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NEW YORK SUPREME COURT
APPELLATE DIVISION, THIRD DEPARTMENT

People v. Colon[1]
(decided July 3, 2003)

Edwin Colon was convicted of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree.[2] Upon conviction, Colon was sentenced to concurrent terms of eight and one-third to twenty-five years in prison.[3] He appealed, grounding one of his claims on the exercise of peremptory challenges in a discriminatory manner in violation of both the United States Constitution[4] and the New York State Constitution.[5] Colon argued that the county court erred on four grounds, namely that the court should not have denied his pretrial motion for a *Wade* hearing,[6] that the trial judge should have required the prosecutor to state a

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[1] 763 N.Y.S.2d 850 (App. Div. 3rd Dep't 2003).

[2] *Id.* at 852.

[3] *Id.*

[4] U.S. CONST. amend. XIV provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[5] N.Y. CONST. art. 1, § 11 provides in pertinent part:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

[6] *Colon*, 763 N.Y.S.2d at 852. *See* People v. Chipp, 552 N.E.2d 608, 614 (N.Y. 1990) ("The purpose and function of the *Wade* hearing is to determine

reason for exercising a peremptory challenge against the only African American on the venire,[7] that the *Sandoval* ruling allowed the People to ask about his guilty plea in federal court,[8] and that he was not given his right to a fair trial because the prosecutor was an unsworn witness.[9] The Appellate Division, Third Department, affirmed the county court's decision.[10] The court held the *Wade* hearing unnecessary,[11] the defendant did not meet his burden of proof for alleging discriminatory use of peremptory challenges,[12] the *Sandoval* ruling was not an abuse of discretion,[13] and the defendant was not deprived of his right to a fair trial.[14] The appellate division held that the defendant failed to state "facts and other relevant circumstances sufficient to raise an inference that the prosecutor used the challenge[ ] to exclude [the prospective juror] because of [his] race."[15]

Colon was arrested after a Schenectady police investigator observed him selling heroin to a confidential police informant at a

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whether a police-arranged pretrial identification procedure such as a lineup, was unduly suggestive.").

[7] *Id.* at 852.

[8] *Id.* at 853. *See* People v. Morales, 764 N.Y.S.2d 104, 107 (App. Div. 2d Dep't 2003). The purpose of a *Sandoval* hearing is to notify the defendant in advance that if he takes the stand, the People are permitted to conduct cross-examination about defendant's criminal conduct for the purpose of impeaching his credibility. *Id.*

[9] *Colon*, 763 N.Y.S.2d at 853.

[10] *Id.* at 854.

[11] *Id.* at 852.

[12] *Id.* at 853.

[13] *Id.*

[14] *Colon*, 763 N.Y.S.2d at 854.

[15] *Id.* at 853.

prearranged meeting at the informant's apartment.[16] During voir dire, the People used a peremptory challenge to remove the only black potential juror.[17] The county court refused to require the People to state the reason for exercising the peremptory challenge.[18] The court focused its analysis on the United States Supreme Court's holding that the discriminatory use of peremptory challenges violates the Equal Protection Clause of the Fourteenth Amendment.[19] Although the United States Constitution delineates no requirement that Congress grant peremptory challenges, the challenge is by far one of the greatest forms of protection for the accused.[20] Over 100 years ago, the Supreme Court held that an African American defendant is denied equal protection when members of his race have been purposefully excluded from a jury.[21] Additionally, the appellate division looked to the New York Court of Appeals, which has consistently held that the discriminatory use of peremptory challenges violates the Equal Protection Clause of the New York State Constitution.[22]

Both the United States Supreme Court and the New York Court of Appeals have found that there are competing interests in

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[16] *Id.* at 852.
[17] *Id.*
[18] *Id.*
[19] *Colon*, 763 N.Y.S.2d at 853 (citing Batson v. Kentucky, 476 U.S. 79 (1986)).
[20] Swain v. Alabama, 380 U.S. 202, 219 (1965) ("Although there is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges, nonetheless the challenge is 'one of the most important rights secured to the accused.'").
[21] Strauder v. West Virginia, 100 U.S. 303, 310 (1879).
[22] *Colon*, 763 N.Y.S.2d at 852 (citing People v. Kern, 554 N.E.2d 1235 (N.Y. 1990)).

preventing the discriminatory use of peremptory challenges.[23] On the one hand, there is the historical tradition that a peremptory challenge can be used for *any* reason.[24] However, there is also a belief that exercising peremptory challenges for discriminatory reasons perverts the right to jury service.[25] Jury service is a "civil right established by Constitution and statute," and discrimination which results in the exclusion of some members violates the notions of a democratic society.[26] The principle is important for both the defendant's and the community's protection.[27] Discrimination harms the juror by preventing him or her from participating in "the administration of justice, and it harms society by impairing the integrity of the criminal trial process."[28] The ends of justice are better served when trial courts are required to notice the discriminatory use of peremptory challenges.[29] Furthermore, prohibiting the discriminatory exercise of peremptory challenges strengthens public confidence in the jury system, since the result

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[23] *See, e.g., Batson*, 476 U.S. at 87-91 (holding that a prosecutor cannot exercise a peremptory challenge for reasons related to race); *Kern*, 554 N.E.2d at 1242 (holding that defense counsel is not permitted to exercise peremptory challenges for reasons related to race).

[24] *Batson*, 476 U.S. at 91. (citing *Swain*, 380 U.S. at 214-20) ("The Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control. . . .").

[25] *Kern*, 554 N.E.2d at 1242.

[26] *Id.*

[27] *Batson*, 476 U.S. at 87.

[28] *Kern*, 554 N.E.2d at 1242.

[29] *Batson*, 476 U.S. at 99 ("By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice.").

would be to ensure that no juror will be removed on the basis of his or her race.[30]

The federal Constitution does not confer a right to peremptory challenges.[31] However, "the peremptory challenge has very old credentials."[32] Peremptory challenges originate from the English common law, which endorsed the necessity of peremptory challenges to ensure a proper trial.[33] The United States adopted this view and, shortly thereafter, federal and state statutes conferred the right of peremptory challenges.[34] "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."[35] However, in *Batson v. Kentucky*, the Supreme Court held that the Constitution's "Equal Protection Clause placed some limits on the State's exercise of peremptory challenges."[36] The Court held that a prosecutor was not permitted to exercise a peremptory challenge to remove a black juror "for reasons wholly unrelated to the outcome of the particular case on trial" or to strip blacks of "the same right and opportunity to participate in the administration of justice enjoyed by the white population."[37]

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[30] *Id.*
[31] *Swain*, 380 U.S. at 219.
[32] *Id.* at 212.
[33] *Id.* at 213-14.
[34] *Id.* at 214, 215.
[35] *Id.* at 220.
[36] *Batson*, 476 U.S. at 91.
[37] *Id.* (citing *Swain*, 380 U.S. at 224).

In *Batson*, the defendant, a black male, was convicted of second degree burglary.[38] During voir dire, the prosecutor removed all four black persons on the venire through the exercise of peremptory challenges.[39] Defense counsel moved to withdraw the jury, claiming that the prosecutor's removal of all African Americans from the venire violated the defendant's rights under the Sixth[40] and Fourteenth Amendments.[41] Defense counsel requested a hearing, but the judge did not rule on his request.[42] Instead, he told defense counsel that the parties could "use their peremptory challenges to 'strike anybody they want to.'"[43] The defendant's conviction was affirmed by the Kentucky Supreme Court.[44]

In reaching its decision, the Supreme Court reaffirmed a portion of one of its prior opinions which held that denying blacks the opportunity to serve as jurors based on their race violated the Equal Protection Clause.[45] A prosecutor was not permitted to

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[38] *Batson*, 476 U.S. at 82.

[39] *Id.* at 83.

[40] U.S. CONST. amend. VI provides in pertinent part:

> In all criminal accusations, the accused 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[41] *Batson*, 476 U.S. at 83.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 84.

[45] *Batson*, 476 U.S. at 84 (citing *Swain*, 380 U.S. at 203-04).

remove blacks from the venire "for reasons wholly unrelated to the outcome of the particular case on trial. . . ."[46]

The Supreme Court reaffirmed the impermissible nature of using peremptory challenges in a discriminatory way, and *Batson* outlined new criteria that a defendant must demonstrate to establish a prima facie case for discriminatory use of peremptory challenges. The defendant must first show that:

> he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen . . . on account of their race.[47]

Once the defendant establishes a prima facie case, the burden shifts to the state to provide a "neutral explanation" for removing black jurors.[48] The Supreme Court, in *Batson*, remanded the case for determination of whether the defendant had established a prima facie case based on the new standards the

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[46] *Id.* at 91 (citing *Swain*, 380 U.S. at 224).
[47] *Id.* at 97.
[48] *Id.*

Court set forth and, if so, whether the prosecutor had a race neutral explanation.[49]

The Supreme Court did not enumerate a specific list of instances in which an inference can arise, but rather, it stated that a trial judge should consider all of the relevant circumstances in its determination.[50] The Court gave two examples of when an inference of discrimination can arise. An inference can occur if there is a "pattern of strikes against black jurors . . ." and through the prosecutor's statements and questions during voir dire.[51]

The New York courts look to the standards set forth by the United States Supreme Court for establishing a prima facie case of discrimination based on the exercise of peremptory challenges. The Court of Appeals has interpreted the removal of jurors based on race as a violation of the Equal Protection Clause of the New York Constitution.[52] While the New York Court of Appeals follows the same standards articulated in *Batson*, it further expanded *Batson* to criminal defendants.[53] The *Batson* Court specifically refused to decide whether the Equal Protection Clause also precludes the discriminatory use of peremptory challenges for defense counsel.[54] However, in subsequent decisions, the Supreme

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[49] *Id.* at 100.
[50] *Batson*, 476 U.S. at 96.
[51] *Id.* at 97.
[52] *Kern*, 554 N.E.2d at 1236.
[53] *Id.* at 1246.
[54] *Batson,* 476 U.S. at 89 n.12 ("We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.").

Court held that private civil litigants[55] and criminal defendants[56] could not exercise peremptory challenges in a discriminatory manner.

The New York Court of Appeals has ruled that the *Batson* violation applies to defense counsel. In *People v. Kern*,[57] the defendants, a group of white teenagers, were convicted of manslaughter of a black male.[58] On the first day of jury selection, defense counsel used his peremptory challenges to remove all three black jurors and applied for eight more challenges.[59] His reason for applying for additional challenges was that "the black jurors did 'not want to be excused. They're coming in here, volunteering,' whereas white jurors 'who aren't anxious to serve are using all kinds of excuses to get off any duty.'"[60] The lower court ruled, under the *Batson* standards, that defense counsel was prohibited from using peremptory challenges in a discriminatory way.[61] The court required defense counsel to state a race neutral explanation when exercising a peremptory challenge in the future.[62] Thereafter, defense counsel exercised another seven peremptory challenges on seven black jurors,[63] providing race

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[55] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991).
[56] Georgia v. McCollum, 505 U.S. 42, 59 (1992).
[57] *Kern*, 554 N.E.2d at 1241.
[58] *Id.* at 1236.
[59] *Id.* at 1239.
[60] *Id.*
[61] *Id.*
[62] *Kern*, 554 N.E.2d at 1239.
[63] *Id.*

neutral explanations for six of the jurors, but the court only accepted three of the explanations.[64]

The appellate division affirmed the defendants convictions.[65] On appeal to the New York Court of Appeals, defendants' argued that the trial court erred in limiting their use of peremptory challenges.[66] It was their position that a criminal defendant was not precluded under the state nor federal constitutions from using peremptory challenges in a discriminatory way.[67] In focusing their argument on the New York State Constitution, they argued that the exercise of peremptory challenges does not constitute state action and, therefore, does not fall within the Equal Protection Clause.[68] The Court of Appeals stated there can be no doubt that the state is involved in the process of excluding jurors when a defendant exercises a peremptory challenge.[69] Not only does a state statute[70] give a defendant the power to exercise a peremptory challenge, but it is the state that summons the jurors who are "subject to voir dire at the direction of the State. . . ."[71] Additionally, the judge acts within the state's authority and enforces the discriminatory decision by excusing the

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[64] *Id.*
[65] *Kern,* 545 N.Y.S.2d 4 (App. Div. 2d Dep't 1989).
[66] *Kern,* 554 N.E.2d at 1240.
[67] *Id.*
[68] *Id.* at 1244.
[69] *Id.* at 1245.
[70] N.Y. CRIM. PROC. LAW § 270.25 (McKinney 2003) provides in pertinent part: "A peremptory challenge is an objection to a prospective juror for which no reason need be assigned."
[71] *Kern,* 554 N.E.2d at 1245.

juror.[72] Upon this reasoning, the Court of Appeals stated that a defense counsel's discriminatory use of peremptory challenges constitutes 'State action' for purposes of equal protection.[73] Therefore, *Batson* applies to criminal defendants, and thus it was proper for defense counsel to be required to state race neutral explanations for challenging black jurors.[74] The Court of Appeals affirmed the order of the appellate division.[75]

New York has also held that a *Batson* violation can occur even if only one juror is removed because of discriminatory reasons. In *People v. Jenkins*,[76] the defendant was convicted of robbery in the second degree.[77] During voir dire, the prosecutor used seven of his ten peremptory challenges to remove seven blacks on the panel.[78] He exercised the remaining three peremptory challenges against three of the thirty-seven white and Latino members.[79] After defense objected, the prosecutor stated that "if [counsel] would like me to go [into] the qualifications of each of the other jurors, I would go through them at this time."[80] The trial court stated there had been no "systemic exclusion and declined the prosecutor's offer to explain her challenges."[81]

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[72] *Id.*
[73] *Id.* at 1246.
[74] *Id.*
[75] *Id.* at 1247.
[76] *Jenkins*, 554 N.E.2d at 51.
[77] *Id.* at 48.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 49.
[81] *Jenkins*, 554 N.E.2d at 49.

The appellate division followed the Supreme Court's *Batson* standards.[82] The court reversed the defendant's conviction and concluded a *Batson* violation occurred because there was a pattern of strikes present.[83] The pattern indicated an inference of discriminatory use of the peremptory challenges that the trial judge ignored.[84] On appeal to the New York Court of Appeals, the People argued that because they did not strike all of the blacks on the panel, there was no demonstration of a discriminatory pattern.[85] However, the court stated that a *Batson* violation occurs even if a prosecutor does not remove all blacks from the jury.[86] Additionally, the court stated that a prosecutor cannot justify discriminatory use of peremptory challenges by using concepts such as 'representative venire' and 'fair cross-section' of the community.[87] Ultimately, the court agreed with the appellate division that a pattern of strikes was present, but it remitted the case because the appellate division's decision was made on the law and not the facts.[88]

In *People v. Childress*,[89] defendant, an African American, was convicted of burglary.[90] Defense counsel made an objection that the prosecutor was using his peremptory challenges in a

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[82] *Id.*
[83] *Id.* at 50.
[84] *Id.*
[85] *Id.*
[86] *Jenkins,* 554 N.E.2d at 50.
[87] *Id.* at 51.
[88] *Id.* at 52.
[89] 614 N.E.2d 709 (N.Y. 1993).
[90] *Id.* at 711.

discriminatory way.[91] Defense counsel stated, "[The black jurors] indicated no reason why they could not serve fairly on this jury. I think that there must be some motivation for that challenging. And I would ask the Court to exclude those challenges."[92] The judge replied, "I am old fashioned. I think the word peremptorily means exactly what it says. However, aside from that, I don't notice anything. Of course, you have your exception."[93] The prosecutor then stated, on the record, "There were three black jurors on this particular panel, and I accepted one black juror. And it is not as if I was excluding black jurors because of their race."[94]

The appellate division affirmed the defendant's conviction, holding that the defendant could not substantiate the claimed error since the voir dire proceedings were not included in the record on appeal.[95] Although the New York Court of Appeals affirmed, it used a different analysis.[96] The Court of Appeals noted that the trial judge unequivocally misstated the law when he stated that the prosecutor could make peremptory challenges regardless of their racial basis.[97] The court applied the *Batson* standards and stated that the exclusion of even one black juror on account of race violates the Equal Protection Clause.[98] The Court of Appeals held that the record did not assert sufficient facts to raise an inference of

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[91] *Id.*
[92] *Id.*
[93] *Id.* at 710.
[94] *Childress*, 614 N.E.2d at 710.
[95] People v. Childress, 575 N.Y.S.2d 1018 (App. Div. 2d Dep't 1991).
[96] *Childress*, 614 N.E.2d at 709.
[97] *Id.* at 710.
[98] *Id.* at 711.

discrimination and affirmed the conviction.[99] The court stated that in order for the trial court to adequately determine defendant's claim, "a party asserting a claim under *Batson v. Kentucky* should articulate and develop all of the grounds supporting the claim, both factual and legal, during the colloquy in which the objection is raised and discussed."[100]

In conclusion, federal and New York holdings are nearly identical when interpreting whether or not a peremptory challenge was exercised in a discriminatory way. Under both the United States Constitution and New York Constitution, the discriminatory use of peremptory challenges violates the Equal Protection Clause whether exercised by a prosecutor or a criminal defendant. The New York Constitution further limits the exercise of peremptory challenges since a *Batson* violation can occur even if only one juror is excluded on the basis of race.[101]

The trial judge in *People v. Colon* did not require the People to give a reason for using a peremptory challenge against the only black juror because the defendant failed to come forth with facts sufficient to raise an inference of discrimination.[102] If defense counsel can support his proposition that the prosecutor's strike against the only black juror on the panel is discriminatory and sufficient to raise an inference of discrimination, the New York Court of Appeals may agree. If so, the People will have to

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[99] *Id.*

[100] *Id.* at 712.

[101] *Childress*, 614 N.E.2d at 711.

[102] *Colon*, 763 N.Y.S.2d at 852.

come forward with a race-neutral explanation, and the conviction may warrant reversal if they cannot provide one.

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FREEDOM OF SPEECH

United States Constitution Amendment I:

Congress shall make no law . . . abridging the freedom of speech . . . .

New York Constitution Article I, Section 8:

[N]o law shall be passed to restrain or abridge the liberty of speech . . . .