Legal Analysis

Inflicting Soares: The Continuing Viability of Peremptory Challenges

By Charles E. Walker, Jr.

I. INTRODUCTION

This year marks the 25th anniversary of Batson v. Kentucky, 476 U.S. 79 (1986), in which the Supreme Court overruled its earlier decision in Swain v. Alabama, 380 U.S. 202 (1965), and declared as unconstitutional the 100 plus year practice of the use of peremptory challenges by prosecutors to exclude blacks from the jury venire. Whereas previously a defendant had to prove that the removal of black jurors was not only “purposeful” but “systemic,” in Batson the court invoked the 6th Amendment and shifted the burden to the prosecution to provide a “race-neutral” nondiscriminatory explanation. In overruling Swain, the Supreme Court relied in part on a seminal Massachusetts Supreme Judicial Court (“SJC”) decision, Commonwealth v. Soares, 377 Mass. 461 (1979), which, in turn, relied on the Massachusetts Declaration of Rights. Over a quarter of a century has passed since the Batson and Soares decisions, and yet there remains an ongoing and critically important debate about whether the goals of the Massachusetts Declaration of Rights and the 6th Amendment are effectuated or eviscerated by the continued use of peremptory challenges. This article will focus on the legacy of the Soares decision and how Massachusetts courts and legislators still struggle with problems inherent in the use of peremptory challenges in the trial courts.
II. BACKGROUND

In Soares, three blacks were tried and convicted in 1976 for the tragic murder of Andrew Poupolo, a Harvard College football player who was stabbed to death in the middle of a fight at the corner of Tremont and Boylston Streets in Boston’s then adult entertainment district, notoriously known as the “combat zone.” During the jury empanelment, the prosecutor struck “ninety-two percent of the available black jurors, and only thirty-four percent of the available white jurors” from the venire. Id. at 473.

The defendants claimed that the elimination of the black jurors deprived them of their right to a fair trial and impartial jury in violation of Articles 12 and 15 of the Massachusetts Constitution. Defense counsel adeptly opted not to appeal on either the federal 6th Amendment (denial of right to a fair and impartial jury), or 14th Amendment (denial of right to equal protection) grounds in order to avoid the draconian standard enunciated by the U.S. Supreme Court thirteen years earlier in Swain.

The SJC boldly side-stepped Swain and, based on the Massachusetts Constitution, reversed the convictions and ordered a new trial. Chief Justice Paul Liacos, writing for the majority, found that the prosecutor’s “exercise of peremptory challenges to exclude members of discrete groups” based on their race violated Article 12 of the Massachusetts Declaration of Rights. Id. at 486.4

As such, Massachusetts joined California as one of only two states whose state supreme courts: 1) abandoned the Swain presumption that the prosecutor’s exclusion of blacks from a jury was validly exercised; and 2) established a three step process that requires a) an objection shouldered by a prima facie showing of discrimination, b) the burden shifting to the prosecutor to provide “race-neutral” justifications for the exclusion; and c) the court’s determination as to whether that explanation is pretextual. Id. at 486; People v. Wheeler, 583 P.2d 748 (Cal. 1978); see also Batson, 476 U.S. at 105, 108.5 Chief Justice Paul Liacos added “…we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories [sic] from sham excuses belatedly contrived to avoid admitting facts of group discrimination.” Id. at 477 n. 12 (citing Wheeler, 22 Cal. 3d 258 (1978)).
III. EXPANSION OF SOARES


IV. INFLECTING SOARES

a) A Challenge for the Challenges

Without question, the implementation of the Soares/Batson burden shifting to the peremptory challenger to articulate reasons for the dismissal of the potential juror has presented the greatest challenge for both civil and criminal litigants. The sufficiency of the reasons is at the core of the challenge to reconcile the need for a fair and impartial jury with the trial court’s and the attorneys’ needs to strike jurors perceived to be biased. Once a defendant makes a sufficient showing of impropriety, the burden shifts to the prosecutor to provide a group-neutral reason for challenging the venire person in question. Soares, 377 Mass at 486. Mere denials are not enough to satisfy the justification for an alleged discriminatory exclusion. Courts have found that neutral justifications that are “implausible,” “silly” or “fantastic” are adequate so long as they are facially and racially neutral and substantiated. See Purkett v. Elem, 514 U.S. 765 (1995) (2 black jurors had “long curly unkempt hair”, “mustache and goatee type beard…[and] looked suspicious”). “The prosecutor must give a `clear and reasonably specific’ explanation of his `legitimate reasons’ for exercising the challenges.” Batson, 476 U.S. at 98 n.20 (quoting Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)). The reasons must be “personal to the juror and not based on the juror’s group affiliation.” Commonwealth v. Young, 401 Mass. 390, 401 (1987) (citing Soares, 377 Mass. at 488); Commonwealth v. Boticelli, 51 Mass. App. Ct. 802, 810 (2001). “[A] legitimate reason is not a reason that makes sense, but a reason that does not deny equal protection.” Purkett, 514 U.S. at 766.
The trial judge must undertake a “meaningful evaluation of the reasons given” by the Commonwealth for making the challenges. *Commonwealth v. Mathews*, 31 Mass. App. Ct. 564, 571 (1991), and determine “the sufficiency of any justification advanced for the exercise of the challenge.” *Id.* at 569. Once the judge decides that an adequate reason exists for exercising the challenge, an appellate court will accord substantial deference to the decision if it is supported by the record. *Fryar*, 414 Mass, at 740; see also *Batson*, 476 U.S. at 98, n.21; *Soares*, 377 Mass. at 486.

As a result of *Soares*, the judgment of the trial courts in ruling on peremptories has come under rigid scrutiny. In *Commonwealth v. Maldonado*, 439 Mass 460 (2003), the prosecutor used his peremptory challenges to dismiss the only two black jurors for the panel and offered as justification that “…He’s single all his life… [and] …It’s just a feeling.....” The Appeals Court reversed the conviction because the trial judge failed to make a finding as to whether the reason “was bona fide.” The Appeals Court gratuitously added that “the proffered reason for the challenge… he was fifty-five years old and childless… [was] no apparent reason … to keep a juror off the panel…." *Id.* at 457-58.

In another example, after the trial court dismissed three out of the five black jurors “for cause” in *Commonwealth v. Burnett*, 418 Mass. 769 (1994), the prosecutor challenged the two remaining black jurors because one worked with youth. The race-neutral reason proffered was that “people who work with young people have certain feelings about youth and crime.” The trial judge made no findings as to whether the “work[s] with young people” was a bona fide reason, and the conviction was reversed.

In *Commonwealth v. Calderon*, 431 Mass. 21 (2000), the trial judge failed to make a finding on the veracity of the prosecutor’s justification for dismissing the only black juror on the panel. The SJC reversed the conviction, independently concluding that that the prosecutor’s reason, “the juror’s husband was a cop” “sounded superficial.”

**b) Reforming the Reforms**

Attorneys opposing the abolition of peremptory challenges argue that such challenges are the only means to remove potentially biased jurors who survive the statutory removals by the trial judge “for cause.” The juror’s automatic inclusion threatens the fairness of the process and the entire jury venire.

The proponents favoring abolition, however, maintain that peremptory challenges are neither constitutionally protected nor sanctioned. Peremptory challenges advance discriminatory practices by enabling parties to perceive a bias based on
stereotypes associated with an “identifiable group,” race, gender, national origin or sexual orientation. The requirement of proffering neutral justifications is an ineffective means to augment discriminatory practices as most lawyers are adept at stating sufficient reasons to mask the underlying discriminatory intent for the exclusion.  

States have sought to reduce the risk of the continued constitutional abuses of peremptory challenges through legislative reforms. While the proposal to abolish peremptory challenges has been entertained, no states to date have passed laws to summarily outlaw their use. Most states have adopted a variety of reforms that range from reducing the number of challenges, or the number of challenges per trial, or the number of challenges for prosecutors only.

Massachusetts, like the majority of states, allocates the same number of challenges to prosecution and defense. Generally, nearly every state allocates more challenges for serious felonies and grants each side between two and six challenges for misdemeanors. In capital cases, the majority of states allocate an average of ten challenges for each side, while others grant as few as four or six, or as many as twenty-five.

There have also been non-legislative proposals that would require the prosecutor to show that he/she would have struck the juror had “[the juror] been white.” The trial judge would concomitantly be required to compare and contrast the prof ered reasons as against the characteristics of the white jurors in the jury venire. Similarly, there are venues that have experimented with the creation of jury venires of dismissed jurors to compare and contrast their deliberations and findings against the jury chosen.

V. A RESOLUTION

It is a classic oxymoron to require a litigant to explain the reasons for exercising a peremptory challenge. The whole notion of having to draw reasons from a lawyer and to subject that lawyer, an officer of the court (often the prosecutor), to a credibility determination is arguably as repugnant to the whole notion of justice as the sordid history of the discriminatory abuses of the challenges. Few can quarrel with the history of abuses that paved the way for this unfortunate conundrum. The balm to be applied after over 25 years of Batson and Soares is for the Bar to explore new mechanisms to restore the trial lawyers’ confidence in the potential jurors selected, and to abolish the creative justifications that mask discriminatory dismissals as opposed to abolishing the peremptory challenges themselves.
1 Under the early English judicial system from which the Anglo-American Judicial process is derived, the Crown and its allies had unlimited peremptory challenges to remove “an unacceptable person that appeared on a jury list.” In 1305, Parliament passed a law that limited their use to “challenges for cause certain.”


2 Generally under sections 28 and 29 of M.G.L. c. 234, attorneys may seek to remove unwanted jurors: 1) “for cause” where following a statutory inquiry the trial judge determines that the juror is incapable of being “indifferent,” and 2) via peremptory challenges which unless subject to a *Batson/Soares* objection, the attorney may remove the juror without an explanation.

3 In 2010, retiring Chief Justice Margaret Marshall exclaimed in a concurring opinion that, “it is time to abolish them entirely or to restrict their use substantially.” *Commonwealth v. Rodriguez*, 457 Mass. 461, 488 (2010).


5 In 1978, Hon. Frederick L. Brown, Associate Justice of the Massachusetts Appeals Court, co-authored a law review article urging the abolishment of peremptory challenges by prosecutors alone. See Brown, McGuire and Winters, *supra at 234 n. 239*. Seven years later, in his concurring opinion in *Batson*, Justice Thurgood Marshall agreed in large part with the wisdom of eliminating peremptory challenges but disagreed with Judge Brown’s admonition to limit this restriction to prosecutors. In balancing limited versus absolute abolishment of peremptory challenges Justice Marshall was uncompromising in his conclusion:

“If the Prosecutor’s Peremptory Challenge could be eliminated only at the cost of eliminating the defendant’s challenge as well, I do not think that would be too great a price to pay.” *Batson*, 476 U.S. at 108.

6 See footnote 3.

7 As better stated by Justice Antonin Scalia, peremptory challenges when used to “eliminate extremes of partiality on both sides, … assures the selection of a qualified and unbiased jury.” *Holland v. Illinois*, 492 U.S. 474 (1990).

8 Justice Thurgood Marshall, in his concurring opinion in *Batson* wrote that “any prosecutor can easily assert facially neutral reasons for striking a juror and trial courts are ill-equipped to second guess those reasons…; consequently, ‘merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the legitimate use of the peremptory challenge.’ *Batson*, 476 U.S. at 105.

9 In 1974, “at the urging of the Chief Judge of Suffolk County Superior Court,” State Representative David Mofenson filed a bill that would have eliminated all peremptory challenges in both criminal and civil matters. See Brown, McGuire and Winters, *supra at 239*. The bill did not pass and has never, to date, been reintroduced.

10 Connecticut gives twenty-five challenges to each side in capital cases. California, Indiana, New York, Pennsylvania, and South Dakota give each side twenty. Whereas Delaware, Georgia, Maryland, New Hampshire, New Jersey, South Carolina and West Virginia give the defendant more peremptory challenges than the prosecution.


12 *Id.* at 381.


14 See Ford, *supra at 381.*