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Batson v. Kentucky Guidelines and the Use of Peremptory Challenges in Arkansas Courts: A Case Study

An Honors Thesis submitted in partial fulfillment of the requirements for Honors Studies in Political Science

By:

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Spring 2023

Political Science

Fulbright College of the Arts and Sciences

The University of Arkansas

Acknowledgments

First, I would like to thank my advisor Dr. Valerie Hunt for her continuous guidance throughout my research process. Dr. Hunt's Constitution II course inspired me to pursue this topic and greatly impacted my knowledge of and perspective on the United States' legal system. Her assistance has been vital over the last year and a half, and this work would not have been possible without her. I must also thank Dr. Amy Farmer and Dr. Brinck Kerr for their support as amazing instructors and committee members.

Thank you to the University of Arkansas Honors College for providing me with the support and direction that was necessary to complete this work. The Honors College resources and staff have been immensely helpful over the past four years, especially leading up to the completion of this research.

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Introduction:

The United States criminal justice system presents the jury as the "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge" (*Duncan v. Louisiana*, 1968). However, the process of jury selection in the United States is complicated, and although a jury "is meant to include twelve members who represent a fair cross-section of the community," there are several ways in which the voir dire process can produce a jury pool with significant biases (*Reams v. State*, 2018). The most controversial method used by attorneys in the jury selection process is the peremptory challenge, which permits the elimination of citizens from the jury pool "without justification or explanation" (Ford, 2010, p. 377). Ideally, the peremptory challenge is utilized to create an impartial jury for a defendant by dismissing possible jurors suspected of being prejudiced against them. However, in *Batson v. Kentucky* (1986), the Supreme Court found that the peremptory challenge was being used to unconstitutionally "exclude potential members of the jury because of their race." Although *Batson* made it a violation of the Equal Protection Clause of the Fourteenth Amendment to dismiss potential jurors on the basis of race, the peremptory challenge is still scrutinized for a variety of reasons. There is also the issue of obtaining a pool of potential jurors from the start that is representative of their community. The process by which a state or county conducts jury selection has the potential to create a biased jury before voir dire begins (Hillhouse, 2019, pp. 1063-1066). The use of peremptory challenges, the method used to evaluate *Batson* claims, and other aspects of the jury selection process in the state of Arkansas are therefore worth examining to determine whether ideological imbalances within the courts could be present.

Literature Review:

Before transitioning to an analysis of Arkansas courts in particular, it is important first to examine the history of the peremptory challenge in general. Also called a peremptory strike, the practice comes from English common law and has been used for centuries (Marks, 2002, p. 622). Although it is not specifically enumerated in the United States Constitution, the exercise of the peremptory challenge has been codified in law and practice for federal courts by Congress since 1790, and state laws have generally followed suit (Marks, 2002, p. 624). There is no singular limit to the number of peremptory strikes that are allowed to be used by any party participating in a case—federal and state courts differ, and cases involving more serious crimes are sometimes allotted more strikes. In Arkansas, civil cases allow each party three strikes, and in criminal cases, the prosecutor is given anywhere from three to ten strikes. The defendant is allowed between three and thirteen strikes (*What Happens the Day of the Trial*, n.d.). While there are some variations, the overall jury selection process must have a few key steps, and the way in which these steps are implemented can impact the use of peremptory strikes. First, a list is compiled from which potential jurors will be selected. Then, the selected members are evaluated during a case's pre-trial phase, and jurors that are not deemed fit to serve in the trial are dismissed "through challenges for cause or peremptory challenges" (Marks, 2002, p. 620). A challenge for cause must exhibit a "narrowly specified, provable and legally cognizable basis of partiality" (*Swain v. Alabama*, 1965).

The courts use two main processes in the United States to compile a jury—the sequential-selection method and the struck-jury system. Sequential-selection is the most commonly used method in the United States, and it begins by bringing out a select few from the entire potential jurors list for evaluation. Lawyers or judges will question these select few and dismiss some of

them for cause or excuse them for other reasons, and afterward, peremptory challenges are used. New potential jurors replace those that were excused, and the process repeats itself "until a full jury is empaneled" (Ford, 2010, p. 383). The struck-jury process is used less frequently in the United States, and it differs from sequential-selection in that the entire potential jury pool is evaluated at once, instead of in cycles. Attorneys and judges consider the panel as a whole when dismissing individuals for cause and by using peremptory strikes. This method allows teams on the case to compare potential jurors, giving them more information about the makeup of the panel (Ford, 2010, p. 834). While one may assume that peremptory challenges may be more useful within the struck-jury system, they are actually "potentially much more powerful in the sequential-selection method" because they "can eliminate a greater fraction of potential jurors" (Ford, 2010, p. 834). Once attorneys and judges are satisfied with the jury pool that they have, they no longer need to question the individuals left on their list. When using the struck-jury method, on the other hand, there is still a large number of potential jurors to be selected from, even after all peremptory challenges are issued.

The peremptory challenge, in theory, should help create ideologically balanced juries, since it allows "each side to exclude those jurors it believes will be most partial toward the other side" (*Holland v. Illinois,* 1990). However, one of the biggest issues that arises from the use of peremptory challenges is the ability to exclude potential jury members from trial participation in a discriminatory way. Since there is a limited amount of information about jurors available to attorneys, they must rely to some extent on generalizations, stereotypes, and demographics. Nonetheless, it is logical to assume that peremptory strikes can often be used in a racist or sexist way. For this reason, the peremptory challenge has been described as "undemocratic," "prone to manipulation," and a "potential First Amendment violation" (Revesz, 2016, p. 2535). These

descriptors may be alarming, but they are also justifiable—if an attorney can dismiss a juror without cause, then there is little that the justice system can do to prevent the misuse of the peremptory strike in this way.

The SCOTUS has decided upon the issue of the peremptory challenge in a variety of cases, beginning in 1965 with *Swain v. Alabama.* This case made its way to the SCOTUS after a black male defendant, who was on trial for rape, challenged the prosecutor's use of his "peremptory challenges to strike all six black persons from the jury pool" (Marks, 2002, pp. 625-626). The SCOTUS found, however, that the defendant's equal protection rights, granted by the Fourteenth Amendment, were not violated, and that a pattern of "systematic exclusion of blacks from juries over a period of time" is necessary in order to prove a violation of the Fourteenth Amendment in this situation (Marks, 2002, p. 626). This standard has been described as impossible to prove successfully and was not reevaluated until twenty years later when *Batson v. Kentucky* (1986) was heard by the SCOTUS (Jackson, 2006, p. 94).

In *Batson v. Kentucky* (1986), a criminal trial in which a black man was the defendant, the prosecutor used his peremptory challenges to remove all four black persons from the potential jury pool resulting in an all-white jury (Marks, 2002, p. 627). The defense presented a motion to discharge the jury panel, indicating that the jury may have been improperly or unfairly selected "on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross-section of the community, and under the Fourteenth Amendment to equal protection of the laws," but this motion was denied by the trial judge (*Batson v. Kentucky*, 1986). The petitioner was convicted, and this conviction was later affirmed by the Kentucky Supreme Court, citing *Swain's* requirement for proof of "systematic exclusion of a group of jurors from the venire," which the

defense lacked (*Batson v. Kentucky*, 1986). This ruling was overturned by the SCOTUS for several reasons.

First, the SCOTUS cites *Strauder v. West Virginia*, a case in which it was decided that putting a black defendant on trial "before a jury from which members of his race have been purposefully excluded" is a violation of the defendant's right to equal protection (*Batson v. Kentucky*, 1986). The SCOTUS then rejects the previous standard of systematic exclusion of certain races from the jury venire under *Swain*, stating that this precedent does not adhere to equal protection standards, and says that now, the defendant may successfully prove "purposeful racial discrimination" within the voir dire process using only facts from his or her case (*Batson v. Kentucky*, 1986). Essentially, the SCOTUS ruled that it was unconstitutional to use a peremptory challenge against an individual solely on the basis of race, regardless of the party's historical use of peremptory strikes in previous cases. And although the implementation of this new precedent is left up to the states, the SCOTUS gives some guidelines as to when and how a defendant can prove his or her constitutional rights are violated due to a discriminatory peremptory challenge.

First, the defendant must prove "that he is a member of a cognizable racial group" and that the potential jury members who were removed by a peremptory challenge are also of that same race (*Batson v. Kentucky*, 1986). Then, the defendant must present specific facts or circumstances that suggest the prosecutor could have struck the jury member solely on the basis of race. After these steps are complete, "the burden shifts to the State" to supply a "race-neutral explanation" for striking the jury member in order for the strike to remain valid (*Batson v. Kentucky*, 1986). After this step is completed, the court then decides if the opponent of the strike provided correct and proper evidence of racial discrimination. Before *Batson*, it was much more difficult for the defense to prove that racially motivated peremptory challenges were being used

against them because of the *Swain* precedent, so this case was a step in the right direction toward equal protection of minority defendants during the jury selection process, which is essential to ensuring a fair trial.

There are a few other notable cases that dealt with the peremptory challenge and expanded on its use. In *Powers v. Ohio* (1991), the SCOTUS decided that "a defendant can make a *Batson* challenge even when the struck juror is not of the same race" or otherwise culturally associated with the defendant (Marks, 2002, p. 628). This decision is beneficial in that it expands the extent to which a peremptory challenge that is suspected to be discriminatory in some way can be denied. *Edmonson v. Leesville Concrete Co.* (1991) extended *Batson* requirements to be applicable to civil cases, as opposed to only criminal cases. And most notably, *J.E.B. v. Alabama* (1994) made it so that peremptory strikes cannot be issued solely on the basis of gender after all male jurors were dismissed "in a paternity and child support case against a male defendant" (Marks, 2002, pp. 628-630).

Although *Batson* was considered a step in the right direction in terms of the peremptory challenge and discrimination, it certainly did not solve everything. After *Batson*, it was decided that only a "race-neutral explanation for a peremptory strike" was needed in order for the strike to be valid, as opposed to an explanation "that is both race-neutral and rational" (Jackson, 2006, p. 95). This specification makes it fairly easy for the party who issued a possibly discriminatory strike to prove its validity. It has been argued that *Batson* fails to truly prevent bias and that it cannot be properly enforced (Revesz, 2016, p. 2535). In his 2016 article in *The Yale Law Review*, Joshua Revesz studies this argument by analyzing how the U.S population's relationship between demographics and political ideology is intertwined in a way that would allow attorneys to use "race as a proxy for ideology" when utilizing peremptory challenges and therefore bypass

Batson requirements (p. 2539). The Pew Research Center's 2014 study, *Political Polarization in the American Public,* found that black women have the greatest tendency to be Democratic, while white males are the most Republican leaning. It was also demonstrated that blacks and Hispanics are much more uniformly aligned with the Democratic party, while whites are more mixed among the political spectrum (Dimock, et al., 2014). Using these statistics, Revesz (2016) found that if a peremptory challenge is used with the intent to remove "a random member of a majority-liberal group (essentially, a racial or ethnic minority), that party will eliminate a Democratic juror fifty-nine percent of the time" (p. 2544). However, if this same action were performed with the goal being instead to remove a Republican juror, it will only work thirty-four percent of the time (Revesz, 2016, p. 2545). Essentially, due to the relationship between demographics and ideologies in the U.S., which has shown that liberal groups are more easily identifiable than conservative groups, it is easier to utilize a peremptory strike to remove a left-leaning jury participant than a right-leaning one. It is possible, therefore, that "an ideological skew in juries" can arise, especially if the goal is to create a conservative-leaning jury (Revesz, 2016, p. 2536). It is also possible that attorneys could use the peremptory challenge in a discriminatory way by giving a reasoning based on supposed ideology. In fact, "empirical work suggests that attorneys engage in 'biased hypothesis testing' when asking their questions during voir dire" (Revesz, 2016, p. 2542). This analysis applies not only to race, but to gender, and could be extended even further to markers such as religious affiliation or sexual orientation.

Inefficiencies with the peremptory challenge have also arisen after *Batson* in areas outside of ideology. Ford (2010) argues that "there is essentially no evidence that peremptory challenges lead to more impartial juries, even when exercised rationally" (p. 379). Michael O. Finkelstein and Bruce Levin studied sixteen criminal trials in New York and found that the

majority of the issued peremptory strikes were "guesses," and that the attorneys knew very little about whether or not their strike would actually be effective (Ford, 2010, p. 389). States are also given the power to determine how they implement the guidelines of *Batson,* which allows for additional discrepancies and confusion (Jackson, 2006, p. 95). Therefore, it is critically important to examine how Arkansas courts use the peremptory challenge, and if it is being used in accordance with Batson's requirements today.

The Arkansas Supreme Court has ruled upon the practice of the peremptory challenge on numerous occasions. In *Cleveland v. State* (1996), Bennie Cleveland was convicted of first-degree murder, attempted capital murder, and theft of property, for which he received a life imprisonment sentence. Cleveland appealed and "argued that the State violated his equal protection rights under *Batson* by exercising six peremptory challenges against six black members of the jury venire" (Jackson, 2006, p. 112). The prosecution gave race-neutral explanations for the strikes, which is sufficient under *Batson* requirements, and all of them were accepted, therefore denying Cleveland of his motion for a mistrial. On appeal, he then argued to the Arkansas Supreme Court "that he made a prima facie showing of racial discrimination" and that most of the explanations for the peremptory strikes were not rational (Jackson, 2006, p. 112). However, the Arkansas Supreme Court found Cleveland's prima facie case to be moot. This creates an issue because the ability to pose a prima facie case, which is outlined in *Batson* guidelines, is necessary in order for the defendant to present evidence of discrimination to the judge (Jackson, 2006, p. 113). This ruling shows that Arkansas courts do not always adhere to the principles of *Batson v. Kentucky* (1986), and it is especially important for the defendant to be able to present a prima facie case because doing so establishes "factual assertions of either a history of…discrimination or discrimination" in an individual's case (Jackson, 2006, p. 113).

The judge needs these facts and arguments in order to make a properly informed decision on the credibility of the peremptory strike, and skipping this step only puts the challenger of said strike at a further disadvantage.

Hollowell v. State (1997) brings up another issue regarding Arkansas courts' use of peremptory challenges. David Shane Hollowell was convicted in trial court of two counts of second-degree battery for abusing his young stepdaughter. He appealed on the grounds that the trial court should not have sustained the prosecutor's objection to his use of peremptory challenges to dismiss female potential jurors. When the court of appeals reviewed the State's prima facie case and found "that the defendant failed to show gender-neutral reasons" for using the peremptory strikes in question, they acknowledged the need for a sensitive inquiry (Jackson, 2006, p. 114). However, the court did not outline "when, where, or how to determine such a need" in future cases (Jackson, 2006, p. 115).

The current test used to evaluate *Batson* claims in Arkansas comes from *MacKintrush v. State* (1998). Walter MacKintrush, a black male, was convicted of the second-degree murder of his wife. He appealed and argued that "the prosecutor exercised some of her peremptory challenges in a discriminatory way" (Jackson, 2006, p. 115). In this case, the trial court's decision was affirmed, but the inconsistent precedents that were being used at the time for *Batson* issues were acknowledged, and an updated three-step system was created for use in Arkansas courts going forward. Jackson (2006), citing *MacKintrush v. State* (1998), outlined these steps as follows:

> First, the party bringing the challenge must present facts "to raise an inference of purposeful discrimination." An attorney can accomplish this "by showing (1) that the strike's opponent is a member of an identifiable racial group, (2) that the strike is part of

> a jury-selection process or pattern designed to discriminate, and (3) that the strike was used to exclude jurors because of their race." "In deciding whether a prima facie case has been made, the trial court should consider all relevant circumstances," and if a prima facie case exists, the inquiry moves to the second step. If it does not, that ends the inquiry, and a trial court would not find discrimination. (p. 116)

After this first step is complete and if a valid prima facie case was made, then the proponent of the strike must produce a racially neutral explanation for the strike. This is step two, according to *MacKintrush v. State* (1998). The Arkansas Supreme Court itself notes that "this explanation need not be persuasive or even plausible; indeed, it may be silly or superstitious" (*MacKintrush v. State*, 1998). The judge will only deny the peremptory strike if "discriminatory intent is inherent in the prosecutor's explanation" (*MacKintrush v. State*, 1998). However, the Arkansas Supreme Court stated that the evaluation of a *Batson* claim cannot end there. The judge must then decide whether the strike's opponent has proven the strike to be discriminatory in nature. The opponent of the strike must show "that the expressed motive of the striking party is not genuine" using argumentative methods or other proof (*MacKintrush v. State*, 1998). Only after this process can the trial court consider all that has been presented and decide whether or not the strike is valid. However, it is necessary for the strike's opponent to carry through to step three—the burden is on them, not the trial court. If the opponent does not present more evidence that the strike was racially motivated, then the trial court does not have to proceed with the additional inquiry, and a conclusion can be made using what has already been presented.

Even this updated and clarified process, however, may not encapsulate the actual goals of *Batson*. Jackson (2006) notes that step three in the aforementioned *MacKintrush* process still leaves room for confusion when a Batson claim is raised (p. 119). Allowing the responsibility of

following through with this step to rest on the opponent of the peremptory strike and not clearly stating when sensitive inquiry should take place by trial courts makes it harder for strike opponents to effectively make their case. Jackson (2006) even mentions that this process "seems to be an almost impossible threshold to overcome" (p. 120). Opponents of a peremptory strike still must provide an abundance of evidence to prove that a strike is racially motivated, while the issuer of a strike is able to work with a great amount of leniency. It is also important to acknowledge that appellate courts are very resistant to reversing any trial court decision on a *Batson* claim and will usually side with the trial court if there is not an outstanding amount of evidence that would encourage it to rule otherwise.

Methodology:

Jackson's discussion about the evolution of the peremptory challenge in the state of Arkansas is extremely useful, and it, therefore, would be beneficial to study more recent cases dealing with *Batson* and the peremptory challenge that have taken place after her work. Accordingly, my analysis will include several Arkansas court cases, all of which have taken place at the Court of Appeals level from the years 2013 to 2019. I chose this time range because my analysis is similar to that of Jackson (2006), so I will examine new Arkansas court cases that were heard after her article's publication. 2019 was the latest data period for which I could access case data. To retrieve these cases, I used the WestLaw database to find recent Arkansas cases that cite *Batson v. Kentucky* (1986), *Batson* challenges, and *MacKintrush v. State* (1998) in their opinions. In total, there are around ten cases from 2013 to the present that deal with these issues, and I will analyze seven cases that contain the most relevant information for this study. After a review of these cases, I found that there are several issues regarding the *Batson* challenge process that are still prevalent in Arkansas courts today. Following the analysis of these cases, I

will discuss whether the process by which Arkansas courts handle *Batson* claims could allow the use of peremptory challenges to result in ideologically imbalanced juries.

Analysis:

The first issue that is common among these cases is that even after more than twenty years of having the *MacKintrush v. State* (1989) clarifications and guidelines, there is a lack of clarity surrounding the *Batson* challenge process as a whole, especially in regard to when and how certain arguments should be made. For example, in *Davis v. State* (2019), Shelby Jamal Davis, a black man, was convicted of aggravated robbery and first-degree battery, for which he received a sentence of one hundred years in prison. Davis appealed and argued that the trial court erred in denying him of his *Batson* challenges. During the trial, the State used five out of six available peremptory challenges against five potential jury members, all of whom were African American. After the defense challenged these strikes, the State gave race-neutral reasons for the removal of these jury members, and the trial court sustained these strikes. However, it was noted that the trial court seemed to have a fundamental misunderstanding of the *Batson* process themselves, because while they at some point agreed with Davis that the State's race-neutral arguments were "factual errors," they allowed the strikes to occur anyway (p. 12). The trial court was essentially under the impression that their hands were tied as long as race-neutral reasons for the strikes were given. Since the trial court operated under this incorrect assumption, the Court of Appeals reversed and remanded Davis's ruling. This case exemplifies the fact that the *Batson* process is still subject to confusion, even among judges and other officials, and it, therefore, may need additional modification in the state of Arkansas.

Another example of the state of confusion surrounding *Batson* challenges lies within the 2019 Court of Appeals case, *Fields v. State*. Robert Fields, an African American male, was

sentenced to fifty-four years in prison after being convicted of several different charges. He appealed on the grounds that the circuit court erred in denying his *Batson* challenge, among other arguments unrelated to *Batson*. During his trial, two black women were removed from the jury venire with the use of peremptory strikes. After Fields challenged these strikes, the prosecution gave race-neutral reasons for their removal and acknowledged that there were already members on the jury who were black. It is outlined in *MacKintrush v. State* (1998) that after the striking party provides race-neutral reasons for their peremptory challenges, the burden then shifts back to the opponent of the strike to prove discriminatory intent—step three of a *Batson* challenge. However, Fields did not follow through with this step, so his *Batson* challenge was denied. The Court of Appeals affirmed the circuit court's ruling. If Fields's defense team was completely aware of the *Batson* step three requirement, in which the burden of proof shifts back to the opponent of the strike, it would make sense that they would at least attempt to provide a response. The defense's failure to complete step three, therefore, serves as further evidence that the steps outlined in *MacKintrush v. State* (1998) do not properly outline the best way to adhere to *Batson v. Kentucky* (1986) principles.

There are also several cases that suggest other aspects of the *Batson* challenge process are confusing. *Williams v. State* (2018), for example, shows us how the defense can fail even to meet the first step of a *Batson* challenge. Jordan Williams was convicted in a circuit court of several crimes and sentenced to fifty years of total imprisonment. He appealed and argued that the court erred in the denial of his *Batson* challenge. Williams's defense counsel stated during the trial that the State's use of two peremptory challenges against two potential jurors, both of whom were black, was a *Batson* violation. However, the defense did not specifically "request that the court rule on whether a prima facie case of discrimination had been shown," which is step one in a

Batson challenge, according to the *MacKintrush* guidelines (p. 10). The Court of Appeals, therefore, ruled that the *Batson* challenge never proceeded past step one and, therefore, could not be further reviewed, so the circuit court's decision was affirmed. This case suggests that the specific wording and procedure for a proper *Batson* challenge may be unclear. In addition, *Antoniello v. State* (2018) comments on the proper timing of raising a *Batson* challenge itself—not the actual steps within the challenge. Antoniello's argument to the Court of Appeals, after he was sentenced in a trial court, was invalid because his defense presented *Batson* claims after the trial began and after the jury was already sworn in. Although this requirement is stated in *Batson v. Kentucky* (1986), it is important to note that it is still possible for the requirement to cause confusion in Arkansas courts—perhaps it should be clarified.

And finally, on the topic of confusion about the *Batson* challenge and its steps, *Boose v. State* (2017) provides an additional example. Cody Alan Boose was convicted of battery in the first degree of a law enforcement officer as well as a firearm enhancement, and he was sentenced to 540 months in prison. Boose appealed on the grounds that he was wrongfully denied a *Batson* challenge in trial court. During the trial, the State used a peremptory strike to remove a black juror, but the defense argued on appeal that "the State did not seek to strike two other similarly-situated jurors" (p. 12). Records from the trial court indicate confusion surrounding the *Batson* challenge process. After the defense makes a *Batson* objection, and they are told by the State that they have not made a prima facie case of purposeful discrimination, the defense says:

> I think the law in *Batson* is changing. I don't think you have to necessarily make a prima facie case. They have to state a reason why they're striking her, not just say, "We're striking her." (p. 11)

The trial court transcripts themselves reveal the persistent confusion surrounding a *Batson* challenge. And because of this confusion, the Court of Appeals could not review the facts of the challenge and therefore affirmed the trial court's ruling. All of the previously discussed cases show that *Batson* challenges require extremely precise language and procedure in order to be considered valid. The responsibility of carrying out this proper language and procedure usually rests mostly, if not totally, upon the defense, who is usually the party that challenges the use of a peremptory strike. And not only is this precision required in order to win a *Batson* challenge, but it is also vital in order to preserve the facts for an appellate court to review the case in the future. As we can see in the above case results, this requirement impacts numerous cases—almost all of the above Courts of Appeals cases affirmed the trial court's ruling because of the fact that the *Batson* challenges were not properly litigated.

The next issue that is still prevalent in Arkansas courts regarding the Batson challenge is that the burden of proof remains heavily on the challenger to prove discrimination. This problem is exemplified in *Todd v. State* (2016). In this case, Michael Todd was convicted of several crimes and sentenced to seventy-five years in prison. He appealed, arguing that "the trial court erred in permitting the State to strike a potential juror" (p. 1). In the trial court, the prosecution dismissed a jury member, who was a person of color, and the defense raised a *Batson* challenge to the dismissal. The prosecution gave a race-neutral reason for their strike, and the juror was officially dismissed. Todd argued that he made a prima facie case of purposeful discrimination and that the prosecutor's race-neutral explanation was invalid. The Court of Appeals disagreed and noted that "Todd presented no further argument or proof to persuade the trial court otherwise" (p. 11). The Court of Appeals cited the steps for a *Batson* challenge outlined in

MacKintrush v. State (1998), and suggests that an unbalanced burden for the defense can be seen in this specific requirement:

> "The strike's opponent must persuade the trial court that the expressed motive of the striking party is not genuine but, rather, is the product of discriminatory intent. If the strike's opponent chooses to present no additional agreement of proof but simply to rely on the prima facie case presented, then the trial court has no alternative but to make its decision based on what has been presented to it." (n.p.)

In this case, Todd did not provide any additional argument or proof to show that the prosecution's strike had discriminatory intent. The Court of Appeals, therefore, affirmed the trial court's decision that the peremptory strike was valid. This case is different from most of the previously discussed cases because, this time, the Court of Appeals was actually able to review the records and arguments of the *Batson* challenge that took place in trial court. However, the Court of Appeals still sided with the trial court, specifically because Todd relied on his original prima facie case of discrimination. According to these rules, it seems as though the defendant's prima facie case will almost never be sufficient to prove a *Batson* claim successfully. All the prosecution must do is provide a lukewarm, race-neutral explanation for their strike, while the defense must propose a compelling argument that proves the prosecution's discriminatory intent—an intent that can often be very easily hidden. And although the trial court also bases its decision on whether to approve a *Batson* challenge based on "an assessment of the credibility" of each party's argument, the fact remains that the burden of proof required of the opposing party is much more difficult to meet than that of the striking party. In *Mister v. State* (2013) for example, one of the prosecutor's race-neutral reasons for striking a black juror was that "her body language made the prosecutor feel that she lacked a rapport with her" (p. 3). While *Batson v.*

Kentucky (1986) only requires a neutral reason for striking a juror, and Arkansas guidelines in *MacKintrush v. State* (1998), therefore, seemingly align with this principle, it is interesting to acknowledge the leniency that *MacKintrush* enumerates for striking parties. The race-neutral reason "need not be persuasive or even plausible; indeed, it may be silly or superstitious" (*MacKintrush v. State*, 1998). While it is true that the trial court must ultimately decide for themselves if they believe the striking party is being sincere, the striking party's ability to fulfill their requirement in a *Batson* challenge is much simpler than the opponent of the strike. This could be why we see more *Batson* challenge denials in trial courts, as well as the affirmation of these denials in appellate courts.

Fields v. State (2019) also serves as an example of the overwhelming burden of proof that the opposing party has when challenging a peremptory strike. After Fields raised a *Batson* claim to one of the prosecutor's peremptory strikes, the prosecution failed once to give a race-neutral reason for the strike. On their second attempt, they claimed "that the prospective juror had hung onto defense counsel's every word during voir dire" (p. 5). This reason prompted the judge to permit the strike and, consequentially, the Court of Appeals to find the strike to be nondiscriminatory as well. In this situation, the striking party received two chances to provide a lukewarm, race-neutral reason for their strike. And since the Court of Appeals allows a great amount of deference to trial courts for *Batson* challenge issues, it was unlikely that Fields had any chance of a reversal. The process that Arkansas courts use for *Batson* challenges makes it very easy for peremptory strikes to occur without much question.

The final observation regarding *Batson* challenge issues still present in Arkansas courts is that a *Batson* challenge must be executed perfectly in order for it to be available to review in appellate courts. I touched on this issue previously alongside the issue of confusion surrounding

the *Batson* challenge steps. However, it is worth discussing more in-depth. The requirement of a proper challenge to be recorded is reasonable. However, the complexity of *Batson* challenge proceedings is why this requirement has become a problem. In *Williams v. State* (2018), for example, the Court of Appeals notes that "it is up to an appellant to obtain a clear ruling on an issue in order to preserve that point for appeal," and that Williams "failed to preserve a Batson challenge for appeal," meaning that the Court of Appeals could not make any changes to the additional ruling (p. 10). The Arkansas Court of Appeals made this interpretation based on the following dialogue, which occurred after the State used a peremptory strike against one of the potential jurors:

> DEFENSE: Judge, may I point out something?
>
> THE COURT: Are you making a motion?
>
> DEFENSE: Yes, Judge. The State has struck, now, two black people that we've brought up. So, that would be in violation of Batson.
>
> THE COURT: Two of three, the Court notes. (p. 9)

Directly after this dialogue, the court proceeded to call another individual to be questioned during voir dire. The court did not prompt the defense to elaborate on their *Batson* claim or show a prima facie case of discrimination. This case shows how easily *Batson* challenges can be brushed over and, therefore, not completed in a way that allows appellate courts to analyze them in the future. *Antoniello v. Stat*e (2018) is another case in which the defense "failed to preserve" their Batson challenge "for review by" the Court of Appeals (p. 6). In this case, however, it is more understandable, as the defense did not raise a Batson claim until after the jury was sworn in.

Conclusion:

It is clear, based on the decisions in recent Arkansas cases dealing with *Batson* challenges, that a lack of clarity persists in the process of challenging peremptory strikes. Although the likelihood that prosecutors are using peremptory strikes constantly in a purposefully discriminatory way is low, the historical presence of racism and exclusion that has existed within our justice system, as well as the implicit biases that are still embedded within it, make it vital that the laws and processes by which juries are compiled protect every individual from a prejudiced jury. Ensuring a clear process for challenging a potentially discriminatory peremptory strike, therefore, is very important, and the Arkansas judicial system is falling short of this necessity. More can be done to make the Batson challenge process easier and fairer for defendants.

One of the original questions posed at the beginning of this research is whether the peremptory challenge is being used in Arkansas courts in a way that creates ideologically imbalanced juries. If peremptory challenges are found to have been used to strike individuals belonging to a minority group—mainly African Americans—during voir dire, then it is expected that the resulting juries would be conservative or ideologically right-leaning, according to the findings in the 2014 Pew Research Center study linking race to political leanings that were discussed earlier (Dimock et al., 2014). Although it is clear that the process used to evaluate a *Batson* challenge in Arkansas courts is confusing and favors prosecutors and those who issue questionable peremptory strikes, there is no evidence that the strikes that were analyzed resulted in overwhelmingly conservative juries. Conservative juries would be expected to favor more punitive verdicts and sentences. And although most of the cases that were analyzed resulted in significant sentences for the defendants, this is the only possible evidence available that could

support the position that these juries were ideologically imbalanced due to the prosecutors' use of peremptory strikes. However, more research is needed in order to fully determine whether Arkansas juries lean a certain way ideologically due to the way the courts practice peremptory strikes and *Batson* claims. A more substantial pattern would need to be discovered that this research could not find.

For future research regarding the question of peremptory strikes resulting in biased juries in the state of Arkansas, it would be useful to analyze data from the courtroom itself. This study was limited by the use of court records only. It was found that *Batson* challenges are quite difficult to execute successfully by defendants who are at risk of racial discrimination during jury selection. This means that, theoretically, it is relatively simple for individuals of a minority group to be struck during voir dire without a logical reason. The lack of protections in place for defendants who raise a *Batson* challenge in Arkansas courts suggests that most peremptory strikes issued in trial court receive little pushback, which means that Arkansas juries are still vulnerable to manipulation to some extent. Therefore, future research could move away from analyzing *Batson* challenge arguments in appellate courts and instead study the use of peremptory strikes directly in trial courts. Although the Arkansas judiciary does not keep records of when and how peremptory strikes are issued in every single trial with a jury, recording this type of information in real-time would be a great way to study the possible effects of peremptory challenges in the future. If researchers compared the peremptory strikes issued in a case to the sentencing outcome, and repeated this process for a variety of cases, then the issue of ideologically imbalanced juries could be answered.

Aside from the use of peremptory challenges in Arkansas, there are several other factors about the state's jury selection process that may lead to unbalanced jury pools and are worth

studying in future research. Firstly, Arkansas does not require all individual counties to adopt the same jury selection program. Instead, counties are able to use "a state-sponsored jury selection computer program," or they can use a proprietary program (Hillhouse, 2019, p. 1063). No matter what program is adopted by Arkansas counties, it has been noted that both the state-sponsored and proprietary programs are outdated, and in Washington County specifically, the process makes property owners more likely to be contacted as a potential juror. The ability to create a jury that is selected from a representative cross-section of the community is therefore already inhibited before potential members are even questioned by lawyers or judges (Hillhouse, 2019, pp. 1063-1066). And to add to these setbacks, it is important to note that the first few steps of the jury selection process as a whole are not clearly described for the public, making it hard to enforce the right to "fair cross-section…because the courts that oversee the jury selection process are themselves the gatekeepers to its inspection" (Hillhouse, 2019, p. 1065).

Overall, the issue with the jury selection process in Arkansas is that it lacks clarity. This lack of clarity leads to confusion within the courtroom. It puts defendants, especially defendants who are part of a minority group, at a disadvantage in their attempt to compile an unbiased and representative jury. This confusion also makes it so that people of color in the state of Arkansas can be denied their right and responsibility to serve on a jury panel more easily than white citizens. Although the misuse of peremptory challenges during jury selection cannot always be proven to be deliberate, "purposeful discrimination in the selection of jurors not only violates the rights of criminal defendants, but it also deprives prospective jurors of significant opportunity to participate in civic life" (*Powers v. Ohio*, 1991). It is still unclear whether the flaws in the Arkansas jury selection process result in ideologically imbalanced juries, but this issue should

continue to be researched in the future, and hopefully, changes can be made that provide additional legal protections to defendants and jury members of color.

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