

New York Court of Appeals Adopts Standard Deferential to Trial Courts in Assessing Prosecution's Explanations for Exercise of Peremptory Challenges

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DEVELOPMENTS IN THE LAW

New York Court of Appeals adopts standard deferential to trial courts in assessing prosecution's explanations for exercise of peremptory challenges

Historically, juries have existed to promote fairness in Anglo-American trials.¹ Selection of a jury occurs during *voir dire*,² where

¹ See W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 1.6(e), (g), at 28-30 (1985) [hereinafter LAFAVE]. Under the sixth amendment, applicable to the states via the fourteenth amendment, criminal defendants "shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI. Participation of laypersons on juries protects a defendant's constitutional right to a fair trial and helps maintain the appearance of fairness in the judicial process to the community. See LAFAVE, *supra*; see also H. KALVEN & H. ZEISEL, THE AMERICAN JURY 3 (1966) (jury "represents a deep commitment to the use of laymen in the administration of justice"). The appearance of an equitable system of justice is preserved by lay participation since unpopular judicial decisions will be attributable to neutral community participants and not to a conspiring profession of lawyers or an oppressive government. See LAFAVE, *supra*.

In both civil and criminal trials, the jury serves "to assure a fair and equitable resolution of factual issues." *Colgrove v. Battin*, 413 U.S. 149, 157 (1973). "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Williams v. Florida*, 399 U.S. 78, 100 (1970).

² See J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 145 (1977). Literally meaning "to speak the truth," *voir dire* "denotes the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors." BLACK'S LAW DICTIONARY 1575 (6th ed. 1990). In both state and federal courts, the examination of potential jurors "during the *voir dire* sets the stage for peremptory challenges as well as challenges for cause." J. VAN DYKE, *supra*. By questioning prospective jurors, and allowing each party to exercise their respective challenges, the *voir dire* process ensures "a fair and impartial jury." See V. STARR & M. MCCORMICK, JURY SELECTION § 2.1.10, at 39 (1985) [hereinafter STARR].

Prior to the *voir dire* stage of the trial, a venire is drawn from members of the community who are eligible to serve as jurors. See Comment, *The Cross-Section Requirement and Jury Impartiality*, 73 CALIF. L. REV. 1555, 1559-60 (1985). The term "venire" designates "[t]he group of citizens from whom a jury is chosen in a given case." BLACK'S LAW DICTIONARY 1556 (6th ed. 1990). Federal courts compile a venire in accordance with the Federal Jury Selection and Service Act of 1968. See 28 U.S.C. §§ 1861-1878 (1988). This Act is designed to provide litigants with a panel representative of the community where the action will be tried. *Id.* § 1861.

In New York, the Commissioner of Jurors randomly selects potential jurors from various state and local compilations, including voter lists, licensed and registered car owners, and taxpayers. See N.Y. JUD. LAW § 506 (McKinney Supp. 1990). The venire must represent a fair cross-section of the community pursuant to the sixth amendment, as applied to the states via the fourteenth amendment. See, e.g., *Duren v. Missouri*, 439 U.S. 357, 364-70 (1979) (exclusion of women from jury violated cross-section requirement).

potential jurors may be dismissed either for cause³ or peremptorily.⁴ Peremptory challenges can be exercised without any justification,⁵ and, therefore, are open to potential abuse by prosecutors who seek to rid a jury of members of a minority defendant's race, gender, or ethnic group.⁶ In *Batson v. Kentucky*,⁷ the United States Supreme Court determined that a defendant may establish a prima facie case of purposeful jury selection discrimination by showing "that he is a member of a cognizable racial group, . . . that

³ See STARR, *supra* note 2, § 2.1.11. Every challenge for cause must be accompanied by an express reason why the particular juror should be excluded. See *id.* The United States Supreme Court has defined challenges for cause as having a "narrowly specified, provable and legally cognizable basis of partiality." *Swain v. Alabama*, 380 U.S. 202, 220 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79, 93 (1986). Although either party is entitled to an unlimited number of challenges for cause, specific grounds for exercising challenges for cause are circumscribed by state statutes. See LAFAVE, *supra* note 1, § 21.3(c), at 844. The judge must agree that the particular basis for disqualification has been adequately demonstrated before the challenging party may remove a potential juror for cause. See *id.*; J. VAN DYKE, *supra* note 2, at 140. In New York, challenges for cause are governed by the Criminal Procedure Law. See CPL § 270.20 (McKinney 1982 & Supp. 1990).

⁴ See STARR, *supra* note 2, § 2.1.12. In contrast to challenges for cause, peremptory challenges may be employed to dismiss a prospective juror without justification or judicial approval. See LAFAVE, *supra* note 1, § 21.3(d), at 847; J. VAN DYKE, *supra* note 2. Similar to most state rules governing the use of peremptory challenges, New York places a limit on the number of challenges exercised without cause according to the type of crime charged. See CPL § 270.25(2) (McKinney 1982) (20 peremptory challenges available to each side if crime is Class A felony, 15 if Class B or C felony, and 10 for all other crimes). See generally Comment, *Vitiating of Peremptory Challenge in Civil Action: Clark v. City of Bridgeport*, 61 ST. JOHN'S L. REV. 155 (1986) (general discussion of peremptory challenges).

⁵ See J. RASICOT, *JURY SELECTION, BODY LANGUAGE & THE VISUAL TRIAL* 93 (1983) ("[p]eremptory challenges need not be defended once established by the state legislature, as long as statutory provisions have been followed"); see also *supra* note 4 and accompanying text.

⁶ See, e.g., *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987) (government struck five out of seven African Americans during *voir dire*); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987) (prosecution exercised six peremptories to remove all African Americans from jury), *vacated in part*, 836 F.2d 1312 (11th Cir.), *cert. dismissed*, 487 U.S. 1265 (1988); *State v. Gonzalez*, 206 Conn. 391, 396, 538 A.2d 210, 213 (1988) (Hispanic defendant challenged discriminatory nature of removal of all Hispanics from petit jury).

The wholesale exclusion of disfavored minority groups from juries, particularly African Americans, has been a prevalent practice among prosecutors since the advent of peremptory challenges. J. VAN DYKE, *supra* note 2, at 150. See generally A. SCHAUFELBERGER, *BLACKS AND THE TRIAL BY JURY* 106-27 (1973) (historical look at discrimination against African Americans in jury selection process).

Due to its historical significance, the peremptory challenge has become "one of the most important rights secured to an accused." *Swain*, 380 U.S. at 219 (quoting *Pointer v. United States*, 151 U.S. 396, 408 (1894)). However, the United States Supreme Court has refused to recognize peremptories as a federal constitutional right. See *Batson*, 476 U.S. at 91; *Swain*, 380 U.S. at 243.

⁷ 476 U.S. 79 (1986).

the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race . . . [and] that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude . . . on account of . . . race."⁸ The Court further noted that once a defendant makes this initial showing, the burden would shift to the prosecution to come forward with a neutral explanation.⁹ Recently, however, in *People v. Hernandez*,¹⁰ the New York Court of Appeals held that although the defendant, a Latino, had established a prima facie case of discrimination under the *Batson* standard, the prosecution had provided adequate, facially neutral reasons for the exercise of its peremptories excluding potential jurors with Latino surnames.¹¹

In *Hernandez*, the Latino defendant faced charges which included attempted murder and criminal possession of a weapon.¹²

⁸ See *Batson*, 476 U.S. at 96. In *Batson*, the Court expressly overruled *Swain v. Alabama*, by removing the "crippling burden of proof" imposed upon defendants. *Id.* at 92. Under *Swain*, a defendant was required to prove a previous pattern of discrimination by the prosecution in its exercise of peremptories. See *Swain*, 380 U.S. at 224-28. The Court in *Batson* allowed a defendant to establish a prima facie case of intentional discrimination by the prosecution based solely on evidence of the prosecutor's use of peremptory challenges in the very case before the Court, without having to demonstrate a pattern of discrimination. See *Batson*, 476 U.S. at 96. Under the *Batson* standard, a defendant has the initial burden of raising an inference that the prosecution has exercised its peremptory challenges discriminatorily. *Id.* at 96-97. To meet this burden, the defendant first must demonstrate that he is a member of a "cognizable racial group," and that the prosecution has utilized its peremptory challenges to dismiss members of the defendant's race or ethnic group. *Id.* at 96. Second, the defendant is entitled to a presumption that peremptory challenges are subject to abuse by prosecutors seeking to discriminate. *Id.* Third, the defendant may utilize these and any other facts to raise an inference of purposeful discrimination. *Id.* When the defendant has satisfied the court that an inference of discrimination has been raised, the burden then shifts to the prosecution to produce evidence which will rebut the inference. *Id.* at 97. If the prosecution fails to produce a sufficiently neutral explanation for each peremptorily challenged juror, the defendant will prevail. See Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 61 (1988). Should the prosecution proffer a satisfactory explanation, however, the court's inquiry would continue. *Id.* In this instance, the trial court would determine whether the defendant has carried his ultimate burden of proving a racially discriminatory exercise of peremptories by the state based upon an analysis of all the relevant facts. *Id.*

⁹ See *Batson*, 476 U.S. at 97.

¹⁰ 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85, cert. granted in part, 59 U.S.L.W. 3275 (1990).

¹¹ *Id.* at 353, 552 N.E.2d at 621-22, 553 N.Y.S.2d at 85-86.

¹² *Id.* at 353, 552 N.E.2d at 621, 553 N.Y.S.2d at 85. The defendant's conviction arose from his attempt to shoot and kill a female acquaintance and her mother as they left a Brooklyn restaurant. *Id.* at 353, 552 N.E.2d at 622, 553 N.Y.S.2d at 86. Stray bullets from the defendant's gun hit and injured two other restaurant patrons. *Id.*

At the close of *voir dire*, the defendant's attorney objected to the prosecutor's use of four peremptory challenges to remove all prospective jurors with Latino surnames and moved for a mistrial.¹³ Applying the *Batson* standard, the Supreme Court, Kings County, concluded that a *prima facie* case of purposeful discrimination was sufficiently established, and shifted the burden to the prosecution to provide neutral explanations for the use of each peremptory challenge.¹⁴ The prosecution argued that the Latino jurors were excused, not because of their ethnic identity, but because they might be unable to refer solely to the official translation of Spanish testimony without relying on their own Spanish language proficiency.¹⁵ Based on this argument, the court held that the prosecution had provided an adequate, facially neutral justification to rebut the inference of purposeful discrimination and denied the defendant's motion for a mistrial.¹⁶ The defendant was subsequently convicted.¹⁷ The Appellate Division, Second Department, affirmed and granted leave to appeal.¹⁸

Upon further review, the New York Court of Appeals affirmed the courts below, holding that the prosecution had proffered a valid nondiscriminatory justification for the exercise of its peremp-

¹³ *Id.* Two of the challenged jurors were dismissed, according to the prosecutor, because they were immediate relatives of individuals formerly prosecuted by the district attorney's office responsible for prosecuting Hernandez. *See id.* Although the defendant did not challenge the dismissal of these jurors, he did challenge the removal of the two other Latino jurors. *See id.* at 354, 552 N.E.2d at 623, 553 N.Y.S.2d at 87.

¹⁴ *See id.* at 356, 552 N.E.2d at 623, 553 N.Y.S.2d at 87.

¹⁵ *See id.* at 354, 552 N.E.2d at 622, 553 N.Y.S.2d at 86. Pursuant to the rule enunciated in *Batson*, "the prosecutor cannot simply state that rejecting the jurors rested on the assumption they might be favorably disposed to the defendant because of shared race or ethnic similarities." *Id.* at 355, 552 N.E.2d at 623, 553 N.Y.S.2d at 87. The prosecution's explanations must be completely neutral. *See Batson*, 476 U.S. at 97. Several courts have composed a generic list of acceptable neutral reasons, including "current and past employment, general appearance and demeanor, previous jury service, and the absence or presence of apparent prejudice." *United States v. Lane*, 866 F.2d 103, 106 (4th Cir. 1989). Furthermore, the Second Circuit has accorded district courts great deference by reviewing the prosecution's proffered explanations under a "clearly erroneous" standard. *See United States v. Biaggi*, 853 F.2d 89, 96 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989).

¹⁶ *See Hernandez*, 75 N.Y.2d at 354, 552 N.E.2d at 623, 553 N.Y.S.2d at 87.

¹⁷ *See id.* at 354, 552 N.E.2d at 622, 553 N.Y.S.2d at 86. The defendant was convicted on two counts of attempted murder in the second degree, one count of criminal possession of a weapon in the second degree, and one count of criminal possession of a weapon in the third degree. *People v. Hernandez*, 140 A.D.2d 543, 543, 528 N.Y.S.2d 625, 626 (2d Dep't 1988), *aff'd*, 75 N.Y.2d 350, 552 N.E.2d 622, 553 N.Y.S.2d 86 (1990).

¹⁸ *See Hernandez*, 140 A.D.2d at 543, 528 N.Y.S.2d at 626.

tory challenges.¹⁹ Writing for the court, Judge Bellacosa explained that the duty to evaluate the prosecution's explanation rested with the trial court, since it was essentially a factual determination.²⁰ The *Hernandez* court rationalized its acceptance of the prosecutor's explanation by emphasizing that it is the jurors' responsibility "to decide a case on the official evidence before them, not on their own personal expertise or language proficiency."²¹ The majority expressly rejected the more probing analysis offered by the dissent which advocated an enhanced standard of scrutiny, claiming such a standard would eviscerate the peremptory challenge by transforming it, *sub silentio*, into a challenge for cause.²² Grounding its decision in equal protection terms, the court refused to diverge from federal law; it concluded that the outcome would be the same under either the Federal or the New York State Constitution.²³

Judge Titone, in his concurring opinion, expressed skepticism over the ability of any judicially prescribed standard to prevent the discriminatory use of peremptory challenges effectively.²⁴ Noting a fundamental inconsistency between peremptory challenges, which need not be justified, and the neutral explanations required under *Batson*, Judge Titone reiterated Justice Marshall's concurring sentiment in *Batson* and suggested the elimination of peremptory challenges altogether.²⁵

¹⁹ See *Hernandez*, 75 N.Y.2d at 353, 552 N.E.2d at 621-22, 553 N.Y.S.2d at 85-86.

²⁰ See *id.* at 356-57, 552 N.E.2d at 623-24, 553 N.Y.S.2d at 87-88. Judge Bellacosa relied on *Batson*. *Id.* In *Batson* Justice Powell stated that "[s]ince the trial judge's findings . . . largely will turn on evaluations of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U.S. at 98 n.21. Judge Bellacosa further reasoned that if judges of the state's highest judicial tribunal could not agree as to whether or not the prosecutor was acting in good faith, the court should refrain from encouraging a redetermination of this factual issue at the appellate level. See *Hernandez*, 75 N.Y.2d at 357, 552 N.E.2d at 624, 553 N.Y.S.2d at 88.

²¹ *Hernandez*, 75 N.Y.2d at 357-58, 552 N.E.2d at 624, 553 N.Y.S.2d at 88. The court, however, cautioned prosecutors that "pretextual maneuvering" was unacceptable, and carefully limited its holding to "the circumstances presented," suggesting that explanations more obviously contrived than those offered here might be deemed insufficient. *Id.*

²² *Id.* at 357, 552 N.E.2d at 624-25, 553 N.Y.S.2d at 88-89.

²³ See *id.*

²⁴ *Hernandez*, 75 N.Y.2d at 358-59, 552 N.E.2d at 625, 553 N.Y.S.2d at 89 (Titone, J., concurring). Judge Titone pointed to the fact that "racist motivations are easily concealed," and that even an enhanced scrutiny might not necessarily "be effective in eradicating racial bias in the jury selection process." *Id.* at 359, 552 N.E.2d at 625, 553 N.Y.S.2d at 89 (Titone, J., concurring).

²⁵ See *id.* at 359-60, 552 N.E.2d at 625-26, 553 N.Y.S.2d at 89-90 (Titone, J., concurring). Judge Titone, declining the dissent's invitation to develop "an authoritative body of state law," urged a legislative response instead. *Id.* (Titone, J., concurring). In dissent, Judge

In a scathing dissent, Judge Kaye, joined by Judge Hancock, accused the majority of rendering illusory the equal protection principles articulated in *Batson*.²⁶ Judge Kaye further argued for a decision based on independent state constitutional grounds as a means of best serving the citizens of New York and assisting the federal judiciary in developing this area of the law.²⁷ Questioning both the legitimacy of the district attorney's concern for juror responsibility,²⁸ and the sincerity of his explanation,²⁹ Judge Kaye strongly urged that a standard of "enhanced scrutiny" be used in evaluating the prosecution's proffered explanations.³⁰

It appears that the *Hernandez* court misconstrued the *Batson* standard in an effort to avoid unduly complicating the law in this area.³¹ However, the *Hernandez* court has "surrendered at the outset" its responsibility to protect the constitutional rights of all New York State citizens,³² in favor of a statutorily codified histori-

Kaye argued that since peremptory challenges are essentially creatures of state statutes, the issue is ideally suited for determination under state law. *Id.* at 360-61, 552 N.E.2d at 626-27, 553 N.Y.S.2d at 90-91 (Kaye, J., dissenting).

²⁶ *See id.* at 361, 552 N.E.2d at 627, 553 N.Y.S.2d at 91 (Kaye, J., dissenting).

²⁷ *Id.* (Kaye, J., dissenting). Judge Kaye indicated that a well developed and significant body of state law decisions would help settle this area of the law for practitioners and citizens, as well as provide a model for the United States Supreme Court and other jurisdictions. *See id.* (Kaye, J., dissenting).

²⁸ *See id.* at 364-65, 552 N.E.2d at 628-29, 553 N.Y.S.2d at 92-93 (Kaye, J., dissenting). Judge Kaye doubted whether the prosecution's reason for excusing the jurors was a legitimate "trial related concern," as required by *Batson*, since the state has no valid interest in perpetuating inaccurate translations by official court interpreters. *Id.* (Kaye, J., dissenting).

²⁹ *See id.* at 363, 552 N.E.2d at 628, 553 N.Y.S.2d at 92 (Kaye, J., dissenting). Pointing to the prosecutor's failure to determine the Spanish language abilities of any jurors other than those with Latino surnames, Judge Kaye remained unpersuaded by the prosecution's articulated reasons. *See id.* (Kaye, J., dissenting).

³⁰ *Id.* at 363-64, 552 N.E.2d at 628, 553 N.Y.S.2d at 92 (Kaye, J., dissenting). The dissent stipulated that an enhanced inquiry would not necessarily raise a peremptory challenge to the same level as a challenge for cause, but would reveal the true motivation behind the excusal of the Latino-surnamed jurors. *See id.* (Kaye, J., dissenting). According to the dissent, heightened scrutiny should have been required due to the meager record presented by the prosecution and the "potential for disparate impact" upon Latinos. *See id.* (Kaye, J., dissenting). Latinos, in particular, might be impacted disproportionately by the prosecution's asserted basis for challenge since most are fluent in Spanish. *Id.* at 361-62, 552 N.E.2d at 627, 553 N.Y.S.2d at 91 (Kaye, J., dissenting). Moreover, if the prosecution can excuse jurors for their fluency in Spanish, Latinos may be excluded disproportionately in cases where testimony in Spanish is offered. *See id.* (Kaye, J., dissenting).

³¹ *Cf.* CPL § 270.25 commentary at 492-93 (McKinney 1982). In his commentaries to section 270.25, Judge Bellacosa predicted that it was "highly unlikely that the traditional historical function will be completely upended or intruded upon so as to add uncertainty, complexity or delay to this phase of a criminal jury trial." *Id.*

³² *See Hernandez*, 75 N.Y.2d at 361, 552 N.E.2d at 627, 553 N.Y.S.2d at 91 (Kaye, J.,

cal tradition.³³ The *Hernandez* court properly observed that the United States Supreme Court "carefully modulated" its decision in *Batson* to require the prosecution to explain its use of peremptory challenges³⁴ only after the defendant has established a prima facie case of purposeful discrimination.³⁵ Thus, the *Hernandez* court's fear of undermining the nature of peremptory challenges appears disingenuous since the *Batson* framework itself preserves the unrestricted exercise of peremptories *until* a prima facie case is established. Nevertheless, in the event of a direct collision between peremptory challenges and constitutional requirements, the former would inevitably have to give way.³⁶ Moreover, the administrative burden of implementing a heightened scrutiny standard is not overwhelming.³⁷

Given the sacred position of juries within our constitutional order and their importance in maintaining the integrity of the judicial system,³⁸ it is suggested that the *Hernandez* court erred when it failed to evaluate the district attorney's explanation for a prima facie showing of discriminatory use of peremptory challenges with "enhanced scrutiny." As a result of the holding in *Hernandez*, the criminally accused may find themselves at the mercy of the prosecutor's discretion in obtaining a jury of their peers.³⁹

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dissenting).

³³ See *State v. Slappy*, 522 So. 2d 18, 20 (Fla.) (where peremptory contains constitutional infirmity, "the constitutional principles must prevail"), *cert. denied*, 487 U.S. 1219 (1988); *State v. Gillmore*, 103 N.J. 508, 529, 511 A.2d 1150, 1161 (1986) (peremptory challenges are "merely a statutory 'incident' of the constitutional right . . . [and] must be confined to further, not . . . undermine, the constitutional right").

³⁴ *Hernandez*, 75 N.Y.2d at 357, 552 N.E.2d at 624, 553 N.Y.S.2d at 88.

³⁵ *People v. Hall*, 35 Cal. 3d 161, 169, 672 P.2d 854, 859, 197 Cal. Rptr. 71, 77 (1983); see also Comment, *State v. Neil: Approaching the Desired Balance Between Peremptory Challenges and Racial Equality in Jury Selection*, 39 U. MIAMI L. REV. 777, 783 (1985) ("peremptory challenges are exempt from judicial inquiry *unless* they are based solely on race").

³⁶ See *supra* note 33.

³⁷ See *Hall*, 35 Cal. 3d at 169, 672 P.2d at 859, 197 Cal. Rptr. at 76.

³⁸ See *supra* note 1 and accompanying text. The composition of a jury is also important to the individual defendant because "the peers of a criminal defendant will better understand and empathize with his feelings, social position, and needs than will those from different backgrounds." Serr & Maney, *supra* note 8, at 7.

³⁹ See Serr & Maney, *supra* note 8, at 43. Under the standard announced in *Her-*