

1989

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Recommended Citation

L. Ashley Lyu, *Getting at the Truth: Adversarial Hearings in Batson Inquiries*, 57 Fordham L. Rev. 725 (1989).

Available at: <https://ir.lawnet.fordham.edu/flr/vol57/iss5/2>

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NOTES

GETTING AT THE TRUTH: ADVERSARIAL HEARINGS IN *BATSON* INQUIRIES

INTRODUCTION

For over a century, the Supreme Court has wrestled with the problem of racial discrimination in jury selection.¹ Where a criminal defendant is tried before a jury from which members of his racial group have been purposely excluded by the prosecution's use of peremptory challenges,² the Court has recognized two equal protection violations. First, the defendant is denied the right to be tried by persons who are selected pursuant to nondiscriminatory criteria.³ Second, the excluded jurors are denied the opportunity to participate in the criminal justice system.⁴

1. *See* *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (peremptory challenges); *see, e.g.,* *Castaneda v. Partida*, 430 U.S. 482 (1977) (grand jury selection); *Swain v. Alabama*, 380 U.S. 202 (1965) (peremptory challenges); *Hernandez v. Texas*, 347 U.S. 475 (1954) (systematic exclusion of persons of Mexican descent); *Avery v. Georgia*, 345 U.S. 559 (1953) (jury selection using colored tickets to represent race); *Patton v. Mississippi*, 332 U.S. 463 (1947) (absence of black jurors for over 30 years); *Pierre v. Louisiana*, 306 U.S. 354 (1939) (purposeful discrimination by jury commissioners); *Norris v. Alabama*, 294 U.S. 587 (1935) (exclusion of blacks from jury lists); *Neal v. Delaware*, 103 U.S. 370 (1881) (exclusion of blacks from petit and grand juries); *Ex parte Virginia*, 100 U.S. 339 (1880) (judge's purposeful discrimination); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (statute declaring blacks ineligible for jury service).

2. Before a jury is impanelled, each potential juror advances through three stages in the jury selection process. *See* J. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 85-175* (1977). The first stage of selection is assembling the jury wheel—the list of prospective jurors—usually from a list of registered or actual voters. *See id.* at 85-109. The second, or excuse stage, consists of disqualifications, exemptions and discretionary excuses. *See id.* at 111-37. The third stage, *voir dire*, consists of the elimination of jurors through challenges for cause and peremptory challenges. *See id.* at 139-75.

A challenge for cause eliminates biased jurors and must be based on a "narrowly specified, provable and legally cognizable basis of partiality," such as a previous relationship between a juror and the defendant. *See Swain*, 380 U.S. at 220. The number of challenges for cause on either side is unlimited. *See* J. Van Dyke, *supra*, at 140.

A peremptory challenge, however, may be exercised "without a reason stated, without inquiry, and without being subject to the court's control." *Swain*, 380 U.S. at 220. Each state determines how many peremptory challenges the defense and prosecution may utilize. For a survey of the number of peremptory challenges in each state, see J. Van Dyke, *supra*, at 281-84 app. D.

3. *See Batson*, 476 U.S. at 86.

4. *See id.* at 87. Aside from these constitutional violations, the Supreme Court acknowledged that the defendant and the excluded jurors were not the only persons wronged. *See id.* Racial discrimination in jury selection creates harm that "touch[es] the entire community" and "undermine[s] public confidence in the fairness of our system of justice." *Id.*; *see also* *Allen v. Hardy*, 478 U.S. 255, 259 (1986) (*per curiam*) ("Our [*Batson*] holding ensures that States do not discriminate against citizens who are summoned to sit in judgment against a member of their own race and strengthens public confidence in the administration of justice.").

Allen held that *Batson* did not apply retroactively to a case on federal habeas corpus review. *See Allen*, 478 U.S. at 260-61. A few months later, the Court held that *Batson*

Even though the impermissible exercise of peremptory challenges infringed upon a fundamental right, it remained oppressively difficult for defendants to succeed on their equal protection claims.⁵ Then, in *Batson v. Kentucky*,⁶ the Supreme Court revised the evidentiary formulation for establishing a prima facie case of racial discrimination in the jury selection process, thereby better securing defendants' and jurors' equal protection rights.⁷

The *Batson* Court declared that the defendant, who bears the burden of proving purposeful discrimination, must make a prima facie showing.⁸ This essentially requires the defendant to show membership in a racially cognizable group and to offer any other relevant circumstances that raise an inference of racially discriminatory intent.⁹ Those circumstances may arise solely from the defendant's case.¹⁰ If the defendant succeeds, the burden then shifts to the state to give neutral and legitimate reasons for its peremptory challenges.¹¹

In devising this general framework, the Court declined to establish specific procedures for executing its decision. It stated that "[i]n light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today."¹² Consequently, federal and state courts have disagreed about the procedural requirements of *Batson*, and are divided over whether the defendant has the right to rebut the prosecutor's explanations in an adversarial hearing. Some courts require adversarial hearings,¹³ while others endorse evidentiary hearings in which the defendant has the right to call witnesses, including the prosecutor, and offer evidence.¹⁴ Still other courts hold that the decision whether to hold a hearing at all is at the trial court's discretion.¹⁵

This Note argues that once a defendant makes a prima facie showing of purposeful discrimination and the prosecutor attempts to rebut that presumption, the defendant must have an opportunity to rebut the prose-

did apply retroactively to all federal and state cases pending on direct review. *See Griffith v. Kentucky*, 479 U.S. 314, 323 (1987).

5. *See Batson*, 476 U.S. at 92.

6. 476 U.S. 79 (1986).

7. *See id.* at 93-98.

8. *See infra* note 47 and accompanying text.

9. *See Batson*, 476 U.S. at 96. *Batson* has been applied to numerous racial groups. *See, e.g., United States v. Alcantar*, 832 F.2d 1175 (9th Cir. 1987) (Hispanics); *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987) (American Indians), *cert. denied*, 109 S. Ct. 534 (1988); *United States v. Biaggi*, 673 F. Supp. 96 (E.D.N.Y. 1987) (Italian-Americans), *aff'd*, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1312 (1989).

10. *See Batson*, 476 U.S. at 95.

11. *See id.* at 97.

12. *Id.* at 99 n.24. Based on the past experience of state courts that had implemented a version of the *Batson* evidentiary standard, the Court anticipated that its holding would create no serious administrative burdens. *See id.* at 99.

13. *See cases cited infra* note 130.

14. *See cases cited infra* note 121.

15. *See cases cited infra* note 117.

cutor's explanations in an adversarial hearing, absent a compelling government interest.¹⁶ Part I examines the evolution of the defendant's evidentiary burden for proving an equal protection violation. Part II analyzes the procedural due process problems that arise if non-adversarial proceedings follow *Batson* objections. It also demonstrates how Title VII procedures, which are analogous to a *Batson* inquiry, support the defendant's right to rebut the prosecution's explanation. Part III evaluates the three types of hearings that federal and state courts have implemented and urges the use of adversarial hearings as the most just and reliable procedural choice. This Note concludes that an adversarial hearing following a prima facie showing of purposeful discrimination is constitutionally mandated to ensure that procedural due process and equal protection are not violated.

I. BACKGROUND

A. *Swain v. Alabama*

Prior to *Batson*, the Supreme Court in *Swain v. Alabama*¹⁷ held that a defendant who claimed that a prosecutor's peremptory challenges were racially discriminatory had to demonstrate systematic exclusion of a group of jurors from the jury venire¹⁸ beyond the facts of the defendant's own case. In *Swain*, after the defendant was convicted and sentenced to death, he moved to quash his indictment, strike the venire and declare the petit jury¹⁹ void on the basis of invidious discrimination in the jury selection.²⁰

The defendant offered statistical evidence concerning the racial composition of the petit and grand juries in his county to support his claim.²¹ Based on this showing, the defendant argued that the state had continuously and systematically discriminated against black jurors by peremptorily striking them.²²

The Court, however, found that the evidence was insufficient to establish a prima facie case of invidious discrimination.²³ In response to the

16. See *infra* note 79 (discussing government interests).

17. 380 U.S. 202 (1965).

18. The venire is the group of persons summoned to serve as jurors from which a petit jury is chosen. See *Black's Law Dictionary* 1395 (5th ed. 1979).

19. The petit jury is the finder of fact at trials as opposed to the grand jury which determines whether an indictment is warranted.

20. See *Swain*, 380 U.S. at 203.

21. The evidence submitted showed that only 10 to 15 percent of the grand and petit jury panels were black, despite the fact that black males over the age of twenty-one constituted 26 percent of the male population in the county. See *id.* at 205. More specifically, in the defendant's case only four or five black persons (the trial record was unclear about the exact number) were on the jury panel of about thirty-three and only two actually served on the grand jury that indicted him. See *id.* The defendant also submitted evidence that although there were six to seven blacks on the average petit jury venire, no black had actually served on a petit jury in that county since about 1950. See *id.*

22. See *id.* at 210.

23. See *id.* at 206.

claim that blacks were underrepresented by as much as 10 percent, the Court ruled that a defendant was not constitutionally entitled to demand a proportionate number of his race on his jury or on the venire from which jurors were drawn.²⁴ Furthermore, it found no evidence that the exclusion of potential black jurors was intentional.²⁵

Reluctant to limit the nature and operation of the peremptory challenge,²⁶ the Court refused to require scrutiny of the prosecutor's motives for striking jurors. Emphasizing the important function of peremptory challenges to ensure an impartial jury,²⁷ the *Swain* Court asserted that examining the prosecutor's challenges in any particular case where all blacks were removed was not constitutionally required.²⁸ Rather, it held that a presumption existed that a prosecutor properly exercised peremptory challenges to obtain a fair jury, and that the facts in a particular case could not overcome this presumption.²⁹

24. *See id.* at 208.

25. *See id.* at 209.

26. The Court stressed the "very old credentials" of peremptory challenges and recounted their operation in England and this country. *See id.* at 212-18. In England, the Crown could remove an unlimited number of jurors without reason. *See* J. Van Dyke, *supra* note 2, at 147. In 1305, Parliament, in an effort to reform these "hand-picked" juries, passed a statute requiring the Crown to challenge for "cause certain." *See id.* In response, English judges created the right of "standing jurors aside," which assumed that whenever the Crown's attorneys wanted to challenge a juror, cause existed. *See id.* at 148. If 12 unchallenged jurors could be impanelled, which almost always occurred because many were summoned to serve, then the jurors asked to "stand aside" were dismissed permanently. *See id.*

27. Finding that peremptory challenges persisted over time and were widely used, the Court reaffirmed its belief that although not constitutionally required, they were "one of the most important of the rights secured to the accused." *See Swain*, 380 U.S. at 219 (citing *Pointer v. United States*, 151 U.S. 396, 408 (1894)). The peremptory challenge permits a prosecutor or defense counsel to remove a juror without explanation to, or inquiry by, the court for reasons that are based on "'sudden impressions and unaccountable prejudices . . .'" *Id.* at 220 (citing *Lewis v. United States*, 146 U.S. 370, 376 (1892)). The peremptory challenge serves the crucial functions of "eliminat[ing] extremes of partiality on both sides," and of removing the juror who might become hostile after an unsuccessful challenge for cause. *Id.* at 219-20; *see also* Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 *Stan. L. Rev.* 545, 554-55 (1975) (searching for reasons to challenge a juror for cause through questioning may so alienate a potential juror that he must be peremptorily challenged); Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 *Md. L. Rev.* 337, 356 (1982) (same).

28. *See Swain*, 380 U.S. at 222. Because the Court found cases where "race, religion, nationality, occupation or affiliations" were "widely explored during the *voir dire*" or constituted the grounds of a challenge for cause, it would not hold that peremptory challenges of black persons in a particular case resulted in an equal protection violation. *See id.* at 220-22.

29. *See id.* In response to the defendant's claims that there had never been a black person on a petit jury in Talladega County and that prosecutors had consistently and systematically exercised their challenges to prevent blacks from serving on the petit jury, the Court stated that "the presumption protecting the prosecutor may well be overcome." *Id.* at 223-24. The proof would have to indicate that the prosecution had "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim," excluded blacks "from juries for reasons wholly unrelated to the outcome of the

In his dissent, Justice Goldberg pointed out a “fundamental defect” in *Swain*.³⁰ He believed that the fact that no black person had ever served on a petit jury in Talladega County was sufficient to establish a prima facie case under settled decisions of the Court.³¹ The majority, however, chose to impose upon the defendant the additional burden of proving the prosecution’s systematic striking of blacks over a number of cases, not just in the defendant’s case, because purposeful exclusion from the petit jury, rather than the jury panel, was alleged.³² Justice Goldberg criticized this baffling distinction and the majority’s view of the importance of preserving the right of peremptory challenges.³³

For the next twenty-one years, almost every defendant who claimed that the state used its peremptory challenges to exclude jurors solely on the basis of race failed to meet the *Swain* standard.³⁴ The evidentiary burden required the defendant “to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges.”³⁵

B. *Batson v. Kentucky*

The *Batson* Court recognized that the *Swain* standard placed a “crippling burden of proof” on defendants.³⁶ Consequently, it reformulated the evidentiary burden to allow the accused to establish a prima facie case from evidence in the instant case, without referring to previous cases.³⁷

In *Batson*, the defendant, a black male, was indicted on charges of second degree burglary and receipt of stolen goods.³⁸ During the jury selection, the prosecutor struck all four black persons on the venire, and an all-white jury was selected.³⁹ Defense counsel moved to discharge the

particular case on trial and that the peremptory system [was] being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population.” *Id.* The Court declined to pursue this matter any further because *Swain* offered no proof of any instances outside his case where the prosecutor was responsible for impermissibly striking black jurors. *See id.* at 224-27.

30. *See id.* at 238 (Goldberg, J., dissenting).

31. *See id.*; *Patton v. Mississippi*, 332 U.S. 463 (1947); *Norris v. Alabama*, 294 U.S. 587 (1935). *Patton* and *Norris* involved exclusion from the jury venire, not the petit jury. In these cases, once a prima facie case was made, the burden of proof shifted to the state to rebut defendant’s showing. *See Patton*, 332 U.S. at 466; *Norris*, 294 U.S. at 597-98.

32. *See Swain*, 380 U.S. at 239 (Goldberg, J., dissenting).

33. *See id.* at 239-42.

34. *See Pizzi*, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 Sup. Ct. Rev. 97, 99-100 (1987); Comment, *Deterring the Discriminatory Use of Peremptory Challenges*, 21 Am. Crim. L. Rev. 477, 485 (1984).

35. *Batson v. Kentucky*, 476 U.S. 79, 92 n.17 (1986) (citing *United States v. Pearson*, 448 F.2d 1207, 1217 (5th Cir. 1971)).

36. *See id.* at 92.

37. *See id.* at 95-98.

38. *See id.* at 82.

39. *See id.* at 83.

jury before it was sworn in, alleging that the prosecutor had violated the defendant's fourteenth amendment right to equal protection.⁴⁰ The trial judge denied the motion, observing that both counsel were entitled to "strike anybody they wanted to" when they used their peremptory challenges.⁴¹ On appeal, the Kentucky Supreme Court, relying on *Swain*, affirmed the trial court.⁴²

The United States Supreme Court reversed and held that the prosecutor's use of peremptory challenges to exclude potential jurors solely on the basis of race violated the defendant's right to equal protection.⁴³

1. Equal Protection

In *Batson*, the Court reaffirmed the principle that the state's deliberate denial to black citizens of the opportunity to serve as jurors violates the equal protection clause.⁴⁴ Because such purposeful exclusion exemplified one of the "evil[s] the Fourteenth Amendment was designed to cure," the Court avowed its continuing efforts to "eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn."⁴⁵

Moreover, the Court maintained that racially discriminatory selection practices deny the defendant "the protection that a trial by jury is intended to secure" as well as the inherent safeguards "against the arbitrary exercise of power by prosecutor or judge."⁴⁶ The Court

40. *See id.* On appeal, the defendant also alleged that his sixth amendment right to a jury drawn from a fair cross-section of the community was violated. *See id.* The Supreme Court expressed no view on the sixth amendment arguments. *See id.* at 85 n.4.

41. *See id.* at 83.

42. *See id.* at 83-84.

43. *See id.* at 89 (7-2 decision). Justices White and O'Connor concurred, but asserted that the decision should not be applied retroactively. *See id.* at 102, 111 (White & O'Connor, J.J., concurring). Justice Marshall, also concurring, advocated the elimination of peremptory challenges entirely. *See id.* at 102-03 (Marshall, J., concurring). Justices Stevens and Brennan concurred, but noted the inconsistency of finding an equal protection violation despite petitioner's sole reliance on sixth amendment grounds. *See id.* at 108-09 (Stevens, J., concurring). Justice Burger filed a dissent in which Justice Rehnquist joined. *See id.* at 112 (Burger, C.J., dissenting).

44. *See id.* at 84. The equal protection clause prohibits the state from making invidious classifications and guarantees that people who are similarly situated will be treated similarly. *See* U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). *See generally* J. Nowak, R. Rotunda & J. Young, *Constitutional Law* § 14.1-2, at 523-28 (3d ed. 1986) (application of equal protection to government actions).

45. *Batson*, 476 U.S. at 85. The *Batson* Court also emphasized the unconstitutional discrimination against the excluded juror. *See id.* at 87. The prospective juror, who is denied the opportunity to serve on a jury because of his race, has standing to raise an equal protection claim. His interests are also implicated once a *prima facie* case is established.

46. *See id.* at 86. The Court declared that "[d]iscrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.'" *See id.* at 87-88 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

subsequently devised procedural requirements to uphold the principles of equal protection.

2. The Revised Evidentiary Burden of *Batson*

According to the Court's reformulation of the evidentiary burden, the defendant must first establish a prima facie case of purposeful discrimination.⁴⁷ To determine whether the defendant has made the requisite showing, "the trial court should consider all relevant circumstances."⁴⁸ If the defendant makes this prima facie showing, the burden of proof then shifts to the prosecutor to rebut the showing by offering neutral and legitimate explanations for striking the jurors.⁴⁹

A prosecutor may not rebut the prima facie case by claiming that he exercised a peremptory challenge on the assumption that the juror would be partial towards the defendant on account of shared race.⁵⁰ Such a presumption would violate the equal protection clause because it would be tantamount to an exclusion of the juror solely on the basis of race.⁵¹ Moreover, the prosecutor may not merely deny having a discriminatory motive or claim that peremptory challenges were exercised in good faith.⁵²

The trial judge must then determine whether the defendant has established purposeful discrimination.⁵³ Because the trial court's finding largely turns on the evaluation of credibility, an appellate court should usually defer to those factual findings.⁵⁴

The Court, however, declined to formulate specific procedures that trial courts must follow once a defendant objects to the prosecutor's use of peremptory challenges.⁵⁵ Because of this lack of guidance, three diver-

47. To establish a prima facie case,

the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 476 U.S. at 96 (citations omitted).

48. *Id.* at 96-97. The Court suggested two examples that might support or refute an inference of discriminatory intent: the "pattern" of strikes against jurors of a cognizable racial group or the prosecutor's questions during voir dire. *See id.* at 97.

49. *See id.* The explanation must somehow relate to the defendant's case. *See id.* at 98. They need not, however, qualify as a challenge for cause. *See id.* at 97.

50. *See id.*

51. *See id.* at 97-98.

52. *See id.* at 98 (citation omitted).

53. *See id.* at 98.

54. *See id.* at 98 n.21. The standard for appellate review of a *Batson* inquiry is beyond the scope of this Note.

55. *See id.* at 99; *supra* note 12 and accompanying text.

gent approaches have developed. Some lower courts interpret *Batson* as requiring either an evidentiary⁵⁶ or an adversarial hearing,⁵⁷ while others allow the prosecution to explain its strikes in a non-adversarial, ex parte proceeding.⁵⁸

II. PROCEDURAL DUE PROCESS PROBLEMS RAISED BY NON-ADVERSARIAL PROCEEDINGS

A. *Procedural Due Process*

The due process clauses of the fifth and fourteenth amendments prohibit, respectively, the federal government and the states from depriving a person of life, liberty or property without due process of law.⁵⁹ The government must provide procedural safeguards whenever these interests are involved. At a minimum, the government must give notice and a fair opportunity to be heard " 'at a meaningful time and in a meaningful manner.' " ⁶⁰

The non-adversarial inquiries in post-*Batson* cases are usually in the form of ex parte proceedings.⁶¹ Some appellate courts have affirmed trial court decisions to hear the prosecutor's explanations ex parte and in camera.⁶² Ex parte and in camera proceedings⁶³ raise different constitutional questions. In the context of a *Batson* inquiry, the former raises a due process issue. The latter implicates the defendant's right to be pres-

56. See *infra* notes 121-129 and accompanying text.

57. See *infra* notes 130-142 and accompanying text.

58. See *infra* notes 117-120 and accompanying text.

59. See U.S. Const. amend. V; U.S. Const. amend. XIV.

60. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (requiring some kind of pretermination hearing) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); see *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (notice, hearing and a legally competent tribunal required by due process). See generally 2 W. LaFare & J. Israel, *Criminal Procedure* § 11.1, at 9-11 (1984) (discussing criminal defendant's due process rights).

61. The Fourth Circuit, in two cases, upheld the trial court's ex parte examination of the prosecutor's notes. See *United States v. Tindle*, 860 F.2d 125, 128 (4th Cir. 1988); *United States v. Garrison*, 849 F.2d 103, 106-07 (4th Cir.), cert. denied, 109 S. Ct. 566 (1988). In dictum, however, the Fourth Circuit asserted that an adversarial hearing should follow a prima facie showing, except where a compelling state interest exists. See *Garrison*, 849 F.2d 103, 106.

62. See *United States v. Tucker*, 836 F.2d 334, 340 (7th Cir.), cert. denied, 109 S. Ct. 143 (1988); *United States v. Davis*, 809 F.2d 1194, 1201-02 (6th Cir.), cert. denied, 107 S. Ct. 3234 (1987). In *Davis*, an opinion that set the precedent for allowing ex parte proceedings, the defendants contended that the district court erred by allowing the prosecution to explain its peremptory challenges in camera rather than on the record or in the presence of defense counsel. See *Davis*, 809 F.2d at 1199. The defendants claimed that such an error violated their right to be present at trial.

Although the Sixth Circuit addressed this claim, it failed to consider the ramifications of defense counsel's exclusion from the proceeding. Even though the district judge had heard defense counsel's arguments after he objected under *Batson*, the judge did not allow defense counsel to actually hear or specifically rebut the prosecution's reasons for exercising peremptory challenges. The court's choice of an ex parte proceeding denied defendant those opportunities and did not provide him with a fair hearing.

63. See *infra* note 82 and accompanying text.

ent, derived from the sixth amendment's confrontation clause.⁶⁴

1. Ex Parte Proceedings

In an *ex parte* proceeding,⁶⁵ the court hears only one party's presentation. This type of proceeding is disfavored because it denies notice and a fair opportunity to be heard, thereby depriving the defendant of procedural due process.⁶⁶ Moreover, an *ex parte* proceeding "can create both the appearance of impropriety and the possibility of actual misconduct."⁶⁷ Thus, *ex parte* proceedings usually occur only when extraordinary conditions necessitate the other party's exclusion.⁶⁸

Ex parte communications between judge and prosecutor are appropriate in only limited circumstances.⁶⁹ They are necessary in some pretrial or collateral proceedings to avoid the disclosure of sensitive information in, for example, applications for a search warrant,⁷⁰ certain discov-

64. See *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam). In some instances, the due process clause also protects the right to be present "where the defendant is not actually confronting witnesses or evidence against him." See *id.*; *infra* note 85 and accompanying text.

65. *Ex parte* is defined as:

[o]n one side only; by or for one party; done for, in behalf of, or on the application of, one party only.

A judicial proceeding, order, injunction, etc., is said to be *ex parte* when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.

Black's Law Dictionary 517 (5th ed. 1979). *Ex parte* hearings are defined as "hearings in which the court or tribunal hears only one side of the controversy." *Id.*

66. See *In re Taylor*, 567 F.2d 1183, 1187-88 (2d Cir. 1977); *Haller v. Robbins*, 409 F.2d 857, 859 (1st Cir. 1969); see also *Rushen v. Spain*, 464 U.S. 114, 126-28 (1983) (per curiam) (Stevens, J., concurring) (*ex parte* communication between judge and juror may raise constitutional issue of defendant's due process right to notice and opportunity to be heard).

67. *United States v. Napue*, 834 F.2d 1311, 1319 (7th Cir. 1987); see also *Grieco v. Meachum*, 533 F.2d 713, 719 (1st Cir.) ("*ex parte* communications shadow the impartiality, or at least the appearance of impartiality, of any judicial proceeding"), *cert. denied*, 429 U.S. 858 (1976).

In addition, Canon 3A of the ABA Code of Judicial Conduct dictates that "[a] judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." ABA Code of Judicial Conduct Canon 3A(4) (1972).

68. See *United States v. Walsh*, 700 F.2d 846, 858 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983); *United States v. Persico*, 349 F.2d 6, 13 (2d Cir. 1965).

69. See, e.g., *United States v. Napue*, 834 F.2d 1311, 1316 (7th Cir. 1987) (*ex parte* proceeding upheld where disclosing witness list to defendant could threaten witness' safety); *United States v. McLaughlin*, 525 F.2d 517, 519 (9th Cir. 1975) (*ex parte* meeting to consider whether to reveal government informant's identity to the defense), *cert. denied*, 427 U.S. 904 (1976). These circumstances include the need to act quickly in issuing temporary restraining orders. See Fed. R. Civ. P. 65(b).

70. See, e.g., *Franks v. Delaware*, 438 U.S. 154, 169 (1978).

ery motions,⁷¹ and motions to disclose privileged⁷² or classified information.⁷³

An *ex parte* proceeding is inappropriate in the *Batson* context because without defense counsel's assistance, the judge could erroneously accept the prosecutor's facially neutral reasons for excluding certain jurors.⁷⁴ A judge not sufficiently familiar with the facts in the prosecutor's neutral explanation may fail to perceive or may even overlook a pretextual reason.⁷⁵ Moreover, if a judge must ferret out the prosecutor's genuine motives, "[h]e would have to take on the role of defense counsel—inventing possible arguments as to why the prosecutor's stated reasons might not be sufficient—while at the same time keeping an open mind so as to rule on the motion impartially."⁷⁶ If the judge hears the prosecutor's reasons "behind closed doors" and rules that his justifications are legitimate, the defendant and the excluded juror may doubt the judge's impartiality.⁷⁷

71. See, e.g., *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 824 (9th Cir.) (en banc review of Border Patrol report to determine whether it fell within rule of Brady v. Maryland, 373 U.S. 83 (1963)), cert. denied, 471 U.S. 1139 (1985).

72. See, e.g., *In re Grand Jury Proceedings-Gordon, Witness*, 722 F.2d 303, 309-10 (6th Cir. 1983), cert. denied, 467 U.S. 1246 (1984).

73. See, e.g., *United States v. Pringle*, 751 F.2d 419, 427 (1st Cir. 1984). It may be argued that because a trial judge is trusted to make these kinds of pretrial determinations without adversarial proceedings, he is also readily able to rule on a defendant's *Batson* objection without holding a hearing. In addition, the judge supervises or participates in the entire voir dire, observes the prosecutor's demeanor and hears his questions and statements. This argument, however, does not consider the fact that in a *Batson* inquiry, no need to avoid disclosure of sensitive or privileged information exists. Moreover, defense counsel could apprise the judge of previous instances where the prosecutor exercised peremptory challenges solely on the basis of race.

74. Arguably, most prosecutors exercise peremptory challenges in good faith, and therefore, a hearing is a waste of time because their neutral explanations will easily rebut the defendant's prima facie showing. In fact, the *Batson* Court asserted that it had "no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes." See *Batson v. Kentucky*, 476 U.S. 79, 99 n.22 (1986). This argument, however, relies too heavily on the presumption of the prosecutor's good faith. It fails to recognize that the use of racially discriminatory peremptory challenges persists. As the Court acknowledged, "[t]he reality of practice, amply reflected in many state and federal court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors." See *id.* at 99. Once a defendant makes a prima facie showing, the prosecutor's good faith should no longer be assumed.

75. See *United States v. Thompson*, 827 F.2d 1254, 1260-61 (9th Cir. 1987). Moreover, "[a] judge's own conscious or unconscious racism may lead him to accept . . . [a facially neutral] explanation as well supported." *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

76. *Thompson*, 827 F.2d at 1260; see also *United States v. Solomon*, 422 F.2d 1110, 1119 (7th Cir.) (in camera, and impliedly *ex parte*, communication "places a substantial burden upon the trial judge to perform what is naturally and properly the function of an advocate"), cert. denied, 399 U.S. 911 (1970).

77. The Fourth Circuit recently upheld an *ex parte*, in camera submission of written materials to supplement the prosecutor's explanations. Circuit Judge Murnaghan, dissenting, wrote:

[I]n our adversarial system, we ordinarily go to great lengths to ensure that both sides have an equal opportunity to argue all points and all evidence before a judge reaches his decision, and to ensure that such proceedings are open to the

If defense counsel is not permitted to participate in the inquiry, the prosecutor's unchallenged explanations may be less reliable and may ultimately result in an inaccurate finding.⁷⁸ When the court excludes defense counsel without some overriding justification,⁷⁹ it denies the defendant procedural due process.⁸⁰

2. In Camera Hearings

Unlike *ex parte* proceedings, in camera hearings may comport with

public. I see no reason to stray from the usual principles in the present contest. Indeed, I would argue that openness and candor are even more important in a *Batson*-type controversy than in most other situations. Anyone denied access to purportedly exonerating materials cannot help suspecting the worst—the best intentions of government counsel and the district court notwithstanding—it is simply human nature to be suspicious when relevant data is withheld by a decisionmaker.

United States v. Tindle, 860 F.2d 125, 133 (4th Cir. 1988) (Murnaghan, J., concurring in part, dissenting in part).

78. See *Thompson*, 827 F.2d at 1260-61.

79. A compelling government interest, however, may be present in rare instances and justify an *ex parte* proceeding. One court has hypothesized that "if by coincidence the government [was] conducting an undercover investigation of the juror's likely involvement in other crimes," an *ex parte* hearing would be warranted. See *United States v. Garrison*, 849 F.2d 103, 106 (4th Cir.), *cert. denied*, 109 S. Ct. 566 (1988). The government would have to "make a substantial showing of necessity" to justify such a hearing. *Id.*; see *Thompson*, 827 F.2d at 1258-59.

The government may also have a compelling interest in not revealing sensitive written materials. In *Tindle*, the Fourth Circuit upheld the *ex parte*, in camera submission of the prosecutor's notes and other information that supplemented his explanation because portions of the documents revealed the defendant's threats to certain individuals and might have endangered them if made public. See *United States v. Tindle*, 860 F.2d 125, 131 (4th Cir. 1988). Whenever possible, however, the court should redact the sensitive information and make the remainder available to the defendant. See *id.* at 132 (Murnaghan, J., concurring in part, dissenting in part).

80. See *United States v. Thompson*, 827 F.2d 1254, 1258-59, 1261 (9th Cir. 1987); see also Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 Va. L. Rev. 811, 833 (1988) (limiting *Batson* inquiry to an *ex parte* proceeding does little for defendant's equal protection rights). One state court observed that

Batson also implicitly approves inquiry into the legitimacy of the explanations because otherwise *Batson* would become a right without a remedy. "Rubber stamp" approval of all nonracial explanations, no matter how whimsical or fanciful, would cripple *Batson's* commitment to "ensure that no citizen is disqualified from jury service because of his race." Without some form of inquiry, a prosecutor could easily conceal his true reason for removing black jurors by simply inventing "neutral" reasons for the strikes. ("[A]ny prosecutor's office could develop a list of 10 or 15 standard reasons for striking a juror. . . .") *Batson* would then merely reinstate, in another form, the "mission impossible" of *Swain*. *Batson* surely cannot be read to produce such an anomalous result.

State v. Butler, 731 S.W.2d 265, 268-69 (Mo. Ct. App. 1987) (citations omitted).

As Justice Marshall noted in *Batson*, "[i]f such easily generated explanations are sufficient to discharge the prosecutor's obligations to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory." *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

due process requirements in the *Batson* context.⁸¹ An in camera proceeding occurs when a judge communicates with a witness, party or counsel either in chambers or some place not open to the public.⁸² The sixth amendment confrontation clause,⁸³ which confers the right to be present to physically confront and cross-examine adverse witnesses, is implicated by such meetings.⁸⁴ The central concern of the clause is to ensure that the defendant has the opportunity to defend himself.⁸⁵

Courts generally regard in camera hearings during a criminal trial as improper and incompatible with the criminal justice system.⁸⁶ Nevertheless, the Supreme Court has indicated that the right to be present is limited to those proceedings where the defendant may contribute to his defense⁸⁷ and has not forfeited the right by disruptive conduct.⁸⁸ In an oft-cited opinion, Justice Cardozo wrote that the defendant had a right to be present at trial "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."⁸⁹

Nonetheless, many courts have required the presence of defense counsel when the defendant is absent from the in camera proceeding.⁹⁰ In a case where defense counsel, but not the defendants, were present at a conference in chambers, the Court of Appeals for the Sixth Circuit found no constitutional violation because defense counsel protected their clients' interests.⁹¹ Therefore, although an in camera hearing is undesirable

81. See *infra* notes 87-89 and accompanying text.

82. See Black's Law Dictionary 684 (5th ed. 1979).

83. The confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

84. See *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934).

85. See *id.* at 106, 108. For example, absent a compelling governmental interest, the accused's presence must be allowed at suppression hearings, see *United States v. Clark*, 475 F.2d 240, 246 (2d Cir. 1973), during the impanelling of the jury, see *United States v. Crutcher*, 405 F.2d 239, 244 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969), and at the reading of additional jury instructions, see *Evans v. United States*, 284 F.2d 393, 394-95 (6th Cir. 1960).

86. See *LaChappelle v. Moran*, 699 F.2d 560, 566 (1st Cir. 1983); *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1141 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978).

87. See, e.g., *United States v. Gagnon*, 470 U.S. 522, 526-27 (1985) (fifth amendment due process clause did not require defendant's presence at in camera conference regarding juror's concern that defendant was sketching the jury); *Snyder*, 291 U.S. at 108 (no right to be present at viewing of crime scene because defendant not confronting adverse witnesses or aiding his defense).

88. See *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (right to be present waived by disruptive conduct).

89. *Snyder*, 291 U.S. at 108.

90. See *United States v. Boone*, 759 F.2d 345, 347 (4th Cir.) (no error by excluding defendant from in chambers conference regarding substitution of a juror because defense counsel was present), *cert. denied*, 474 U.S. 861 (1985); *United States v. Brown*, 571 F.2d 980, 987 (6th Cir. 1978) ("An in-chambers conference concerning the dismissal of a juror . . . is not a stage of the trial when the absence of the defendant would frustrate the fairness of the trial so long as counsel for the defendant is present").

91. See *Brown*, 571 F.2d at 987; see also *Ellis v. Oklahoma*, 430 F.2d 1352, 1355 (10th Cir. 1970) ("a criminal defendant does not have an absolute constitutional right to be a

because it is not held in open court, it does not necessarily violate the defendant's right to be present under the sixth amendment or offend due process under the fifth and fourteenth amendments.⁹²

B. Title VII Analogy

In explaining the factors involved in a *prima facie* showing by the defendant, the *Batson* Court repeatedly referred to Title VII⁹³ decisions.⁹⁴ The Court stated that its "decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of *prima facie* burden of proof rules."⁹⁵ These references arguably explain what procedures the Court envisioned for *Batson* cases.⁹⁶

In Title VII cases, the Supreme Court, to ensure equal protection, established procedural requirements for proving employment discrimination. The underlying goals of Title VII and *Batson* are substantially similar—the elimination of discriminatory selection practices based on impermissible classifications.⁹⁷ Accordingly, the procedural standards for *Batson* inquiries arguably must also secure equal protection. The

participant in such *in camera* discussions where his lawyer is present"), *cert. denied*, 401 U.S. 1010 (1971). *But see* *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1143-44 (2d Cir.) (defense counsel's absence from in chambers meeting did not violate defendant's right to effective assistance of counsel), *cert. denied*, 439 U.S. 913 (1978).

92. But as one district judge has stated, "[j]ustice must not only be done; it must be seen to be done. The interest of justice requires more than a proceeding that reaches an objectively accurate result; trial by ordeal might by sheer chance accomplish that. It requires a proceeding that, by its obvious fairness, helps to justify itself." *United States v. McDaniels*, 379 F. Supp. 1243, 1249 (E.D. La. 1974).

93. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)). In enacting Title VII of the Civil Rights Act of 1964, Congress intended to ensure equal employment opportunity and to eliminate discriminatory practices and barriers based on race or other impermissible classifications. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973). Title VII applies to discrimination based not only on race but also color, religion, sex and national origin. *See* Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1982).

94. *See* *Batson v. Kentucky*, 476 U.S. 79, 94 n.18, 96 n.19 (1986) (referring to *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

95. *Batson*, 476 U.S. at 94 n.18; *see also* *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987) ("[t]aking our cue from *Batson's* repeated analogies to Title VII jurisprudence"); *Stanley v. State*, 313 Md. 50, 71, 542 A.2d 1267, 1277 (1988) ("As *Batson* has referred us to them, we turn to the Title VII cases for the explanation of the operation of *prima facie* burden of proof rules."); *State v. Antwine*, 743 S.W.2d 51, 63 (Mo. 1987) (en banc) ("*Batson* intimates that it should be read side-by-side with the Supreme Court's Title VII cases."), *cert. denied*, 108 S. Ct. 1755 (1988).

96. *See Stanley*, 313 Md. at 61-62, 71-72, 542 A.2d at 1272-73, 1277; *Antwine*, 743 S.W.2d at 63 ("Read together, these cases provide a relatively focused picture of the procedural requirements of *Batson* at the trial level."); National Jury Project, Inc., *Jurywork Systematic Techniques* § 4.04[4], at 43 (1988) ("The opinion in *Batson* more or less tracks [Title VII] stages of proof, but the language leaves it unclear whether a separate third stage of surrebuttal is permitted.")

97. *See supra* note 93.

Batson Court, therefore, drew an appropriate analogy to procedures used in Title VII cases to prove invidious discrimination.⁹⁸

1. *McDonnell Douglas*: The Three-Stage Procedure

In *McDonnell Douglas Corp. v. Green*⁹⁹ and its progeny, the Court established three distinct procedural stages for proving discriminatory employment practices.¹⁰⁰ First, the plaintiff bears the burden of proving a prima facie case of discriminatory intent.¹⁰¹ Second, if the plaintiff makes the requisite prima facie showing, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."¹⁰² Third, if the defendant's reason is deemed nondiscriminatory, the plaintiff must have a fair opportunity to prove that the reason proffered was a pretext for discrimination.¹⁰³

By requiring an initial burden of making a prima facie case and an ultimate burden of proving discriminatory intent, courts can efficiently screen out an employer's legitimate, nondiscriminatory reasons for rejecting the plaintiff.¹⁰⁴ In effect, the ultimate burden of persuading the court never shifts from the plaintiff-employee to the defendant-employer.¹⁰⁵ Since the ultimate burden rests with the plaintiff, he must have an opportunity to prove that the proffered reason was pretextual or legally insufficient.¹⁰⁶

The third step is crucial in Title VII cases because, even where the defendant rebuts the presumption raised by the plaintiff's prima facie case, the trier of fact still may consider the plaintiff's initial evidence and effective cross-examination of the employer together to discredit the defendant's explanation.¹⁰⁷

2. Applying Title VII Procedures to *Batson* Inquiries

Similar to the plaintiff-employee in Title VII cases, the *Batson* defend-

98. See *supra* note 94 and accompanying text.

99. 411 U.S. 792 (1973).

100. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981); *McDonnell Douglas*, 411 U.S. at 802-04.

101. See *McDonnell Douglas*, 411 U.S. at 802. The plaintiff must show "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.*

102. *McDonnell Douglas*, 411 U.S. at 802.

103. See *id.* at 804.

104. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981).

105. See *id.* at 253.

106. See *id.* at 256; National Jury Project, *supra* note 96, at 42-43 (defendant's burden of rebutting prosecutor's reasons merges with ultimate burden of proving intentional discrimination).

107. See *Burdine*, 450 U.S. at 255 n.10.

ant has the ultimate burden of proving intentional discrimination.¹⁰⁸ Consequently, the *Batson* defendant, like the Title VII plaintiff, should have the opportunity to hear, respond to, and challenge the prosecutor's proffered reasons before the trial court makes its final ruling.¹⁰⁹

In Title VII cases, the Supreme Court set out the basic allocation and order of burdens and created a presumption of discriminatory treatment by defining a prima facie case. Courts adhered to these procedural requirements to assess and "progressively to sharpen the inquiry into the elusive factual question of intentional discrimination."¹¹⁰ If the defendant-employer carried the burden of proof and rebutted the prima facie case, the "factual inquiry proceed[ed] to a new level of specificity" by granting the plaintiff-employee a full and fair opportunity to demonstrate that a discriminatory reason more likely motivated the defendant-employer or that the explanation was unreliable.¹¹¹

The three-stage procedure in Title VII cases provides an appropriate model for *Batson* inquiries because it allows the party seeking relief to prove that the proffered reasons were a pretext for discrimination. Without this third stage, the complainant in both Title VII and *Batson* cases would be unable to sustain his ultimate burden of proving intentional discrimination.¹¹²

To some trial courts, the requirement of yet another hearing may seem unduly burdensome. Nonetheless, the *Batson* defendant should have a full and fair opportunity to rebut the prosecutor's explanations because the fundamental rights at stake in *Batson* hearings are identical to those in Title VII cases, where surrebuttal is required.¹¹³

III. POST-BATSON FEDERAL AND STATE COURT CASES

Federal and state courts that have addressed the issue of what procedure should follow a prima facie showing of purposeful discrimination

108. See *Batson v. Kentucky*, 476 U.S. 79, 94 n.18 (1986); *Stanley v. State*, 313 Md. 50, 61, 542 A.2d 1267, 1272 (1988).

109. See *Stanley*, 313 Md. at 62, 542 A.2d at 1272-73 ("We read *Batson* as allowing rebuttal as per the Title VII cases.").

110. *Burdine*, 450 U.S. at 255 n.8.

111. See *id.* at 255-56.

112. See *supra* notes 104-107, 74-80 and accompanying text.

113. Arguably, this analogy, although forceful, is inexact because Title VII and *Batson* cases differ with respect to the context in which they occur. A *Batson* inquiry is usually a pretrial proceeding during jury selection, before the defendant is tried for the alleged crime. On the other hand, in Title VII cases, the procedural requirements pertain to trials where the sole issue is whether discriminatory employment practices existed.

A *Batson* inquiry, however, is different from other pretrial or collateral proceedings because it concerns an issue wholly unrelated to matters in the prosecution's case. When a defendant objects under *Batson*, he asserts a violation of equal protection which arises in a pretrial proceeding. A defendant may not bring a civil rights action because the prosecutor's quasi-judicial activities are insulated by absolute immunity. See *Imber v. Pachtman*, 424 U.S. 409, 430-31 (1976). Because the defendant has no other practical recourse, his *Batson* objection should be treated separately, and an adversarial hearing is warranted.

can be separated into three groups. The first view permits hearings at the trial court's discretion.¹¹⁴ The second approach approves of full evidentiary hearings.¹¹⁵ The third and most widely embraced view requires adversarial hearings.¹¹⁶

A. *Hearings at the Discretion of the Trial Court*

Under the discretionary approach, the decision whether to conduct an evidentiary hearing, an adversarial hearing, or no hearing at all is at the trial court's discretion.¹¹⁷ The Sixth and Seventh Circuit Courts of Appeals reason that because *Batson* did not explicitly require any hearing after the prosecutor's explanation, and because *Batson* declined to specify procedures after a prima facie showing, the trial court has discretion to determine whether to hold a hearing, and if so, what kind.¹¹⁸

These courts, however, suggest that an adversarial hearing is preferred. For example, despite finding that *Batson* did not require rebuttal by defense counsel, the Seventh Circuit concluded that adversarial hearings were the appropriate procedure in most *Batson* inquiries and should be conducted by trial courts whenever possible.¹¹⁹

Among its advantages, the discretionary approach creates no administrative burden and respects the judge's ability to discern bad faith or pretextual reasons. If a court does not conduct an adversarial hearing, however, it denies the defendant a full opportunity to satisfy his evidentiary burden.¹²⁰

B. *Evidentiary Hearings*

In a typical evidentiary hearing, the defendant has the right to call witnesses, including the prosecutor, and offer evidence.¹²¹ If called, the

114. See *infra* notes 117-120 and accompanying text.

115. See *infra* notes 121-129 and accompanying text.

116. See *infra* notes 130-142 and accompanying text. Some courts refer only to the defendant's right to rebut the prosecutor's reasons for exercising peremptory challenges. Although these courts do not specifically address what type of hearing should be conducted, the absence of imposing a full evidentiary hearing intimates that they would favor an adversarial hearing.

117. See *United States v. Tucker*, 836 F.2d 334, 340 (7th Cir.), *cert. denied*, 109 S. Ct. 143 (1988); *United States v. Davis*, 809 F.2d 1194, 1202 (6th Cir.), *cert. denied*, 107 S. Ct. 3235 (1987).

118. See, e.g., *Tucker*, 836 F.2d at 340; *Davis*, 809 F.2d at 1202.

119. See *Tucker*, 836 F.2d at 340. In *Davis*, the Sixth Circuit declined to issue a per se rule and limited its analysis to the case before it. See *Davis*, 809 F.2d at 1201. It also noted that it was not concluding that rebuttal by defendants was always inappropriate. See *id.* at 1202. The qualifications in these opinions demonstrate the courts' uneasy attitude toward non-adversarial hearings.

120. See *supra* notes 65-80 and accompanying text.

121. Several courts have upheld the implementation of an evidentiary hearing or mini-trial in which defense counsel cross-examines the prosecutor. See *United States v. Brown*, 817 F.2d 674, 675 (10th Cir. 1987); *United States v. Biaggi*, 673 F. Supp. 96, 98 (E.D.N.Y. 1987), *aff'd*, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1312 (1989); *Powell v. State*, 182 Ga. App. 123, 124, 355 S.E.2d 72, 73 (1987); *People v. Allen*, 168 Ill.

prosecutor must explain under oath why he struck the jurors and is subject to cross-examination.

In *United States v. Biaggi*,¹²² a district court in the Second Circuit conducted an evidentiary hearing¹²³ following a prima facie showing of impermissible peremptory challenges against Italian-American jurors. Judge Weinstein emphasized that although the adversarial method of inquiry was time-consuming and cumbersome, it "help[ed] [the court] get at the truth."¹²⁴ The court concluded that the administrative cost of "defense counsel's vigorous and dogged questioning of the prosecutors" was minimal.¹²⁵

An evidentiary hearing in which defense counsel may cross-examine the prosecutor provides the most rigorous truth-seeking procedure, and thus best safeguards the defendant's equal protection right. Courts nevertheless have rejected evidentiary hearings as being too intrusive and disruptive.¹²⁶ One court even concluded that the cost of calling the prosecutor as a witness outweighed any benefit obtained by his testimony.¹²⁷ Another disadvantage of an evidentiary hearing is that often it may delay the principal trial¹²⁸ because counsel will likely request a continuance to call witnesses or submit affidavits and memoranda.

On balance, however, an evidentiary hearing, with its attendant formalities, secures the greatest protection of the defendant's equal protection right.¹²⁹ If court time were infinite, then it would not be

App. 3d 397, 402, 521 N.E.2d 1172, 1174 (1988); *State v. Green*, 324 N.C. 332, 378 S.E.2d 422 (1989); *Yarborough v. State*, 732 S.W.2d 86, 90-91 (Tex. Ct. App. 1987), vacated on other grounds, 761 S.W.2d (Tex. Crim. App. 1988) (per curiam) (en banc).

122. 673 F. Supp. 96 (E.D.N.Y. 1987), *aff'd*, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1312 (1989).

123. Before the hearing, Judge Weinstein directed both counsel to submit memoranda and affidavits and, if they wished, to provide witnesses. *See id.* at 98.

124. *Id.* (quoting *United States v. Thompson*, 827 F.2d 1254, 1259 (9th Cir. 1987)). Defense counsel's participation assisted the court by pointing out possible bad faith reasons for the challenges and preserving facts for the record and a possible appeal. *See id.*

125. *Id.* The rationale for holding an evidentiary hearing is not explained in all cases. The Georgia Court of Appeals remanded a *Batson* case for an evidentiary hearing to decide whether the prosecutor's explanations were constitutionally sufficient. *See Powell v. State*, 182 Ga. App. 123, 124, 355 S.E.2d 72, 73 (1987). The court may have been influenced by the fact that the state's explanations at trial were contradicted by the record before the court. *See id.* Similarly, the Texas Court of Appeals noted that the trial court had allowed defense counsel to cross-examine the prosecutor, but did not comment on the appropriateness of this procedure. *See Yarborough v. State*, 732 S.W.2d 86, 90-91 (Tex. Ct. App. 1987), vacated on other grounds, 761 S.W.2d 17 (Tex. Crim. App. 1988) (per curiam) (en banc).

126. *See United States v. Tindle*, 860 F.2d 125, 130-31 (4th Cir. 1988); *United States v. Garrison*, 849 F.2d 103, 106 (4th Cir.), *cert. denied*, 109 S. Ct. 566 (1988); *State v. Jackson*, 322 N.C. 251, 258, 368 S.E.2d 838, 842 (1988). *But see United States v. Thompson*, 827 F.2d 1254, 1259 (9th Cir. 1987) (administrative burden should not deny defendants benefit of cross-examination and opportunity to offer contradictory evidence).

127. *See Jackson*, 322 N.C. at 258, 368 S.E.2d at 842.

128. *See Tindle*, 860 F.2d at 130-31 ("*Batson* does not require a trial within a trial . . .").

129. *See supra* note 121 and accompanying text.

burdensome to hold such hearings. The reality of limited resources and backlogged dockets, however, forces more practical choices. Fortunately, a satisfactory alternative to evidentiary hearings is available.

C. *Adversarial Hearings*

In an adversarial hearing, the prosecutor explains his underlying reasons for exercising peremptory challenges, and defense counsel attempts to refute those reasons. Like the evidentiary hearing, the adversarial hearing provides the trial judge with the "benefit of forceful arguments by both sides."¹³⁰ The adversary process allows defense counsel to rebut a prosecutor's reason that appears to be pretextual or indicates bad faith. For example, defense counsel can expose the fact that the prosecutor allowed other potential jurors, who were similarly situated to the challenged juror, to serve on the jury.¹³¹ If a prosecutor bases his explanations on his intuition that a juror would be partial because he is of the same race as the defendant, defense counsel can refute the explanation as being legally improper under *Batson*.¹³² Additionally, defense counsel can expose a prosecutor's concealed motive for removing the juror if the prosecutor's reason was part neutral and part improper.¹³³

Another benefit of the adversarial hearing is that it guarantees that the prosecutor's exact reasons and defense counsel's rebuttal are preserved in the record for a possible appeal.¹³⁴ This is especially important because defense counsel is charged with making an adequate record at trial, and the appellate court will only consider the record created during trial.¹³⁵ If the trial court does not hold an adversarial hearing, the appellate court would have no basis for reversal. Because counsel's arguments were

130. *Thompson*, 827 F.2d at 1258. The majority of cases addressing this issue have determined that the defendant has a right to rebut the prosecutor's reasons for excluding the jurors. Some of these decisions hold that *Batson* requires an adversarial hearing. See *United States v. Eagle*, 867 F.2d 436, 441 (8th Cir. 1989); *United States v. Tindle*, 860 F.2d 125, 131 (4th Cir. 1988); *United States v. Garrison*, 849 F.2d 103, 106 (4th Cir.), *cert. denied*, 109 S. Ct. 566 (1988); *United States v. Alcantar*, 832 F.2d 1175, 1180 (9th Cir. 1987); *United States v. Thompson*, 827 F.2d 1254, 1258-59 (9th Cir. 1987); *Stanley v. State*, 313 Md. 50, 62, 542 A.2d 1267, 1273 (1988).

Other courts assert that the defendant should have an opportunity to rebut the proffered explanation, but do not specifically mention an adversarial hearing. See *United States v. Wilson*, 853 F.2d 606, 612, *vacated and reh'g granted*, 861 F.2d 514 (8th Cir. 1988) (*en banc*); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987), *cert. dismissed*, 109 S. Ct. 28 (1988), *vacated in part on other grounds*, 836 F.2d 1312 (11th Cir. 1988); *United States v. Wilson*, 816 F.2d 421, 423 (8th Cir. 1987); *Williams v. State*, 507 So. 2d 50, 53 (Miss. 1987); *Keeton v. State*, 749 S.W.2d 861, 868 (Tex. Crim. App. 1988).

131. See *United States v. Thompson*, 827 F.2d 1254, 1260 (9th Cir. 1987).

132. See *United States v. Alcantar*, 832 F.2d 1175, 1179-80 (9th Cir. 1987); *Thompson*, 827 F.2d at 1260.

133. See *Alcantar*, 832 F.2d at 1180; *Thompson*, 827 F.2d at 1261.

134. See *Alcantar*, 832 F.2d at 1180; *Thompson*, 827 F.2d at 1261.

135. See *Keeton v. State*, 749 S.W.2d 861, 871 n.1 (Tex. Crim. App. 1988); Fed. R. App. P. 10(b)(2) ("If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.").

never heard or recorded, the appellate court would almost always sustain the lower court's judgment.¹³⁶

Adversarial hearings, however, create administrative costs—they require more time, are subject to abuse, and may require the prosecutor to reveal case strategy.¹³⁷ Yet a typical hearing could consist of the prosecutor's explanation followed by defense counsel's rebuttal, with duration and scope prudently controlled by the court.¹³⁸ As the Ninth Circuit insisted, "Adversary proceedings do in fact take more time, and they are more cumbersome, but with good reason: The adversary process helps us get at the truth."¹³⁹

Another argument against the adversarial hearing is that if the prosecutor's reasons are related to confidential matters of strategy, divulging those reasons to defense counsel may prejudice the state's case.¹⁴⁰ The prosecutor's motives for striking jurors, however, are not usually strategic.¹⁴¹ Even if the prosecutor's reasons are strategy-related, the protection of the defendant's constitutional rights outweighs the minimal burden caused by requiring the state to disclose its strategy.¹⁴²

In sum, an adversarial hearing, like an evidentiary hearing, grants defense counsel an opportunity to provide the court with necessary information to make its final determination. Defense counsel's arguments are heard by the court and preserved on the record for appeal. Even though an adversarial proceeding does not include cross-examination and offering evidence, the equal protection rights of the defendant and excluded jurors, as well as the defendant's due process right, are protected by the adversary process.

136. *Cf. Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986) (appellate courts should usually defer to trial court's factual findings).

137. *See Thompson*, 827 F.2d at 1259.

138. *See United States v. Eagle*, 867 F.2d 436, 441 (8th Cir. 1989); *Thompson*, 827 F.2d at 1259-60.

139. *Thompson*, 827 F.2d at 1259. An adversarial hearing can be abused if defense counsel tries to prolong it by charging, but not proving, improper motives. *See id.* at 1259-60. If this occurs, the trial judge can, at his discretion, restrict the scope, duration and depth of the proceeding. *See id.*

140. *See Thompson*, 827 F.2d at 1259. Arguably, the prosecution would be deterred from fully exercising its strikes for fear that it would have to reveal its case strategy. *See id.*

141. *See id.* Instead, the strikes are usually motivated by the potential juror's previous jury experiences, attitudes, profession or address. *See id.* Numerous factors influence the prosecution's decision to use its peremptory challenges such as "current and past employment, general appearance and demeanor, previous jury service, and the absence or presence of apparent prejudice." *See United States v. Lane*, 866 F.2d 103, 106 (4th Cir. 1989). Requiring the disclosure of these reasons will not prejudice the state. *See Thompson*, 827 F.2d at 1259.

142. *Cf. Batson v. Kentucky*, 476 U.S. 79, 98 (1986) (use of peremptory challenges is ultimately subject to the restraints of equal protection). Moreover, the prosecutor's strategy may be readily apparent from his questions during voir dire. *But see United States v. Tindle*, 860 F.2d 125, 131-32 (4th Cir. 1988) (upheld *ex parte* examination of prosecutor's notes discussing attempted intimidation by defendant and revealing strategy).

CONCLUSION

The *Batson* Court, in reformulating the defendant's evidentiary burden to prove purposeful discrimination, recognized that the discriminatory use of peremptory challenges persisted, and that the defendant's equal protection rights were not sufficiently protected. Although the Court did not specify the type of hearing that follows a *prima facie* showing, subsequent decisions demonstrate that a hearing must be adversarial to be fair.

To ensure that the greater protection afforded by *Batson* is effectuated, lower courts must hold adversarial hearings in *Batson* inquiries, absent a compelling state interest. These hearings should resemble the three-stage procedure in Title VII cases in order to guarantee procedural due process. Without an adversarial hearing, a defendant will not have a full and fair opportunity to argue his equal protection claim.

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