How Batson Played In Arizona or The Discriminating Use of Peremptory Challenges

Dave Cole, Arizona Summit Law School
Mara Siegel

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like actors arriving for opening night, three
groups of people descend on courthouses daily
throughout Arizona to participate in one of the
most important democratic functions — jury
service. The three groups, of course, are litiga­
tants and their counsel, judges, and prospective
jurors.

Like trained actors, these groups have historically been
assigned clearly defined roles. However, in the real-life setting
of a courtroom, there is no producer, director, or musical score.
The specter of a black man unjustly accused of raping a white
woman, facing an all-white male jury, has caused lawmakers to
draft guidelines to prevent purposeful racial and gender dis­


I. LITIGANTS’ RIGHTS

Although the rationale that underlies Batson v. Kentucky
applies to both civil and criminal cases, an examination of the
leading criminal opinions that culminated in Batson is necessary
to an understanding of the current state of the law.

CRIMINAL LITIGATION

Defendant’s Right to Equal Protection

Jury selection has evolved considerably since the Thirteenth
and Fourteenth Amendments were enacted following the Civil
War. In 1880, the United States Supreme Court decided the
first of its century-long series of cases expressing the constitu­
tional abhorrence of purposeful discrimination in jury selection.

In Strauder v. West Virginia, the Supreme Court held that
excluding former slaves from jury service based solely on race
deprived them of participating equally in their full civic rights as
citizens.

It is well known that prejudices often exist against
particular classes in the community, which sway the
decisions of jurors, and which, therefore, operate in
some cases to deny persons of those classes the full enjoy­
ment of that protection which others enjoy.

However, the Court did not provide a right to a jury of any
particular racial composition.

In 1965, Swain v. Alabama gave the Court another opportu­
nity to address the issue. There were no African-Americans on
the jury that sentenced Robert Swain to death for raping a white
woman. Swain’s case was not an isolated incident in Talladega
County; 26 percent of men eligible for jury service were
African-American, yet none had served on a petit jury since
1950. The Supreme Court ultimately rejected Swain’s claim of
discrimination based on the prosecutor’s peremptory striking
all black veniremen.

Swain placed a nearly insurmountable evidentiary burden on
criminal defendants seeking relief under Strauder. A defendant
could prevail only if he could demonstrate that prosecutors in a
particular jurisdiction “consistently and systematically” exer­
sed challenges to prevent “any and all” African-Americans
from serving. This type of “systematic practice” constituted an
“invidious discrimination” violating equal protection.

Although Swain neither overruled nor specifically repudiated
Strauder, it can fairly be characterized as a step backward. As
might well be imagined, Swain made successful challenges “few
and far between.”

Batson v. Kentucky

In Batson v. Kentucky, the Supreme Court eliminated the
requirement that the defendant prove a pattern of purposeful
discrimination precisely because it placed a "crippling burden of proof" on the defendant while allowing prosecutors "immunity" from constitutional scrutiny." This landmark decision reasserted the defendant's Sixth Amendment right to a jury drawn from a fair cross-section of the community. It did this, in part, because of our State's "rich and diverse... racial, ethnic, and religious groups." This language suggests that religious affiliation may ultimately be accorded "cognizable group" status in Arizona.

Gender

In Taylor v. Louisiana, the Supreme Court held that a jury selection system excluding women from service violated the Sixth Amendment. The Court has not specifically addressed gender-based peremptory challenges under Batson. However, in Brown v. North Carolina, Justice O'Connor indicated in a concurring opinion that Batson should be limited to race.

Recently, the United States Supreme Court granted certiorari in an Alabama paternity suit brought by a putative father who objected to the State's use of peremptory challenges to exclude nine men from a panel of prospective jurors. It is expected that J.E.B. v. T.B. will address the question whether Batson should be extended to gender-based peremptory challenges.

Federal and state courts are split concerning the viability of peremptory challenges based on gender. Moreover, gender-based Batson protections are not restricted to women. For instance, in People v. Blunt and People v. Mitchell, the New York Supreme Court and the Illinois Court of Appeals held that a male defendant could seek relief on the ground that men were improperly excluded from jury service.

Race and ethnic issues arise when the prosecution exercises peremptory challenges based on a woman's surname. Reliance on surnames can result in improperly excluding married women who use their husbands' names. A surname may have little value in determining a juror's racial background or ethnic identity. It is not difficult to envision a situation in which such information might actually mislead the litigants.

Arizona appellate courts have not yet decided whether Batson applies to gender discrimination. Litigants are hampered in raising the issue here because the Arizona Constitution does not expressly prohibit gender discrimination. Nonetheless, counsel may rely on analogous legislation, such as employment anti-discrimination acts. For instance, A.R.S. §41-1463 prohibits employers, employment agencies, and labor organizations from discriminating against employees because of race, color, religion, age, handicap, national origin or sex. The same standards may serve as guides for a claim of gender discrimination in the jury selection process.

Age, Economic Status, Educational Level, and Disability

To date, courts have consistently refused to accord age "cognizable group" protection. Courts have applied Batson to African-Americans, Hispanics, and Asians. Religious affiliation has been afforded Batson protection outside of Arizona. Though Arizona courts have not addressed whether association with a particular religious group makes one eligible for membership in a "cognizable group" under Batson, one case suggested that it would. In State v. Superior Court (Gardner), the Arizona Supreme Court extended Batson protection under the Sixth Amendment right to a jury drawn from a fair cross-section of the community; it did this, in part, because of our State's "rich and diverse... racial, ethnic, and religious groups." This language suggests that religious affiliation may ultimately be accorded "cognizable group" status in Arizona.
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Arizona courts apparently have not recognized persons of a given economic status as a "cognizable group." Recently, in State v. Rodarte,49 the Court of Appeals, citing State v. Hernandez,49 held that a juror's unemployment or work instability could be an appropriate ground for a peremptory challenge. However, in a dissenting opinion in State v. Reyes,50 one judge expressed "doubt... whether membership in a particular socio-economic class is a legitimate reason for the exercise of a peremptory challenge."51 A juror's lack of education may be a legitimate basis for a peremptory challenge in certain cases.52 However, in State v. Boston,53 the Arizona Court of Appeals held that a prosecutor failed to rebut the defendant's prima facie showing of race-based discrimination where the only reason for the juror's exclusion was her limited education.54

With the enactment of the Americans with Disabilities Act (ADA), judges and lawyers may not be permitted to exclude jurors based solely on disability. Whether "disability" will constitute a cognizable group under Batson/Grimmer remains a question to be addressed by our courts.

A Defendant's Right to Challenge the Exclusion of Prospective Jurors from any or Different "Cognizable Groups"

At first, it appeared that Batson would
prevent exclusion of only African-American jurors who were the same race as the defendant. Courts soon abandoned that limitation: African-American defendants, as well as Hispanic ones, were permitted to challenge peremptory strikes of Hispanic jurors. In State v. Kaizorke,53 the Arizona Court of Appeals allowed a Hispanic defendant to raise a Batson objection to the prosecutor's exclusion of an African-American juror.

Historically, Batson protection was afforded only to defendants of color. However, the Supreme Court has permitted defendants of any race, even Caucasian ones, to object to the exclusion of venire members of other races.56

**Defendant's Sixth Amendment Right to a Jury Drawn from a Fair Cross-Section of the Community**

The United States Supreme Court premised Batson on due process and equal protection, but not on the Sixth Amendment right to a jury drawn from a fair cross-section of the community. Although it had relied on the Sixth Amendment right in Taylor v. Louisiana57 (invalidating Louisiana's automatic exclusion of women from jury service), these arguments were rejected implicitly in Batson and explicitly in Holland v. Illinois.59

Before Batson, a few states and the Second Circuit applied the Sixth Amendment or state law to prevent prosecutors from exercising their peremptory challenges in a discriminatory fashion.60 One year before Batson was decided, Justice Feldman, in his concurring opinion in State v. Wiley, suggested that Arizona courts utilize a Sixth Amendment analysis when deciding whether a prosecutor has acted in a discriminatory manner in striking a potential juror for reasons relating to race.61 Two years after Batson, the Arizona Supreme Court settled our position. In State v. Superior Court (Gardner),52 the Court recognized Batson-type protection under the Sixth Amendment. The United States Supreme Court denied certiorari in State v. Superior Court one year after deciding Holland; thus, Gardner...
REVERSE BATSON

Batson addressed only the prosecutor's discriminatory strikes; it did not address those exercised by criminal defendants. However, the Supreme Court explicitly rejected that practice in Georgia v. McCollum,68 decided late in the 1991-92 term. In McCollum, three white defendants were charged with assaulting two African-Americans.69 The prosecution feared that the defense would strike African-American veniremen.69 Relying principally on Edmonson v. Leesville Concrete Company,66 the Court held that because (1) the state oversees and administers the jury system, and (2) criminal defendants rely on state law to exercise their peremptory challenges, there was sufficient state action to entitle prosecutors to raise a Batson claim.61 The McCollum Court noted that “peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial.”68

The McCollum majority concluded that a criminal defendant's rights do not outweigh the interests articulated in Batson.69 Relying on Edmonson, Justice Thomas concurred in the opinion, but noted that “we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death.”70 In dissent, Justice O'Connor, relying on Polk County v. Dodson,71 argued that criminal defendants and their lawyers are not government actors when they perform traditional trial functions.72 She further explained that “in our system . . . a defense lawyer characteristically opposes designated representatives of the State.”73

To date, Arizona courts have not decided the reverse Batson issue. Relying on Edmonson, the Court of Appeals in State v. Anaya74 allowed a criminal defendant to challenge a co-defendant's peremptory strike because it constituted state action.75 However, it is unclear whether Arizona courts will extend that right to prosecutors.76 Our courts will have to decide whether (1) the exercise of peremptory challenges by a defendant constitutes state action; (2) prosecutors have standing to raise this constitutional challenge; and (3) a defendant's state constitutional right to present a defense precludes or outweighs the prosecutor's right to raise Batson objections.

Recently, one commentator criticized McCollum because it

substituted one discriminatory evil for another without critically assessing the relative harm of each. The unfortunate result of the court's haste is a role that debases one of the criminal justice system's highest values: jury impartiality — and leaves those with the most to fear from racism in the courtroom with the least protection from it.77

The question whether McCollum will apply in Arizona is now in the hands of our courts.

CIVIL LITIGATION

In the 1990-91 term, the Supreme Court extended Batson to civil litigation.78 In Edmonson v. Leesville Concrete Co., a black construction worker who suffered a job-related injury sued his employer for negligence.79 The defense struck two African-Americans from the venire.80 The Supreme Court held that the plaintiff was entitled to urge a Batson challenge.81

Writing for the majority, Justice Kennedy noted that “[i]f our society is to continue to progress in a multi-racial democracy, it must recognize that the automatic evocation of race stereotypes retards that progress and causes harm and injury.”82 Furthermore, he asserted that “[t]he quiet rationality of the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.”83 Finally, he urged that “[t]he quiet rationality of the courtroom made it an ideal place to confront ‘racial-based fears.’”84

Because the Edmonson Court applied an equal protection analysis, it had to find that a civil defendant's peremptory strikes constituted state action to reach this result.85 Applying the two-part state action test,86 it concluded that (1) peremptory challenges are permitted only when the government enables parties to exercise them;87 and (2) the defendant concrete company was a government actor88 because it extensively used “government procedures” with the government's “own, significant assistance.”89 As with McCollum, Arizona appellate courts will eventually be asked to decide whether Batson should be extended to civil litigants.

II. THE JUROR’S RIGHT TO SERVE

Over a century of doctrinal precedent establishes that race-based jury selection violates not only the litigants’ rights, but also the rights of excluded jurors.90 This principle was recently reaffirmed by Powers v. Ohio, Edmonson, and McCollum.91

Standing is a crucial issue. In Powers, the Court noted that serious obstacles prevent jurors from asserting their own rights. The litigants seeking third-party standing suffer injury-in-fact. Hence, there is a sufficient nexus between the
interests of the litigant and those of the juror to ensure that the litigant will aggressively advocate the jurors' rights. Therefore, litigants are entitled to third-party standing with the advent of McCollum, the Supreme Court had given prosecutors, criminal defendants, and civil litigants standing to assert the rights of discriminatorily excluded jurors.

Three years before Powers, the Arizona Supreme Court in State v. Superior Court (Gardner), without specifically providing a criminal defendant standing to assert the rights of the excluded juror, declined the effect that the discriminatory exclusion of prospective jurors has on the entire justice system.

The harm done by such state discrimination is not limited to violation of defendant's constitutional rights. It also damages our system of justice by depriving minorities of their opportunity for jury service, one of the most important privileges and responsibilities of citizenship. Worse yet, such methods create a perception that the American criminal justice system is imposed on certain minorities rather than operating to protect the further rights of all citizens.

After Powers, the Court of Appeals, in State v. Anaya, expressly granted defendants 'standing to raise [an] excluded venireperson's claim not to be discriminatorily excluded.' This holds even when the litigant is not a member of the same cognizable group as the juror.

III. THE JUDGE'S ROLE

The judge is the ultimate arbiter concerning whether a party has established purposeful discrimination in another party's exercise of its peremptory strikes.

TIMING OF CHALLENGES

Timeliness is a threshold issue. There is little leeway; a Batson challenge must be made before the jury is empaneled and the stricken jurors excused. Because a Batson challenge does not involve fundamental error, it must be timely raised or it is waived.

THE LITIGANT'S BURDEN OF PROOF

Because Arizona courts have not specifically extended Batson to civil litigants or prosecutors, the following discussion will be limited to the criminal defendant's burden of proof.

To evaluate a defendant's Batson/Gardner challenge, a judge must first determine whether the whole panel comport with the Sixth Amendment, i.e., presents a fair cross-section of the community. Most judges observe more jury panels than do counsel. If the judge consistently sees panels that appear to underrepresent some "cognizable group," he/she should look into jury selection practices used in the jurisdiction. Because the ordinary litigant is not in a position to recognize a pattern, it is incumbent on trial judges to critically watch for, and inquire into, any apparent systemic discrimination.

A judge's next concern is whether a party improperly strikes members of "cognizable groups." If this happens, the judge should consider the possibility that disparate treatment has taken place.

If the prosecutor strikes a juror who is a member of a "cognizable group" but fails to strike a juror who does not belong to that group, where both are otherwise identical, a potential Batson violation exists. For example, a prosecutor may retain a Caucasian juror who has a criminal record and strike an African-American juror because of such a record. The explanation for the peremptory challenge is the pretext for striking the African-American juror for reasons related to race.

In the event of a Batson challenge, the trial judge must next determine whether the defendant has made a "prima facie case of purposeful discrimination." The factual showing must raise an inference that the prosecutor used a peremptory strike solely because of race, ethnicity, or religion. The judge should consider all pertinent information about the juror, including gender, race, national origin, educational background, and economic status.

THE PROSECUTOR'S BURDEN

Once the defense makes a prima facie showing the burden shifts to the prosecutor to "explain the challenge with a neutral reason, one more than an affirmation of good faith or an assumption that the challenged juror would be partial to the defendant because of a shared identification." Although Division One of the Arizona Court of Appeals requires that the prosecutor's race-neutral explanation "be related to the particular case to be tried," Division Two specifically rejected this requirement. However, on July 29, 1993, in State v. Cruz, the Arizona Supreme Court settled this dispute, holding that a Batson challenge must be case-related.

In Hernandez v. New York, the United States Supreme Court held that a prosecutor was merely required to provide "an explanation based on something other than the race of the juror." "At this step [the court's only inquiry] ... is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be race-neutral." However, in Cruz, the Arizona Supreme Court unanimously reversed Mr. Cruz's convictions and death sentence, in part, because the state provided "no objective support for [his] impressions of [the juror's] weakness, leadability, or lack of contact." The Court held:

Obviously, if we hold that a party's assertion of a wholly subjective impression of a juror's perceived qualities, without more, overcomes a prima facie showing of discrimination, Batson could easily and quickly become a dead letter. We do not believe the United States Supreme Court issued the landmark Batson opinion without intending that state courts vigorously protect it.

Where the state offers a facially neutral, but wholly subjective, reason for a peremptory strike, it must be coupled with some form of objective verification before it can overcome the prima facie showing of discrimination. Objective verification could be gleaned from the words of the juror, or the "prosecutor's statement concerning the facts upon which the subjective conclusion is based." The Court held that this showing "would assist the
trial court in determining whether the proffered reason was truly neutral or merely pretextual."

As the record in Cruz contained "no independent verification from any source to support ... the prosecutor's subjective feelings about" why he struck the juror, the Court held that the State failed to establish a "race neutral case-related explanation for striking the juror." The Court held:

In the face of a prima facie showing of discrimination, which admittedly exists here, we will not read Batson to permit peremptory strikes of minorities by any party based solely on an unverified subjective impression, lest Batson's guarantee of equal protection become nothing more than empty words. 118

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THE COURT'S CHALLENGE: DECIDING BATSON CLAIMS

In light of Hernandez v. New York and Cruz, trial courts must carefully scrutinize prosecutors' explanations for striking jurors from cognizable groups to ensure that there are race-neutral, case-related reasons for each strike. 119 Additionally, the trial court must examine each strike to ensure that it is not being used as a pretext to discriminate against a juror. 120 If the prosecutor fails to provide an adequate race-neutral, case-related explanation, or if it is simply a pretext, the judge should disable it and reinstate the juror.

By observing attorney-conducted voir dire, reviewing juror questionnaires, and surveying the "mini-opening statements" made before the jury is selected (if allowed by the court), the judge is in the best position to gauge whether a lawyer has discriminatorily exercised a strike.

Because appellate courts tend to defer to the trial judge, she/he must be particularly vigilant to prevent race, gender, ethnic, or religious-based discrimination from occurring during the jury selection process. This is the true role of the judge—guardian of the parties', the jurors' and the community's right to justice.

Judges are not alone in this process. Trial lawyers share the responsibility to ensure that jurors are not improperly excluded. If they do not, Justice Marshall's prediction concerning the ablation of the peremptory challenge will likely come true.

The Hon. David R. Cole, Judge of the Superior Court of Arizona, Maricopa County, is currently assigned to a criminal calendar. Prior to his 1989 appointment to the bench, Judge Cole served as a judge respondent to peremptory challenges based on "race" and "ethnic heritage," appear to extend Batson coverage to groups similarly protected from discrimination under the Civil Rights Act of 1960, i.e. St. Francis College v. Korea, 493 U.S. 114 (1989), which observed that "Congress intended to protect discrimination against individuals or groups who are subject to intergroup discrimination solely because of their ancestry or ethnic characteristics." Id. at 117. 121

ENDNOTES


4. 100 U.S. at 309.

5. Id. at 305. This principle has been criticized since Stroud. See Barnes v. Kentucky, 476 U.S. 85 (1985).


7. Id. at 231.

8. Id. at 205.

9. Id. at 208-09.

10. Id.

11. Id. at 202-03.

12. Id. at 202.

13. Id. at 203.

14. Id. at 204.

15. Id. at 205.

16. Id. at 206.


361. 55 T.Y.S. at 92.

390. 32 E. at 86-88.


461. State v. Pence, 170 Ariz. 327, 320-31, 826 P.2d 1153 (Ariz. 1991), Division One of the Arizona Court of Appeals did not treat the gender issue; because the defendant failed to raise a gender-based claim in a timely fashion, he was denied appelate review. Id. at 1106-11.

U.S. v. Pender, 557 F.2d 901, 905 (9th Cir. 1977) prior to Batson and the court held that 18-29 was a cognizable group; (3) the prosecutor was entitled to use the group to exclude Hispanics on the basis of age or socioeconomic status of the defendant; (4) the court noted that 18-29 were a cognizable group; (5) the State was entitled to conclude that a Hispanic juror was peremptorily challenged on the basis of an objection raised at voir dire. See also, De la Fuente v. State, 821 So.2d 222, 223 (Fla. Dist. Ct. App. 1999).


134. See also, State v. Haataja, 439 Ill. 457 (1975).

261. 112 Ill. 2d at 2087.


271. 112 Ill. 2d at 2087.

287. See also, State v. Haataja, 439 Ill. 457 (1975).


312. 113 Ill. 2d at 589.