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## Cooper v. State, 134 Nev. Adv. Op. 104 (Dec. 27, 2018)

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## CONSTITUTIONAL LAW: PEREMPTORY CHALLENGE

### **Summary**

The Court determined that removing a potential juror on the basis of race is a violation of the Equal Protection Clause and held that the district court erred when it did not find a prima facie showing of race-based discrimination during the jury selection process.

### **Background**

James Cooper, an African-American man, was initially charged with two separate counts of child abuse, neglect or endangerment and one count each of battery constituting domestic violence committed by strangulation and battery constituting domestic violence. These charges were made in connection with his behavior at the home of the victim and her two children.

During the jury selection process, the State used two peremptory challenges to remove two jurors: Juror No. 217 and Juror No. 274. These two jurors were African-American and therefore, the same race as Cooper. The challenges came after all for-cause challenges were resolved. The venire at the time of the challenges contained twenty-three prospective jurors, including three African-Americans.

Cooper objected to the peremptory challenges pursuant to *Batson v. Kentucky*.<sup>2</sup> Cooper argued that the prospective jurors indicated they could be fair and, therefore, the current circumstances of the challenges portrayed a pattern of striking African-American jurors. The State rebutted by stating the African-American jurors were excused for-cause and that there was no prima facie showing of discrimination. Moreover, the State argued that they only needed to justify their reasoning if there was a prima facie showing of discrimination. The district court did not make such a finding. It found that Cooper's objection was based on a dislike for the racial make-up of the venire. The court also found that it could think of many non-discriminatory reasons the State would have wanted to strike the two prospective jurors. Accordingly, the district court dismissed the *Batson* challenge without allowing Cooper to provide further analysis. This appeal followed.

### **Discussion**

When a party raises a race-based objection to a peremptory challenge, the Court must conduct the three-part *Batson* analysis.<sup>3</sup> First, the party opposing the peremptory strike must make a "prima facie showing that a peremptory challenge has been exercised on the basis of race."<sup>4</sup> Once such a showing is made, the party advocating for the peremptory strike must provide any race-neutral explanations for the strike.<sup>5</sup> Lastly, the district court is required to hear the arguments and

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<sup>1</sup> By Christi Dupont.

<sup>2</sup> *Batson v. Kentucky*, 476 U.S. 79 (1876).

<sup>3</sup> See *Batson* at 93–100.

<sup>4</sup> *Williams v. State*, 134 Nev. Adv. Op. 83, 429 P.3d 301, 305 (2018) (internal quotation marks omitted).

<sup>5</sup> *Id.* at 306.

determine whether the party opposing the peremptory strike has proven purposeful discrimination.<sup>6</sup>

In the present case, the Court found that the prima facie showing in the first step of the *Batson* analysis does not require the peremptory strike opponent to meet their ultimate burden of proof.<sup>7</sup> Rather, the party must provide “sufficient evidence to permit the trier of fact to draw an inference that discrimination occurred.”<sup>8</sup> One example of an inference of discrimination could be a ‘pattern’ of strikes against black jurors included in the venire.<sup>9</sup> Other evidence that may be sufficient includes “the disproportionate effect of peremptory strikes [and] the nature of the proponent’s questions and statements during voir dire.”<sup>10</sup>

Here, the State used 40 percent of its peremptory challenges (2 of 5) to remove 67 percent of African Americans in the venire (2 of 3). The Court acknowledged that numbers alone are not enough to prove prima facie discrimination, however, the numbers here proved a disproportionate effect on African Americans, creating an inference of discrimination. The Court decided that this inference of purposeful discrimination was enough to constitute a prima facie showing of discrimination under the totality of the circumstances.

Because the district court dismissed the *Batson* analysis at its’ first-step, the Court here had an inadequate record to perform the second-step of the *Batson* analysis. The Court found this inappropriate because the *Batson* framework calls for real answers, not judicial speculation.<sup>11</sup> The inadequacy was especially problematic because the State asked venire members what their opinion about the Black Lives Matter movement was, which was minimally relevant at best. While that question contained race-based implications constituting further purposeful discrimination, the Court could not perform the second step of the *Batson* analysis without hearing the State’s reasoning.

## **Conclusion**

The Court found that the district court erred when it stopped the *Batson* analysis at the first step, where it found that a prima facie showing of discrimination did not exist and that the record does not clearly support the denial of Cooper’s objection. Accordingly, the Court reversed Cooper’s conviction and remanded to the district court for a new trial.

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<sup>6</sup> *Id.*

<sup>7</sup> *Watson v. State*, 130 Nev. Adv. Op. 764, 775, 355 P.3d 157, 166 (2014).

<sup>8</sup> *Id.*

<sup>9</sup> *Batson v. Kentucky*, 476 U.S. 79, 97 (1876).

<sup>10</sup> *Watson*, 130 Nev. Adv. Op. at 776–76, 335 P.3d at 166.

<sup>11</sup> *Johnson v. California* 545 U.S. 162, 172 (2005).