

JURY TRIAL, PEREMPTORY CHALLENGES -- In general.....
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While the United States and Arizona Constitutions do not specifically confer any right to peremptory challenges, peremptory challenges have been traditionally viewed as one means of assuring the selection of a qualified and unbiased jury. *Batson v. Kentucky*, 476 U.S. 79, 91, 106 S.Ct. 1712, 1720, 90 L.Ed.2d 69 (1986); *State v. Thompson*, 68 Ariz. 386, 390, 206 P.2d 1037, 1039 (1949); *State ex rel. Romley v. Superior Court*, 181 Ariz. 271, 274, 889 P.2d 629, 632 (App. 1995). The Arizona case law on peremptory challenges is clear: the right to exercise a peremptory challenge is a substantial right, not just a procedural one, and denial or impairment of that right constitutes reversible error without proof of prejudice. *State v. Rigsby*, 160 Ariz. 178, 181, 772 P.2d 1, 4 (1989); *State v. Thompson*, 68 Ariz. at 390, 206 P.2d at 1039; *State v. Eisenlord*, 137 Ariz. 385, 392-93, 670 P.2d 1209, 1216-17 (App. 1983).

The exercise of peremptory challenges may not be made for discriminatory purposes, to exclude "any substantial and identifiable class of citizens from the privilege and obligations of jury service." *State v. Superior Court*, 157 Ariz. 541, 546, 760 P.2d 541, 546 (1988), *cert. denied* 499 U.S. 982 (1991). This rule is based on the equal protection clause of the United States Constitution. *J.E.B. v. Alabama*, 511 U.S. 127, 128, 114 S.Ct. 1419, 1421, 128 L.Ed.2d 89 (1994); *Holland v. Illinois*, 493 U.S. 474, 476, 110 S.Ct. 803, 805, 107 L.Ed.2d 905 (1990); *Batson v. Kentucky*, 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d 69. Nevertheless, in the context of gender-based challenges, the Supreme Court has made clear the continuing viability of peremptory challenges:

Our conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory

challenges. Neither does it conflict with a State's legitimate interest in using such challenges in its effort to secure a fair and impartial jury. Parties still may remove jurors whom they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias. Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to "rational basis" review. Even strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext.¹⁶

¹⁶ For example, challenging all persons who have had military experience would disproportionately affect men at this time, while challenging all persons employed as nurses would disproportionately affect women. Without a showing of pretext, however, these challenges may well not be unconstitutional, since they are not gender or race based.

J.E.B. v. Alabama, 511 U.S. 127, 143, 114 S.Ct. 1419, 1429, 128 L.Ed.2d 89 (1994).

(citations omitted).

Batson itself dealt only with a defendant challenging the prosecution's use of peremptory challenges to strike members of the defendant's race. However, *Batson* and its progeny now prohibit *any* discriminatory use of peremptory challenges. In *State v. Superior Court*, 157 Ariz. 541, 546, 760 P.2d 541, 546 (1988), the Arizona Supreme Court held that "under the jury trial clause of the sixth amendment, the state may not make *discriminatory* use of the peremptory challenge to exclude any substantial and identifiable class of citizens from the privilege and obligations of jury service."

[Emphasis in original.] In *Powers v. Ohio*, 499 U.S. 400, 416, 111 S.Ct. 1364, 1373, 113 L.Ed.2d 411 (1991), the Supreme Court extended *Batson* by holding that a criminal defendant, regardless of race, may challenge a prosecutor's racially based peremptory challenge. In *Georgia v. McCollum*, 505 U.S. 42, 59, 112 S.Ct. 2348, 2359, 120 L.Ed.2d 33 (1992), the Court again extended *Batson* and held that a criminal defendant, like the State, is prevented from exercising a peremptory challenge in a discriminatory manner.

"*Batson* has been interpreted as precluding the peremptory challenge of any cognizable

group when the challenge is made for a discriminatory purpose." *State v. Anaya*, 170 Ariz. 436, 439, 825 P.2d 961, 964 (App. 1991).

The courts employ a three-step analysis to use in determining if a peremptory challenge has been improperly made:

- (1) The party opposing the strike must make a *prima facie* showing that the strike was made on the basis of race [or gender];
- (2) if the requisite showing is made, the burden shifts to the one who made the strike to articulate a race-neutral [or gender-neutral] explanation for the strike; and
- (3) if the proponent of the strike articulates a race-neutral [or gender-neutral] reason for the strike, the trial court must decide whether the one who challenges the strike has carried the burden of proving purposeful discrimination.

State v. Henry, 191 Ariz. 283, 285-86, 955 P.2d 39, 41-42 (App. 1997).

To begin the *Batson* analysis, the party alleging racial or gender discrimination must first make a *prima facie* showing of purposeful discrimination. *J.E.B. v. Alabama*, 511 U.S. 127, 144-45, 114 S.Ct. 1419, 1429, 128 L.Ed. 2d 89 (1994); *Batson v. Kentucky*, 476 U.S. 79, 96, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69 (1986); *State ex rel. Romley v. Superior Court*, 181 Ariz. 271, 274, 889 P.2d 629, 632 (App. 1995). In *Batson*, the Supreme Court stated that "a black defendant alleging that members of his race have been impermissibly excluded from the venire may make out a *prima facie* case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson v. Kentucky*, 476 U.S. 79, 93-94, 106 S.Ct. 1712, 1721, 90 L.Ed.2d 69 (1986). The party challenging the peremptory strike always bears the burden of making a *prima facie* showing of discriminatory purpose. "The trial court cannot pass over this step in hopes of making voir dire more efficient." *State ex rel. Romley v. Superior Court*, 181 Ariz. 271, 274, 889 P.2d 629, 632 (App. 1995).

The Arizona Supreme Court has imposed an additional requirement in *Batson* cases -- a requirement that, at the second step of the *Batson* analysis, a subjective reason for a peremptory strike be supported by "some form of objective verification." In *State v. Cruz*, 175 Ariz. 395, 397, 857 P.2d 1249, 1251 (1993) the prosecutor explained peremptory strikes of two Hispanic jurors by stating that they seemed "weak" and had "poor contact with me." The Arizona Supreme Court found that the transcripts contained "no objective confirmation of the prosecutor's subjective conclusions" concerning those jurors and held that a purely subjective reason for striking a minority juror was insufficient. *Id.* at 399, 857 P.2d 1253. Citing *State v. Reyes*, 163 Ariz. 488, 490, 788 P.2d 1239, 1241 (App. 1989) with approval, the Court held:

[W]here, as here, the state offers a facially neutral, but wholly subjective, reason for a peremptory strike, it must be coupled with some form of objective verification before it can overcome the prima facie showing of discrimination. [Citation omitted.] Such verification could come from the words of the prospective juror but, of course, it did not in this case. The objective verification could also be accomplished by a prosecutor's statement concerning the facts upon which the subjective conclusion is based. This would assist the trial court in determining whether the proffered reason was truly neutral or merely pretextual. In appropriate cases, the objective verification could be the trial court's own observations, made on the record, which might show that the prosecutor's subjective conclusion was an appropriate reason for a facially neutral peremptory challenge. . . .

* * *

In the face of a prima facie showing of discrimination . . . we will not read *Batson* to permit peremptory strikes of minorities by any party based solely on an unverified subjective impression, lest *Batson's* guarantee of equal protection become nothing more than empty words.

State v. Cruz, 175 Ariz. 395, 399-400, 857 P.2d 1249, 1253-54 (1993).

The current status of the *Cruz* rule is unsettled.¹ In *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995), the Supreme Court held that at step two of the *Batson* analysis, all that is necessary is for the proponent of the strike to

offer a race-neutral reason for the strike. The explanation need not be persuasive, or even plausible. If a discriminatory intent is not inherent in the reason offered, the explanation will be deemed race neutral. The analysis then proceeds to the third step, where the opponent of the strike has the burden of proving that the reason given for the strike is a pretext for purposeful discrimination. It is not until the third step in the *Batson* analysis, when the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination, that the persuasiveness of the explanation may be considered in determining if the explanation is pretextual:

At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge may choose to disbelieve a silly or superstitious reason at step three is quite different from saying that a trial judge must terminate the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

Purkett v. Elem, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995).

The Court stated that what *Batson* meant by a "legitimate reason" for striking a prospective juror "Is not a reason that makes sense, but a reason that does not deny equal protection." *Id.* at 769, 115 S.Ct. at 1171.

Purkett seems to remove the *Cruz* requirement of "objective verification," but the matter is not settled in Arizona yet. Both divisions of the Court of Appeals have said that *Purkett* controls over *Cruz*, but the Arizona Supreme Court has not done so. In *State v. Henry*, 191 Ariz. 283, 286, 955 P.2d 39, 42 (App. 1997), the Court of Appeals stated that *Purkett* had "eliminated" the *Cruz* requirement of "objective verification" of the reason for a peremptory challenge at the second step of the *Batson* analysis:

Whether *Purkett* is viewed as changing *Batson* or merely clarifying it, that inquiry into plausibility has been eliminated, and with it, so has the *Cruz*

requirement of objective verification. Division Two of this Court reached the same conclusion in *State v. Harris*, 184 Ariz. 617, 911 P.2d 623 (1995).

Review was denied in both *Harris* and *Henry*. However, in *State v. Trostle*, 191 Ariz. 4, 12, 951 P.2d 869, 877 (1997), the Arizona Supreme Court declined to examine "the continued validity of *Cruz* in light of the U.S. Supreme Court's more recent decision in *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)."

In *State v. Eagle*, 196 Ariz. 27, 30, 992 P.2d 1122, 1125 (App. 1998), *cert. denied*, 531 U.S. 839, 121 S.Ct. 102, 148 L.Ed.2d 60 (2000), the Court of Appeals, citing *Henry*, *supra*, again stated that *Purkett* "eliminated the "objective verification" requirement of *Cruz*. We must await a decision by the Arizona Supreme Court to see if *Purkett* controls or if *Cruz* is still the law in Arizona.

¹ For safety's sake, however, it would be good practice for all prosecutors responding to *Batson* challenges to assume that *Cruz* is still the law in Arizona and make certain that there is objective verification in the record to support any peremptory strikes.