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Criminal Law - Discriminatory Use of Peremptory Challenges in Jury Selection: State of New Mexico v. Sandoval

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CRIMINAL LAW—Discriminatory Use of Peremptory Challenges in Jury Selection: *State of New Mexico v. Sandoval*

I. INTRODUCTION

In *State of New Mexico v. Sandoval*,[1] the New Mexico Court of Appeals reversed and remanded Sandoval's lower court convictions, based on the prosecutor's failure to comply with constitutional requirements regarding possible racial discrimination during petit jury selection.[2] The *Sandoval* court held that when the defendant makes a prima facie case of discrimination, based on the prosecutor's possible discriminatory use of peremptory challenges, the burden shifts to the state to rebut the prima facie case.[3] More importantly, the court held that the defendant need not go beyond the circumstances of his case to show discrimination.[4]

This note will examine the precedents relied upon by the court, and the implications of this ruling in New Mexico.

II. STATEMENT OF THE CASE

Sandoval was convicted for multiple counts of armed robbery and false imprisonment, with firearm sentencing enhancement.[5] Sandoval appealed on seven grounds.[6] One basis for the appeal was an assertion that the State used peremptory challenges to remove all members of the defendant's race from the jury.[7] The New Mexico Court of Appeals reversed the convictions and remanded the case for a new trial, based on Sandoval's claim of racial discrimination.[8] The court of appeals found that the trial court erred in not applying the standard enunciated by the United States Supreme Court in *Batson v. Kentucky*,[9] for determining whether racial discrimination was the basis for the use of peremptory challenges by the

1. 105 N.M. 696, 736 P.2d 501 (Ct. App. 1987).
2. *Id.* at 700, 736 P.2d at 505. A petit jury is "[t]he ordinary jury for the trial of a civil or criminal action; so called to distinquish it from the grand jury." BLACK'S LAW DICTIONARY 768 (5th ed. 1979). A grand jury is a "[b]ody of citizens, the number of whom varies from state to state, whose duties consist in determining whether probable cause exists that a crime has been committed and whether an indictment (true bill) should be returned against one for such a crime." *Id.*
3. *Sandoval*, 105 N.M. at 700, 736 P.2d at 505.
4. *Id.*
5. *Id.* at 697, 736 P.2d at 502.
6. *Id.*
7. *Id.*
8. *Id.* at 700, 736 P.2d at 505.
9. 476 U.S. 79 (1986).

prosecution.[10] The New Mexico trial court had applied an overruled standard from *Swain v. Alabama*,[11] and had required the defendant to show systematic exclusion of a racial group, beyond the defendant's case.[12] The *Batson* standard is easier for the defendant to meet, because it does not require any evidence beyond the circumstances of the defendant's trial.[13]

III. HISTORICAL PERSPECTIVE OF PEREMPTORY CHALLENGES

Peremptory challenges to jurors are challenges that do not require a showing of cause.[14] Theoretically, peremptories are used when sufficient reasons to challenge for cause cannot be shown, but jurors are suspected of being prejudiced against a party.[15] At common law, the defendant was allowed thirty-five peremptory challenges for the most serious crimes, but the number fluctuated below that at times.[16] The king was not limited in the number of peremptories allowed at common law, but later was restricted to challenges for cause certain.[17] Eventually, peremptories for both sides became accepted.[18] These common law roots provided the beginning for peremptories in the United States.[19]

The uncontrolled exercise of peremptory challenges has potential to lead to violations of the Sixth and Fourteenth Amendments of the Constitution of the United States. The Sixth Amendment provides that the accused in a criminal proceeding shall enjoy a trial by an impartial jury.[20] The jury must be drawn from a fair cross section of the community, to satisfy the requirements of the Sixth Amendment.[21] Excluding significant groups of the community violates the Sixth Amendment, because drawing

10. *Sandoval*, 105 N.M. at 700, 736 P.2d at 505.

11. 380 U.S. 202 (1965).

12. *Sandoval*, 105 N.M. at 699, 736 P.2d at 504.

13. *Batson*, 476 U.S. at 95. *Batson* rejected the *Swain* standard of proof which required the defendant to show systematic exclusion beyond the defendant's trial. *Id.* at 93.

14. W. FORSYTH, HISTORY OF TRIAL BY JURY 191 (2d. ed. 1971) [hereinafter W. FORSYTH). A prosecutor can ordinarily exercise peremptory challenges for any reason, in his view related to the outcome of the case. *Batson*, 476 U.S. at 89.

15. J. PROFFATT, TRIAL BY JURY 207 (1877) [hereinafter J. PROFFATT]. "[C]hallenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality. . . ." *Swain*, 380 U.S. at 220. The relatively strict standard for challenges for cause makes peremptories particularly attractive for removing potential jurors for reasons such as lack of attention or other reasons that would not suffice for challenges for cause.

16. J. PROFFATT, *supra* note 15, at 208.

17. W. FORSYTH, *supra* note 14, at 192. Unlimited challenges led to delays, so the king's number of challenges was limited. *Id.*

18. *Id.*

19. *Swain*, 380 U.S. at 214.

20. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI.

21. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

a jury from a fair cross section of the community is impossible when significant groups are excluded.[22] This does not impose a requirement that the jury must mirror the distinctive groups of the community, however.[23]

The requirement of the Sixth Amendment of trial by an impartial jury is binding on state courts, by virtue of the Fourteenth Amendment.[24] The Fourteenth Amendment guarantees due process and equal protection to citizens, and the Equal Protection Clause is violated, if a prosecutor peremptorily challenges potential jurors solely on the basis of their race.[25] The Fourteenth Amendment applies to the selection of the jury venire as well as the selection of the petit jury, in order to protect the accused throughout the proceedings.[26]

A. Modern Cases Concerning Peremptories and Discrimination

Swain v. Alabama was the controlling case in the United States, concerning peremptory challenges and racial discrimination, for many years.[27] The *Swain* Court dealt not only with the question of peremptory strikes, but also with the question of discrimination in the selection of members of grand jury and petit jury venires.[28] The *Swain* Court faced the fact that no Black had served on a petit jury in Talladega County, Alabama, for nearly fourteen years.[29] Black males over the age of twenty-one constituted twenty-six percent of all males in Talladega County in that age group.[30] Eight Blacks were members of Swain's petit jury venire, but two were exempt, and the other six were stricken through the use of peremptory challenges by the prosecutor.[31] The United States Supreme Court found that any discrimination was not intentional and that an im-

22. *Id.*

23. *Id.* at 538. This is an important point to understand. Defendants are not entitled to a jury that consists of all groups of the community or any members of the defendant's race. *Id.* Defendants are entitled to a jury chosen from a panel of potential jurors that has not been chosen by excluding distinctive groups of the community. *Id.*

24. *Id.* at 526. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 2. The exercise of peremptory challenges by the State is subject to the Equal Protection Clause of the Constitution. *Batson*, 476 U.S. at 89.

25. *Id.*

26. *Id.* at 88.

27. *Swain* was considered the guiding case in this area of law, from the time of the decision in 1964, until a major portion of the decision was rejected in *Batson*, in 1986.

28. *Swain*, 380 U.S. at 205. Evidence presented showed that Blacks constituted only 10% to 15% of the grand and petit jury venires chosen since 1953. *Id.*

29. *Id.* However, Blacks had served on nearly 80% of grand juries during this time. *Id.* Two Blacks served on the grand jury that indicted Swain. *Id.*

30. *Id.*

31. *Id.*

perfect system of selection is not the same as purposeful discrimination.[32]

The *Swain* Court found that the defendant did not meet a requirement of showing systematic exclusion of Blacks in cases beyond the defendant's.[33] Such a requirement demands that the defendant must somehow compile data relating to the prosecutor's use of peremptories in other cases, in advance of the defendant's awareness that the issue might become relevant.[34]

The *Swain* Court discussed the history of peremptory challenges,[35] and viewed peremptories as a necessary part of jury trials.[36] The United States Constitution does not provide for the right of peremptory challenges, but they are considered an important right by the courts.[37]

The *Swain* Court assumed that peremptory challenges were used to choose an impartial and qualified jury.[38] With this assumption in mind, the Court stated that the striking of Blacks in a case, even all Blacks, is not a denial of equal protection.[39] The Court's deference to the existence of peremptory challenges forced the Court to allow the prosecutor to strike without explanation of motives or reasons.[40] Justice Goldberg argued in a dissenting opinion that when a choice must be made between peremptory challenges and the Fourteenth Amendment, the Fourteenth Amendment must be chosen.[41] However, Justice Goldberg would require the defendant to prove systematic exclusion beyond the defendant's own case.[42] Defendant's have a right to trial by a jury selected in a nondiscriminatory manner.[43] Peremptories can be exercised in a manner con-

32. *Id.* at 209. The "imperfect" system in Talladega County did not function as Alabama law required. *Id.* at 206-207. Three jury commissioners were supposed to place the names of all males over 21, who met certain morality standards, on the jury role. *Id.* at 206. In practice, however, the jury commissioners simply selected people of whom they were aware through various sources such as church lists and conversations. *Id.* at 207.

33. *Id.* at 225.

34. State of New Mexico v. Crespin, 94 N.M. 486, 487, 612 P.2d 716, 717 (Ct. App. 1980).

35. *Swain*, 380 U.S. at 212.

36. *Id.* at 219.

37. *Id.* Peremptories are considered an important right, because they "eliminate extremes of partiality on both sides" and assure that the jurors will decide the case on the issues presented to them. *Id.* In England, peremptory challenges have been used rarely for a century, but the right is still available. *Id.* at 213 n.12.

38. *Id.* at 221.

39. *Id.* at 222. The Court stated that a Black is not entitled to a jury containing Blacks, but purposeful or deliberate exclusion of Blacks based on race violates the Equal Protection Clause. *Id.* at 203-204.

40. As long as peremptories were considered a challenge that did not require justification, recognizing their existence meant that no justification could be required.

41. *Id.* at 244 (Goldberg, J., dissenting). Justice Goldberg did not believe that such a choice was necessary in *Swain*, however. *Id.* He believed that Swain had shown a prima facie case of racial discrimination under settled decisions, and if the Court followed those precedents, no constitutional decision would be necessary. *Id.* at 245.

42. *Id.*

43. *Batson*, 476 U.S. at 85-86.

sistent with the Fourteenth Amendment, but they can also be used improperly to defeat the rights guaranteed by the Fourteenth Amendment.

In *Batson*, the United States Supreme Court rejected the *Swain* burden of proof[44] and found that a defendant can show purposeful racial discrimination in jury selection solely on the facts of the defendant's case.[45] The *Batson* Court stated that the ultimate issue is discrimination in the defendant's case.[46] The defendant must first establish a prima facie case of discrimination by: (1) showing that the defendant is a member of a cognizable racial group, and the prosecution has removed members of the defendant's race by peremptory challenges; and (2) showing that the prosecutor used that practice in a racially motivated manner.[47] The defendant can rely on the fact that peremptory challenges make it possible for discrimination to occur.[48]

Justice Marshall argued in a concurring opinion that the only way to eliminate racial discrimination from peremptory challenges is to eliminate peremptory challenges.[49] He believed that a prima facie case is difficult for a defendant to show, especially if only one or two Black jurors survive the challenges for cause.[50]

The new standard of proof under *Batson* is not ideal. While *Batson* enables a defendant to show discriminatory exclusion in an easier and more realistic manner, a prosecutor who chooses to discriminate can still manipulate the rules.[51] If a defendant can make a prima facie case of discrimination, the burden shifts to the prosecutor to present racially neutral reasons for excluding the members of the defendant's race.[52] The prosecutor's reasons do not have to rise to the level of exclusions for cause,[53] but the prosecutor cannot merely state that the reasons were not

44. *Id.* at 93.

45. *Id.* at 95.

46. *Id.* Batson based his claim on alleged violations of his Sixth and Fourteenth Amendment rights, but the Court resolved his claim under the Fourteenth Amendment and expressed no view on his Sixth Amendment claim. *Id.* at 84-85 n.4. However, the Court in *Taylor* found that the defendant's Sixth Amendment rights to a jury from a representative cross section of the community were violated by a state statute that excluded women from jury duty unless they specifically requested to serve. 419 U.S. at 525.

47. *Batson*, 476 U.S. at 96.

48. *Id.*

49. *Id.* at 102-103. (Marshall, J., concurring). Justice Marshall believed that state officers had turned to more subtle ways of excluding Blacks from jury venires, because the Court invalidated laws allowing discrimination in jury selection. "[I]n 15 criminal cases in 1974 in the Western District of Missouri involving [B]lack defendants, prosecutors peremptorily challenged 81% of [B]lack jurors." *Id.* 103 (citing United States v. Carter, 528 F.2d 844, 848 (8th Cir. 1975), *cert denied*, 425 U.S. 961 (1976)).

50. *Id.* at 105.

51. *Id.* at 106. The prosecution is only required to present racially neutral reasons for the challenge in question. This is not a difficult standard for a creative prosecutor who chooses to discriminate.

52. *Id.* at 97.

53. *Id.*

racially motivated.[54] Some actual neutral reasons must be presented.[55] The Supreme Court did not provide, in *Batson*, an exact standard for evaluating the prosecutor's neutral reasons, however.[56] This gives a great deal of discretion to the trial judge in determining the adequacy of the prosecutor's reasons for exercising peremptory challenges.

The *Batson* Court's "creation" of a new standard to show discrimination in jury selection was more accurately a resurrection and expansion of an old and apparently forgotten standard. The *Batson* Court cites the case of *Avery v. Georgia*[57] at various places in the Court's opinion.[58] The *Batson* Court, however, does not present *Avery* in full light. Although the factual situation was different in *Avery* than in *Batson*, a similar test evolved. The predominant factual distinction between the two cases is that the discrimination in *Avery* was found in the supposed random selection of potential jurors by a judge, not by the use of peremptory challenges by the prosecution.[59] The *Avery* Court stated that, in order to show discrimination in jury selection, the defendant must make a prima facie case of discrimination; then the defendant's case alone is enough to shift the burden to the state to overcome.[60] This method is very similar to the test announced in *Batson*.[61] The Court decided *Avery* decades before *Batson*, but did not apply *Avery* to cases in the interim.[62] *Avery* appeared to be clear precedent for forming a relaxed standard of proof for the defendant, but *Swain* moved in the opposite direction and increased the burden.

B. Effects of Improper Use

The use of peremptory challenges for reasons other than choosing a fair and impartial jury raises the issue of their usefulness and appropriateness in our judicial system. The purported benefit of peremptory chal-

54. *Id.* at 97-98.

55. *Id.* at 98.

56. The Court provided only that neutral reasons be given. *Id.* Shifty eyes, uncombed hair, and large feet are all neutral reasons. Only the realms of the human imagination can place a limit on such a standard.

57. 345 U.S. 559 (1953).

58. *Batson*, 476 U.S. at 84 n.3, 88, 96.

59. *Avery*, 345 U.S. at 561.

60. *Id.* at 562-63.

61. The *Avery* test is a skeletal form of the *Batson* test. *Batson* sets forth steps that the defendant must use to establish a prima facie case of discrimination. 476 U.S. at 96. *Avery* only states that a prima facie case must be made. 345 U.S. at 563. *Batson* provides that after the defendant makes a prima facie case of discrimination, the prosecutor must give neutral reasons for the questioned challenges. 476 U.S. at 97. *Avery* only provides that after the defendant makes a prima facie case of discrimination, the burden shifts to the State to overcome. 345 U.S. at 563. *Avery* does not provide the type of reasons necessary for the State to use to overcome the burden.

62. *Avery* was decided in 1963, 33 years before *Batson*.

lenges is a more fair and impartial jury than could be achieved without the use of such challenges.[63] This view of jury selection ignores the fact that peremptories have been used to discriminate,[64] which defeats their purpose of fairness and impartiality.

Uncontrolled use of peremptories affects the challenged juror, also. The potential juror, who is excused by peremptory challenge, loses his right, at that particular time, to participate in the legal system. This is an important right reserved for law-abiding citizens. To many people, jury duty may be the only time that the legal system has an opportunity to directly touch and influence their lives with an experience that will not soon fade. It is unfair, indeed, to snatch from such people this reward and opportunity, based on some inference, for example, that they may be too old to sympathize with the defendant or too poor to sympathize with the state.

IV. DISCUSSION: PEREMPTORY CHALLENGES IN NEW MEXICO

A. Statutes

New Mexico statutes provide for a varying number of peremptory challenges, based on the level of court hearing the case and the severity of the possible punishment for the offense charged.[65] For example, in New Mexico, an offense punishable by death or by life imprisonment, which would be heard at the district court level, would permit twelve peremptory challenges for the defense and eight for the state.[66] In all other cases, the defense would be permitted five peremptory challenges, and the state would be permitted three peremptories.[67]

B. Modern Cases

The *Batson* decision was the basis for the New Mexico Court of Appeals to reverse and remand *Sandoval*.[68] In *Sandoval*, the trial judge was unaware of the new standards and procedures that *Batson* presented, and

63. *Swain*, 380 U.S. at 212.

64. *Batson*, 476 U.S. at 98-99. "In 100 felony trials in Dallas County in 1983-1984, prosecutors peremptorily struck 405 out of 467 eligible [B]lack jurors." *Id.* at 104 (Marshall, J., concurring). "[I]n 13 criminal trials in 1970-1971 in Spartansburg County, South Carolina, involving [B]lack defendants, prosecutors peremptorily challenged 82% of [B]lack jurors." *Id.* at 103.

65. N.M.R. CRIM. P. §§ 7-605(C), 6-605(C), 5-606(D) (1978). Actually, the severity of the offense charged would also determine what level of court would hear the case. An exception to this is that petty misdemeanors and misdemeanors can be heard in a magistrate court as well as a metropolitan court. The same number of peremptories are allowed in both of those courts, for the same category of offense charged. N.M.R. CRIM. P. §§ 7-605(C), 6-605(C) (1978).

66. N.M.R. CRIM. P. § 5-606(D)(1)(a) (1978).

67. *Id.* at (D)(1)(b).

68. *Sandoval*, 105 N.M. at 699, 736 P.2d at 504.

applied the law as it stood before *Batson*.[69]

The law concerning peremptory challenges in New Mexico, prior to *Sandoval*, was set forth in *State of New Mexico v. Crespin*.[70] In *Crespin*, the state exercised a peremptory challenge against the only Black member of the jury venire.[71] Crespin claimed error to the New Mexico Court of Appeals, because the trial court refused to require the state to explain its reasons for the challenge.[72] This was an issue of first impression in New Mexico.[73]

The *Crespin* court recognized the requirement, from *Swain*, of showing systematic exclusion and provided two techniques for showing such systematic exclusion.[74] The defendant could show a pattern of discrimination, on the part of the prosecutor, in cases beyond the defendant's,[75] or the defendant could show systematic exclusion by the absolute number of challenges in the defendant's case.[76]

The *Crespin* court recognized a presumption that the prosecution properly uses its peremptory challenges.[77] However, a helpful procedure for rebutting that presumption was noted in *People v. Wheeler*.[78] If a party believes that peremptory challenges are being used because of group bias, the party must fulfill three requirements to rebut the presumption in favor of proper use.[79] The three requirements are: first, the party must timely raise the point and make a prima facie case; second, the party must show that the persons challenged are members of a cognizable group; and third, the party must show that there is a strong likelihood that the challenges were made because of the group association.[80] In *Wheeler*, the prosecutor peremptorily challenged at least seven Blacks.[81] However, in *Crespin*, only one Black was challenged, so the court distinguished *Wheeler* on the facts.[82]

The requirement of broader-based discrimination is the standard used by the United States Supreme Court in *Swain v. Alabama*.[83] The *Crespin*

69. *Id.*
70. 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 488, 612 P.2d at 718.
75. *Id.*
76. *Id.*
77. *Id.* at 487, 612 P.2d at 717.
78. 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748, *reh'g denied*, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978).
79. *Id.* at 280, 148 Cal. Rptr. at 905, 583 P.2d at 764.
80. *Id.*
81. *Id.* at 265, 583 P.2d at 753, 148 Cal. Rptr. at 895.
82. *Crespin*, 94 N.M. at 487, 612 P.2d at 717.
83. *Swain*, 380 U.S. at 227.

court stated that it was controlled by *Swain*.[84] The *Crespin* court also recognized that the burden of proof on the defendant in *Swain* was too great, and so provided the alternate method from *People v. Wheeler*.[85]

In *State of New Mexico v. Davis*,[86] a case very similar to *Crespin*, the New Mexico Court of Appeals reiterated the standards set forth in *Crespin*.[87] The *Davis* court held that the exclusion by peremptory challenge of the sole Black venireman on the jury panel did not meet either standard pronounced in *Crespin*.[88] *Batson* alleviates the harsh burden of proof required in *Davis*, since the exclusion of even one juror for racially motivated reasons is grounds for reversal.[89]

In deciding *Sandoval*, the New Mexico Court of Appeals had the benefit of much guidance. The United States Supreme Court had decided *Batson*, and the Tenth Circuit Court of Appeals had decided *United States v. Chalan*,[90] which interpreted *Batson*.

C. Tenth Circuit Court of Appeals

Chalan, an American Indian, was convicted of first degree murder, robbery, and the use of a firearm during the commission of a violent crime.[91] During jury selection at his trial, all members of his race were removed from the jury venire.[92] One, and possibly two, were excused for cause, and the remaining two were removed by peremptory challenge by the government.[93] The defendant raised the issue of all members of his race being struck from the jury.[94] The prosecutor did not present a valid reason for striking one of the jurors, but the district court reasoned that the striking of one juror without a valid reason did not present a prima facie case of discrimination.[95]

The United States Tenth Circuit Court of Appeals held that Chalan had established a prima facie case for intentional discrimination, under the test set forth in *Batson*.[96] Chalan was a member of a cognizable racial group; members of his group were stricken by the government; and the government used peremptory challenges to strike the remaining member

84. *Crespin*, 94 N.M. at 487, 612 P.2d at 717.
85. *Id.* at 488, 612 P.2d at 718.
86. 99 N.M. 522, 660 P.2d 612, *cert. denied*, 99 N.M. 522, 660 P.2d 612 (Ct. App. 1983).
87. *Id.* at 524-25, 660 P.2d at 614-15.
88. *Id.*
89. *Crespin*, 94 N.M. at 487, 612 P.2d at 717.
90. 812 F.2d 1302 (10th Cir. 1987).
91. *Id.* at 1304.
92. *Id.* at 1312.
93. *Id.* The *Chalan* court noted that the striking of only one juror was questioned, since the other juror struck by peremptory challenge could have been excused for cause.
94. 812 F.2d at 1312.
95. *Id.*
96. *Id.* at 1314.

of his group from the jury.[97] The striking of one juror was sufficient to invoke the *Batson* test.[98] The *Chalan* court noted the particular susceptibility of peremptory challenges to be used for racial discrimination, since peremptory challenges traditionally have not required an explanation of reasons for the challenge.[99]

Chalan was convicted prior to *Batson*, but his conviction was vacated for a hearing on the reasons for the government's exclusion of the jury member.[100] The case of *Griffith v. Kentucky*[101] provides that *Batson* applies retroactively to all cases pending on direct review.[102] The Tenth Circuit Court of Appeals, therefore, correctly applied *Batson* to *Chalan*.

D. Effects of Sandoval

The decision in *Sandoval* is a decision based on binding precedent that could not be ignored. The *Sandoval* decision is a drastic step, in New Mexico, toward easing the burden on the defendant to prove racial discrimination during jury selection. *Sandoval* also provides an opportunity to eliminate all types of discrimination in jury selection.[103] The *Swain* Court stated that constitutional protection applies to any identifiable group that may be subject to prejudice.[104] Discrimination occurs against groups in our society based on age, social status, and many other reasons not racially motivated. Courts have spoken in terms of racial and sexual discrimination, but those seem no worse than any other type of discrim-

97. *Id.* The court seemed to weigh the cumulative effect of challenges for cause and peremptory challenges, to decide that the *Batson* test had been met. *Id.* The prosecutor had removed all members of the defendant's race, by using a combination of peremptories and challenges for cause. *Id.* at 1313-14.

98. *Id.* at 1314.

99. *Id.*

100. *Id.* at 1317.

101. 479 U.S. 314 (1987).

102. *Id.* at 327.

103. In State of New Mexico v. Hall, the New Mexico Court of Appeals adopted a restricted view of when a defendant can use the *Batson* test to show purposeful discrimination. 107 N.M. 17, 751 P.2d 701 (Ct. App. 1987), *cert. denied*, 107 N.M. 17, 751 P.2d 701 (1988). In *Hall*, the defendant, who is Black, contended that the prosecutor's use of peremptories to remove most Hispanic-surnamed members from the the jury venire denied the defendant certain rights. *Id.* at 705. The court held that the Batson test applies to members of the defendant's race. *Id.* The court held that Hall did not show substantial underrepresentation of his race, so he failed to meet his burden of proof. *Id.* This is a partial blow to any future expansion of *Sandoval*, but only in the limited situation of a defendant claiming purposeful exclusion of a race other than the defendant's.

The rationale offered in *Hall* is contrary to the United States Supreme Court's rationale in *Taylor*. 419 U.S. at 526. Taylor, a male, claimed that because females were excluded from jury duty by Louisiana statutes and the Louisiana Constitution, unless they requested in writing to serve, his Sixth and Fourteenth Amendment rights were violated. *Id.* The Supreme Court found that there was no rule that requires that only members of an excluded class can raise such claims. *Id.* The Supreme Court reversed and remanded Taylor's conviction, based on his claim of purposeful exclusion of women. *Id.* at 538.

104. *Swain*, 380 U.S. at 205.

ination that affects the impartiality of a jury. Perhaps the courts of New Mexico will view *Sandoval* as a means to the constitutionally guaranteed end of a jury selected without discrimination.

V. CONCLUSION

Defendants do not care what kind of discrimination resulted in their convictions. A conviction requires punishment, and, if obtained by the use of discriminatory jury selection, is a violation of constitutional rights.

If all types of discrimination in jury selection are eliminated, or at least held to the *Batson* standard, peremptory challenges will be of limited use. Perhaps that is the natural progression that should occur. Peremptory challenges should only be used to excuse a potential juror who is incapable of forming an unbiased decision, not to shape a jury to insure a favorable decision. *Sandoval* can be the first step in a movement to achieve the proper use of peremptory challenges in New Mexico.

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