

## Peremptory Challenges in Jury Selection

As an accompaniment to the “Jury Selection – Live!” presentation, which will be a real-time mock jury selection at the plenary, we have compiled the following analysis of cases throughout the country that address issues associated with peremptory challenges and issues associated with them.

### A Case Study of Peremptory Challenges

It is well known that the use of peremptory challenges based on race violates the Equal Protection Clause and Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79 (1986); *Edmonson v. Leesville Concrete Company*, 500 U.S. 614 (1991) (extending this prohibition to civil cases). As we all know, an opposing party’s challenge to the use of a peremptory strike in violation of the Equal Protection Clause is referred to as a *Batson* Challenge. Despite this long precedent and Constitutional Amendments, the use of peremptory challenges continues to pose issues and problems at trial.

For instance, the U.S. District Court for the Northern District of Illinois found that when an attorney applies facially neutral criteria (e.g. home ownership, employment status) inconsistently between different races, that can support a finding of pretext and, therefore, discrimination. *Richardson v. Hardy*, 855 F. Supp. 2d 809 (N.D. Ill. 2012).

### Age, Demeanor, and Vocation

Even though people over 40 years of age are in a protected class for employment purposes, a juror’s age is a valid and race-neutral reason to strike a juror. *Sanchez v. Roden*, 808 F.3d 85, 90 (1st Cir. 2015); *Sims v. Brown*, 425 F.3d 560, 574-76 (9th Cir. 2005) (upholding the use of peremptory strike due to juror's youth and lack of life experience); *Manning v. Campbell*, No. PWG-19-2450, 2022 BL 235702 (D. Md. July 06, 2022) (*Batson*’s holdings do not extend to the use of “Generation X” or “Blue Collar” jurors as a discriminatory use of peremptory challenges).

Attorneys also routinely rely upon a juror’s demeanor as a valid basis for exercising a peremptory challenge. However, even that facially-valid justification for striking a juror can be deemed pretextual. *Harris v. Hardy*, 680 F.3d 942, 965 (7th Cir. 2012) (“demeanor-based explanations for a strike are particularly susceptible to serving as pretexts for discrimination.”) The most common problem with using demeanor as the basis for a peremptory strike is when the trial court does not make a finding on the record of the credibility or validity of this explanation to justify the challenge. *United States v. Rutledge*, 648 F.3d 555 (7th Cir. 2011); *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). When the trial court does not make such a finding and the peremptory strike is challenged, it cannot be affirmed. *United States v. McMath*, 559 F.3d 657 (7th Cir. 2009). The trial court’s observation of the demeanor is typically considered the best evidence. *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). So, when confronted with a challenge to a strike based on juror demeanor, make sure to make your record on your reasoning and ask the court to make findings that bolster that reasoning.

As discussed in further detail below, Washington’s General Rule 37, for example, sets stringent restrictions on use of peremptory challenges on behaviors and characteristics that are commonly pretextual. If a party intends to strike a juror for “behavior” that includes sleeping, inattentiveness, staring or failing to make eye contact, exhibiting a “problematic” attitude, body language, or

demeanor; or providing “unintelligent or confused answers,” the party must give “reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.” Wash. GR 37(i). Absent verification from the court, these reasons for a peremptory strike will result in a sustained challenge.

While perhaps not the most common reason, there is authority at the federal and state level that will uphold the use of a peremptory strike for a juror’s outfit when it is deemed disrespectful. *United States v. Biaggi*, 853 F.2d 89 (2d Cir. 1988) (disrespectful shirt); *United States v. Rodriquez*, 859 F.2d 1321, 1324 (8th Cir. 1988), cert. denied, 489 U.S. 1058 (1989) (disrespectful chain outside juror's clothing); *Taitano v. Commonwealth*, 358 S.E.2d 590, 591 (Va. Ct. App. 1987) (striking a juror who was "dressed as if he were going to work at the shipyard"). In that same vein, the Supreme Court also upheld a strike due to a juror’s long, unkempt hair, a mustache, and beard, because those reasons are race neutral. *Purkett v. Elem*, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).

### Gender, Sexual orientation, & Gender Identity

It is well-settled that using peremptory strikes on the basis of gender and sexual orientation is prohibited. *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994) (gender) *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014) (sexual orientation). However, gender identity is a less developed area of the law as it relates to peremptory challenges. There is no clear consensus among the circuits about the use of peremptory strikes for transgendered potential jurors, although, under federal law, transgendered individuals have not been recognized as a protected or suspect class. *Kaao-Tomaselli v. Butts*, No. 11-00670, [2013 BL 27730], 2013 U.S. Dist. LEXIS 13280, 2013 WL 399184 , at \*5 (D. Haw. Jan. 31, 2013) (“Plaintiff puts forth no evidence that her status as a hermaphrodite, or transgender female, qualifies her as a member of a protected class. Nor has this court discovered any cases in which transgendered individuals constitute a 'suspect' class”). Yet, on a state level, many “blue states” prohibit discrimination based on gender expression or identity, so the chances of a peremptory strike being successfully challenged as discriminatory in those states are higher.

### Body Weight and Disability

In general, striking a juror due to obesity or being overweight does not violate the Equal Protection clause. *United States v. Santiago-Martinez*, 58 F.3d 422 (9th Cir. 1995) (holding that it is not an Equal Protection violation to use a peremptory strike on the basis of obesity). However, the Second Circuit Court of Appeals remanded a case where a prosecutor used a peremptory strike to an overweight African American juror, that the trial court did not make an adequate finding as to the race-neutral explanation for striking the juror. *Dolph v. Mantello*, 552 F.3d 236 (2d Cir. 2009).

Disability can be upheld as a proper use of a peremptory strike when it may legitimately be argued that it affects a person’s ability to serve as a juror. *United States v. Harris*, 197 F.3d 870 (7th Cir. 1999) (upholding the dismissal of an African American juror with multiple sclerosis as valid because her medication made her drowsy). Even though alcoholism is recognized as a disability pursuant to the ADA, alcoholism is not a protected class, so *Batson* does not prohibit the use of

peremptory strikes based on alcoholism. *State v. Kleypas*, 40 P.3d 139 (Kan.2001) (overruled in part on other grounds by *State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004)).

### Religion

It remains unsettled whether religion is a valid basis for exercising a peremptory strike. *United States v. DeJesus*, 347 F.3d 500 , 506-07 (3d Cir. 2003) (affirming use of peremptory strikes for heightened religious involvement, not specific religious affiliation); *United States v. Heron*, 721 F.3d 896 (7th Cir. 2013) (declining to extend *Batson* protections to religion due to failure to preserve the issue for appellate review); *United States v. Berger*, 224 F.3d 107 , 120 (2d Cir.2000) (declining to decide whether *Batson* extends to strikes based on religious affiliation because prosecutor provided a reason for the strike based on something other than juror's membership in a protected class). Just this past February, the Supreme Court denied a petition for a writ of certiorari in a case where jurors were dismissed due to their religious beliefs. *Missouri Department of Corrections v. Jean Finley*, No. 23–203, cert. denied. February 20, 2024.

### Implicit Bias

In 2018, the Washington Supreme Court was the first state to introduce a rule, known as General Rule 37, that expands prohibited reasons for exercising peremptory challenges. The rule applies to both civil and criminal trials. The purpose is to treat implicit bias in jury selection the same as explicit bias. The Washington State Court stated that these enumerated reasons have historically been associated with improper discrimination but will pass a *Batson* Challenge since they are race neutral. The below reasons are presumptively invalid for exercising a peremptory strike.

- (i) having prior contact with law enforcement officers;
- (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
- (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
- (iv) living in a high-crime neighborhood;
- (v) having a child outside of marriage;
- (vi) receiving state benefits; and
- (vii) not being a native English speaker

Since Washington enacted GR 37, a number of other states have taken steps to address implicit bias in peremptory strikes. Arizona eliminated peremptory challenges altogether from the rules of criminal and civil procedure in 2022. Connecticut, New Jersey, and California have also passed laws to address ongoing discrimination and implicit bias in peremptory strikes.

### Key Take-Away

Effective use of peremptory strikes is crucial to selecting a jury. However, we must always be mindful of the myriad ways that strikes may be challenged under *Batson*. Even if an attorney defeats a *Batson* challenge, it is imperative to ensure the trial court makes a sufficient record to withstand later scrutiny on appeal. The most effective way to do this is to request that the presiding judge articulate the reasons why the peremptory strike does not run afoul of *Batson*.