
Festschrift

Limitations of the *Batson* Analysis in Addressing Racial Bias in Jury Selection

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Does Peremptory Strike of the Only Juror of a Particular Race Constitute a *Prima Facie* Showing of Racial Discrimination?

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In *City of Seattle v. Erickson*, 188 Wash.2d 721 (2017), the Washington Supreme Court considered whether a peremptory strike of the only juror from a cognizable racial group constituted a *prima facie* case of racial discrimination. The petitioner, Mr. Matthew Erickson, objected to the prosecutor's peremptory removal of the only black juror on the panel after the empaneled jury and the rest of the venire had been excused for the day. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the U.S. Supreme Court guaranteed a jury selection process free from racial animus. In *Erikson*, the Washington Supreme Court addressed two issues. Was the timing of Mr. Erikson's objection after the jury and rest of the venire had been dismissed for the day untimely? Secondly, was the peremptory dismissal of the only black juror a *prima facie* case of discrimination?

Facts of the Case

In June 2013, Officer Kevin Clay observed Mr. Erickson, an African-American male, walking down the sidewalk backward with a knife drawn, followed by several other individuals. Officer Clay and his partner followed Mr. Erickson into a shopping cen-

ter, drew their weapons, and ordered him to drop the knife. Mr. Erickson complied, but refused to follow the instructions to lay face down on the floor. After a prolonged physical struggle and resistance from Mr. Erickson, the officers subdued him and took him into custody. He was charged in the Seattle Municipal Court with unlawful use of a weapon and resisting arrest. After *voir dire*, each party exercised three peremptory strikes. The City exercised one of the three peremptory strikes against the only African-American juror on the panel. After the jury was empaneled and excused with the rest of the venire, Mr. Erickson objected to the peremptory strike of a black juror, claiming racial motivation pursuant to *Batson*. The City rebutted that Mr. Erickson had waived his right to a *Batson* challenge as the objection was untimely after the venire had been dismissed and the jury was excused for the day. The City further argued that Mr. Erickson did not make a *prima facie* case of discrimination because *Batson* "stands for the 'proposition that there needed to be a pattern or practice of discrimination'" (*Erikson*, p 725).

The municipal court found that Mr. Erickson had not waived the *Batson* challenge and had not presented a *prima facie* case for discrimination. Although the dismissed juror was the only African-American person, five other individuals were identified by the court as well as by both parties as "people of color" (*Erikson*, p 725). The court also recognized that striking a single juror of a particular race under some circumstances could rise to the level of a *prima facie* discrimination, but it ruled that it saw no such circumstances in this case. Because the court had already ruled against Mr. Erickson on the first step, a full *Batson* analysis was terminated, and the trial subsequently moved forward. Mr. Erickson was convicted on both counts.

Mr. Erickson appealed the municipal court's decision to King County Superior Court. The court affirmed the municipal court's finding that circumstances did not raise any inference that the juror was stricken because of his race, without addressing whether the motion was timely. Mr. Erickson then petitioned the Court of Appeals for discretionary review, which was denied. His motion to modify the commissioner's ruling was similarly denied. He finally petitioned the Washington Supreme Court for discretionary review, which was granted.

Ruling and Reasoning

The Washington Supreme court addressed two issues in the ruling. Was the timeliness of raising a *Batson* challenge appropriate, and did striking a single jury member of a particular racial group create a *prima facie* showing for racial discrimination? *Batson* created a three-part test for determining racial discrimination. First, a defendant has to establish a *prima facie* case that gives rise to an inference of discriminatory purpose. Second, once a *prima facie* case is made, the burden shifts to the prosecutor to provide an adequate, race-neutral justification for the strike. Third, when the race-neutral explanation is provided, the court must weigh all relevant circumstances and decide whether racial discrimination motivated the strike. Although the U.S. Supreme Court provided this framework, it left the states to establish rules about the particular procedures to be followed upon a defendant's timely objection to a prosecutor's peremptory strikes.

In an *en banc* decision delivered by Justice Owens, and two concurring opinions by Justices Stephens and Yu, the court found that Mr. Erickson's objection was timely, and the municipal court erred when it failed to infer racial bias from the dismissal of the only black juror on the jury panel. The court noted that Mr. Erickson did not waive his right to a *Batson* challenge when he objected to the striking of a juror after the jury was empaneled but before testimony was heard. The court noted that several state and federal jurisdictions allowed *Batson* challenges even after a jury had been selected and sworn in. The court recognized that when Mr. Erickson made his challenge, no other motions had been filed, no testimony had been heard, and no evidence had been admitted. It further acknowledged that, while the timing of the challenge was not ideal, the challenge was raised when the trial court still had an opportunity and adequate ability to remedy any error.

The court recommended adopting a bright-line rule, as previously argued by the dissent in *State v. Rhone*, 168 Wash.2d 645 (2010), with the *Batson* framework. In doing so, the court noted that *Batson* required a pattern of racial discrimination in jury selection. It further concluded that though such a pattern may demonstrate racial animus, the constitution forbids striking even a single prospective juror for discriminatory purposes. The Washington court decided that the trial court erred in applying the first step of the *Batson* analysis for two reasons. First, the *Batson* challenge should be concerned with whether a juror was struck because of his race, not

the level of diversity remaining on the jury. Second, a *Batson* violation can occur if even one juror is struck, arguing that while a discriminatory pattern would be informative, it is not necessary. The court recognized that Washington's *Batson* protections were "not robust enough" to effectively combat racial discrimination during jury selection. *Batson* creates a particularly difficult hurdle to overcome as it makes proving discrimination very difficult even where it clearly exists. The court also limited the discretion it had provided to trial courts for the finding of a *prima facie* case pursuant to a *Batson* challenge by adopting a bright-line *Rhone* rule. The court held that the trial court must recognize a *prima facie* case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury. The trial court can then require an explanation from the striking party and analyze, based on the explanation and totality of the circumstances, if the strike was racially motivated.

Justice Stephens provided a separate concurring opinion with Justice Fairhurst. He argued that embracing the bright-line rule is neither necessary nor particularly likely to transform the *Batson* analysis into a useful tool for combating racial bias in jury selection. He underscored that *Batson* has largely failed in its premise to eliminate bias and in finding a meaningful solution that goes beyond just "tinkering with the first prong of the *Batson* analysis" (*Erikson*, p 739). He expressed concern that the *Batson* inquiry following the *prima facie* claim still requires some finding of "intentional discrimination," a requirement that is difficult to determine. Justice Yu provided another concurring opinion with Justice Gonzalez. Although she applauded the majority's effort to address the equal protection concerns under *Batson*, she argued that this effort falls short in ensuring that no juror is removed solely due to race, gender, sexual orientation, or religious beliefs. She argued that the basic framework of *Batson* does not work. She joined Justice Gonzales in calling for the complete abolishment of peremptory challenges, arguing that the jury selection process already provides a meaningful method for any party to remove a juror "for cause" when "a juror cannot be fair or impartial" (*Erikson*, p 740).

Discussion

This case highlights the need for a more thorough approach, beyond *Batson*, to address racial bias in the jury selection process. The Washington court ruled on the inadequacy of *Batson* protections in the jury

selection process by embracing the bright-line rule in the first step of the analysis, which makes it easier to establish the *prima facie* case of discrimination, while retaining the remainder of the *Batson* framework. In the concurring opinions, several justices make the important point that the modified bright-line-rule does not address the biases that are acted upon through peremptory strikes of any other class based on gender, religion, age, sexual orientation, or many other attributes that both prosecutors and defense attorneys may consider disadvantageous.

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Constitutionality of the DNA Fingerprint, Unsolved Crime and Innocence Protection Act (DNA Act) under California’s Proposition 69

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The Supreme Court of California Held That the DNA Act Did Not Violate the Defendant’s Fourth Amendment Rights or His Search-and-Seizure Rights Under the California Constitution When It Required DNA Collection

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In *People v. Buza*, 413 P.3d 1132 (Cal. 2018), the California Supreme Court considered whether a law requiring the collection of DNA from every person arrested for a felony is lawful under the state’s constitution. Mr. Mark Buza was transported to county jail on arson-related felony charges, and he refused to provide a buccal swab for DNA analysis as required by California law. He was subsequently found guilty on a misdemeanor refusal charge by the Superior

Court of San Francisco as well as arson-related charges. On Mr. Buza’s appeal, the Court of Appeal reversed his misdemeanor conviction on the grounds that his Fourth Amendment rights were violated. The state petitioned for review which was granted. While the case was pending appeal, the U.S. Supreme Court addressed a similar issue in *Maryland v. King*, 569 U.S. 435 (2013). The Supreme Court of California remanded with directions. The California Court of Appeal again reversed his misdemeanor conviction due to a violation of California constitutional protections against unreasonable searches and seizures. The Supreme Court of California granted review, superseding the opinion of the Court of Appeal.

Facts of the Case

On January 21, 2009, Mr. Buza was arrested after a San Francisco police officer witnessed him running away from a police car with burning tires. He was subsequently searched and found to be in possession of matches, a road flare, a container of oil, and a container assumed to be gasoline. Mr. Buza was arrested on arson-related felony charges and transported to the county jail. The DNA Act was passed by California voters in 2004 and expanded DNA collection and identification requirements to include all individuals arrested for or convicted of felony offenses. During the booking process, Mr. Buza was informed that a DNA sample was required by California law and refusal to provide this sample would result in a misdemeanor charge. He refused to provide the required DNA sample.

Probable cause for Mr. Buza’s arrest was found the following day by judicial review. The district attorney subsequently charged him with felony arson-related charges and a misdemeanor refusal charge. Mr. Buza argued for acquittal of the misdemeanor charge on the claim that his Fourth Amendment rights were violated by the DNA Act. The court denied his motion and he was later convicted of all charges by a jury. The court ordered Mr. Buza to provide a DNA sample and, when he refused, the Sheriff’s Department was authorized to obtain it by reasonable force.

The Court of Appeal ruled the DNA Act violated Mr. Buza’s Fourth Amendment rights and reversed his misdemeanor refusal conviction. The Supreme Court of California granted review. While the case was pending, the U.S. Supreme Court reached a different decision in *Maryland v. King*. The Court held that “[w]hen officers make an arrest supported by