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Criminal Procedure - What Constitutes a Race-Neutral Explanation for Using Peremptory Challenges - State v. Guzman and Purkett v. Elem

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CRIMINAL PROCEDURE—What Constitutes a Race-Neutral Explanation for Using Peremptory Challenges? *State v. Guzman* and *Purkett v. Elem*

I. INTRODUCTION

A recent New Mexico Court of Appeals' decision, *State v. Guzman*,[1] reversed and remanded two convictions based on the prosecution's inappropriate use of peremptory challenges. The court of appeals reviewed the trial court's application of the test first set forth by the United States Supreme Court in *Batson v. Kentucky*,[2] which held that racially motivated peremptory challenges violate the Equal Protection Clause of the Fourteenth Amendment. *Batson* provides a three-step inquiry to determine whether racial classification formed the basis for a strike: (1) the opponent makes a prima facie showing that the peremptory challenge was exercised in a discriminatory manner; (2) the proponent rebuts the prima facie showing by providing a race-neutral explanation for the strike; and (3) the trial court then determines if the peremptory challenge was racially motivated.[3] After finding that the trial court erred in applying the third step of the inquiry, the New Mexico Court of Appeals reviewed the record to determine the sufficiency of the prima facie showing and subsequent rebuttal.[4]

After the court of appeals decided *Guzman*, however, the United States Supreme Court decided *Purkett v. Elem*,[5] a per curiam opinion that clarifies the test set forth in *Batson*. The *Purkett* decision addresses the second step of the inquiry, holding that the proponent of the strike can satisfy the second step simply by offering an explanation which is race-neutral on its face.[6] In contrast, New Mexico courts have applied the *Batson* inquiry by requiring a plausible explanation at the second step, before proceeding to the third step of the analysis.[7]

This Note addresses what impact *Purkett* has on *Batson* inquiries in New Mexico. First, this Note summarizes how federal courts have historically addressed racial discrimination in jury selection. Second, this

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1. 119 N.M. 190, 889 P.2d 225 (Ct. App. 1994), *cert. denied*, 119 N.M. 20, 888 P.2d 466 (1995).

2. 476 U.S. 79 (1986).

3. *Id.* at 95-98.

4. *Guzman*, 119 N.M. at 194, 889 P.2d at 229.

5. 115 S. Ct. 1769 (per curiam)(1995).

6. *Id.* at 1771.

7. State v. Moore, 111 N.M. 619, 620, 808 P.2d 69, 70 (Ct. App.), *cert. denied*, 111 N.M. 706, 809 P.2d 56 (1991) (the explanation must be "sufficient to provide an explanation that the trial court can determine is a bona fide reason relating to legitimate criteria in selecting a jury on behalf of the state"); State v. Moore, 109 N.M. 119, 126, 782 P.2d 91, 98 (Ct. App.), *cert. denied*, 109 N.M. 54, 781 P.2d 782 (1989) (reasons that are implausible or suggestive of bias require further inquiry). *See also* State v. Aragon, 109 N.M. 197, 202, 784 P.2d 16, 21 (1989) (when conducting an inquiry, the trial court should demand articulate and explicit substantiation of the explanation for the challenges).

Note explores how New Mexico has traditionally prohibited racially motivated peremptory challenges. Finally, this Note analyzes the *Guzman* rationale and what effect *Purkett* may have on the exercise of peremptory challenges in New Mexico courts.

II. STATEMENT OF THE CASE

Defendants Margaret Guzman and Linda Gutierrez were convicted in the Bernalillo County District Court of possession of marijuana with intent to distribute, conspiracy to commit distribution of marijuana, and possession of drug paraphernalia.[8] During voir dire, the prosecution used all five of its peremptory challenges[9] to strike Hispanics from the venire.[10] Invoking a *Batson* inquiry, counsel for Gutierrez objected that the prosecutor's use of the peremptory challenges was racially motivated.[11] Before the trial court determined whether defense counsel had made a prima facie showing to satisfy the first step of the inquiry, the prosecutor initiated the second step by immediately explaining that he had challenged two jurors because they were "young" and two others because they had "less responsible jobs involving less education."[12] The trial court found no "con[c]erted plan to restrict the make up of the jury . . . *particularly in view of the preponderance of accepted Hispanic surnamed jurors*" remaining on the petit jury.[13] The trial court further stated that *Batson* was primarily concerned with fairness in terms of a jury composed of a cross-section of the community.[14] Thus, according to the trial court, because a majority of Hispanics remained on the jury, the prosecutor's challenges were permissible.[15]

On appeal, the court of appeals remanded for a new trial, after finding that the trial court improperly ruled on the *Batson* inquiry.[16] The court of appeals found that the trial court's ruling was inconsistent with the

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8. *Guzman*, 119 N.M. at 191, 889 P.2d at 226.

9. In non-capital cases in New Mexico, defense counsel may exercise five peremptory challenges, while the prosecution may exercise three peremptory challenges. N.M. R. CRIM. P. 5-606(D)(1)(b). If two or more persons are tried jointly, both the prosecution and defense are allowed two additional peremptory challenges per defendant. N.M. R. CRIM. P. 5-606(D)(2). In capital cases, the defense may exercise twelve peremptory challenges, while the prosecution may exercise eight. N.M. R. CRIM. P. 5-606(D)(1)(a). In *Guzman*, the defendants were allowed a total of seven peremptory challenges; the prosecution, five. 119 N.M. at 192, 889 P.2d at 227.

10. *Guzman*, 119 N.M. at 191, 889 P.2d at 226.

11. *Id.* "The State has exerted five strikes. So far, each and every one has been a Hispanic venireman." *Id.* The prosecution also noted that defendants had used six of their seven peremptory challenges to dismiss Anglo-surnamed prospective jurors. *Id.* at 191-92, 889 P.2d at 226-27. The court held that Anglos are a cognizable racial group in New Mexico, and therefore prohibited strikes predicated solely on a prospective juror's Anglo ethnicity. *Id.* at 194, 888 P.2d at 229.

12. *Id.* at 194, 889 P.2d at 229. If a prosecutor offers an explanation before the defendant completely establishes a prima facie showing, she risks waiving the issue of whether defendant actually met the prima facie burden if the trial court progresses to the ultimate question of discrimination. *See* Hernandez v. New York, 500 U.S. 352, 359 (1991).

13. *Guzman*, 119 N.M. at 193, 889 P.2d at 228 (quoting district court's ruling) (alteration in original) (emphasis added by court of appeals).

14. *Id.* at 193-94, 889 P.2d at 228-29.

15. *Id.*

16. *Id.* at 195, 889 P.2d at 230.

test set forth in *Batson* and later adopted by New Mexico in *State v. Sandoval*.[17] The trial court inappropriately conducted the third step of the inquiry by examining the prima facie showing and rebuttal in light of the defendant's right to a fair, impartial jury, guaranteed by the Sixth Amendment.[18] *Batson*, on the other hand, emphasized the rights of citizens to participate in jury service and found that such racially motivated peremptory challenges violate the Equal Protection Clause.[19]

After reevaluating the inquiry by substituting an equal protection analysis, the court of appeals found that the peremptory challenges were racially motivated.[20] Guzman and Gutierrez were granted a new trial.[21]

III. HISTORICAL AND CONTEXTUAL BACKGROUND

To further the goal of selecting an impartial jury, courts allow litigants to exercise two types of challenges during jury selection: challenges for cause and peremptory challenges.[22] The use of such challenges allows litigants to excuse jurors who do or might have particular biases which prevent them from hearing a case objectively.[23] Challenges for cause, the first type of challenge, are unlimited in number, provided the trial court finds that a party has shown good cause for striking the juror.[24] In addition, the trial judge herself may excuse a clearly biased juror for cause.[25] The second type of challenge is a peremptory challenge, which historically requires no finding of cause at all.[26] Unlike challenges for cause, a set number of peremptory challenges are granted by statute to each party in both state and federal systems.[27]

Arbitrary and capricious by nature, the peremptory challenge is often based on a "hunch" or "seat-of-the-pants" instinct that a juror might

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17. 105 N.M. 696, 736 P.2d 501 (Ct. App. 1987).

18. *Guzman*, 119 N.M. at 194, 889 P.2d at 229.

19. 476 U.S. 79, 84 n.4 (1986). "[I]t is the stigma attached to the disqualification of a juror because he or she appears to be of a particular racial or ethnic group that the Supreme Court has has [sic] attempted to prevent . . . ." *Guzman*, 119 N.M. at 194, 889 P.2d at 229. Note, however, that New Mexico courts have applied the impartial jury provision of the state constitution to limit peremptory challenges. *See* discussion *infra* part III.B.

20. *Guzman*, 119 N.M. at 194, 889 P.2d 229.

21. *Id.* at 195, 889 P.2d at 230.

22. HARRY I. SUBIN ET AL., THE CRIMINAL PROCESS: PROSECUTION AND DEFENSE FUNCTIONS § 18.2(a), at 293 (1993) [hereinafter SUBIN].

23. *Id.*

> The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.

Swain v. Alabama, 380 U.S. 202, 219 (1965).

24. SUBIN, *supra* note 22, § 17.5(b), at 283.

25. SUBIN, *supra* note 22, § 18.2(a), at 293.

26. *Swain*, 380 U.S. at 220. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Id.*

27. *See* N.M. STAT. ANN. § 38-5-14 (Repl. Pamp. 1991); 28 U.S.C.A. § 1870 (1959) (in federal courts, both parties are granted three peremptory challenges in civil cases); FED. R. CRIM. PROC. 24(b) (in federal criminal cases, each side is granted twenty peremptory challenges in capital cases; in felony cases, the prosecution is allowed six peremptory challenges, while the defendant is allowed ten).

be biased.[28] Peremptory challenges allow counsel, without having to show cause, to strike a juror who may have an unconscious bias or may be predisposed to favoring the other side.[29] The availability of the peremptory challenge also allows counsel to delve more deeply into possible bias during voir dire with less risk, since he may use the peremptory challenge to dismiss a juror he inadvertently offended with sensitive questions.[30] Even though peremptory challenges, by nature, are often based on inarticuable, gut feelings, courts have found that peremptory challenges based solely on race or gender conflict with the Equal Protection Clause of the Fourteenth Amendment.[31]

A. Federal Cases

1. Equal Protection Cases Involving Jury Discrimination, Pre-*Batson*

The use of peremptory challenges to perpetuate race and gender discrimination has been successfully challenged in federal courts on equal protection grounds.[32] Successful challenges to states' use of discriminatory practices in jury selection began in 1879 with *Strauder v. West Virginia*.[33] In *Strauder*, the United States Supreme Court struck down a statute which excluded otherwise qualified African Americans from jury service solely because of their race.[34] The West Virginia statute violated the Equal Protection Clause by denying African Americans the essential right of jury participation.[35] The Court explained that the question was not whether an African American "has a right to a grand or petit jury composed in whole or in part of persons of his own race or color," but whether "all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any [African American] man sit upon the jury."[36]

Subsequent years brought further challenges to jury selection predicated on racial exclusion. For example, in *Norris v. Alabama*,[37] the Court held unconstitutional the administration of a venire qualification statute which,

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28. *Batson*, 476 U.S. at 138 (Rehnquist, J., dissenting).

29. *Swain*, 380 U.S. at 219.

30. *Id.* at 219-220.

31. Batson v. Kentucky, 476 U.S. 79 (1986) (peremptory challenges exercised on the basis of race violate the Equal Protection Clause); J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1421 (1994) (the Equal Protection clause proscribes that "gender, like race, is an unconstitutional proxy for juror competence and impartiality" when exercising peremptory challenges).

At least one petitioner has asked the Court to prohibit the exercise of peremptory challenges based on religion, but the Court denied certiorari. *See* Davis v. Minnesota, 114 S. Ct. 2120 (1994) (dissent to denial of petition for certiorari).

32. The Fourteenth Amendment prevents states from denying "to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 4.

33. 100 U.S. 303 (1879). Strauder, an African American who was convicted of murder, successfully attacked the constitutionality of the following statute: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors . . . ." *Id.* at 305.

34. *Id.* at 310.

35. *Id.* at 308.

36. *Id.* at 305.

37. 294 U.S. 587 (1935).

in effect, excluded African Americans from grand and petit venires.[38] Although the statute at issue was facially neutral, years of its administration showed no African Americans "had served on any grand or petit jury in [Jackson County, Alabama] within the memory of witnesses who had lived there all their lives."[39] The "wholesale exclusion" of otherwise qualified African Americans was enough to meet a prima facie showing that the administration of the statute violated the Equal Protection Clause of the United States Constitution.[40] The *Norris* decision resulted in the application of the "rule of exclusion," wherein a petitioner had the burden of showing systematic exclusion of a segment of the population over a period of time.[41]

Strauder, *Norris*, and other jury selection cases[42] provided the backdrop for the first direct attack on racially motivated peremptory challenges, *Swain v. Alabama*.[43] While determining whether the exercise of peremptory challenges could be subject to limitation, the *Swain* court carefully traced the history and purpose of the peremptory challenge.[44] The Court underscored the fact that use of peremptory challenges is traditionally beyond the subject of a court's control.[45] The Court held, however, that evidence showing that African Americans had been excluded from juries in case after case, for purposes wholly unrelated to the trial at hand, established a prima facie showing of discrimination in violation of the Equal Protection Clause.[46] *Swain* required the defendant to "show the prosecutor's systematic use of peremptory challenges against [African Americans] over a period of time."[47] In deference to peremptory challenges, the Court declined to extend the rule of exclusion, or result analysis, set forth in previous jury selection cases, and instead required evidence of the prosecutor's motivation for using peremptory challenges in case after case.[48]

2. *Batson* Replaces *Swain*

Not until over twenty years later did the Supreme Court reevaluate *Swain* in *Batson v. Kentucky*.[49] The Court held that *Swain*'s requirement

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38. *Id.* at 590, 596.
39. *Id.* at 591.
40. *Id.* at 597.
41. *Id.* at 579.
42. *See* Swain v. Alabama, 380 U.S. 202, 204 n.1 (1965), in which the Court cited a plethora of cases prohibiting racial discrimination in selection of the jury.
43. 380 U.S. 202 (1965). Swain, an African American convicted of rape in Talladega County, Alabama, challenged the jury system of the county, but failed to establish a prima facie case of discrimination. *Id.*
44. *Id.* at 212-22.
45. *Id.* at 220.
46. *Id.* at 224.
47. *Id.* at 227. Swain's case was at least as strong as Norris', based on the statistical evidence of exclusion presented: 26% of the eligible males in the county were African American yet the percentage of African Americans on jury panels was only 10-15%. *Id.* at 205. Even so, the Court distinguished previous jury selection cases from *Swain*, finding that the rule of exclusion should not be "woodenly applied" to cases involving peremptory challenges. *Id.* at 227. The Court reached this conclusion based upon the fact that defendants participate in the use of peremptory challenges, while other jury selection practices are accomplished entirely by state actors. *Id.*
48. *Id.* at 223.
49. 476 U.S. 79 (1986). In *Batson*, an African American was indicted for second-degree burglary

of a "systematic showing" failed to provide prospective jurors with the equal protection of the law.[50] The Supreme Court replaced the *Swain* burden of proof by allowing a defendant to establish a prima facie showing of discriminatory use of peremptory challenges based on the facts of the instant case.[51] Those facts are sufficient to overcome the presumption of proper use, that is, that the peremptory challenges were used in a legitimate fashion, and were not racially motivated.[52]

Under *Batson*, whenever a party questions the propriety of peremptory challenges, the trial court conducts a three-step inquiry to determine if the challenges were racially motivated. At the first step, the opponent of the strike must make a prima facie showing that (1) the juror belongs to a cognizable racial group,[53] (2) the peremptory challenge constitutes a jury selection practice which permits discrimination, and (3) "any other relevant circumstances" which raise an inference of jury exclusion based on race.[54] Once the opponent of the strike establishes a prima facie showing, the burden shifts to the proponent of the strike, and the inquiry proceeds to the second step of the analysis.[55] At the second step, the proponent must advance a race-neutral explanation for the strike related

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and receipt of stolen goods. *Id.* at 82. At trial, the prosecutor struck all African American panel members, which resulted in an all-white jury. *Id.* at 83.

50. *Id.* at 92-93 ("Swain has placed on defendants a crippling burden of proof . . . ."). Although Batson argued that the peremptory challenges violated his Sixth Amendment right to a jury drawn from a fair-cross section, the *Batson* Court employed an equal protection analysis. *Id.* at 84 n.4. Despite frequent invitations to extend the fair cross-section requirement to the petit jury, the Supreme Court has consistently ruled that the Sixth Amendment's cross-section protection against partiality applies only to the jury pool. *See, e.g.*, Holland v. Illinois, 493 U.S. 474 (1990).

51. *Batson*, 476 U.S. at 95.

52. *Id. See id.* at 101 (White, J., concurring).

53. *Id.* at 96 (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)). In the *Batson* decision, the party challenging the strike had to be the same race as the prospective juror, but a subsequent decision, Powers v. Ohio, 499 U.S. 400, 416 (1991), abolished that requirement. The Court also has allowed *Batson* inquiries by a prosecutor who objected to defendant's use of racially motivated peremptories, Georgia v. McCollum, 505 U.S. 42, 43 (1992) and by civil litigants, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991).

54. *Batson*, 476 U.S. at 96. What constitutes "any other relevant circumstances" has been developed by lower courts. *See, e.g.*, Splunge v. Clark, 960 F.2d 705, 707 (7th Cir. 1992) (in which prosecutor's questions and statements during voir dire raised inference when prosecutor asked prospective juror if sharing race with defendant would influence her objectivity); United States v. Lewis, 892 F.2d 735, 736-37 (8th Cir. 1989) (stating that disparate treatment of whites and African Americans who share the same occupation, residency, lifestyle, relationships, acquaintances, etc., might raise an inference contributing to prima facie showing); United States v. Clemons, 843 F.2d 741, 748 (3d Cir.) (listing five factors giving rise to necessary inference: number of prospective jurors who belong to the cognizable group; the nature of the crime; the race of the defendant and victim; pattern of strikes; and prosecutor's behavior during voir dire), *cert. denied*, 488 U.S. 835 (1988); United States v. Sangineto-Miranda, 859 F.2d 1501, 1520 (6th Cir. 1988) (listing relevant factors as to whether an inference exists: the racial composition of the initial group seated and the final panel sworn; the number of peremptory challenge strikes allowed each side; the race of the prospective jurors struck for both cause and peremptorily; the order of the strikes; and who exercised the strikes); United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987) (reasoning that "the additional fact that the Government used its peremptory challenges to strike the last remaining juror of defendant's race is sufficient to raise an inference . . . .").

55. *Batson*, 476 U.S. at 97. When a proponent offers an explanation for the peremptory challenge, and the trial court rules on the ultimate question, the issue of whether an opponent has made a prima facie showing is moot. Hernandez v. New York, 500 U.S. 352, 359 (1991).

to the particular case to be tried.[56] Although the explanation need not rise to the level of cause, a mere denial of discriminatory motive is insufficient.[57] Finally, the third step of the Batson inquiry requires the trial court to consider both the prima facie case and rebuttal to determine if, indeed, the opponent of the strike has established purposeful discrimination.[58]

The *Batson* Court suggested that certain factors may give rise to a necessary inference of purposeful discrimination, such as a pattern of strikes against African American jurors[59] and the content of the prosecutor's questions during voir dire.[60] *Batson*'s only instruction regarding the sufficiency of an explanation for the strike was that the prosecutor's explanation need not rise to the level of cause, but cannot be a mere denial of racial motivation.[61] Based on the totality of the circumstances, the trial court has to determine whether the defendant met his burden of establishing purposeful discrimination.[62] The Court declined to formulate further instructions, acknowledging the different jury selection procedures for state and federal courts.[63] Further, the trial court's assessment during step three is a factual inquiry that rests heavily on a finding of credibility.[64] Thus, "a reviewing court ordinarily should give those findings great deference."[65]

3. *Purkett* Clarifies Second Step

When deciding *Batson*, the Supreme Court left to lower courts the task of developing detailed procedures for conducting the *Batson* inquiry. Not until its 1995 term did the Court clarify what constitutes a sufficient explanation to rebut the prima facie inference.[66] In *Purkett v. Elem*,[67] the Court explained that the second step of the *Batson* inquiry requires proponents simply to assert reasons for the strikes that are neutral on their face.[68] The only guidance from *Batson* was that the strike did not

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56. *Batson*, 476 U.S. at 97-98.
57. *Id.*
58. *Id.* at 98.
59. *Id.* at 97. Establishing a pattern is not necessary, however, since the U.S. Constitution prevents a state from using peremptory challenges to strike any African American juror on the basis of race. *Id.* at 99 n.22.
60. *Id.* at 97.
61. *Id.* at 97-98.
62. *See id.* at 98.
63. *Id.* at 99 n.24. In dissent, Chief Justice Burger argued that roughly 7,000 jurisdictions and 500 federal trial judges were left to "find their way through the morass" without proper instruction from the Court. *Id.* at 131 (Burger, C.J., dissenting).
64. *Batson*, 476 U.S. at 98 n.22 (citing Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) (a Title VII sex discrimination case)).
65. *Id.*
66. *But see* Hernandez v. New York, 500 U.S. 352 (1991): "At [the second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 360.
67. 115 S. Ct. 1769 (per curiam) (1995).
68. *Id.* at 1771.

have to rise to the level of cause, but a mere denial was insufficient.[69]

After being convicted for second degree robbery, Purkett challenged, through a writ of habeas corpus, the prosecution's use of peremptory challenges to strike two African American jurors from the panel.[70] The prosecutor explained that one juror did not appear to be a good juror because he had long, unkempt hair.[71] The Eighth Circuit remanded the case because the prosecutor's explanation proffered at step two was not plausible.[72] The Supreme Court reversed the Eighth Circuit, reasoning that: "to say that a trial judge may choose to disbelieve a silly or superstitious reason at step [three] is quite different from saying that a trial judge must terminate the inquiry at step [two] when the race-neutral reason is silly or superstitious."[73] The Court explained that *Batson* required the reason at step two to be reasonably "related to the particular case to be tried" only to reinforce its warning that a mere denial of racial motivation would be insufficient.[74] In so doing, the Court eschewed the Eighth Circuit's requirement that the explanation be plausible, holding that the reason must be only race neutral on its face.[75]

B. New Mexico Cases

While the United States Supreme Court used an equal protection analysis to circumscribe racially motivated peremptory challenges, New Mexico courts have employed the impartial jury provisions of the state constitution. New Mexico jurisprudence addressing racially motivated peremptory challenges has centered on applying the New Mexico Constitution when the United States Supreme Court has failed to act. In addition, New Mexico courts have crafted clear instructions for conducting each step of the *Batson* inquiry.

New Mexico first applied the state constitution to prevent racially motivated peremptory challenges in *State v. Crespin*,[76] in response to the insurmountable burden of *Swain v. Alabama*.[77] In *Crespin*, an African American defendant appealed his conviction, arguing that the trial court had wrongly excluded from the record the State's reason for striking an African American venireman.[78] Although affirming the trial court's ruling, the New Mexico Court of Appeals indicated that improper use of peremptory challenges could be shown either by the procedure set forth in *Swain* or under Article II, section 14 of the New Mexico Constitution.[79]

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69. Batson v. Kentucky, 476 U.S. 79, 97-98 (1986).
70. *Purkett*, 115 S. Ct. at 1770.
71. *Id.*
72. *Id.*
73. *Id.* at 1771.
74. *Id.* (quoting *Batson*, 476 U.S. 79, 98 (1986)).
75. *Id.* "What [*Batson*] means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.*
76. 94 N.M. 486, 612 P.2d 716 (1980).
77. *Id.* at 486-88, 612 P.2d at 716-18 (analyzing *Swain*, 380 U.S. 202 (1965)).
78. *Id.* at 486, 612 P.2d at 716.
79. *Id.* at 488, 612 P.2d at 718. Article II, § 14 of the New Mexico Constitution provides: "[T]he accused shall have the right to . . . an impartial jury . . . ."

Under the New Mexico Constitution, a defendant could show that the absolute number of challenges in one case raised the necessary inference of purposeful discrimination.[80]

New Mexico again applied the impartial trial guarantees of the state constitution in *State v. Aragon*.[81] In *Aragon*, a Hispanic defendant challenged the prosecution's use of peremptory challenges to strike two African Americans from the venire.[82] The New Mexico Supreme Court held that the right to an impartial jury extends to the use of peremptory challenges.[83] Even though defendants are not entitled to a jury of a particular composition, "the state should not be able to accomplish indirectly at the selection of the petit jury what it has not been able to accomplish directly at the selection of the venire."[84] Both *Crespin* and *Aragon* applied impartial jury principles, rather than the equal protection rationale used by the United States Supreme Court.[85]

In addition to decisions that applied the New Mexico Constitution to prohibit racially motivated peremptory challenges, New Mexico has developed detailed procedures to conduct the *Batson* inquiry.[86] From the time New Mexico first adopted *Batson* in *State v. Sandoval*,[87] it has expounded upon what constitutes a prima facie case, the rebuttal, and those factors to be considered in determining pretext. In New Mexico, a "prima facie showing means such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted."[88] After the juror's race is clearly established,[89] New Mexico courts consider three factors which give rise to the inference of improper use to satisfy step one of the inquiry: (1) substantial underrepresentation of defendant's racial group on the jury in comparison to the group's population;[90] (2) susceptibility of the case to racial discrimination;[91] and

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80. *Crespin*, 94 N.M. at 488, 612 P.2d at 718. A subsequent New Mexico decision averred this same dicta, although the defendant actually failed to meet the lessened requirement. State v. Davis, 99 N.M. 522, 524-25, 660 P.2d 612, 614-15 (Ct. App.), *cert. denied*, 99 N.M. 578, 661 P.2d 478 (1983). *Crespin* and *Davis* follow the trend set by People v. Wheeler, 583 P.2d 748 (Cal. 1978). In *Wheeler*, California applied the impartial jury guarantees of its state constitution after finding numerous *Swain* challenges proved unsuccessful, even though numerous minorities continued to be excluded from jury service. *Id.* at 761-62.

81. 109 N.M. 197, 784 P.2d 16 (1989).

82. *Id.* at 198, 784 P.2d at 17.

83. *Id.* at 201, 784 P.2d at 20.

84. *Id.* The court formally adopted the *Wheeler* doctrine that it had discussed earlier in *Crespin* and *Davis*. *Id.*

85. Purkett v. Elem, 115 S. Ct. 1769, 1771 (per curiam) (1995).

86. *Batson* declined to provide much detail about conducting an inquiry, acknowledging that trial courts employ different procedures and have experience conducting voir dire. *See Batson*, 476 U.S. at 99 n.24.

87. 105 N.M. 696, 736 P.2d 501 (Ct. App. 1987).

88. State v. Gonzales, 111 N.M. 590, 596, 808 P.2d 40, 46 (Ct. App.) (citations omitted) (a showing that 80% of protected group were stricken meets prima facie case, even though members of that group remained on jury), *cert. denied*, 111 N.M. 416, 806 P.2d 65 (1991).

89. State v. Jim, 107 N.M. 779, 781, 765 P.2d 195, 197 (Ct. App.) (a mere assertion that a prospective juror belonged to racial group is insufficient, absent some evidence such as asking the prospective juror about her race), *cert. denied*, 107 N.M. 720, 764 P.2d 491 (1988).

90. State v. Lara, 110 N.M. 507, 512, 797 P.2d 296, 301 (Ct. App.), *cert. denied*, 110 N.M.

(3) the absence of members of defendant's racial group on the jury,[92] although some same-race jurors remaining on the petit jury is not a determinative factor.[93] A pattern of using the strikes against members of defendant's race may also support the inference of improper use.[94]

At step two of the *Batson* inquiry, the proponent of the strike must offer a reason "sufficient to provide an explanation that the trial court can determine is a bona fide reason relating to legitimate criteria in selecting a jury on behalf of the state."[95] Yet, rather than dwelling on what constitutes a sufficient rebuttal, New Mexico appellate courts focus on how to determine the credibility of a rebuttal, or step three of the *Batson* inquiry. New Mexico interprets *Batson* to require trial courts to evaluate whatever explanation is offered, and if the "reasons given are either implausible or suggestive of bias, to make further inquiry."[96]

In determining whether the explanation is plausible, New Mexico courts have examined the prosecutor's conduct during voir dire. The only New Mexico Supreme Court decision addressing peremptory challenges, *State v. Aragon*, has frowned upon a trial court's rubber-stamping prosecutor's explanations, without "demanding . . . articulate and explicit substantiation."[97] A clear indication of pretext is the varied treatment of white and nonwhite members of the panel when the grounds for the peremptory challenge are "equally applicable" to the white juror as well.[98] Other indicators of pretext may be the extent to which the proponent attempted to question the juror about the suspected partiality,[99] and if the explanation for exercising the peremptory challenge has not been tied to the case being tried.[100] Correspondingly, evidence that the proponent's conduct

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330, 795 P.2d 1022 (1990); *Jim*, 107 N.M. at 781, 765 P.2d at 197; State v. Goode, 107 N.M. 298, 301, 756 P.2d 578, 581 (Ct. App.), *cert. denied*, 107 N.M. 308, 756 P.2d 1203 (1988). *Cf.* State v. Dominguez, 115 N.M. 445, 451-52, 853 P.2d 147, 154 (Ct. App.) (if percentage of jurors of defendant's race is higher on petit jury than on panel, no prima facie inference), *cert. denied*, 115 N.M. 409, 852 P.2d 682 (1993). *See also Gonzales*, 111 N.M. at 595, 808 P.2d at 45 ("[a]single prospective juror may be stricken for a racially motivated reason and the jury still retain its 'representative' character").

91. *Lara*, 110 N.M. at 512, 797 P.2d at 301; *Jim*, 107 N.M. at 781, 765 P.2d at 197; *Goode*, 107 N.M. at 301, 756 P.2d at 581.

92. *Lara*, 110 N.M. at 512, 797 P.2d at 301; *Jim*, 107 N.M. at 781, 765 P.2d at 197; *Goode*, 107 N.M. at 301, 756 P.2d at 581 (citing U.S. v. Chalan, 812 F. 2d 1302 (10th Cir. 1987).

93. *See Jim*, 107 N.M. at 782, 765 P.2d at 198. *Cf Dominguez*, 115 N.M. at 451, 853 P.2d at 153 (the presence of same-race jurors "tends to undercut any inference of purposeful discrimination.")

94. *Gonzales*, 111 N.M. at 595, 808 P.2d at 45.

95. State v. Moore, 111 N.M. 619, 620, 808 P.2d 69, 70 (Ct. App.), *cert. denied*, 111 N.M. 706, 809 P.2d 56 (1991) [hereinafter *Moore II*].

96. State v. Moore, 109 N.M. 119, 127, 782 P.2d 91, 99 (Ct. App.), *cert. denied*, 109 N.M. 54, 781 P.2d 782 [hereinafter Moore I].

97. 109 N.M. 197, 202, 784 P.2d 16, 21 (1989). Although *Aragon* employs an impartial jury principle, it extends the *Batson* test to such challenges.

98. *Moore II*, 111 N.M. at 621, 808 P.2d at 71. *See also* State v. Goode, 107 N.M. 298, 302, 756 P.2d 578, 582 (Ct. App.), *cert denied*, 107 N.M. 308, 756 P.2d 1203 (1988); State v. Dominguez, 115 N.M. 445, 450, 853 P.2d 147, 152 (Ct. App.), *cert. denied*, 115 N.M. 409, 852 P.2d 682 (1993).

99. *Goode*, 107 N.M. at 302, 756 P.2d at 582; State v. Jim, 107 N.M. 779, 782, 765 P.2d 195, 198 (Ct. App.), *cert. denied*, 107 N.M. 720, 764 P.2d 491 (1988).

100. *Goode*, 107 N.M. at 303, 756 P.2d at 583.

during voir dire evinces careful consideration supports credibility,[101] as does the fact that the proponent exercised only some of her peremptory challenges when members of defendant's race remained on the petit jury.[102] Thus, without explicitly saying so, New Mexico appellate courts determine whether purposeful discrimination exists by scrutinizing the proponent's explanation and actions rather than reevaluating the prima facie showing.

IV. RATIONALE OF THE *GUZMAN* COURT

On appeal, the court of appeals ruled that the trial court conducted the *Batson* inquiry in an erroneous manner by considering defendant's rights to an impartial jury while ignoring the jurors' equal protection rights.[103] The court of appeals emphasized that the equal protection prohibition of race-based challenges works to promote public confidence in the courts.[104] Litigants share a prospective juror's interest in preventing the discrimination which destroys that confidence.[105] The trial court must consider the equal protection interests of the jurors during a *Batson* inquiry, since *Batson*'s purpose was to protect such rights.[106]

The court of appeals then conducted its own *Batson* inquiry, applying equal protection principles. The prosecutor acknowledged that a prima facie showing of discrimination had been made by offering explanations for the strikes before the trial court ruled on whether defendants established the necessary inference.[107] Thus, the court of appeals assumed the necessary inference of discrimination and proceeded to the second step of the inquiry.[108]

The court of appeals proceeded to step two by reviewing the explanations for the strikes which had been offered by the prosecution to rebut the

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101. *Id.*

102. State v. Lara, 110 N.M. 507, 512, 797 P.2d 296, 301 (Ct. App.), *cert. denied*, 110 N.M. 330, 795 P.2d 1022 (1990).

103. State v. Guzman, 119 N.M. 190, 193, 889 P.2d 225, 228 (Ct. App. 1994), *cert. denied*, 119 N.M. 20, 888 P.2d 466 (1995). The trial court found that *Batson* dealt with the fairness of the jury, and saw no "con[c]erted plan to restrict the make up of the jury . . . particularly in view of the preponderance" of Hispanics left on the venire. *Id.* (quoting district court's ruling) (alteration in original) (emphasis added by court of appeals omitted). Yet "it is the stigma attached to the disqualification of a juror because he or she appears to be of a particular racial or ethnic group that the Supreme Court has has [sic] attempted to prevent since *Strauder*." *Id.* at 194, 889 P.2d at 229.

104. *Cf. Guzman*, 119 N.M. at 193, 889 P.2d at 228 (quoting Powers v. Ohio, 499 U.S. 400, 413-14 (1991) (racially rejected prospective jurors "may lose confidence in the court and its verdicts").

105. *Id.*

106. *Id.*

107. *Id.* at 194, 889 P.2d at 229. *See supra* note 55.

108. Although the State, on appeal, challenged whether defendants had shown the jurors were Hispanic, the court stated that identification by surname is sufficiently reliable to establish racial background, absent an objection by opposing counsel at trial. *Guzman*, 119 N.M. at 194, 889 P.2d at 229. The State cited State v. Neely, 112 N.M. 702, 713, 819 P.2d 249, 260 (1991), which involved a challenge to the jury pool being selected from voter registration lists rather than driver's license records. *Neely* rejected the argument, stating, "[a]n analysis of [H]ispanic surnames, without more, is not an adequate indicator of whether an individual is of [H]ispanic descent." *Id.* The *Guzman* court distinguished the issues of *Neely* from *Batson* inquiries, especially when both counsel and judge appear to consent to the characterization at trial. *Guzman*, 119 N.M. at 194, 889 P.2d at 229.

prima facie showing.[109] The prosecution struck two prospective jurors because they were "young" and feared that they might identify with Defendant Guzman, who was also young.[110] The court of appeals found that this explanation lacked merit since the defendants were mother and daughter and the prosecution failed to strike older potential jurors who might identify with Gutierrez.[111] The two other Hispanic prospective jurors were struck because they had "less responsible jobs involving less education."[112] The court of appeals reasoned that this explanation also lacked merit because two of the remaining Anglo potential jurors had similar educational and vocational backgrounds as the excused Hispanic jurors.[113] The prosecution failed to point to characteristics unique to the stricken jurors—race was the only classification which distinguished them from the jurors left on the panel.[114] Thus, the prosecution failed to provide a racially neutral explanation.[115] Defendants were granted a new trial to protect prospective jurors' equal protection rights not to be removed from jury service on account of race.[116]

V. ANALYSIS OF *GUZMAN* AND IMPACT OF *PURKETT*

Guzman did not change New Mexico law. The court of appeals simply corrected the trial court's failure to consider the equal protection rights of the prospective jurors. With that purpose in mind, the court of appeals cited United States Supreme Court decisions preventing racial discrimination in jury selection. Those cases underscore the importance of preserving a juror's right not to be excluded from jury service because of her race.[117]

Unfortunately, the court of appeals missed a wonderful opportunity to explain the differing principles which give rise to state and federal constitutional prohibitions. The United States Supreme Court has employed only an equal protection analysis to limit peremptory challenges,[118] while New Mexico courts have applied the impartial jury provision of

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109. *Guzman*, 119 N.M. at 194, 889 P.2d at 229. An explanation for striking the fifth prospective Hispanic juror, if given by the prosecutor, is absent from the opinion.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* Although the court of appeals did not cite New Mexico authority for its review of the explanation, it examined the explanation similarly to the way in which New Mexico courts have done in the past. *See* discussion *supra* part III.B.

115. *Guzman*, 119 N.M. at 194, 889 P.2d at 229.

116. *Id.* at 195, 889 P.2d at 230. *See also* Batson v. Kentucky, 476 U.S. 79, 100 (1986); Powers v. Ohio, 499 U.S. 400, 409 (1991).

117. The court of appeals cited Strauder v. West Virginia, 100 U.S. 303 (1879) (holding a statute unconstitutional that excluded African Americans from jury service); Carter v. Jury Commission, 396 U.S. 320 (1970) (where qualified African Americans were never summoned for jury service); *Batson*; and two cases that expanded the ability to bring *Batson* challenges (Powers v. Ohio, 499 U.S. 400 (1991) and Georgia v. McCollum, 505 U.S. 42 (1992)).

118. The United States Supreme Court has declined to apply the Sixth Amendment to prohibit the exercise of racially motivated peremptory challenges. Holland v. Illinois, 493 U.S. 474 (1990).

the state constitution.[119] An opinion which clarified the use of both principles could lessen confusion, especially since the trial court in *Guzman* considered one constitutional prohibition, but not the other.[120]

The central importance of *Guzman* for this discussion is the way in which the court of appeals evaluated the three-step *Batson* inquiry. *Guzman* is representative of *Batson* jurisprudence in New Mexico, which conflicts with *Purkett v. Elem*, decided three months later. Put simply, New Mexico has required a plausible explanation at step two of the inquiry,[121] while *Purkett* permits any explanation, no matter how silly or superstitious.[122] The type of explanation required at step two affects which party carries the burden of proof and, therefore, which party will win in close-call situations.

Purkett asserts that the burden of proof "never shifts from the opponent of the strike."[123] Although the court may choose to disbelieve the proffered explanation during step three of the analysis, it must accept a race neutral explanation at step two.[124] Under this analysis, the second step of the inquiry is actually a burden of production rather than a burden of proof. The result is a type of balancing test, with a bare minimum required on the proponent's side of the scale. Little is required from the proponent to explain his motivation, although the main goal of the *Batson* inquiry is to determine whether that motivation was racially based.[125]

In contrast, New Mexico courts have conducted *Batson* inquiries by shifting focus from the opponent once the prima facie showing was established. If the trial court questioned the credibility of the explanation offered at step two, *Aragon* instructed courts to conduct further inquiry for an "articulate and explicit substantiation" of the explanation proffered at step two.[126] In addition, New Mexico appellate courts have examined the suggested motivation for the challenges in light of the actions of the proponent, rather than reexamining the prima facie case, or asking for more from the strike's opponent.[127] New Mexico's evaluation of the proponent's actions in conjunction with the "plausibility" requirement represents an attempt to prevent race neutral explanations which actually mask racial motivation.

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119. *See, e.g.*, State v. Aragon, 109 N.M. 197, 784 P.2d 16 (1989).

120. State v. Guzman, 119 N.M. 190, 192, 889 P.2d 225, 227 (Ct. App. 1994), *cert. denied*, 119 N.M. 20, 888 P.2d 466 (1995). The court of appeals' language is also misleading:

> A review of United States Supreme Court cases establishing the constitutional parameters of the limitations on peremptory challenges indicates the prohibition is grounded *not only in a defendant's right to a fair cross-section of jurors* but also in the principle that all citizens have the right to participate in jury service.

Id. (emphasis added) In fact, the United States Supreme Court has never expanded the Sixth Amendment's impartial jury provision to limit peremptory challenges. *Holland*, 493 U.S. at 476.

121. *See supra* note 8.

122. Purkett v. Elem, 115 S. Ct. 1769, 1771 (1995).

123. *Id.*

124. *Id.*

125. Batson v. Kentucky, 476 U.S. 79, 97 (1986).

126. State v. Aragon, 109 N.M. 197, 202, 784 P.2d 16, 21 (1989).

127. *See* discussion *supra* part III.B.

These conflicts present the question of whether New Mexico will provide more protection than the federal constitutional mandates of *Purkett*. Of course, New Mexico is bound by the United States Supreme Court's equal protection analysis; however, it also may require a plausible explanation under the state constitution.

If it chooses to follow *Purkett*'s instruction, two problems may occur on appellate review. First, if the proponent of the strike initiates the second step of the inquiry by offering an explanation prematurely, the underlying prima facie showing required at step one may not be adequately substantiated in the record.[128] A record containing an incomplete prima facie showing, coupled with meager evidence of the proponent's motivation for offering the strike, will result in more cases being remanded, or the inquiry being subjected to less scrutiny on appeal. Second, the type of issue raised in *Guzman* could further frustrate appellate review when the trial court applies inadequate principles at step three to evaluate steps one and two of the inquiry. A race neutral explanation in a cold record will make an appellate court's review of the proponent's motivation even more difficult. Again, appellate courts will have to remand a greater number of cases or simply accept the explanation at face value.

New Mexico may avoid these problems by requiring more from a proponent before advancing to step three of the inquiry. If New Mexico decides to require a *plausible* excuse from the proponent to satisfy step two, it may turn to the New Mexico Constitution to limit peremptory challenges, as it has done before. New Mexico can graft its own application of *Batson* to both the impartial jury and equal protection provisions of the New Mexico Constitution, while continuing to conduct *Batson* inquiries by analyzing the credibility of the explanation based on the proponent's actions. At the very least, New Mexico courts could follow *Purkett*, but review more carefully those cases on appeal in which the proponent offers his explanation before the trial court rules on the prima facie case.

VI. CONCLUSION

Guzman represents another case in which the court of appeals has carefully examined the explanations proffered for peremptory challenges at step two of the inquiry. In light of *Purkett*, New Mexico courts may review all future *Batson* inquiries by applying its own constitution to require a plausible explanation at step two, as it has in *Aragon*. To promote meaningful review of questionable explanations, New Mexico courts have already enunciated clear, specific guidelines for conducting *Batson* inquiries. In addition, New Mexico courts have evinced a willingness to apply the impartial jury provisions of the New Mexico Constitution when the United States Supreme Court has not provided an adequate procedure for rooting out racially motivated strikes. A plau-

128. *See Purkett*, 115 S. Ct. at 1772-73 (Stevens, J., dissenting). According to Justice Stevens' dissent, this was the case in *Purkett* itself.

sibility requirement at step two coincides with New Mexico taking seriously what the United States Supreme Court considers a mere formality.

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