The Challenge of Challenges

Chief Judge Ann Bailey Smith

"Well most folks seem to think they're right and you're wrong...."

"They're certainly entitled to think that, and they're entitled to full respect for their opinions," said Atticus, "but before I can live with other folks I've got to live with myself. The one thing that doesn't abide by majority rule is a person's conscience."

From "To Kill a Mockingbird" by Harper Lee

Peremptory – not open to appeal or challenge; final. As lawyers, we are all familiar with peremptory challenges during the jury selection process. A peremptory challenge allows a party to eliminate a prospective juror from serving on a jury without stating a reason for doing so... Well at least in most instances. Peremptory challenges are not constitutionally guaranteed, however, KRS 29A.290 states that the Supreme Court shall prescribe the number of peremptory challenges. The Kentucky Supreme Court stated in *Glenn v. Commonwealth*, Ky., S.W. 3d 186 (2013) that while this statute encroaches upon the prerogatives of the judiciary, the Court would tolerate this encroachment because it is not inconsistent with rules of the Supreme Court. Civil Rule 47.03 provides for three peremptory challenges for opposing sides, with that number increased by one if alternate jurors are to be seated. Additionally, co-parties with antagonistic defenses shall be given three peremptory challenges each. On the criminal side, RCr 9.40 allows for eight peremptory challenges for each side in a felony trial with an additional peremptory being given to each side when alternate jurors are seated. Where there are codefendants being tried together, then each defendant is entitled to one additional peremptory to be exercised independently of the other codefendants.

Not surprisingly, peremptory challenges are a carryover from English jurisprudence. Originally in England, only the prosecutor was given peremptory challenges, but eventually, in order to level the playing field, defense counsel was also permitted to exercise peremptory challenges. Over time, the prosecutor's use of peremptory challenges was taken away. Then, in 1989, Parliament abolished the use of peremptory challenges by either side as a result of concerns about their discriminatory use and the threat to the increasing diversity of venirepersons.

In doing research for this article, I reread the United States Supreme Court's opinion in *Swain v. Alabama*, 380 U.S. 202 (1965), delivered by Justice Byron White. His words took my breath away, and not in a good way. He writes about the history of the peremptory challenge in deciding a case where "Robert Swain, a Negro, was indicted and convicted of rape (of a white woman) in the Circuit Court of Talladega County, Alabama and sentenced to death." Swain challenged at the trial level and on appeal the composition of the Grand Jury, the jury pool and the use of peremptory challenges by the prosecutor to exclude prospective jurors of color. There were eight blacks on the jury panel; two were struck for cause and the prosecutor used six peremptory challenges to remove the rest. The *Swain* Court saw no problem with this when it stated:

> ...the question... is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be... Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried. *Id*, at 221.

This troubling opinion goes on to say:

> The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. *Id*. at 222.

The *Swain* Court elevated the use of peremptory challenges over the constitutional guarantee of a fair and impartial jury. The *Swain* decision imposed a burden on criminal defendants to not only show discriminatory behavior by prosecutors in the use of peremptory challenges in their own case but also in other cases to establish pervasive discriminatory conduct. Justice Goldberg, in his dissenting opinion joined by two other justices, pointed out that no person of color had ever served as a juror in Talladega County, Alabama.

Some twenty years later *Batson v. Kentucky,* 476 U.S. 79 (1986), was decided, which found that a prosecutor's use of peremptory challenges to dismiss jurors based on race without giving a race neutral explanation for doing so violated the Equal Protection Clause of the Fourteenth Amendment and discrimination had to be shown in the present case, not in past cases as required by *Swain*:

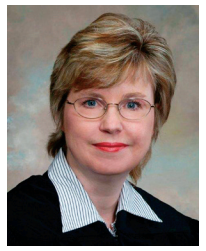
> [T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. Id at 89.

Justice Marshall concurred in the result but cautioned in his concurring opinion that the procedure set forth in *Batson* for challenging a peremptory will not end racial discrimination that "peremptories inject into the jury selection process." *Id*, at 103. Instead, Justice Marshall asserted that peremptory challenges should be banned all together. It was his belief that prosecutors could easily formulate a racially neutral reason for the use of a peremptory challenge which would withstand further scrutiny from the trial judge.

Since the *Batson* decision, its holding has been expanded to include not just prosecutors but also defense attorneys and has been applied to civil jury trials. Additionally, it now prohibits discrimination based on ethnicity and gender. But discrimination persists in the use of peremptory challenges, as can be seen in the facts discussed in the 2008 opinion of the United States Supreme Court in *Snyder v. Louisiana*, 552 U.S. 472, where the Court rejected the two race neutral reasons put forth by the prosecutor as to a black prospective juror when compared to similarly situated white prospective jurors.

In 2022, Arizona became the first state in the nation to eliminate the use of peremptory challenges. Three reasons were advanced for doing so: 1) peremptory challenges are not constitutionally guaranteed; 2) research demonstrated that the Batson analysis had failed because peremptory challenges were still being exercised in a discriminatory way by both the prosecution and the defense; and 3) protecting a defendant's due process right to a jury of his or her peers and a citizen's equal protection right to serve on a jury improved confidence in the justice system. As a result, the Arizona Supreme Court removed all peremptory challenges from Arizona's civil and criminal procedure rules.

Washington also sought to address Batson problems; its Supreme Court adopted a rule which seeks to eliminate both intentional and implicit bias in jury selection. While peremptories are still allowed, an objective observer standard has been adopted as to whether that observer could view race or ethnicity as a factor in the exercise of the peremptory challenge. A similar standard was enacted in California through its legislature. Other states have formed task forces to study whether peremptory challenges continue to be exercised in a discriminatory manner based on race, ethnicity or gender so there may be, in the near future, actions taken in line with Arizona, Washington and California. It remains to be seen whether Kentucky will consider reform as to peremptory challenges.



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