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**Touro Law Review**

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Volume 17 | Number 3

Article 10

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March 2016

## **United States v. Ramirez-Soberanes: Is Sympathy Towards Minorities a Race-Neutral Reason under Batson v. Kentucky?**

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### **Recommended Citation**

Galan, Thomas (2016) "United States v. Ramirez-Soberanes: Is Sympathy Towards Minorities a Race-Neutral Reason under Batson v. Kentucky?," *Touro Law Review*: Vol. 17: No. 3, Article 10.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol17/iss3/10>

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**UNITED STATES v. RAMIREZ-SOBERANES:<sup>1</sup>  
IS SYMPATHY TOWARDS MINORITIES A  
RACE-NEUTRAL REASON UNDER BATSON v.  
KENTUCKY<sup>2</sup>?**

*Thomas Galan*<sup>3</sup>

**I. INTRODUCTION**

In September of 1997, during a cocaine investigation of a Utah condominium, Luis Alberto Ramirez-Soberanes was arrested for illegal firearm possession.<sup>4</sup> During the warranted search of the condominium, law enforcement officials uncovered a .45 caliber semi-automatic handgun, a loaded magazine, and a box of .45 caliber ammunition in a closet of the condominium.<sup>5</sup> Subsequent to his conviction of the firearms charge, Ramirez-Soberanes appealed to the United States Court of Appeals for the Tenth Circuit raising, *inter alia*, that a constitutional violation of his rights under *Batson v. Kentucky*<sup>6</sup> occurred through the use of one of the Government's peremptory challenges.<sup>7</sup> Ms. Hannah Brown was challenged by the Government by reason of her being an employee of a McDonald's in a neighborhood that was predominately populated by minorities.<sup>8</sup> The Government explained the peremptory challenge by stating that "[t]here may be some sympathies" towards minorities and "to eliminate any sense of prejudice . . . we felt that it was appropriate to strike her."<sup>9</sup> Although the defendant claimed the peremptory challenge was a race-based decision, the district court ruled in favor of the

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<sup>1</sup> 210 F.3d 391 (10th Cir. 2000), No. 99-4097, 2000 U.S. App. LEXIS 6666, at \*3, *cert. denied*, 531 U.S. 887 (2000).

<sup>2</sup> 476 U.S. 79 (1986).

<sup>3</sup> J.D., Jacob D. Fuchsberg, Touro Law Center, 2002. This Note was the *Touro Law Review's* competition winner in the Spring 2000 competition.

<sup>4</sup> Ramirez-Soberanes, No. 99-4097, 2000 U.S. App. LEXIS 6666, at \*3.

<sup>5</sup> *Id.* at \*3.

<sup>6</sup> 476 U.S. 79.

<sup>7</sup> Ramirez-Soberanes, No. 99-4097, 2000 U.S. App. LEXIS 6666, at \*2.

<sup>8</sup> *Id.* at \*4.

<sup>9</sup> *Id.*

Government and found the decision to be race-neutral, ultimately excusing Ms. Brown from the jury.<sup>10</sup>

The issue of race discrimination as part of the decision making process when selecting a jury was tackled in *Batson v. Kentucky*,<sup>11</sup> in which the United States Supreme Court mapped out a three-prong test in order to assist in the elimination of race-based peremptory challenges.<sup>12</sup> The first step of the *Batson* test requires the defendant to make out a prima facie case of discrimination.<sup>13</sup> Next, the burden shifts to the Government which must then put forth an adequate, race-neutral explanation for the peremptory challenge.<sup>14</sup> "In determining whether the Government has satisfied the requirements of *Batson's* second step, we must keep firmly in mind that *Batson's* holding rests squarely on the Equal Protection Clause of the Fourteenth Amendment."<sup>15</sup> The third prong delegates to the trial court the duty of determining whether the defendant established purposeful discrimination.<sup>16</sup>

Since its inception in 1986, the *Batson* test has evolved into a tool employed to combat discrimination. The second step of the test, which deals with the Government's race-neutral explanation, is often the focal point of discussion and even more so the element that most cases turn on.<sup>17</sup> This Note will discuss the effects that the *Batson* test and its progeny have had on the peremptory challenge, with a strong focus on the second prong of the three-prong test. Furthermore, this Note will examine the term "race-neutral" as defined by the various decisions of the courts and analyze "race-neutral" in relation to the explanation of

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<sup>10</sup> *Id.* at \*5.

<sup>11</sup> 476 U.S. 79.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 93.

<sup>14</sup> *Id.* at 94.

<sup>15</sup> *U.S. v. Uwaezhoke*, 995 F.2d 388, 393 (3d Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994).

<sup>16</sup> *Batson*, 476 U.S. at 98.

<sup>17</sup> *See Hernandez v. New York*, 500 U.S. 352 (1991). *See also Purkett v. Elem*, 514 U.S. 765 (1995); *U.S. v. Sneed*, 34 F.3d 1570 (10th Cir. 1994); *U.S. v. Johnson*, 4 F.3d 904 (10th Cir. 1993), *cert. denied*, 510 U.S. 1123 (1994).

"sympathies" for minorities which was the prosecutor's explanation in the *Ramirez-Sorberanes* case.

## II. HISTORY

### A. THE PEREMPTORY CHALLENGE

"A Peremptory Challenge is a challenge to a prospective juror for which no reason need be given or cause assigned."<sup>18</sup> The peremptory challenge can be dated back as far as two thousand years in the usage of Roman Law in 104 BC.<sup>19</sup> England also made use of the peremptory challenge in its early days of trials where the prosecutor in felony cases had unlimited challenges and the defendants were permitted to execute thirty-five strikes.<sup>20</sup> The history of the peremptory challenge in American jurisprudence dates back to the early common law of the United States.<sup>21</sup> The English tradition of the peremptory challenge was brought to the United States, and "[i]n 1790 the new United States Congress granted thirty-five peremptories to defendants in treason trials and twenty to defendants in trials for capital felonies specified in the Act of 1790."<sup>22</sup> From 1870 to present time, nearly all states have provided both the prosecution and the defendant a certain number of peremptory challenges.<sup>23</sup>

The peremptory challenge has been used to narrow the venire list with the goal of procuring an ideal jury with optimum qualifications and to build a jury that can make decisions based on the evidence rather than on personal bias.<sup>24</sup> The attorney and the

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<sup>18</sup> 47 AM. JUR. 2d *Jury* § 234 (1995).

<sup>19</sup> Eric N. Einhorn, *Batson v. Kentucky and J.E.B. v. Alabama Ex Rel. T.B.: Is the Peremptory Challenge Still Preeminent?*, 36 B.C. L. REV. 161, 166 (1994).

<sup>20</sup> *Id.*

<sup>21</sup> See *Swain v. Alabama*, 380 U.S. 202, 212-17 (1965) (summarizing the development of the peremptory challenge from its early stages at common law through its usage in the 20th Century).

<sup>22</sup> Einhorn, *supra* note 19, at 167.

<sup>23</sup> Einhorn, *supra* note 19, at 167.

<sup>24</sup> *Swain*, 380 U.S. at 219.

client are given a set amount of opportunities during the voir dire to strike any prospective juror because of a personal characteristic that may lead to a bias. The list of commonly accepted race-neutral reasons is long and encompasses reasons ranging from juror demeanor and attentiveness to the juror's familiarity with the subject matter of the case.<sup>25</sup> Any reason, "ranging from the juror's occupation to the look in his eye,"<sup>26</sup> may be acceptable. Although the peremptory challenge may be invoked without cause, and "need not rise to the level justifying exercise of a challenge for cause,"<sup>27</sup> litigants are restricted from challenging a juror on racial grounds.<sup>28</sup> The issue of race-based peremptory challenges has sparked much debate in the legal community. It has been challenged in the courts in a number of legal decisions which limit the peremptory challenge without completely eliminating its usage.<sup>29</sup>

#### B. THE EFFECT OF *BATSON V. KENTUCKY* ON THE PEREMPTORY CHALLENGE

The United States Supreme Court made a first attempt to address the problematic issues of the peremptory challenge in *Swain v. Alabama*.<sup>30</sup> After Robert Swain, an African-American, was convicted of rape in the circuit court of Talladega County, Alabama, he made motions to strike the trial jury and to void the petit jury on the basis of racially discriminatory peremptory challenges.<sup>31</sup> Swain argued that the peremptory challenges violated his Equal Protection Rights under the Federal Constitution because eight black jurors were eliminated from the jury venire, six of whom were struck through peremptory

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<sup>25</sup> Michelle Mahony, *The Future Viability of Batson v. Kentucky and the Practical Implications of Purkett v. Elem*, 16 REV. LITIG. 137, 154-55 (1997).

<sup>26</sup> Jayson Hochberg, *Peremptory Challenge: An American Relic*, 10 WTR. CRIM. JUST. 10 (1996).

<sup>27</sup> *Batson*, 476 U.S. at 97.

<sup>28</sup> 47 AM. JUR. 2d *Jury* § 244 (1995).

<sup>29</sup> Mahony, *supra* note 25, at 140-41.

<sup>30</sup> 380 U.S. 202.

<sup>31</sup> *Id.* at 203.

challenges.<sup>32</sup> On appeal, the Supreme Court of Alabama affirmed the conviction and the United States Supreme Court subsequently granted certiorari.<sup>33</sup>

The United States Supreme Court's holding in *Swain* defined a new burden that was placed on the defendant in proving a case of discrimination in jury selection. The Court held that "the defendant must, to pose the issue, show the prosecutor's *systematic use* of peremptory challenges against Negroes over a period of time."<sup>34</sup> This burden remained in effect for the next twenty-one years, until the United States Supreme Court overruled the burden in the landmark case of *Batson v. Kentucky*.<sup>35</sup>

In *Batson v. Kentucky*, a black man was tried in Jefferson circuit court, Kentucky on charges of second degree burglary and receipt of stolen goods.<sup>36</sup> The jury was made up of all whites due to the prosecution's challenges of the only four black men on the venire.<sup>37</sup> Defense counsel moved to discharge the entire jury based on a violation of the defendant's rights under the Sixth and Fourteenth Amendments.<sup>38</sup> The motions were denied and the defendant was convicted, only to appeal to the Supreme Court of Kentucky, which affirmed the trial court's holding.<sup>39</sup> The United States Supreme Court subsequently granted certiorari and ultimately reversed the lower court's ruling.<sup>40</sup>

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<sup>32</sup> *Id.* at 205.

<sup>33</sup> *Id.* at 203.

<sup>34</sup> *Id.* at 227 (emphasis added).

<sup>35</sup> *Batson*, 416 U.S. at 92.

<sup>36</sup> *Id.* at 82.

<sup>37</sup> *Id.* at 83.

<sup>38</sup> *Id.*; See U.S. CONST. amend. VI, XIV. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, 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 . . ." The Fourteenth Amendment provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .; nor deny to any person within its jurisdiction the equal protection of the laws."

<sup>39</sup> *Batson*, 476 U.S. at 83-84.

<sup>40</sup> *Id.* at 84.

In combating the heavy burden set out in the *Swain* decision, the Supreme Court established a three-prong test previously mentioned in evaluating a claim of racial discrimination in peremptory challenges.<sup>41</sup> The first of the three prongs requires the defendant to make out a prima facie case of purposeful discrimination.<sup>42</sup> To establish such a case, 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.<sup>43</sup> Second, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate."<sup>44</sup> Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used the peremptory challenge to exclude the prospective juror from the petit jury on account of their race.<sup>45</sup>

The second prong of the three-part process shifts the burden to the prosecution to give a race-neutral explanation for the peremptory challenge.<sup>46</sup> Although the prosecution's explanation need not rise to the level of a challenge for cause, the government may not simply rebut the prima facie case by stating the challenge was made "on the assumption – or his intuitive judgment – that [the juror] would be partial to the defendant because of their shared race."<sup>47</sup> Furthermore, the explanation must be "related to the particular case to be tried."<sup>48</sup>

The process of shifting the burden was borrowed from Title VII of the Civil Rights Act of 1964,<sup>49</sup> and is concerned with disparate treatment rather than disparate impact in deciding

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<sup>41</sup> *Id.* at 94-98.

<sup>42</sup> *Id.* at 94.

<sup>43</sup> *Id.* at 96.

<sup>44</sup> *Batson*, 476 U.S. at 83-84 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

<sup>45</sup> *Id.* at 96.

<sup>46</sup> *Id.* at 97.

<sup>47</sup> *Id.* at 97.

<sup>48</sup> *Id.* at 98.

<sup>49</sup> See 42 U.S.C. §§ 1981-2000(h) (1994).

whether a peremptory challenge is race-neutral.<sup>50</sup> This prong has a strong grounding in the Equal Protection Clause, which guarantees citizens freedom from racial discrimination by the government.<sup>51</sup> Furthermore, the Equal Protection Clause would be made “vain and illusory” if the courts permitted the prosecutor’s assumption that the mere race of a person comes along with biases that would cause a juror to make a decision on personal prejudice rather than the evidence.<sup>52</sup>

After the reason for the peremptory challenge is given by the prosecutor, “the burden shifts back to the defendant to prove by a preponderance of the evidence that the State purposefully discriminated against the struck jurors on the basis of their race in exercising its peremptory challenges.”<sup>53</sup> This final prong of the three-prong *Batson* test is left up to the discretion of the trial court to “determine whether the defendant has established purposeful discrimination.”<sup>54</sup> By reason of the final prong having little evidence to establish itself, “the best evidence often will be the demeanor of the attorney who exercises the challenge.”<sup>55</sup>

The next step in this procedure is for the trial court to determine whether the explanation for the challenge is purposefully discriminatory.<sup>56</sup> “Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected . . . a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>57</sup>

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<sup>50</sup> *Batson*, 476 U.S. at 94, n.18 (disparate treatment under Title VII of the Civil Rights Act requires intent or purpose to discriminate, as distinguished from disparate impact, which is the impact of discrimination on a certain group as a result of non-racial decisions that are made).

<sup>51</sup> *Batson*, 476 U.S. at 97.

<sup>52</sup> *Id.* at 98.

<sup>53</sup> *Mahoney*, *supra* note 25, at 155.

<sup>54</sup> *Batson*, 476 U.S. at 98.

<sup>55</sup> *Hernandez*, 500 U.S. at 365.

<sup>56</sup> *Batson*, 476 U.S. at 98.

<sup>57</sup> *Hernandez*, 500 U.S. at 360 (quoting *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).



Five years after the *Batson* decision, the Supreme Court revisited the issue of peremptory challenge in *Powers v. Ohio*.<sup>58</sup> In *Powers*, a white man objected to the striking of seven black jurors.<sup>59</sup> The trial court overruled each of the objections made by the defendant and he was subsequently convicted of murder.<sup>60</sup> The Supreme Court was asked to determine whether the Equal Protection Clause extended to a peremptory challenge when the defendant and the prospective juror were of different races.<sup>61</sup> The *Powers* decision in essence expanded *Batson's* holding, eliminating the requirement that the defendant and the prospective juror must be of the same race.<sup>62</sup> The Supreme Court stated, "[t]o bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service."<sup>63</sup>

Other decisions have helped mold the *Batson* decision into what it is today. In the 1991 case of *Edmonson v. Leesville*,<sup>64</sup> the Supreme Court extended the *Batson* three prong test to civil cases.<sup>65</sup> Additionally, in 1992 the Court decided *Georgia v. McCollum*,<sup>66</sup> where it held that the *Batson* claim could be made by the prosecution against a defendant's peremptory challenge.<sup>67</sup> One of the most significant expansions of the *Batson* test was made in *Hernandez v. New York*.<sup>68</sup> In *Hernandez*, the Court held that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the

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<sup>58</sup> 499 U.S. 400 (1991).

<sup>59</sup> *Id.* at 402-03.

<sup>60</sup> *Id.* at 403.

<sup>61</sup> *Id.* at 404.

<sup>62</sup> *Id.* at 413-15.

<sup>63</sup> *Id.* at 415.

<sup>64</sup> 500 U.S. 614 (1991).

<sup>65</sup> *Id.* at 631 (recognizing that the harms that are to be protected by the three prong test are not limited to the criminal sphere, the Court held that the protections offered by *Batson* are extended to civil cases).

<sup>66</sup> 505 U.S. 42 (1992).

<sup>67</sup> *Id.* at 59 (holding "the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.")

<sup>68</sup> 500 U.S. 352.

ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.”<sup>69</sup> This change essentially eliminates the need for the first prong of the *Batson* test if the prosecutor offers any explanation for the challenge.<sup>70</sup> The most recent case that further develops the *Batson* ruling is the 1995 case of *Purkett v. Elem*,<sup>71</sup> in which the Supreme Court focuses mainly on the second prong of the *Batson* test.<sup>72</sup> It is the metamorphosis of the *Batson* decision with respect to the most recent case of *Purkett v. Elem* that leads to the discussion and analysis of *United States v. Ramirez-Sorberanes*.

### III. UNITED STATES V. RAMIREZ-SOBERANES: RACE NEUTRAL?

#### A. THE PEREMPTORY CHALLENGE IN RAMIREZ-SOBERANES

It was the challenge against the African-American juror, Ms. Hannah Brown, that sparked the *Batson* claim in *Ramirez-Sorberanes*.<sup>73</sup> It is important to identify the explanation given by the Government in analyzing a *Batson* claim to discern whether a race-neutral reason has been given. In the judge’s chambers the prosecuting attorney gave the following reasons for the strike:

MR. VINCENT<sup>74</sup>: The reason is her place of employment; has nothing to do with her ethnic background.

THE COURT: Where does she work?

MR. VINCENT: She works at McDonald’s.

THE COURT: The reason - she works at McDonald’s and you find that significant is what?

MR. VINCENT: Nothing more than they have a

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<sup>69</sup> *Id.* at 359.

<sup>70</sup> *Id.*

<sup>71</sup> 514 U.S. 765.

<sup>72</sup> *Id.* at 768-70.

<sup>73</sup> *Ramirez-Sorberanes*, No. 99-4097, 2000 U.S. App. LEXIS 6666, at \*4.

<sup>74</sup> *Id.* at \*4 (testimony of prosecutor Mark Vincent, justifying his removal of juror Ms. Brown).

tendency in fast-food restaurants to deal with-in lot of areas minority groups, legals, illegals. There may be some sympathies that are there one way or the other. And just to eliminate any sense of prejudice one way or the other, we felt that it was appropriate to strike her.<sup>75</sup>

The prosecuting attorney, Mr. Vincent, went further to state:

Well, I'm not prejudiced against her for being black . . . If she was white, if she was Hispanic, if she was any other ethnicity, it is my experience that people who work at McDonald's have a lot of dealings with a large group of people, including aliens. And I don't know if there's any sympathies one way or the other, but because there is a propensity for her to have dealings with a large group of people, that may or may not have prejudiced her. I don't know. I just feel that it's sufficient.<sup>76</sup>

In furtherance of his explanation to prove that the decision to challenge Ms. Brown was race-neutral, Mr. Vincent offered the fact that he had refrained from excluding two Hispanic members of the jury.<sup>77</sup> The district court subsequently accepted the reasons offered by the prosecutor as race-neutral and denied any relief to the defendant.<sup>78</sup> In the instant case, the issue rests heavily on the interpretation of the second prong of race-neutrality and the third prong of pretextual analysis made by the trial court.

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at \*4-5.

<sup>77</sup> *Id.* at \*5.

<sup>78</sup> *Id.*

**B. STEP TWO: RACE-NEUTRAL UNDER *BATSON* TODAY?**

The “race-neutral” issue coupled with the issue of pretextuality has been the focal point of many debates since the *Batson* decision.<sup>79</sup> In *Ramirez-Soberanes*, Ms. Brown was struck from the jury because she worked at McDonald’s, which would potentially render her sympathetic towards minorities.<sup>80</sup>

Following *Batson* there were a number of cases in which jurors were challenged for reasons analogous to the reasons set forth in *Ramirez-Soberanes*.<sup>81</sup> In *United States v. Sneed*,<sup>82</sup> a juror was challenged because of her profession and the place in which she lived, and the challenge was upheld by the court.<sup>83</sup> In a slightly more narrow decision, *United States v. Bishop*,<sup>84</sup> the Ninth Circuit followed United States Supreme Court precedent by barring the prosecutor from making a challenge based on a mere assumption.<sup>85</sup> The *Ramirez-Soberanes* case differs from *Bishop* in that the prosecutor’s explanation in the instant case was not an assumption, rather, as the prosecution explained, he was speaking through experience.<sup>86</sup> Furthermore, the challenge was made to eliminate a juror who could possibly carry sympathies toward minorities and to eliminate the possibility of any prejudice on the petit jury, rather than on mere speculation.<sup>87</sup> “Numerous factors

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<sup>79</sup> Compare Mahony, *supra* note 25, at 168-70, and Andrew G. Gordon, *Beyond Batson v. Kentucky: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 FORDHAM L. REV. 685, 693-706 (1993), with Christopher E. Smith and Roxanne Ochoa, *The Peremptory Challenge in the Eyes of the Trial Judge*, JUDICATURE, 185-88 (1996).

<sup>80</sup> *Ramirez-Soberanes*, No. 99-4097, 2000 U.S. App. LEXIS 6666, at \*4.

<sup>81</sup> See *United States v. Alvarado*, 951 F.2d 22 (2d Cir. 1991); See also *United States v. Lane*, 866 F.2d 103 (4th Cir. 1989) (these cases dealt with the issue of making peremptory challenges based on employment and prejudice).

<sup>82</sup> *Sneed*, 34 F.3d at 1570.

<sup>83</sup> *Id.* at 1580 (the prospective juror was a Chinese-American woman who “worked in the counseling field and lived in Bolder, Colorado, commonly known as a liberal community) *Id.* at 1579.

<sup>84</sup> 959 F.2d 820 (9th Cir. 1992).

<sup>85</sup> *Id.* at 825.

<sup>86</sup> *Ramirez-Soberanes*, No. 99-4097, 2000 U.S. App. LEXIS 6666, at \*4.

<sup>87</sup> *Id.*

may influence the decision of a prosecutor and defense counsel, including *current and past employment*, general appearance and demeanor, previous jury service, and the *absence or presence of apparent prejudice*.”<sup>88</sup> In 1991, the *Alvarado* case encountered the issues of employment and sympathy.<sup>89</sup> Two jurors were challenged and ultimately struck from the jury.<sup>90</sup> The first juror struck was a minority woman who was challenged because she had children that were the same age as the defendant and the prosecution felt this would make her sympathetic towards the defendant.<sup>91</sup> The second juror was challenged based on the woman’s employment as a social worker.<sup>92</sup> The trial court found that both reasons were race-neutral and the Second Circuit affirmed.<sup>93</sup>

To further analyze this issue we must also consider the situation where the prosecutor’s explanation is not considered race-neutral, as in *United States v. Wilson*.<sup>94</sup> In *Wilson*, the defendant made a *Batson* claim that the six challenges against black jurors violated his constitutional rights.<sup>95</sup> At the *Batson* hearing, the district court found the first step of the *Batson* test to be satisfied and offered the prosecution an opportunity to offer a race-neutral explanation.<sup>96</sup> The following is an excerpt from the race-neutral explanation given:

Q. Will you admit that because of the large number of blacks in the Lexa area and because of Wilson’s reputation it was necessary for you to more closely scrutinize the black panel members than the white panel members; yes or no?

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<sup>88</sup> *Lane*, 866 F.2d at 106 (emphasis added).

<sup>89</sup> *Alvarado*, 951 F.2d at 24-26.

<sup>90</sup> *Id.* at 24.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 26.

<sup>94</sup> 884 F.2d 1121 (8th Cir. 1989).

<sup>95</sup> *Id.* at 1122.

<sup>96</sup> *Id.*

A. With regard to the Lexa area, it was the connection with Mr. Wilson, which was the problem; not so much the race.

Q. Well, did you not –

A. I mean, race is just a – race sets it up like being a member of a lodge.<sup>97</sup>

“[T]he prosecutor must give a ‘clear and reasonably specific’ explanation of his ‘legitimate reasons’ for exercising the challenges.”<sup>98</sup> “[A] finding of intentional discrimination is a finding of fact entitled to appropriate deference by a reviewing court.”<sup>99</sup> With these *Batson* concepts in mind, the court held that the Government did not present a race-neutral explanation for the peremptory challenge, rather, the prosecutor clearly indicated a stereotypical racial reason for striking the potential black juror.<sup>100</sup>

In spite of the fact that a conclusion based on the foregoing reasons could be made in determining whether a race-neutral reason was given in *Ramirez-Soberanes*, the 1995 case of *Purkett v. Elem* solidifies the analysis of how a court should interpret the second prong of *Batson*.<sup>101</sup>

### C. THE IMPACT OF *PURKETT V. ELEM* ON STEP TWO

The *Purkett* Court stated that “[t]he second prong of this process does not demand an explanation that is persuasive, or even plausible.”<sup>102</sup> This is best evidenced in the reasoning given by the prosecution in the *Purkett* case for challenging two black males. His explanation follows:

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<sup>97</sup> *Id.* at 1123.

<sup>98</sup> *Batson*, 476 U.S. at 98, n.20 (quoting Texas Dep’t. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

<sup>99</sup> *Batson*, 476 U.S. at 98, n.21 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

<sup>100</sup> *Wilson*, 884 F.2d at 1124-25.

<sup>101</sup> *Purkett*, 514 U.S. at 766-68.

<sup>102</sup> *Id.* at 768.

I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and goatee type beard. And juror number twenty-four also had a mustache and goatee type beard. Those are the only two people on the jury . . . with facial hair . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.<sup>103</sup>

The *Purkett* Court went on to affirm the Missouri Court of Appeals' finding that the reasoning was a "legitimate hunch," which did not "raise the necessary inference of racial discrimination."<sup>104</sup> *Purkett* allows an explanation for a peremptory challenge that is merely facially valid, even if "silly or superstitious," which places an extremely heavy burden on the defendant who is making the *Batson* claim.<sup>105</sup> The Supreme Court explains that it is a mistake to merge the second and third prongs of *Batson* and that the trial judge need not terminate the inquiry simply because of the reason offered in the second prong.<sup>106</sup>

This decision obviously erupted much emotion in critics, beginning with the dissent by Justice Stevens and Justice Breyer.<sup>107</sup> "Today, without argument, the Court replaces the *Batson* standard with the surprising announcement that any neutral explanation, no matter how implausible or fantastic, even if it is silly or superstitious, is sufficient to rebut a *prima facie*

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<sup>103</sup> *Id.* at 766.

<sup>104</sup> *Id.* at 766 (quoting *State v. Elem*, 747 S.W.2d 772, 775 (Mo. App. 1988)).

<sup>105</sup> *Id.* at 768.

<sup>106</sup> *Purkett*, 514 U.S. at 768.

<sup>107</sup> *Id.* at 770-78 (Stevens, J., dissenting).

case of discrimination.”<sup>108</sup> The decision in *Purkett* frustrated many, and in the eyes of those who oppose peremptory challenges, the Supreme Court gave attorneys the right to make irrational decisions with “implausible and ridiculous explanations.”<sup>109</sup> Today, in the wake of *Purkett*, Mr. Ramirez-Sorberanes is left with the burden of proving the prosecutor’s state of mind, which is a near impossibility without a clear admission of discrimination, as was the case in *Wilson*.<sup>110</sup>

#### IV. CONCLUSION

The peremptory challenge has long been a part of the legal community and at this time in history does not seem to be an element that will soon disappear. The cases that led up to *Batson* and those that would follow helped develop the peremptory challenge into the tool that it is today. The peremptory challenge jurisprudence has unfolded with the attempted goal of eliminating racial discrimination; there are serious doubts as to whether this can be done. However, whether one agrees or disagrees, the Supreme Court is clear as to its opinion on this issue. From the overwhelming case law that followed these decisions, it is fair to conclude that the explanation given in *Ramirez-Sorberanes* would be considered race-neutral. With the most recent and controversial decision, *Purkett v. Elem*, it is no surprise that the evolution of the peremptory challenge is far from over.

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<sup>108</sup> *Id.* at 775.

<sup>109</sup> See Hochberg, *supra* note 26, at 12 (discussing the Supreme Court decision of *Purkett v. Elem*).

<sup>110</sup> See Mahony, *supra* note 25, at 169.



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