FUNDAMENTALS OF TRIAL ADVOCACY COURSE

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JURY SELECTION

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JURY SELECTION

Right to a Jury Trial

1. **Sixth Amendment, U.S.Constitution**: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ."

2. **Article 2, Section 23, Arizona Constitution**: "The right of trial by jury shall remain inviolate."

3. **Article 3, Section 24, Arizona Constitution**: "[i]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial by an impartial jury . . ."

4. **A.R.S. section 13-114**: "In a criminal action defendant is entitled: (1) To have a speedy public trial of the county in which the offense is alleged to have been committed."

Jury Eligibility

A trial is jury eligible if either of the following is present:

1) The offense had a common law antecedent which was jury eligible

or

2) If the offense is "serious".
   a) Incarceration of 6 months or less = petty offense = presumptively not jury eligible.
   b) Presumption may be rebutted by "demonstrating the offense carries additional severe, direct, uniformly applied, statutory consequences that reflect the legislature's judgment that the offense is serious." *Derendal v. Griffith,* 209 Ariz. 416, 104 P.3d 147 (2005).

Number of Jurors

1. **A.R.S. section 21-102:**
   a. Imprisonment for 30 years or more: 12 jurors
   b. Imprisonment/sentence of less than 30 years: 8 jurors
   c. Misdemeanor: 6 jurors

2. **Arizona Rules of Criminal Procedure, Rule 18.2: Alternate jurors**

Jury Selection

1. **Arizona Rules of Criminal Procedure, Rule 18.3: Jury Information**, "Prior to the voir dire examination on the day when jury selection is commenced, the parties shall each be furnished with a list of the names of the panel of prospective jurors called for the case together with the zip code, employment status, occupation, employer, residency status, education level, prior jury duty experience, and felony conviction status . . . ."

2. **Arizona Rules of Criminal Procedure 18.4: Challenges**
    a. **Challenge to the Panel**: Written challenge alleging panel selection materially departed from legal requirements.
    b. **Challenge for Cause** (by the court or by a party)
    c. **Peremptory Challenge**
        1. Ten in death penalty cases
        2. Six in all other Superior Court cases
        3. Two in all limited jurisdiction courts
        4. Joint trials: Each defendant gets ½ of the peremptory challenges
        5. Parties may agree to exercise fewer peremptory challenges
        6. *Batson v. Kentucky,* 476 U.S. 79 (1986)

3. **Arizona Rules of Criminal Procedure, Rule 18.5: Procedure for Selecting Jury**
    a. **Swearing Panel**
    b. **Calling Jurors for Examination**: Regarding # of juror questioned, court may either:
        * Call # equal to # to serve + # of alternates + # of peremptory challenges

        or

        * All prospective jurors
    c. **Inquiry by the Court; Brief Opening Statements**
        * Court gives overview and introductions
        * Court shall ask questions regarding juror qualifications
        * Court may allow parties to give brief opening statements
    d. **Voir Dire Examination**
        * Court controls
        * Conducted on the record
        * Court shall permit further examination by a party
        * Written questionaires not precluded
    e. **Scope of Examination**
        * Court ensures juror privacy reasonably protected
        * Inquiries limited to bases for cause/peremptory challenges
    f. **Challenge for Cause**
        * Challenge made on the record but out of hearing of jurors
        * If juror is excused, another member of the panel will replace juror

g. **Exercise of Peremptory Challenges**
   * Alternating with prosecutor going first
   * Failure of party to exercise challenge is waiver of party's remaining challenges
   * If parties fail to exercise full # of challenges, clerk shall strike jurors on bottom of the list until only the # to serve + alternates remain

h. **Selection of Jury**
   * Alternates chosen by lot by the clerk just before deliberations
   * Alternates will be instructed to continue to follow admonitions until they are informed of verdict or jury discharged
   * If deliberating juror excused, court will chose replacement from alternates
   * If alternate joins deliberations, court will instruct jury to begin deliberations anew

i. **Deliberations in a Capital Case**

4. **A.R.S. section 21-201: Qualifications**
   a. At least 18 years old
   b. U.S.citizen
   b. Resident of jurisdiction
   c. Never convicted of felony or felon with rights restored

5. **A.R.S. section 21-202: Persons entitled to be excused from jury service.**

Batson

- ***Strauder v. West Virginia*, 100 U.S. 303 (1879)**
  - An African American was convicted of murder. The defendant appealed their conviction by an all Caucasian jury. Defendant claimed that a state law limiting those eligible for jury to all Caucasians as violating his Equal Protection rights.
  - Does a state law limiting jury service to Caucasians only violate the Equal Protection Clause?
    - Yes, the purpose of the Clause was so that persons of every race could enjoy all the civil rights under the law. The Court also said that there can be limits on jury service such as gender and education.
  - Justice Field dissented and Justice Clifford concurred with the dissent.
- ***Swain v. Alabama*, 380 U.S. 202 (1965)**
  - A defendant appealed their criminal conviction claiming that the use of peremptory strikes by the prosecutor excluding all African Americans was unconstitutional. Further, at the time this use of strikes was so

widespread and systematic that no African American had ever served on a jury in that particular county.

- Was the Prosecutors use of peremptory strikes constitutional?
  - Yes, the use of peremptory strikes applies to both the defense and the prosecution. African Americans were not being excluded from jury service since they were included on the list for jury service.
- Chief Justice Goldberg and Justice Douglas dissented.

- ***Arlington Heights v. Metro Housing*, 429 U.S. 252 (1977)**
  - A company wanted to build on several tracts of land for the purpose of constructing low income, multiple family housing in an area that was predominantly Caucasian. The land at the time was zoned as single family, therefore constructing the residences would be contingent upon rezoning. Rezoning was denied on the grounds that the land was unsuitable for low income, multiple family housing. Company sued claiming that the rezoning denial had a discriminatory effect based on the rezoning mainly affecting minorities.
  - Was the denial of the rezoning discriminatory, violating the petitioners Equal Protection rights?
    - No, while the denied rezoning may have a disproportionate discriminatory effect on minorities the party asserting the claim, could not demonstrate that the zoning was denied with discriminatory intent.

- ***Batson v. Kentucky*, 476 U.S. 79 (1986)**
  - During jury selection a prosecutor used four peremptory strikes removing all African Americans from the panel. Defense counsel objected stating that doing so violated the defendant's Sixth and Fourteenth Amendment rights.
  - Does a peremptory strike based solely on race violate the Constitutional rights of a defendant?
    - Yes, the practice violated the Equal Protection rights of the defendant. To establish a *prima facie* case of discrimination defendant must show that they are a part of a cognizable racial group, the prosecutor used peremptory strikes to exclude potential jurors of the same racial group and there are any other relevant details that can be inferred that the prosecutor was attempting to exclude potential jurors based on their race.
  - Justice White filed a concurring opinion. Justice Marshall filed a concurring opinion. Justice Stevens filed a concurring opinion in which Justice Brennan joined. Justice O'Connor filed a concurring opinion.

Chief Justice Burger filed a dissenting opinion in which Justice Rehnquist joined. Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger joined.

- ***Hernandez v. N.Y.*, 500 U.S. 352 (1991)**
  - Defendant sought review of the rejection of their *Batson* claim when the prosecutor used two peremptory strikes on Spanish speaking jurors because they felt that the prospective jurors would not be able to listen to and follow the translator.
  - Does a *Batson* challenge include peremptory strikes based solely on ethnicity?
    - Yes, United States Supreme Court ruled that a peremptory strike based only on ethnicity violated the Equal Protection Clause. Here the prosecutor offered a neutral reason for the strike.
  - Justice O'Connor, with whom Justice Scalia joined, concurred in the judgment and filed an opinion. Justice Blackmun dissented and filed a statement. Justice Stevens, with whom Justice Marshall joined, dissented and filed an opinion.
- ***State v. Davis*, 504 N.W.2d 767 (Minn. 1993)**
  - A prosecutor used a peremptory strike on a member of the jury panel claiming that it was due to the person belonging to a certain religion. When asked for a reason for the exclusion the prosecutor stated that in his experience members of the particular religion were reluctant to be in the position of exercising authority over others.
  - Do *Batson* challenges include peremptory strikes based on religion?
    - No, Court refused to extend *Batson* to include peremptory strikes based on religion and The Supreme Court of the United States denied certiorari.
- ***J.E.B. v. Alabama*, 511 U.S. 127 (1994)**
  - In a paternity suit brought by Alabama the attorney for Alabama used 9 out of 10 peremptory strikes on male jurors, resulting in an all-female jury. The putative father appealed claiming that this practice violated his Equal Protection rights.
  - Does a peremptory strike based solely on gender violate the Equal Protection Clause?
    - Yes, United States Supreme Court reversed the lower court decision. Ruling that *Batson* challenges extended to peremptory strikes based solely on gender.

- Justice O'Connor filed a concurring opinion. Justice Kennedy filed an opinion concurring in the judgment. Chief Justice Rehnquist filed a dissenting opinion. Justice Scalia dissented and filed an opinion in which Chief Justice Rehnquist and Justice Thomas joined.

- ***Purkett v. Elem*, 514 U.S. 765 (1995)**
  - Prosecutor used two peremptory strikes on African Americans on the jury panel. The prosecutor claimed that they didn't like the way the potential jurors had their hair cut and that their facial hair made them look suspicious.
  - Was the reason given for the peremptory strike insufficient to overcome a *Batson* challenge to the strike?
    - Yes, Court found that explanations for peremptory strikes need not be plausible or persuasive. In response the party asserting the *Batson* challenge has the burden of showing that the reason offered is pretextual.
  - Justice Stevens filed dissenting opinion in which Justice Breyer joined.

- ***Payton v. Kearse,* 495 SE2d 205 (S.C. 1998)**
  - In a civil case, one party claimed that the trial judge improperly denied their *Batson* challenge. When the party exercising the peremptory strike was asked for a reason for the strike, they stated that the potential juror was from a family that had problems with the law and that they were of a *redneck variety*. The trial judge then denied the *Batson* challenge.
  - Did the trial court err when it denied the *Batson* challenge?
    - Yes, once a pretextual discriminatory reason is given for a peremptory strike it poisons any other reason given. Here the term *redneck* is a stereotype that applies exclusively to Caucasians. It is a stereotype that includes a broad group without evidence that all members of the group have certain characteristics. Such as a person who is a member of the KKK or Black Panthers. Therefore, the trial judge improperly denied the *Batson* challenge.

- ***State v. Lucas*, 199 Ariz. 366, 18 P.3d 160 (App. 2001)**
  - Prosecutor used peremptory strike on the only African American on the panel. The reason given for the strike was that the person was a lawyer and that they were from the South.
  - When a neutral reason is given for a strike along with a discriminatory reason, is the defendant's Equal Protection rights violated?
    - Yes, once a discriminatory reason has been uncovered-either inherent or pretextual this reason taints any other neutral reason for the strike.

- ***Johnson v. California*, 545 U.S. 162 (2005)**
    - Defendant appealed their second-degree murder conviction after the prosecutor used three peremptory strikes on the remaining African American venire persons. Trial judge rejected the *Batson* claim stating that defendant failed to show a strong likelihood of purposeful discrimination. The appeal claimed that the California standard of 'strong likelihood' was different from the United States Supreme Court's standard of a 'reasonable inference' that discrimination occurred.
    - Are the California standard (strong likelihood) for a *prima facie* case that discrimination has occurred in a *Batson* challenge copacetic with the United States Supreme Court standard (reasonable inference)?
        - Yes, the standards are the same, inferences of discrimination are sufficient to present a *prima facie* case of discrimination, the burden then shifts to the opposing party to present a neutral reason for the exclusion.
    - Justice Breyer concurred and filed opinion. Justice Thomas dissented and filed opinion.
- ***United States v. Blaylock*, 421 F.3d 758 (8th Cir. 2005)**
    - The defendant appealed their conviction for drug trafficking, claiming among other things, that the peremptory strike of a venire person based on sexual orientation violated his Equal Protection rights.
    - Does *Batson* extend to peremptory strikes based on sexual orientation?
        - Court did not address the issue. It only expressed doubt that it did and that even if sexual orientation was included the prosecutor provided a neutral reason for the exclusion.
- ***State v. Newell*, 212 Ariz. 389, 132 P.3d 833 (2006)**
    - In a death penalty case the prosecutor used a peremptory strike on the only remaining African American on the venire panel. Prosecutor claimed the strike was due to perceived contradiction about whether they would be able to vote for the death penalty, they did not believe that the contradiction was enough for grounds to strike for cause.
    - Did the prosecutor improperly exercise their peremptory strike, violating the defendant's Equal Protection rights?
        - No, Defendant was not able to show evidence, other than inference, that strike was purposeful racial discrimination.
- ***Snyder v. Louisiana*, 552 U.S. 472 (2008)**
    - A prosecutor used a peremptory strike on a juror because, they appeared nervous and were a student teacher with school obligations. Prosecutor

claimed that due to their other obligations they would be unduly motivated to reach a prompt verdict.

- Did the use of a peremptory strike violate the defendants Equal Protection rights?
    - The Supreme Court found that due to other jurors being in similar circumstances who were not struck, the reasoning was pretextual for purposeful discrimination. Further there was nothing in the record to indicate that the juror appeared nervous.
- Thomas, joined by Justice Scalia, dissented and filed an opinion.

- ***US v. Collins*, 551 F.3d 914 (9th Cir. 2009)**
    - The defendant was convicted of drug offenses involving distribution of methamphetamine. The defendant appealed their conviction stating that the trial judge applied an improper standard on a *Batson* challenge. When the prosecutor used a peremptory strike on the only remaining African American venire person. When the *Batson* challenge was made the prosecutor was not asked for a reason for the strike. They only stated that a *prima facie* case had not been made since the defendant could not show that a pattern of discrimination.
    - Was an improper standard for reviewing a *Batson* challenge used by the trial judge?
        - Yes, the correct test for a *prima facie* case for a *Batson* challenge is: the prospective juror is a member of a cognizable racial group, the prosecutor used a peremptory strike to remove the juror, and the totality of the circumstances raises an inference that the strike was motivated by race. Here, the fact that there was only one member of a cognizable racial group left does not mean that there was not discriminatory intent. Further, other jurors in similar circumstances were not struck. In applying both of these factors the defendant did establish a *prima facie* case. The prosecutor now has the burden of demonstrating a neutral reason for the peremptory strike.

- ***SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014)**
    - In a civil dispute regarding a claim about a good faith and fair dealing violation when Abbott increased its cost of an HIV drug fourfold, a juror was excluded by use of a peremptory strike. A *Batson* challenge was raised claiming that the potential juror was excluded based solely on sexual orientation.
    - Does a *Batson* challenge extend to peremptory strikes based solely on sexual orientation?

- Yes, sexual orientation is subject to heightened scrutiny. Therefore, rejecting a juror based solely on sexual orientation violates equal protection rights.

Preparation of Jurors

Arizona Rules of Criminal Procedure, Rule 18.6

* Jurors may be provided a handbook approved by Supreme Court
* Oath (note new language effective 1/1/14)
* Court shall give preliminary instructions immediately after swearing jury regarding order of proceedings, procedure for submitting questions, and elementary legal principles
* Court shall instruct jurors that they may take notes, and shall provide materials. Court has discretion to also authorize documents and exhibits to be included in notebooks . Jurors have access to their notebooks during recesses and deliberations. After a verdict, notes will be destroyed by bailiff/clerk (in capital cases, notes available until after sentencing verdict)
* Jurors will be instructed they may submit written questions to the court. Counsel may object to the questions out of the presence of the jury. For good cause, the court may prohibit or limit questions to witnesses.