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Equal Protection

Division, Second Department reiterated the rule set forth in *Hernandez*, that a trial court should be given great deference to determine whether or not counsel's race neutral explanations are pretextual.[179]

In conclusion, federal courts and the New York courts clearly give great deference to a trial court's determination of the credibility of trial counsel's race neutral explanations. Accordingly, upon finding that the trial court was not clearly erroneous in determining that defense counsel's race neutral explanations were pretextual, the Appellate Division, Second Department, in *Jones*, affirmed the conviction of the defendant.[180]

People v. Stiff[181]
(decided December 12, 1994)

The criminal defendant claimed the trial court erred when it refused to allow him to use his peremptory challenges to "exclude potential jurors because they [did] not belong to a particular racial group."[182] The Appellate Division, Second Department, concluded that it was unconstitutional for either the defendant or the prosecutor to use racially motivated peremptory

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People v. Green, 181 A.D.2d 693, 694, 581 N.Y.S.2d 357, 358 (2d Dep't 1990) (affirming trial court's finding that defendant counsel's race neutral basis proffered for challenge to white juror was pretextual).

178. 181 A.D.2d 693, 581 N.Y.S.2d 357. In *Green*, the prosecution objected to the defendant's use of peremptory challenges claiming they were being used to exclude white jurors. *Id.* at 693, 581 N.Y.S.2d at 358. Eleven of the defendant's thirteen peremptory challenges were used to exclude potential white jurors. *Id.* The prosecution proceeded to establish a prima facie case of discrimination and defense counsel was forced to "articulate race-neutral explanations for the challenges." *Id.* Finding the excuses to be pretextual, the trial court seated two of the jurors to which the defendant had objected. *Id.*

179. *Id.* at 694, 581 N.Y.S.2d at 358.

180. *Jones*, 204 A.D.2d at 485, 611 N.Y.S.2d at 641.

181. 206 A.D.2d 235, 620 N.Y.S.2d 87 (2d Dep't 1994).

182. *Id.* at 236, 620 N.Y.S.2d at 88.

challenges.[183] This includes situations where the challenges are not used against members of a "cognizable racial group,"[184] where a showing of purported discrimination can be established based solely upon the pattern of strikes used by the party.[185] The court held that this type of discrimination violated the jurors' rights under the Equal Protection and Civil Rights Clauses of the State Constitution,[186] as well as the Equal Protection Clause of the Federal Constitution.[187]

In *Stiff*, during the jury selection for the criminal trial of a black defendant, the prosecutor raised a "Batson challenge"[188]

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183. *Id.*

184. *Id.* at 239, 620 N.Y.S.2d at 90. A cognizable racial group has been defined as "one that is a recognizable, distinct class, singled out for different treatment under the laws." Casteneda v. Partida, 430 U.S. 482, 494 (1976) (citing Hernandez v. Texas, 347 U.S. 475, 494 (1954)).

185. *Stiff*, 206 A.D.2d at 240, 620 N.Y.S.2d at 91.

186. *Id.* at 242, 620 N.Y.S.2d at 92. N.Y. CONST. art I, §11. Section 11 states in relevant 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 the state or any agency or subdivision of the state.

Id.

187. *Stiff*, 206 A.D.2d at 242, 620 N.Y.S.2d at 92. *See* U.S. CONST. amend. XIV, § 1. Section 1 provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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.

Id.

188. *Stiff*, 206 A.D.2d at 236, 620 N.Y.S.2d at 89. This challenge draws its name from the United States Supreme Court case of Batson v. Kentucky, 476 U.S. 79 (1986). In *Batson*, the Court held that peremptory challenges cannot be used by the prosecutor to exclude potential jurors because of their race. *Id.* at 89. The Court established a test to determine upon what circumstances a prima facie case of purposeful discrimination can be drawn.

> [T]he defendant first must show that he is a member of a cognizable racial group . . . [T]he prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race . . . . Finally, the defendant must show that these facts and any

after objecting to five of the defendant's peremptory challenges, "noting that panelist number two was a white male, number four was an Asian male, number seven was an [sic] Hispanic male, number nine was a white female, and number fourteen was an [sic] Hispanic female."[189] After observing that none of the challenged jurors were black, the trial judge concluded that there was a prima facie showing that the defendant had used "his [peremptory] challenges in a racially discriminatory manner."[190] Upon this determination, the court required the defendant to support these challenges with race-neutral reasons. After hearing the defendant's alleged race-neutral explanations for his peremptory challenges, the court replaced jurors two and nine, holding that the defendant's reasons for excluding them were merely pretextual.[191] At the conclusion of the trial, the jury returned a guilty verdict.[192]

The issue before the court was whether a defendant could use peremptory challenges to exclude persons of all other races other than his or her own.[193] In affirming the trial court's decision that the use of peremptory challenges in this manner was

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other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venire men from the petit jury on account of their race.

Id. at 96.

189. *Stiff*, 206 A.D.2d at 236, 620 N.Y.S.2d at 89.

190. *Id.* at 236-37, 620 N.Y.S.2d at 89.

191. *Id.* at 237, 620 N.Y.S.2d at 89. As to panelist two, the court rejected the defendant's argument that he should be excluded "because he was employed in a supervisory capacity, and because he had previously sat on a civil jury." *Id.* The court allowed panelist four to be excluded based on the defendant's argument that "his employment as a subway train operator and resulting contact with the New York City Transit Police might taint his objectivity." *Id.* Panelist seven was also excluded because, during voir dire, he stated that "he might find a police officer more credible than other witnesses." *Id.* As to panelist nine, the trial judge rejected the defendant's argument that she would be biased against him because she worked for "New York Telephone, a large 'hierarchical organization.'" *Id.* Panelist fourteen was removed *sua sponte* by the court because it appeared that she had difficulty understanding English. *Id.*

192. *Id.*

193. *Id.* at 236, 620 N.Y.S.2d at 88.

impermissible, the court extended the holding of the New York Court of Appeal's decision, *People v. Kern*.[194] In *Kern*, the court held that neither the defendant nor the prosecutor was permitted, through the use of peremptory challenges, "to exclude a particular racial group from the petit jury . . . ."[195]

In *Stiff*, the defendant argued that the prosecution "failed to establish a prima facie case of discrimination" as required under *Batson*, because "nonblacks are not a 'cognizable racial group.'"[196] In its extension of *Kern*, the appellate division reasoned that "application of the 'cognizable racial group' standard in a manner which requires the party challenging the exclusions to demonstrate exclusion of a single, particular racial group, would permit a defendant to 'stack' the jury with members of his own race to the exclusion of all others."[197]

The court ultimately determined that "the central concern" in all variations of a *Batson* situation, where the excluded jurors are not the same race as the defendant, "is the right of *every* citizen

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194. 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647, *cert. denied*, 498 U.S. 824 (1990). In *Kern*, three white male defendants accused of manslaughter as well as several lesser charges stemming from their attack of two black teenagers, continually used their peremptory challenges throughout jury selection to exclude black jurors. *Id.* at 647-48, 554 N.E.2d at 1239-40, 555 N.Y.S.2d at 651-52.

195. *Id.* at 650, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653. *See* Georgia v. McCollum, 112 S. Ct. 2348, 2359 (1992) ("[T]he exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotype held by the party.").

196. *Stiff*, 206 A.D.2d at 240, 620 N.Y.S.2d at 91.

197. *Id.* It appears that the appellate division discarded the requirement that the juror be part of a cognizable racial group when *Batson* challenges are raised. The court distinguishes the case at bar from People v. Smith, 81 N.Y.2d 875, 613 N.E.2d 539, 597 N.Y.S.2d 633 (1993). In *Smith*, the New York Court of Appeals held that, due to the fact that "[t]he record [was] silent in this case as to the race or ethnicity of the excluded jurors . . . 'minorities' in general [do not] constitute a cognizable racial group." *Id.* at 876, 613 N.E.2d at 540, 597 N.Y.S.2d at 634. The *Smith* court therefore concluded that the defendant had not met the standard of showing purposeful discrimination as established in *Batson*. *Id.* In the case at bar, the prosecution clearly "state[d] on the record the race or ethnic background of each excluded juror . . . . [Moreover,] there is no claim here that the defendant excluded a vaguely-defined group . . . ." *Stiff*, 206 A.D. 2d at 241, 620 N.Y.S.2d at 91.

to sit on a jury."[198] In reaching this conclusion, the court followed the reasoning of the *Kern* court when it held that the exclusion of a potential juror for racially motivated reasons violated that juror's civil rights and equal protection under the State Constitution.[199]

In determining whether the Civil Rights Clause applied to protect jurors from a defendant's peremptory challenge, the *Kern* court held that, due to the fact that the Civil Rights Clause is not self-executing, it would be necessary to find either a statute, common law, or provision in the Constitution which prohibits discrimination in order to effectuate the clause.[200] In order to prevent potential discrimination against a juror, the court utilized the Civil Rights Clause and applied it to peremptory challenges. The court found both legislative and Constitutional support for doing this.[201] First, "jury service is a 'privilege of citizenship' secured to citizens of this State by Article I, [section] 1 of the State Constitution."[202] Secondly, Civil Rights Law section 13 prohibits the disqualification of potential jurors on account of

198. *Stiff*, 206 A.D.2d at 238, 620 N.Y.S.2d at 90 (emphasis added). *See, e.g.*, Georgia v. McCollum, 112 S. Ct. 2348, 2354 (1992) ("Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could undermine the very foundation of our system of justice . . . ."); Powers v. Ohio, 499 U.S. 400, 408 (1991) ("Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds . . . ."); Batson v. Kentucky, 476 U.S. 79, 99 (1986) ("[T]he rule of law will be strengthened if we insure that no citizen is disqualified from jury service because of his race."); *Kern*, 75 N.Y.2d at 652, 554 N.E.2d at 1242, 555 N.Y.S.2d at 654 ("A citizen's privilege to be free of racial discrimination in the qualification for jury service is hardly a privilege if that individual may nevertheless be kept from service on the petit jury solely because of race.").

199. *Kern*, 75 N.Y.2d at 650-58, 554 N.E.2d at 1241-47, 555 N.Y.S.2d at 653-59.

200. *Id.* at 650, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653.

201. *Id.* at 651, 554 N.E.2d at 1242, 555 N.Y.S.2d at 654.

202. N.Y. CONST. art I, § 1. Section 1 states in pertinent part: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." *Id.*

race.[203] Based on these factors, the court concluded that the Civil Rights Clause is applicable in this instance and prohibits "purposeful racial discrimination in the exercise of peremptory challenges."[204]

The *Kern* court further established that a defendant's use of racially motivated peremptory challenges violated a potential juror's equal protection rights under the New York State Constitution.[205] Unlike a claim for a violation of the Civil Rights Clause, which prohibits private as well as state discrimination, a claim brought under the Equal Protection Clause requires a showing of state action.[206] In *Kern*, the court held that:

> [T]here can be no question that the State is inevitably and inextricably involved in the process of excluding jurors as a result of a defendant's peremptory challenges. A defendant's right to exercise the challenges is conferred by State statute. . . . The jurors are summoned for jury service by the State . . . sit in a public courtroom and are subject to voir dire at the direction of the State, and . . . it is the judge with the full coercive authority of the State, who enforces the discriminatory decision by ordering the excused juror to leave the courtroom . . . .[207]

Based on the foregoing, the court held that a defendant's peremptory challenges are to be considered state action subject to claims brought pursuant to the Equal Protection Clause "and therefore *Batson* applies to the defense."[208]

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203. N.Y. CIV. RIGHTS LAW § 13 (McKinney 1992). Section 13 provides in pertinent part: "No citizen of the state possessing all other qualifications which are or may be required or prescribed by law, shall be disqualified to serve as a grand or petit juror in any court of this state on account of race, creed, color, national origin or sex." *Id.*

204. *Kern*, 75 N.Y.2d at 653, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655.

205. *Id.* at 657, 554 N.E.2d at 1246, 555 N.Y.S.2d at 658.

206. *See* N.Y. CONST. art. 1, § 11.

207. *Kern*, 75 N.Y.2d at 656, 554 N.E.2d at 1245, 555 N.Y.S.2d at 657.

208. *Id.* at 657, 554 N.E.2d at 1246, 555 N.Y.S.2d at 658. In holding that a defendant who used peremptory challenges in a racially discriminatory manner violated a potential juror's civil rights, as well as the juror's equal protection rights under the state Constitution, the *Kern* court only resolved half of the issue because jurors themselves cannot raise issues to the court. Rather it

It appears that New York law is consistent with federal law regarding this issue. In *Georgia v. McCollum*,[209] the United States Supreme Court held that a juror's Fourteenth Amendment right to equal protection was violated when the defendants purposefully discriminated based on the juror's race during their use of peremptory challenges in the jury selection.[210] Based on the foregoing, it appears that both under New York law and federal law a criminal defendant must follow the same procedures that a prosecutor would utilize with respect to the use of peremptory challenges in the selection of jury panels.

SUPREME COURT

NEW YORK COUNTY

Pierre v. New York City Health & Hospitals Corp.[211]
(printed December 28, 1994)

The attorney plaintiffs argued that New York's Judiciary Law section 474-a[212] violated the separation of powers doctrine, as well as their due process rights and equal protection rights under

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is the prosecutor who can invoke a claim on the behalf of the excluded jurors. "[A]s a representative of the community, the District Attorney has a direct interest in protecting its citizens and therefore a substantial relationship with the excluded jurors. Moreover, as the jurors are not parties to the litigation . . . the State should be able to vindicate their rights." *Id.* at 654, 554 N.E.2d at 1244, 555 N.Y.S.2d at 656.

209. 112 S. Ct. 2348 (1992). Prior to jury selection, three white defendants accused of beating two African-Americans expressed that "the circumstances of their case gave them the right to exclude African-American citizens from participating as jurors in the trial." *Id.* at 2351.

210. *Id.* at 2359. In *McCollum*, the supreme court held, for essentially the same reasons as did the New York Court of Appeals in *Kern*, that a defendant's peremptory challenges were to be considered "state action" when under the review of the Equal Protection Clause and that the state had standing to raise the claim on behalf of the jurors. *Id.* at 2355-57.

211. N.Y. L.J. , Dec. 28, 1994, at 25 (Sup. Ct. New York County 1994).

212. N.Y. JUD. LAW § 474-a (McKinney 1986).