Minn. 2000). The trial court is charged with determining whether novel scientific evidence is generally accepted and reliable enough

to be presented to a jury. *Id.* If the two prongs of the *Frye-Mack* test are not met, the jury will not even hear the evidence. On the other hand, a trial court's finding that the two prongs are satisfied simply allows the evidence to be presented; it does not prevent the defendant from arguing that the jury should not give the evidence much weight. The trial court deprived Bailey of his right to present a complete defense when it refused to allow Bailey's expert witness to offer testimony that may have persuaded the jury to give less weight to the results of the DNA test in this case. Consequently, Bailey is entitled to a new trial.

This Court's recent opinion in *State v. Jones* is directly on point. 678 N.W.2d 1, 15 (Minn. 2004). In *Jones*, the defense challenged the trial court's finding that the state had satisfied both prongs of the *Frye-Mack* test and, therefore, the DNA evidence was admissible. *Id.* at 13. Among other things, the defense argued that the second prong of *Frye-Mack* had not been met because the BCA heated the slide containing the evidence with a Bunsen Burner. *Id.* at 15. The trial court ruled that the defense's "alleged errors went more to the weight instead of the sufficiency of the DNA evidence." *Id.* This Court affirmed the trial court's opinion that the defendant's "challenges to the DNA testing methods could adequately be addressed through cross-examination and rebuttal witnesses." *Id.* Significantly, this Court did not suggest that the trial court's threshold finding of admissibility in any way limited the defense's right to question the reliability or weight of the DNA evidence.

Similarly, in *State v. Traylor*, the defendant challenged the trial court's determination that PCR-STR testing had attained general acceptance in the scientific

community and that the use of this procedure in his case yielded reliable results. 656 N.W.2d 885 (Minn. 2003). This Court found that the district court did not abuse its discretion in finding that both prongs of the *Frye-Mack* test had been met. *Id.* at 897-98. Despite this conclusion, the *Traylor* court pointed out that the defendant “could have also questioned the BCA technicians about the procedures and methodology followed, their validation studies, and their interpretation of the results.” *Id.* at 899. This Court acknowledged that a preliminary determination of foundational reliability should not deprive a defendant of his right to present a complete defense.

Here, the trial court unconstitutionally prevented Shields from testifying that the BCA should have conducted a validation study prior to testing the question sample in Bailey’s case. This error was not harmless beyond a reasonable doubt because Shields’ expert opinion would have provided a basis for the jury to question the BCA’s testing procedures and the reliability of their results. Had the jury heard Shields’ expert opinion that a validation study should have been conducted first, they may have regarded Knutson’s testimony more skeptically because she did not follow that procedure. The jury may have wondered if Knutson really was as careful with the sample as she claimed to be and may have given more credence to the defense’s theory that the sample had been contaminated. The defense’s closing argument that the BCA mishandled the DNA sample was considerably weaker because it could not reference any expert testimony regarding the appropriate time to conduct a validation study in this case.

The trial court deprived Bailey of his constitutional right to present a defense by substituting its judgment on admissibility for the jury's judgment on weight. Because this error was not harmless, Bailey is entitled to a new trial.

4

CONCLUSION

The trial court's erroneous denial of Bailey's *Batson* challenge, admission of testimony regarding sub-150 RFU peaks and limitation of Bailey's expert witness testimony all deprived Bailey of a fair trial. Therefore, Bailey respectfully requests a new trial.

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Respectfully submitted,



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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).