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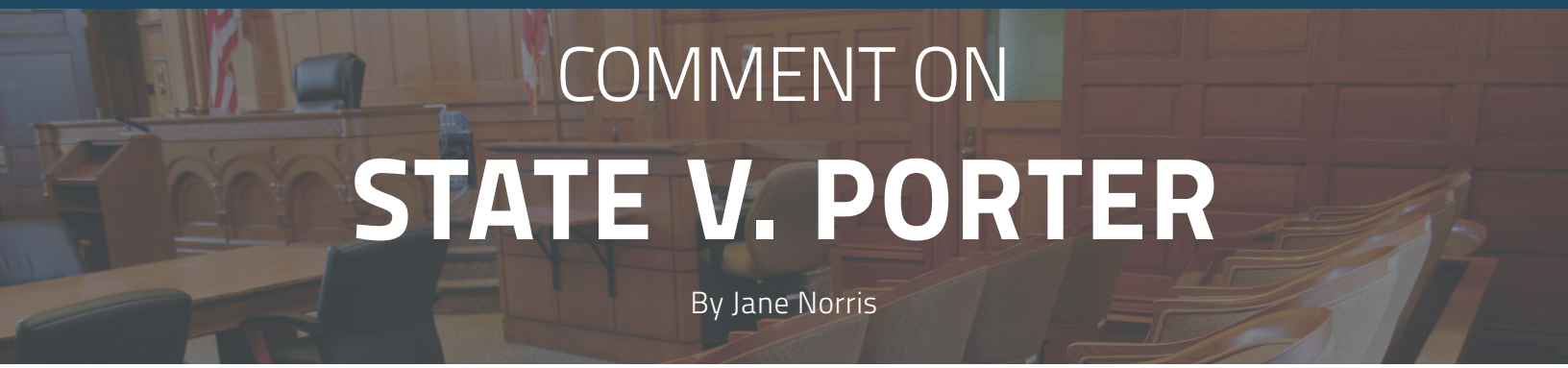

COMMENT ON
STATE V. PORTER

By Jane Norris

Imagine this: You, a public defender, are about to participate in *voir dire* after weeks of trial preparation.[1] Your client, a Black woman, is accused of resisting arrest and aggravated assault of a police officer. You've read the studies on how racial discrimination is prevalent in jury selection.[2] You are aware of how the racial makeup of a jury affects sentencing.[3] After asking your curated questions to the jury panel, you believe you know which jurors are going to hurt your client. After both you and the prosecutor have struck jurors for cause, the prosecutor uses peremptory challenges to strike the only prospective Black jurors.[4] Believing that the prosecutor is operating on discriminatory grounds, you immediately raise a *Batson* challenge—an objection to a peremptory challenge—on the grounds that the opposing party used the peremptory challenge to exclude a potential juror based on race, ethnicity or sex.[5]

In response, the prosecutor offers a few explanations for striking the Black jurors. He states that the first struck juror's brother had a criminal history, and that juror had an uncertain demeanor when they described their ability to remain impartial.[6] He defends his second peremptory challenge by bringing up the juror's history with the court.[7] You respond by pointing to the court transcript, where the first struck Black juror said that she was confident that she would be able to be an impartial juror. Despite this, the judge finds the prosecutor's proffered reasons reasonable and race-neutral and allows the strikes. The all-white jury convicts your client of resisting arrest.[8] You are confident that if the jury had been representative of the racial makeup of the court's jurisdiction, your client would have been found not guilty.[9]

These are the facts of *State v. Porter,* a case that was appealed to the Arizona Supreme Court on July 22, 2021.[10] Unfortunately, this case demonstrates the many issues with *Batson* challenges.

The *Batson* challenge originated in the Supreme Court case *Batson v. Kentucky,* and involves three steps.[11] First, the objecting party makes a prima facie case of the striking party's intentional discrimination.[12] Then, the striking party articulates a racially neutral explanation for why it struck a particular potential juror.[13] These explanations may be based on the juror's background, education or other experience-based reasons. These explanations may also be based on the potential juror's external demeanor, such as uncertainty.[14] When demeanor-based reasons are accepted by the trial court, appellate courts give these findings high deference because demeanors cannot be recorded in a transcript, and therefore, are very difficult to review.[15] After the striking party proffers their explanations, the objecting party is given an opportunity to prove that the striking party's proffered neutral reason is pretext for discrimination.[16] The court will then determine if the striking party had discriminatory intent, meaning purposeful discrimination.[17] In making this determination, the court must "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'"[18]

While *Porter* questions the validity of a *Batson* challenge, the Arizona Supreme Court relied heavily upon *Snyder v. Louisiana*, a U.S. Supreme Court case. In *Snyder,* the plaintiff raised a *Batson* challenge after the prosecution used peremptory strikes against the only prospective Black jurors, one of whom was a student.[19] In response, the prosecution offered two race-neutral reasons for the strike against the student: (1) the juror looked nervous throughout the questioning; and (2) the juror may be tempted to give a lower sentence to shorten trial to quickly return to educational obligations.[20] The trial court made no express findings on the "nervous" demeanor, but it did expressly accept the second proffered explanation as valid.[21]

In its analysis regarding a lack of express finding, the Supreme Court reasoned that, "it is possible that the [trial] judge did not have any impression one way or the other concerning [the juror]'s demeanor.... we cannot presume that the trial judge credited the prosecutor's assertion that [the prosecutor] was nervous."[22] The Court reasoned that this understanding was necessary for cases in which the trial judge may have been unable to make such a determination because of circumstantial reasons, such as the memory of the judge, the amount of time in between the challenge and the interview, etc.[23] However, the Supreme Court found the non-demeanor reason given by the prosecutor in *Snyder* to be pretextual, and without evidence of the demeanor based reason to consider, ordered a new trial.[24] The Arizona Supreme Court relied on this holding in *Porter*, and stated that the lack of express finding on the uncertainty of the juror was inconsequential: the non-demeanor based justification was found not to be pretextual.[25] By falling in line with *Snyder*, *Porter* fails to give minority defendants a chance at a fair trial.

Under *Snyder,* if the trial judge only makes express findings on the proffered reason that is found neutral, then it is inconsequential if the other demeanor-based reason, with no express findings, is discriminatory. The appellate court can only rely on express findings by the trial court in evaluating demeanor-based justifications, as there is no evidence for the appellate court to review regarding demeanor-based justifications. If the court is not required to make express findings, then it allows the trial court the option to decide if demeanor-based reasoning can be reviewed. A requirement for trial courts to make express findings is desperately needed, as *Batson* jurisprudence only requires the consideration of the parties' explanations and arguments.

Nevertheless, even if trial judges always made express findings, their findings would likely still be deferred to by appellate court, as "a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous."[26] This is due to the unique position of the trial court has in evaluating *Batson* claims, as step three of the *Batson* inquiry, "involves an evaluation of the prosecutor's credibility… and 'the best evidence of [discriminatory intent] often will be the demeanor of the attorney who exercises the challenge."[27]

The dissenting opinion to the Arizona Court of Appeal's reasoning, issued by Judge McMurdie, discusses the problems that this high level of deference causes.[28] While recognizing that the trial court has a unique role in deciding this question, it is nearly impossible to determine if the trial court clearly erred because demeanor-based justifications are indiscernible in a transcript, even if express findings on the validity of the demeanor based justifications are given.[29] McCurdie further contends that requiring the trial courts to make such express findings would not ensure that *Batson* is "meaningfully enforced," and believes the majority's finding is a result of their belief that *Batson* has been unable to end discrimination in juries from its creation.[30]

Batson's inability to protect juries from racial bias has been stated beginning as early as Justice Marshall's concurrence in *Batson*.[31] There, Justice Marshall stated that *Batson* is only a first step towards ending racial discrimination in jury selection, as it only enables defendants to challenge blatant examples of racism.[32] Justice Marshall also contended that *Batson* fails to protect against a conscious or unconscious racism that could be possessed by a prosecutor or judge.[33]

State v. Porter continues the nationwide tradition of puzzling *Batson* jurisprudence. While stating that the Arizona *Batson* jurisprudence does not require trial courts to make explicit determinations at each step of *Batson*, the Court refuses to change this, citing that, "Arizona precedent allows courts to defer to an implicit finding that a reason was nondiscriminatory even when the trial court did not expressly rule on the third *Batson* factor."[34] The Court ignores its ability to create its own rules to *Batson* jurisprudence. And, its preference for deference is illustrated by its continuous reference to the shared belief that "[demeanor] cannot be shown from a cold transcript."[35] This case demonstrates how broad the scope is for a peremptory challenge even under *Snyder*'s limitations, and how easy it is to exercise a peremptory challenge without running afoul of *Batson*.

The impracticability of the *Batson* challenge has led states to adopt court rules that allow for easier prevention of racial and gender bias on juries. In 2018, the Washington Supreme Court adopted General Rule 37 ("GR 37").[36] This rule expanded the prohibition against using race-based peremptory challenges during jury selection to include instances that an "object observer" could view race or ethnicity as a factor in the use of the peremptory strike, such as the juror's demeanor, inattentiveness, failure to make eye contact or exhibited a problematic attitude.[37] The rule also finds having prior contact with law enforcement officers, expressing a distrust of law enforcement, having a child outside of marriage and living in a high-crime neighborhood presumptively invalid reasons for a peremptory challenge.[38]

Similarly, the California legislature passed Assembly Bill 3070 ("AB 3070") in August of 2020.[39] While it has similar language to GR 37, it differs in its inclusion of gender, gender identity, sexual orientation, national origin, or religious affiliation, in the bases that may not be used to strike a juror.[40] However, even these rules are greatly criticized as being inadequate to fight racial discrimination.

Some scholars argue that rules like AB 3070 and GR 37 will not succeed without training in implicit bias because these laws don't help lawyers more accurately identify real, evidence-based concerns for juror bias on their own, which could lead to doubt or fear in utilizing a *Batson* challenge.[41] Scholars also criticize these laws for failing to include an individual's socioeconomic status as a presumptively invalid reason in a peremptory strike, as socioeconomic status has been supported by research to be closely connected to race and ethnicity.[42] Finally, these rules still do not identify an appellate standard of review for erroneous applications by trial judges.[43] Other scholars, however, argue that retaining the peremptory strikes with some reform is better than eliminating the peremptory strike altogether, as eliminating the peremptory strike "would likely result in an expansion of for-cause challenge jurisprudence, including appellate review of for-cause challenges" as jurors and judges hold racial biases, and there would still be debate about race and jury selection.[44]

While these rules make it more difficult to use a peremptory challenge based on race, this legislation is inadequate in preventing discrimination in jury selection. Even though AB 3070 and GR 37 would have protected the minority defendant in *Porter*,[45] they do not prevent a lawyer from consciously or unconsciously developing a "cheat sheet" of justifications that would be sufficient in the case of a *Batson* challenge.[46] Furthermore, neither rule prevents an attorney from asking about these relationships, and an unconscious bias paired with a conscious awareness of these rules may allow a lawyer to use a peremptory strike for a proffered valid reason.

In their dissent, Judge McCurdie and Judge Swann raised additional compelling arguments for the abolition of peremptory strikes.[47] They argued that it is constitutionally required that juries be selected "from 'a representative cross section of the community [which] is an essential component of the Sixth Amendment right to a jury trial,'" and cited studies demonstrating that this is still not the case after *Batson*.[48] They further urged that the abolition of peremptory strikes

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was necessary to achieve a representative cross section of the community.[49] Thankfully, the Supreme Court of Arizona accepted these arguments in the petition, and became the first state to eliminate peremptory challenges. Beginning January 1, 2022, prospective jurors may only be excused for cause.[50] All eyes are on Arizona to see whether this legal experiment "will create a fairer jury selection process or if it will create other problems."[51]

1. *Voir dire* refers to the process of questioning prospective jurors about their backgrounds and potential biases. *See, e.g.,* Cathy E. Bennett ET AL., *How to Conduct a Meaningful & (and) Effective Voir Dire in Criminal Cases*, 46 SMU L. Rev. 659, 660 (2016).
2. *See* ELISABETH SEMEL ET AL., WHITEWASHING THE JURY BOX (Berkeley Law Death Penalty Clinic ed., 2020) ("Empirical evidence overwhelmingly shows that implicit biases play a significant role in prosecutors' peremptory challenges. Strikes based on these biases most often adversely affect Black defendants and Black Jurors").
3. *See* Shamena Anwar ET AL., *The Impact of Jury Race in Criminal Trials*, The Q. J. of Econ., May 2012, at 1017.
4. A peremptory challenge allows counsel to eliminate prospective jurors without providing explanation. *See* Black's Law Dictionary 1136 (6th ed. 1990).
5. *Batson v. Kentucky*, 476 U.S. 79, 139, 1986 U.S. LEXIS 150, at *110-112 (1986) ("The Court today holds that the State may not use its peremptory challenges to strike black prospective jurors on this basis without violating the Constitution").
6. *State v. Porter*, 460 P. 3d 1276, 1279 Ariz. App. LEXIS 362, at *2 (The prosecutor struck this juror "because that juror's 'brother was convicted of a crime that is of the same nature as this matter, aggravated assault,' and '[s]he did not seem to be very sure with her responses to the State whether how [sic] that impacted her or not.'").
7. *See State v. Porter*, 460 P. 3d 1276, 1279 (Ariz. Ct. App. 2020) ("the prosecutor explained that she struck that juror because she 'had been on a criminal jury in the past which had found an individual not guilty' and 'had also been the foreperson of that jury'").
8. *See State v. Porter*, 460 P. 3d 1276, 1279. (The jury acquitted Porter of aggravated assault and convicted her of resisting arrest.)
9. Juries are required to be selected from "a representative cross section of the community [which] is an essential component of the Sixth Amendment right to a jury trial." *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).
10. The defendant appealed the trial court's finding regarding the *Batson* challenges and argued that the prosecutor's disparate treatment of jurors and failure to conduct *voir dire* on the topic of prior jury service revealed the prosecutor's discriminatory intent in jury selection. The appellate court ruled in favor of the defendant. The State of Arizona then appealed the case before the Arizona Supreme Court. *See* State v. Porter, 491 P.3d 1100, 1104, 2021 Ariz. LEXIS 243, at *3 (Ariz. 2021).
11. This test is analogous to the *McDonnell Douglas* test used in the employment discrimination context. *See* Christopher L. Ekman, *Batson Challenges in State and Federal Courts in Alabama: A Refresher and Recent Decisions*, 72 Ala. Law. 46, 48 (2011).
12. Batson v. Kentucky, 475 U.S. 79, 97, 1986 U.S. LEXIS 150, at *110-112 (1986).
13. *Id.*
14. *Snyder v. Louisiana*, 552 U.S. 472, 477, 2008 U.S. LEXIS 2708, at *9 (2008).
15. *State v. Snyder*, 942 So. 2d 484, 496, 2006 La. LEXIS 2309, at *35 (La. 2006) ("[N]ervousness cannot be shown from a cold transcript, which is why only the trial judge can evaluate the demeanor of the juror and why the judge's evaluation must be given much deference").
16. *See Batson v. Kentucky*, 475 U.S. 79, 96.
17. *See Batson v. Kentucky*, 475 U.S. 79, 93.
18. *Id.*
19. *Snyder v. Louisiana*, 552 U.S. 472, 475-476, 2008 U.S. LEXIS 2708, at *8 (2008).
20. See *Snyder v. Louisiana*, 552 U.S. 472, 478.
21. See *Snyder v. Louisiana*, 552 U.S. 472, 479 ("Rather than making a specific finding on the record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation").
22. See *Snyder v. Louisiana*, 552 U.S. 472, 487.
23. *Id.*
24. See *Snyder v. Louisiana*, 552 U.S. 472, 482-487.
25. See *State v. Porter*, 491 P.3d 1100, 1108-1109.
26. See *Snyder v. Louisiana*, 552 U.S. 472, 477.
27. *Id.*
28. *State v. Porter*, 460 P. 3d 1276, 1278, 2020 Ariz. App. LEXIS 362, at *2 (Ariz. Ct. App. 2020) (McCurdie, P., dissenting).
29. See *State v. Porter*, 460 P. 3d 1276, 1278.
30. See *State v. Porter*, 460 P. 3d 1276, 1289.
31. *Batson v. Kentucky*, 476 U.S. 79, 102-109, 1986 U.S. LEXIS 150, *46-58 (1986).
32. *Id.*
33. See *Batson v. Kentucky*, 476 U.S. 79, 106.
34. *State v. Porter*, 491 P.3d 1100, 1107, 2021 Ariz. LEXIS 243, at *3 (Ariz. 2021) (citing *State v. Smith*, 475 P.3d 558, 577, 2020 Ariz. LEXIS 308, *32 (Ariz. 2020)).
35. *State v. Snyder*, 942 So. 2d 484, 496, 2006 La. LEXIS 2309, at *35 (La. 2006).
36. Wash. General Rule 37 (effective 2018).
37. *Id.*
38. *Id.*
39. Jim Frederick & Kate M. Wittlake, *New Jury Selection Procedure in California: Is this the End of Peremptory Challenges? Is this the End of Batson?*, THE NAT'L L. REV. (Dec. 2, 2020), https://www.natlawreview.com/article/new-jury-selection-procedure-california-end-peremptory-challenges-end-batson.
40. Cal. Civ. Proc. Code § 237.1 (West 2021).
41. Brooks Holland, Article, *Confronting the Bias Dichotomy in Jury Selection*, 81 La. L. Rev. 165, 213-216 (2020).
42. Simon, *supra* note 44.
43. Holland, *supra* note 45, at 212.
44. Annie Sloan, *"What to do About Batson?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 Calif. L. Rev. 233, 263-265 (2020).
45. *Compare* Cal. Civ. Proc. Code § 237.1 (West 2021) and Wash. General Rule 37 (effective 2018).
46. *See* Ian A. Mance, Article, *Cheat Sheets and Capital Juries: In State v. Tucker, North Carolina's Attorney General and Supreme Court Contend with Evidence of Prosecutors' Efforts to Circumvent Batson v. Kentucky*, 44 Campbell L. Rev. 3 (2021) (discusses a case involving North Carolina prosecutors' use of a list, or "cheat sheet," of justifications to recite to a judge that may overcome a *Batson* challenge).
47. Hon. Peter B. Swann & Hon. Paul J. McMurdie, *Petition to Amend Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure*, (June 1, 2021), https://www.azcourts.gov/Rules-Forum/aft/1208.
48. *Id.*
49. *Id.*
50. Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, R-21-0020 (2021).
51. Cheryl Corley, *Arizona's Supreme Court Eliminates Peremptory Challenges,* NPR (Sept. 6, 2021), https ://www.npr.org/2021/09/06/1034556234/arizonas-supreme-court-eliminates-peremptory-challenges.