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Peremptory Challenges: Free Strikes No More

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CRIMINAL LAW NEWSLETTER

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by H. Patrick Furman

Lawyers exercise peremptory challenges on the basis of an infinite number of hunches, gut reactions, myths and stereotypes, as well as an occasional serious study. Jurors are excused for reasons as straightforward as their beliefs and their jobs, and for reasons as esoteric as the bumper stickers on their cars and the magazines to which they subscribe. Jury selection remains a delicate art, not a science.

The question arises as to where the race of a prospective juror fits into this art. A recent poll of nearly 800 jurors revealed significant differences in the attitudes of black jurors and white jurors.[1] White jurors were far more likely than black jurors to believe that blacks were more apt to commit crimes than whites. Black jurors were far more likely than white jurors to believe that minority defendants get a less fair trial than white defendants. Given these results and previous anecdotal support for these propositions, it is not surprising that criminal lawyers have used race as a basis for exercising peremptory challenges.

In the past few years, the U.S. and Colorado Supreme Courts have addressed the question of whether the exercise of peremptory challenges on the basis of the race of the prospective juror is constitutional. This article reviews the history of attacks on race-based peremptory challenges and discusses the procedures used to investigate and resolve such attacks. The article also contains a brief discussion of other possible limits on peremptory challenges.

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History of Peremptory Challenges

Historically, the exercise of peremptory challenges was not subjected to judicial scrutiny or control. As stated by the U.S. Supreme Court:

> The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control.[2]

In the 1965 case of *Swain v. Alabama*,[3] the U.S. Supreme Court addressed the question of whether the use of peremptory challenges to strike prospective jurors on the basis of their race should be subject to judicial scrutiny. The defendant, who was black, contested the use of peremptory challenges by the prosecutor to exclude all the prospective jurors who were black. The Court held that this action by the prosecutor did not violate the defendant's right to the equal protection of the law because the defendant was entitled only to a jury which was impartial, not one which was representative of the community.

The Court noted that a different issue would be raised if the defendant could establish that there was an historical pattern of prosecutorial discrimination against jurors on the basis of race. The Court intimated that proof of a systematic exclusion of minority jurors would raise different equal protection issues and might require a different result. Establishing such a pattern required a great deal of investigation and was extremely difficult.

In the 1986 case of *Batson v. Kentucky*,[4] the U.S. Supreme Court recognized this difficulty and significantly reduced the burden of proof on the defendant. The *Batson* Court held that a black criminal defendant could establish

> a *prima facie* case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.[5]

The requirement that the defendant establish a systematic exclusion of minority jurors over a series of trials was dropped. The challenges made in a single trial, as well as the comments and questions of the prosecutor during *voir dire* and the challenging process, could, under *Batson*, establish an improper motivation.

Batson, like *Swain*, was based on the right of a minority defendant to the equal protection of the law, the law being the Sixth Amendment right to an impartial jury. However, the Court gave a hint of things to come by noting that the exclusion of a juror based on race deprives that *juror* of the right to serve on a jury and that such a denial may implicate the juror's right to the equal protection of the law.

The Colorado Supreme Court addressed the issue the next year in *Fields v. People*.[6] In this case, a black defendant was challenging the exclusion of Span-

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ish-surnamed jurors from the jury by the prosecutor.[7] The Supreme Court adopted the Sixth Amendment analysis used by various state courts,[8] rather than the *Batson* analysis, and held that race-based peremptory challenges by the prosecutor implicated the defendant's right to an impartial jury under both the Sixth Amendment and Article II, § 16 of the Colorado Constitution. The *Fields* court adopted the procedure set forth in *Batson* for proving such a claim and held that a defendant may establish a *prima facie* case of racial discrimination in the selection of the jury solely on the basis of the challenges made by the prosecution in that trial. The defendant in *Fields*, however, lost his appeal because the court found legitimate race-neutral reasons for challenging three of the four minority jurors at issue.

The Colorado Supreme Court in *Fields* suggested that the equal protection argument was available only to defendants who were of the same class as the challenged jurors, although they did not decide this issue. The right to an impartial jury based on a fair cross-section of the community is available to all defendants, regardless of race, and the concerns protected by that right outweighed, in the court's opinion, the danger of imposing limits on the prosecutor's use of peremptory challenges.

Swain and *Batson* were based on the principle that a defendant has an equal protection right to an impartial jury and that this right is infringed when prospective minority jurors are excluded from jury service in the trial of a minority defendant. The white defendant in *Holland v. Illinois*[9] attempted to reach the same result under a purely Sixth Amendment analysis. The U.S. Supreme Court held that there was no Sixth Amendment right protecting a white defendant who complained that the prosecutor was striking blacks from the jury. However, a majority of the Court indicated that any defendant, regardless of race, would have standing to raise a claim asserting the excluded juror's equal protection right to serve on a jury,[10] and this approach was soon adopted.

Current Analysis of Discriminatory Challenges

In 1991, the focus of the decisions on this issue shifted to the equal protection right of every citizen to sit on a jury, regardless of race. This change in rationale, illustrated by *Powers v. Ohio*,[11] had significant repercussions.

In *Powers*, the U.S. Supreme Court held that a white defendant had standing to contest the discriminatory use of a peremptory challenge on a black prospective juror. The Court held that the defendant had third-party standing to assert this claim on behalf of the juror because the defendant and the juror shared a common interest on the issue and the juror was unlikely to ever assert the right in a separate action. The Court then held that the juror had an equal protection right to participate equally in civil life and that this right was impaired if a juror was stricken from a jury on the basis of race.

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Once the Court adopted the conclusion that the equal protection right of jurors was the right being protected, expansion of the right to contest racially motivated peremptory challenges was inevitable. The U.S. Supreme Court extended the right to civil litigants[12] and, in *Georgia v. McCollum*,[13] to prosecutors alleging that peremptory challenges by defense counsel were racially motivated.

The *McCollum* decision recognized that giving prosecutors the right to attack peremptory challenges by defense counsel altered the balance of power in the courtroom and invaded on the traditional view of a defendant's right to the assistance of counsel. However, the Court found that peremptory challenges by a criminal defendant constituted state action under the Fourteenth Amendment and that the exercise of this state action was controlled by the equal protection clause of that Amendment.

Procedure

It is now clear that the peremptory challenges of both the prosecutor and the defense lawyer are subject to an attack that they are motivated by racial considerations. A number of recent cases, at both the state and federal level, have addressed the procedural issues which have inevitably arisen in connection with these attacks.

A party who believes that opposing counsel is improperly exercising peremptory challenges on the basis of race has the duty to raise the claim during the jury selection process. Counsel cannot wait until after the jury is sworn to raise the claim.[14] The party making this claim has the burden of establishing a *prima facie* case of racial discrimination.[15]

The trial court must then decide whether a *prima facie* case of racially motivated challenges has been made out. The Colorado Supreme Court has held that a single peremptory challenge generally does not establish discriminatory intent.[16] However, a single challenge which results in no members of a cognizable racial minority remaining on the jury has been held to establish a *prima facie* case by the Colorado Court of Appeals.[17]

A *prima facie* case may be based on the questions and comments of counsel as well as the actual strikes.[18] For example, support for a *prima facie* case has been found in the fact that a prosecutor asked a prospective African-American juror if he knew anyone who had been charged with robbery but asked prospective white jurors if they knew anyone who had been *the victim* of a robbery.[19]

If the court finds that a *prima facie* case has been established, the burden shifts to the party making the peremptory challenge to show that there are legitimate race-neutral explanations for the peremptory challenges.[20] Finally, the party contesting the peremptory challenges is entitled to respond to the race-neutral explanations offered by the attorney who made the challenges.[21]

This same procedure applies when the apparently discriminatory challenge is made to keep a minority juror off the jury by placing that juror in the alternate's seat. In *People v. Portley*,[22] the trial judge used a variation on the traditional method of selecting the jury that included assigning numbers to the prospective jurors so that the attorneys knew who the replacement juror would be when they struck a juror. There was only one African-American in the jury panel, and the prosecutor used a peremptory challenge in such a fashion as to place that juror in the second alternate spot on the jury. The defendant argued that this use of the peremptory challenge violated *Batson*. The prosecutor argued that the defendant had not even made out a *prima facie* case of discrimination, and the trial court agreed.

The Colorado Court of Appeals reversed the defendant's conviction. Even though the African-American juror was

neither challenged nor excluded, the net effect of the prosecutor's action was to minimize or eliminate the possibility that the juror would deliberate. In fact, the juror did not deliberate. The court concluded that the defendant had made out a *prima facie* case and that the prosecutor should have been required to offer a racially neutral explanation for the challenge. The case was remanded for this purpose.

Race-Neutral Explanations

Counsel whose peremptory challenges are contested must respond with a race-neutral explanation only if the trial court finds that a *prima facie* case of racial discrimination has been established.[23] However, if counsel jumps the gun and offers explanations for the challenges before the trial court makes the finding that a *prima facie* case has been established, the Colorado appellate courts will consider counsel's explanations anyway.[24] The explanations offered by counsel must be "clear and reasonably specific" and related to the particular case.[25] By the very nature of a peremptory challenge, the explanations do not have to rise to the level of a challenge for cause,[26] but they must rise above counsel's assumption that the prospective juror is less able to serve because of race.[27]

A number of decisions address the question of what constitutes a race-neutral justification for a peremptory challenge. The U.S. Supreme Court held that it was legitimate for a prosecutor to strike four Latino jurors on the grounds that two of the jurors had relatives who had been prosecuted by his office and that he feared the other two Latinos, both of whom spoke Spanish, would not be willing to rely solely on the official translation when listening to evidence presented in Spanish. The Supreme Court refused to disturb the trial court's finding of fact and noted that a racially disparate result of peremptory challenges is not enough: there must be a showing of discriminatory intent.

In *People v. Arrington*,[28] the Colorado Court of Appeals reversed the defendant's murder conviction after finding that the "race-neutral" explanations offered by the prosecutor who struck the sole remaining African-American juror were not, in fact, race neutral. There were two African-Americans on the jury panel. One was excused for cause. The remaining African-American was questioned extensively about race and discrimination, and it was learned that he was the plaintiff in an employment discrimination suit. He stated that he could be fair and impartial and that his race would not be a factor. The prosecutor challenged him.

The defendant objected to the exclusion of this juror, and the prosecutor responded that he had two race-neutral reasons: the evidence included racial slurs, and the defendant's father had once claimed that the defendant's arrest was racially motivated. The court found that the two reasons given here were both race specific: both reasons

> were based strictly upon the prosecutor's subjective belief that [juror's] race would cause him not to be impartial in a case against a black defendant.[29]

Under these circumstances, the prosecutor failed to rebut the defendant's *prima facie* case, and the defendant was granted a new trial.

Several federal circuit court decisions have addressed the issue of whether counsel's explanations are race-neutral. For example, in the Seventh Circuit, a prosecutor who struck an African-American juror in the trial of an African-American defendant justified his challenge by claiming that the juror had not demonstrated an adequate understanding of the burden of proof and that he simply had

a "feeling" about her that was not race-based. The court's review of the record convinced it that the juror's answers to questions about the burden of proof mirrored those of white jurors who were not challenged. The court ordered a new trial.[30]

Similarly, a prosecutor who explained that he struck a juror not because she was black, but because she lived in a predominantly low-income black neighborhood and was therefore more likely to believe that the police "pick on black people," was found to be making generic and unsupported assumptions that people who live "in an area heavily populated by poor black people could not fairly try a black defendant."[31] Therefore, the court ordered a new trial.

The use of a juror's nationality and the attitudes the prosecutor associated with that nationality were held to be an inadequate explanation by the U.S. Court of Military Appeals in *United States v. Greene*.[32] A black male soldier was accused of sexually assaulting a white female soldier, and the prosecutor challenged a black, Panamanian-born male juror. The prosecutor argued, among other things, that a three-year tour of duty in Panama had left him with the belief that Panamanian men had different attitudes about sex and a male's right to sex. The prosecutor believed that such men had a "macho" attitude about sex and were more likely than others to believe a man had a "right" to sex. The court found this to be a racial stereotype without any support in the answers given during *voir dire*.

Finally, a prosecutor in the Ninth Circuit who struck the only Hispanic juror and the only Hispanic alternate explained his challenges by stating that they were based on the age, residence, type of employment and appearance of those jurors. However, the record revealed that a white juror with the same residence was not struck and that there had not been any discussion of age with the jurors. The court recognized that employment and appearance might constitute legitimate race-neutral explanations of a peremptory challenge. However, it reversed the conviction on the grounds that at least two of the four proffered explanations appeared to be shams and there was an inadequate record as to the remaining two proffered explanations.[33]

Remaining Procedural Details

There are several remaining issues which should be addressed when dealing with the adequacy of counsel's explanations for peremptory challenges.

Mixed Explanations

The first issue is whether an attorney who has offered both a race-neutral and a race-based explanation for a peremptory challenge has met the burden of establishing a race-neutral explanation. *Batson* held that peremptory strikes are improper when based "solely on account of [the juror's] race,"[34] suggesting that a strike based partially on race and partially on a legitimate reason might be acceptable. Neither the U.S. nor Colorado Supreme Court has directly addressed this question. However, the Colorado Court of Appeals has held that

> if even one explanation was insufficient, the [trial] court should have ruled that the exclusion violated both the defendant's and the prospective juror's equal protection rights.[35]

Other courts that have addressed the question have reached conflicting results. For example, the U.S. Court of Military Appeals has interpreted *Batson* to require that "all the reasons proffered by trial counsel be untainted by any inherently discriminatory motives,"[36] while the Eighth Circuit has held that one valid explanation is all that is necessary to justify a peremptory strike, even when the other explanations appear to be race-based.[37]

Adequate Findings By Trial Court

A second point is that a trial court ruling on the question of whether counsel's explanation for apparently racially motivated challenges is race-neutral must make adequate findings to allow an appellate court to review the ruling.[38] A simple finding that there has not been any systematic exclusion of minority jurors is inadequate.[39] Inadequate findings by the trial court may result in an order for a new trial from an appellate court if it proves too difficult to reconstruct the motives underlying the peremptory challenges.[40]

The fact that some minority jurors do eventually end up sitting on the jury is not dispositive of the question of whether counsel's peremptory challenges have been improperly motivated by race. One court has held that once a *prima facie* case of racial discrimination has been established, the fact that one or more minority jurors remain on the jury is irrelevant.[41] However, it also has been held that leaving minority jurors on the jury, particularly when counsel has peremptory challenges remaining and does not use them, is evidence of a lack of discriminatory intent.[42]

The fact that a trial court believes that the exclusion of minority jurors both helps and hurts a litigant should not be the basis for a ruling. Because it is the equal protection right of the stricken juror that is being protected, the question of whether the exclusion helps or hurts a litigant is immaterial.[43]

Limited Appellate Review

Finally, counsel should be aware that appellate review will be limited. Trial court rulings concerning jury selection have traditionally been given deference, and this same deference is given to trial court rulings on the adequacy of counsel's explanations for peremptory challenges.[44] Trial judges are in the best position to evaluate peremptory challenges and the explanations for those challenges because of their knowledge of local conditions and their ability to observe the process.[45] A trial court ruling on the adequacy of such an explanation will normally be reversed only if clearly erroneous.[46]

Expansion of Batson *Challenges*

Lawyers often exercise peremptory challenges on the basis of the gender of the prospective juror, although the question of whether a male or female juror is better for any particular type of case remains the subject of much dispute. The previously mentioned juror poll noted some differences between male and female jurors. For example, both male and female jurors felt that female jurors were "more thoughtful" in reviewing the evidence and were "more ready to speak up during deliberations."[47] Although these differences may not be as dramatic as those found between black and white jurors, they are certainly worth consideration by anyone picking a jury.

The U.S. Supreme Court has not decided whether the *Batson* rationale should be applied to peremptory challenges based on other attributes of jurors. For example, while the Court has held that gender discrimination in determining who is called for jury duty is unconstitutional,[48] it has not yet decided whether peremptory challenges based on the gender of the prospective juror violate the equal protection rights of that juror or the defendant. The Court recent-

ly granted *certiorari* in an Alabama case raising this issue and should render a decision next term.[49]

However, at least one lower court has extended the *Batson* analysis to peremptory strikes based on the gender of prospective jurors. In *United States v. DeGross*,[50] the prosecution complained that the female defendant was striking male jurors, and the defendant complained that the prosecution was striking female jurors. The defendant struck seven males, and the trial court found that this amounted to a *prima facie* case of gender discrimination. The prosecution admitted that it struck a female to try and achieve some gender balance on the jury.

In *DeGross*, the Ninth Circuit Court of Appeals held that the *Batson* analysis applied to peremptory challenges based on gender because they, like peremptory challenges based on race, were predicated on the improper assumption that a particular group of people was either unqualified for jury service or could not be fair. The court also noted that these strikes excluded and therefore harmed a distinct group of people, harmed community participation in jury service and undermined public confidence in the jury system, just as do challenges based on race. The court went on to hold that the challenges from both parties were improper and ordered a new trial.

However, the Fifth Circuit and most state courts which have considered whether to extend the *Batson* analysis to gender-based peremptory challenges have refused to do so. In *United States v. Hamilton*,[51] the defendant argued that the prosecutor had challenged certain prospective jurors on the basis of race. The prosecutor responded by explaining that he had struck the jurors on the basis of gender, not race. The Fourth Circuit expressly refused to extend the *Batson* analysis to peremptory challenges based on gender, noting that it did not "applaud" any peremptory challenge based on a group classification, but read the decision in *Batson* to apply only to peremptory challenges based on race.[52]

Conclusion

Peremptory challenges, which went unregulated by the courts throughout most of American legal history, are now being subjected to scrutiny by the courts to ensure that they are not being used in a racially discriminatory fashion. The already difficult task of selecting a jury has been complicated by this development, and a whole new set of arguments and counter-arguments are now available to counsel in jury selection.

Inquiry into racially discriminatory use of peremptory challenges seems here to stay, and this scrutiny may be extended to gender-based challenges as well. The courts are unlikely to allow much further expansion of the inquiry into peremptory challenges but have not yet set any precise limits. Trial attorneys will undoubtedly continue to test these limits as this area of law continues to evolve.

NOTES

1. Cheever and Naiman, "The View from the Jury Box," *The National Law Journal*, Feb. 22, 1993, at S1-S15.
2. *Swain v. Alabama*, 380 U.S. 202, 220 (1965).
3. *Id.*
4. 476 U.S. 79 (1986).
5. *Id.* at 96.
6. *Fields v. People*, 732 P.2d 1145 (Colo. 1987).
7. The court rejected the prosecution argument that the defendant did not have standing to raise an equal protection claim because he was a member of a different minority group than the challenged jurors.
8. *See, e.g., People v. Wheeler*, 583 P.2d 748 (Cal. 1978).
9. 493 U.S. 474 (1990).
10. *Id.*, J. Kennedy, concurring, Justices Marshal, Brennan, Blackmun and Stevens, dissenting.
11. *Powers v. Ohio*, 111 S.Ct. 1364 (1991).
12. *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991); Stacy and Sauro, "*Edmonson*: Dramatic Change in the Use of Peremptory Challenges," 21 *The Colorado Lawyer* 687 (April 1992).
13. 112 S.Ct. 2348 (1992).
14. *People v. Mendoza*, 22 Colo.Law. 1010 (Colo.App. 1993).
15. *Batson, supra*, note 4.
16. *Fields, supra*, note 6 at n.20.
17. *People v. Portley*, 22 Colo.Law. 349 (Feb. 1993) (App.No. 90CA0859, *annc'd* 12/17/92). *See also United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987).
18. *Batson, supra*, note 4.
19. *Splunge v. Clark*, 960 F.2d 705 (7th Cir. 1992).
20. *Hernandez v. New York*, 111 S.Ct. 1859 (1991).
21. *Mendoza, supra*, note 14.
22. *Supra*, note 17.
23. *Batson, supra*, note 4; *Mendoza, supra*, note 14.
24. *Mendoza, supra*, note 14.
25. *Batson, supra*, note 4 at 98.
26. *Mendoza, supra*, note 14.
27. *Batson, supra*, note 4.
28. 843 P.2d 62 (Colo.App. 1992).
29. *Id.* at 65.
30. *Splunge, supra*, note 19.

31. *United States v. Bishop*, 959 F.2d 820 (9th Cir. 1992).
32. 36 M.J. 274 (CMA 1993).
33. *United States v. Chinchilla*, 874 F.2d 695 (9th Cir. 1989).
34. *Supra*, note 4 at 89.
35. *Mendoza, supra*, note 14 at 1011.
36. *Greene, supra*, note 32 at 280. *See United States v. Briscoe*, 896 F.2d 1476 (7th Cir. 1990); *United States v. Alcantar*, 897 F.2d 436 (9th Cir. 1990).
37. *United States v. Iron Moccasin*, 878 F.2d 226 (8th Cir. 1989). *See Williams v. Chrans*, 957 F.2d 487 (7th Cir. 1992).
38. *Alcantar, supra*, note 36.
39. *Mendoza, supra*, note 14.
40. *Alcantar, supra*, note 36.
41. *Id.*
42. *Briscoe, supra*, note 36.
43. *Id.*
44. *Batson, supra*, note 4.
45. *Fields, supra*, note 6.
46. *Briscoe, supra*, note 36.
47. Cheever and Naiman, *supra*, note 1.
48. *Taylor v. United States*, 419 U.S. 522 (1975) (statute required only women to state a desire for jury duty); *Duren v. Missouri*, 439 U.S. 357 (1979) (statute gave women an automatic exemption from jury duty upon request).
49. *J.E.B. v. T.B.*, No. 92-1239 (May 17, 1993), reported at 61 Law Week 3771.
50. 960 F.2d 1433 (9th Cir. 1992).
51. 850 F.2d 1038 (4th Cir. 1988).
52. *See also Eiland v. State*, 607 A.2d 42 (Md.App. 1992); *State v. Oliviera*, 534 A.2d 867 (R.I. 1987); *State v. Pullen*, 811 S.W.2d 463 (Mo.App. 1991); *Dysart v. State*, 581 So.2d 541 (Ala.Ct.App. 1990); *State v. Culver*, 444 N.W.2d 662 (Neb. 1989); and *Hannan v. Commonwealth*, 774 S.W.2d 462 (Ky.App. 1989).

Notice to Estate Planning Practitioners
—*NEW PROBATE FORMS*—

The Colorado Supreme Court has approved the following new probate forms:

Form	*Title*	*Date*
CPC29	Petition for Appointment of Conservator	5/93
CPC30A	Order Appointing Conservator (Adult)	5/93
CPC30M	Order Appointing Conservator (Minor)	5/93
CPC32	Petition for Appointment of Guardian for Incapacitated Person	12/92
CPC33	Order Appointing Guardian for Incapacitated Person	12/92
CPC34	Petition for Appointment of Guardian for Minor	12/92
CPC35	Order Appointing Guardian for Minor	12/92
CPC40	Affidavit for Collection of Personal Property Pursuant to Small Estate	12/92
CPC24/25-S	Schedule of Distribution	9/92
CPC25-H	Schedule of Heirship	9/92
CPC2GC	Notice of Hearing to Protected Person or Incapacitated Person	10/92