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State v. Andujar: WHY MEANINGFUL REFORM IS NEEDED

By Natalie Aguilar



State v. Andujar: Batson v. Kentucky Evaded

On July 13, 2021, the New Jersey State Supreme Court affirmed the appellate court's decision to reverse Edwin Andujar's conviction of first-degree murder and weapons offenses.¹ The Court held that the State violated Andujar's right to a fair trial because the State's racial discrimination infected the jury selection process.² This case gave the New Jersey Supreme Court the opportunity to discuss the critical role of jury selection and to consider the additional measures needed to prevent discrimination in jury selection.³

The Sixth Amendment of the Constitution guarantees the right to a trial by a fair and impartial jury.⁴ The criminal justice system has designed two stages to ensure fairness and impartiality among jury selection. Firstly, the pool from which juries are drawn from must be representative of the community.⁵ Secondly, the jury selection process identifies and removes jurors who cannot be impartial.⁶ Both attorneys and judges interview potential jurors to ensure impartiality.⁷

Attorneys have two different ways to exclude prospective jurors during the jury selection process.⁸ Counsel can challenge for cause, which requires convincing a judge that a prospective juror has a bias that precludes impartiality.⁹ Or, attorneys can issue a peremptory challenge, which allows lawyers to exclude jurors without explanation or evidence of impartiality.¹⁰

Usually, if a trial court rejects a challenge for cause, then the attorney who raised the for-cause challenge will issue a peremptory challenge, which can trigger a *Batson* analysis.¹¹ A *Batson* challenge is made by the party who believes the peremptory challenge is being used to exclude a juror on the basis of race.¹² A *Batson* challenge includes a three-step analysis, where the party contesting the peremptory challenge must show that the peremptory challenge was intentionally exercised on the basis of race or ethnicity.¹³ The burden then shifts to the party issuing the peremptory challenge to provide a race-neutral explanation supporting the peremptory challenge.¹⁴ Finally, the trial judge decides whether the proffered explanations are genuine and reasonable grounds to remove the juror or simply baseless excuses hiding discriminatory motivations.¹⁵

In *State v. Andujar*, the prosecution issued a challenge for cause against potential juror F.G.¹⁶ The state argued that, "F.G.'s background, associations and knowledge of the criminal justice system were problematic," and also suggested that F.G. had been evasive.¹⁷ The trial judge rejected the challenge and found F.G. would make a fair and impartial juror.¹⁸ The State then chose to run a criminal history check on F.G. and found that he had an outstanding warrant.¹⁹ He was arrested, though his charges were later dropped.²⁰ The State did not investigate any other juror to this extent.²¹

The trial court in the Andujar case never engaged in a *Batson* analysis: after the court rejected the for-cause challenge, the State did not raise a peremptory challenge. Instead, the State ran a "criminal history check on F.G... effectively evad[ing] any *Batson*...analysis."²²

The Supreme Court of New Jersey affirmed the appellate division's decision to reverse Andujar's conviction. The Court also held that, for future cases, "any party seeking to run a criminal history check on a prospective juror must present a reasonable, individualized, good-faith basis for the request and obtain permission from the trial judge."²³ A good-faith basis request requires the party to believe that a record check might reveal "pertinent information unlikely to be uncovered through the ordinary voir dire process."²⁴ "Mere hunches" are not enough to justify a criminal record check.²⁵

As indicated above, this new "standard," which determines whether a criminal history check was appropriate, was not met in Andujar's case.²⁶ In *Andujar*, the State neither presented a request—individualized, based in good faith or otherwise—nor obtained the judge's permission to run a background check on F.G.²⁷ Instead, the State ran the background check after the judge determined F.G. would make a fair and impartial juror.²⁸ Based upon the prosecution's disregard of this standard, the Court concluded that F.G.'s removal may have stemmed from the State's implicit bias.²⁹

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Batson's Failures

The *Batson* analysis explicitly applies to only peremptory challenges. Therefore, courts have not extended the doctrine to allegations of discrimination to for cause challenges.³⁰ Courts have held that there is no legal basis to apply the *Batson* analysis to for challenge.³¹ The courts reason that for-cause challenges already require the party issuing the challenge to provide a race-neutral reason.³² Therefore, there is no need to apply *Batson* because the *Batson* analysis would accomplish the same thing: require the issuing party to provide a race-neutral reason.³³ However, this disregards the ease in which race-neutral justifications are easily offered and accepted.³⁴

Surprisingly, in the Andujar case, the state supreme court appears to imply that the *Batson* analysis applies to for-cause challenges as well.³⁵ The Court accepted that, "implicit bias is no less real and no less problematic than intentional bias. The effects of both can be the same: a jury selection process that is tainted by discrimination."³⁶

The *Batson* analysis is meant to address racial discrimination in courts. However, legal scholars view the analysis to be ineffective.³⁷ An important reason the *Batson* challenge often fails is that it only addresses purposeful racial discrimination in jury selection. It does not address or combat implicit bias.³⁸ Therefore, the flaws in the *Batson* analysis allow for the "ease with which 'race-neutral' reasons are accepted by judges and the failure to account for the nuances of racial discrimination and bias."³⁹

Reform sought

Other states have recognized the effect of implicit bias upon jury selection and have accordingly revised the *Batson* analysis. For example, Washington state attempted to address *Batson's* failures,⁴⁰ by passing a statute⁴¹ that modified the *Batson* analysis.⁴² The statute removed the purposeful discrimination requirement from the *Batson* analysis and instead imposed an objective view inquiry.⁴³

Instead of inquiring whether the prosecutor was motivated by racial animus, Washington state implemented the "objective observer test." This test asks whether an average, reasonable person could view race or ethnicity as a motivator in issuing the

peremptory challenge.⁴⁴ In other words, the court no longer needs to inquire whether the prosecutor intentionally removed a potential juror on the basis of race. Instead, the court applies this objective standard to determine if the prosecutor acted in a racially discriminatory manner.

"The statute also provides a list of purported reasons, which are presumptively invalid, for striking a juror: (i) having prior conduct with law enforcement;...(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;... (iv) living in a high-crime neighborhood."⁴⁵

In *State v. Jefferson*,⁴⁶ the Washington Supreme Court defined the objective observer standard, "based on the average, reasonable person—defined here as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision-making in nonexplicit, or implicit, unstated, ways."⁴⁷ "By moving the inquiry into how an objective observer would perceive the juror's removal, rather than probing a prosecutor's mind for overt racial animus, the test more effectively deals with the issue of implicit bias."⁴⁸

Ideally, a judge who imposes this "objective observer standard" will be able to rule on a *Batson* challenge impartially, detached from her personal feelings or opinions. But, how realistic is an objective standard, especially when this standard hinges on the assumption that the judge making the decisions is an objective ruler? What is to secure the "objective standard" from a judge's own implicit biases?

While this author is glad that the courts have acknowledged the pervasive failure of *Batson*, she is cautious to declare this reform as a complete fix to the problem. However, Washington has taken a step in the right direction to address implicit bias in jury selection. And now that New Jersey has acknowledged the real harm implicit bias creates, New Jersey needs to take real steps in addressing the problem as well.

A defendant's right to a fair and impartial jury is guaranteed by the Sixth Amendment of the Constitution and needs to be better protected. Prosecutors have constantly violated that right by removing potential diverse jurors for no reason other than racial

bias. Too often, the explanations offered in for-cause challenges and peremptory strikes are justifications that hide implicit or blatant racial biases.

While the Washington *Batson* reform does not explicitly involve for-cause challenges, for-cause challenges can also benefit from the same type of reform.⁴⁹ The *Batson* reform effectively deals with implicit bias by no longer requiring courts to find that the prosecutor had purposeful bias in removing a juror for a *Batson* challenge to succeed. The reform removes the subjective inquiry into the prosecutor's mind, and instead analyzes the reasoning offered for a peremptory strike under an objective standard. Thus, when the judge decides whether a for cause challenge was made for race neutral reasons or for racially discriminatory reasons, the judge no longer has to worry about the subjective intent of the prosecutor.

Since the state supreme court in the Andujar case has likely expanded the application of *Batson* to for-cause challenges, if New Jersey would apply the Washington-type of reform, the reformed analysis would most likely apply to for-cause challenges as well. While eliminating all bias from courts may be impossible, the New Jersey judicial system can continue to address bias by reforming its *Batson* analysis and protecting defendants' 6th Amendment rights.⁵⁰

Diversity in a jury pool is essential to a defendant's right to an impartial and fair trial. Diversity in the jury pool is needed to provide for diversity of thought, experience and socio-economic background. Studies have proven that diverse juries "deliberate longer, more thoroughly evaluate the evidence and are less likely to have a presumption of guilt."⁵¹ Instead of removing diverse jurors from the jury pool, the criminal system needs to ensure the diversity of juries, thereby increasing the probability of a fair and impartial trial.

1. *N.J. v. Andujar*, 247 N.J. 275 (2021).

2. *Id.*

3. *Id.* at 285.

4. Michael I. Norton, Samuel R. Sommers & Sara Brauner, *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, J. Behav. Dec. Making, 20: 467, 467 (2007).

5. *Andujar Id.*

6. *Id.*

7. *Id.*

8. *Id.*
9. *Id.*
10. *Id.*
11. *N.J. v. Andujar*, 247 N.J. 275, 284–285 (2021).
12. *Batson v. Kentucky*, 106 U.S. 79, 96 (1986).
13. *N.J. v. Andujar*, 247 N.J. 275, 300 (2021).
14. *Id.*
15. *Id.*
16. *N.J. v. Andujar*, 247 N.J. 275 (2021).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 313.
23. *Id.* at 284.
24. *Id.* at 308.
25. *Id.* at 308.
26. *Id.* at 284.
27. *Id.* at 284.
28. *Id.* at 283.
29. *Id.* at 284.
30. New Jersey State Bar Associate: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 42 (2021).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 40.
35. *Id.*
36. *N.J. v. Andujar*, 247 N.J. 275 (2021).
37. New Jersey State Bar Associate: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 32 (2021).
38. *N.J. v. Andujar*, 247 N.J. 275, 302 (2021).
39. New Jersey State Bar Association: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 33 (2021).
40. New Jersey State Bar Association: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 38 (2021).
41. Wash. Gen. R.37.
42. New Jersey State Bar Association: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 35 (2021).
43. Annie Sloan, *What to Do about Batson?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 Calif. L. Rev. 233, 253 (2020).
44. New Jersey State Bar Association: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 35 (2021).
45. *Id.* at 36.
46. *State v. Jefferson*, 429 P.3d at 480 (2018). (The Court acknowledged that the *Batson* analysis fails to adequately address race discrimination in jury selection. Therefore, the Court changed *Batson's* third step. The judge must now ask whether an objective observer could view race as a factor in the peremptory strike.)
47. New Jersey State Bar Association: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 35 (2021).
48. *Id.* at 37.
49. *Id.* at 41.
50. *Id.* at 27.
51. Liane Jackson, *The Chauvin conviction shows why diverse juries matter* (Aug 1, 2021).



EViction SEALING

By Danielle DalPorto and Makela Hayford

Evictions do not tell a tenant's full story, or necessarily predict whether a potential tenant is likely to default on her rent. Yet landlords often search for eviction filings and judgments in making decisions about whether to rent to prospective tenants. Eviction sealing is a legal mechanism that may provide relief to those who have eviction filings or judgments on their record. It involves the removal of an eviction record on file with the court. This simple removal provides one less barrier to those seeking housing, a basic human need.

Few cities in the United States offer tenants the opportunity to seal their evictions. While Ohio does not create a right for eviction sealing, Cleveland's housing court offers tenants limited eviction sealing. In 2018, Housing Court Judge Ronald O'Leary, a Republican appointee, established Cleveland's formal eviction-sealing rule.¹ Currently, there are four potential options for a tenant to seal an eviction:

- a) The tenant defeats eviction or the Court dismisses the case;
- b) The landlord dismisses the case before adjudication;
- c) By written agreement of the landlord to seal the record; or
- d) The landlord prevails *and* the tenant remains eviction-free for five years, *and* extenuating circumstances brought about the eviction, *and* at least five years have passed since the landlord prevailed on the possession claim.²

Regardless of the sealing outcome, however, tenants must disclose prior evictions or filings if asked by prospective landlords.³

Although Cleveland Housing Court gives tenants the opportunity to seal their eviction records, the authors still find the existing eviction-sealing rule limiting and that it rules out a significant number of tenants. Viewing Cleveland's eviction-sealing rule from a critical perspective, the authors conclude that while sealing evictions to destigmatize individuals who have experienced eviction is a step in the right direction, lawmakers or judges acting in this capacity should amend the rule to broaden the population of individuals who may leverage it. This

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