

A Jury of Your Peers: Why You Are Not Actually Tried by a Jury of Your Peers A Step-by-Step Guide to Jury Selection

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If you were charged with murder, would you want a trial by jury? After all, the Ohio Constitution Article I, Section 10 specifically requires “a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.” More specific details of what a jury is, does, how it is selected, and its limitations can be found in the Ohio Revised Code, specifically Chapter 2945.¹

Ultimately, whether a defendant waives their constitutional right to a jury trial rests entirely with the defendant. Their attorney can advise them of the benefits and risks, but ultimately, that decision is up to the defendant. In my experience, the majority of cases involving a defendant on trial for a felony crime are presented to a jury. One of the possible reasons for this choice is that for a jury to convict a defendant, the entire jury of twelve individuals must unanimously agree the prosecutor proved every element of the crime beyond a reasonable doubt. Due to the unanimity requirement, if only one juror feels the prosecutor does not prove every element beyond a reasonable doubt, then the defendant is not convicted. When a jury is unable to decide unanimously (either for guilty or not guilty), the case is considered to be a hung jury. If a jury is unable to come to a unanimous decision, the jury is then dismissed, and a mistrial is declared.

Often, the declaration of a mistrial based on a hung jury may lead to additional plea negotiations. A defendant who narrowly escaped a conviction by an eleven (guilty) to one (not guilty) verdict may have additional incentive to reach a plea agreement with the prosecutor. Conversely, a prosecutor who managed to squeak out a hung jury with eleven jurors voting for not guilty and one juror voting for guilty has additional incentive to make a better plea offer.

In addition to offering a plea to the defendant, the prosecutor may also choose to dismiss the case entirely or simply move forward again without extending an additional plea offer. In the event the case is not disposed of by dismissal or plea agreement, the parties begin a new jury selection with a new jury pool. Selecting a

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¹ See generally OHIO REV. CODE ANN. § 2945 (West 2023).

fair and impartial jury is always challenging. Especially when you include the strikes given to each side, the various ways a potential juror can be removed from the pool, and the limitations for removing a juror.

INTRODUCTION

A trial by jury is one of the most fundamental constitutional rights that exist. The ability of a defendant to choose whether to have a group of citizens determine his guilt or innocence rather than a judge is a critical decision. Although the United States Constitution guarantees a defendant a right to a trial by jury, a defendant can waive his right to jury trial and have the case tried by the judge. One of the key aspects of trying a case to the jury boils down to numbers—specifically, the amount of people needed for a conviction.

For a bench trial (trial by the judge), all that is needed for a conviction is one person (the judge) to believe the government has proven beyond a reasonable doubt all of the essential elements of the crime. However, if the case is tried before a jury, all twelve jurors must unanimously find that the prosecution has proven beyond a reasonable doubt every element of the crime(s) charged. This has the practical effect of upping the requirement for attaining a conviction when the case is tried to the jury.

There are some potential benefits, however, that come from trying a case before the judge instead of a jury. Those benefits include the judge's likely ability to not be swayed by bias or prejudice. Sometimes a defendant is not likeable to the general public or has something distasteful in his past that would be revealed during trial. If a judge knows his role, he should be steadfast in resisting prejudice of the defendant. Further, if the victim is particularly sympathetic, the judge should also be better able to set aside feelings of sympathy when judging the facts of the case, whereas the common juror may not be.

Also, the judge may be able to set controversial items aside and simply judge the case on its merits. For example, a juror might assume the defendant is a habitual offender simply because they have a prior criminal record. Conversely, the judge has better potential to see through past offenses, compartmentalize potentially biased material, and analyze the case based entirely on the merits.

An analysis of the jury selection process is important to determine if the best outcome for the defendant is having a judge or a jury as the factfinder.

I. JURY

In most of Ohio, jury selection proceeds in a variety of ways. For brevity, I will narrow the scope of jury selection to state felony cases. This scope therefore excludes non-capital (non-death penalty), federal, and misdemeanor cases. I have prosecuted cases in many counties throughout the state of Ohio. Based on the jurisdictions and counties where I have prosecuted cases, most jury selection processes happen as follows, absent some minor alterations.

First, the jury panel is selected. Often, the jury pool is selected from registered voters in the county for which there is jurisdiction (i.e., where the crime occurred). In larger cities, a time and place to appear is designated. Conversely, in smaller jurisdictions, the jurors are instructed to call the court days or weeks prior to trial to determine if they will be needed for jury selection. If there is a trial during that time, those jurors are told to come to court for individual case jury selection. For the larger jurisdictions, the jurors are told via letter or juror subpoena to appear at the courthouse at a specific time and place.

Once the jurors arrive at their designated time and place, the jurors fill out a questionnaire. In some jurisdictions, the court gives this questionnaire to jurors in advance to fill out and send back. This questionnaire serves as a preliminary first step to determine if the juror can remain fair and impartial. One of the most fundamental aspects of being a juror is an ability to remain fair and impartial. Usually, this questionnaire contains generic questions related to jurors' duties, such as: "Do you hate police?" "Do you think everyone who is arrested is guilty?" "Have you heard about this case before?" and "Are you able to find a person guilty if the state has met its burden of proof?"

The questionnaire might also include demographic information that could suggest to the court whether the juror is fair and impartial. These questions may include questions like: "Where do you work?" "Do you know any of the parties involved?" and "Do you understand English?"

Based on these questionnaires, the lawyers will then have an opportunity to exercise challenges for cause. Challenges for cause are based on the premise that the identified juror cannot be fair and impartial because of their background, beliefs, or answers given in their questionnaire. Usually, this step occurs once the jurors arrive in court and are able to undergo further scrutiny by the parties or the judge under oath.

Once the juror pool is assembled, individual jury selection begins. Each side (prosecution and defense) is given time to question the jurors to determine whether any juror should be removed from the pool. These questions can be general, such as asking a juror if she has ever been a victim of a crime, what types of podcasts the jurors listen to, or what books they enjoy reading. The questions can also be more specific, such as asking how a juror felt during the George Floyd protests, how many children they have, or what their favorite criminal law movie is. These nuances often give the lawyers subtle hints as to which jurors will be sympathetic to their arguments and which jurors may lean more toward the opposing views.

Either the prosecution or defense may challenge a juror for cause or via a peremptory strike. A peremptory strike is a strike used by any party for (almost) any reason. As long as the strike is not made with the intention of removing a juror based upon sex, race, or national origin, the strike will be honored, and the potential juror will be stricken from the rolls and dismissed. In felony trials, each side is given four (sometimes three) peremptory strikes to use at their discretion.

Given that lawyers only have a set number of peremptory strikes, they often cannot afford to use them on every juror they prefer to remove. Inevitably, there are

jurors that a trial lawyer would like to remove simply because the juror gives them “bad vibes.” However, those “bad vibes” often do not rise to the level to justify using a peremptory strike.

Practically, the judge seats all the jurors in some sort of order. Usually, this is in the numerical order that they were given by the jury commission. As a result, since lawyers have a limited number of peremptory strikes, they often cannot afford to use them on every juror they might prefer to remove. If no strikes were exercised (challenges for cause or preemptory challenges) the first twelve jurors (out of however many were called and appeared for jury service) would be the selected jury panel.

When a strike is exercised within the panel of the first twelve jurors, a juror from outside of the panel of the first twelve moves in to fill the vacant spot. Therefore, lots of strategic decision making become crucial. The lawyers are typically not aware of who their counterpart intends to dismiss from the jury, making this process even more strategically challenging.

Imagine the first twelve jurors are seated, with another 28 potential jurors waiting to be selected. A lawyer may feel uneasy about juror number six, but if she strikes juror number six, then potential juror number thirteen will take his place. If the lawyer has an even worse feeling about juror number thirteen, she faces a difficult decision. Further, she may run out of peremptory challenges. Therefore, she could be stuck down the road with a juror not favorable to her case. It is important to note that while peremptory strikes are limited, there is no cap on challenges for cause. Additionally, a juror can be stricken for cause at any point during the jury selection process if it is discovered that juror cannot be fair and impartial.

Once all challenges for cause have been exercised and peremptory challenges used by all sides (or a party chooses to forgo using remaining challenge(s)), the jury is set. The jurors are then sworn in and the trial proceeds. For a prosecutor, this process can be tricky because they are the first to exercise preemptory challenges. As a result, the prosecutor will be the first to use all of their challenges, thus giving the defense the final opportunity to either strike an individual or accept the jury panel as it stands. The defense can ultimately decide if they are satisfied with the current set of jurors or take another crack at striking a juror. If the defense attempts to strike another juror, the defense puts a person in a newly created open position. Because the defense has the last challenge, the prosecutor would be stuck with whomever that person is and whatever beliefs they have (unless those beliefs rise to the level of a challenge for cause.)

II. ISSUES AND CHALLENGES IN JURY SELECTION: REPRESENTATION AND DIVERSITY IN JURY PANELS

Most people will tell you that a person has a right to trial by a jury of one’s peers. Contrary to popular belief, a trial by a jury by one’s “peers” is not in the text of the United States Constitution. Nor is that requirement in the Ohio Constitution.

In typical lawyer fashion, a jury of one's peers likely differs from what one might think. "Peer" means an "equal." This has been interpreted by courts to mean that the available jurors include a broad spectrum of the population, particularly of race, national origin, and gender. Jury selection may not involve a process that excludes those of a particular race or intentionally narrows the spectrum of possible jurors. However, it does not mean that women must be tried by women, Asians by Asians, or African Americans by African Americans.

Recently, I discussed a case that I prosecuted with someone who was surprised to find out that it would be just as improper for me to specifically kick a juror of a particular race off the jury even if my motivation was simply to include jurors of a different race. This is true regardless of the race of the defendant. For instance, if the defendant was Black, the defense attorney could not attempt to stack the jury with Black jurors. That would be just as improper as the prosecutor attempting to eliminate all of the Black jurors.

Defendants may object if they believe their particular jury pool lacks sufficient representation of their race or excludes it entirely. However, such a claim is very hard to make successfully. Ohio Criminal Rule 24(F) governs jury selection:

In order to establish a violation of the fair representative cross-section of the community requirement for a petit jury array under the Sixth and Fourteenth Amendments to the United States Constitution, a defendant must prove: (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the representation is due to systematic exclusion of the group in the jury-selection process.²

In *Taylor v. Louisiana*, the Supreme Court held that "selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial."³ Thus, "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community."⁴ However, there is "no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population," nor is there any right to "a jury of any particular composition."⁵ "The Sixth Amendment guarantees only the opportunity for a representative jury, not a representative jury itself. The focus, therefore, is properly

² *State v. Fulton*, 57 Ohio St. 3d 120, 120 (1991); *State v. Hopkins*, 112 N.E.3d 98, 125 (Ohio Ct. App. 2d Dist. 2018).

³ *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

⁴ *Id.* at 538.

⁵ *Id.*

placed on the procedure of selecting juries, not on the outcome of that process.”⁶ Ohio's statutory scheme for the selection of jurors is based upon the principle that qualified jurors will be selected in a random manner.⁷

Four years after the Taylor decision, the United States Supreme Court established a three-part test to demonstrate a prima facie violation of the fair cross-section requirement: (1) the defendant must show that the group alleged to be excluded is a “distinctive” group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of persons in the community; and (3) the under-representation is due to systematic exclusion of the group in the jury selection process.⁸ In 1991, the Ohio Supreme Court adopted this test in *State v. Fulton*.⁹

In *State v. Gulley* the Supreme Court held that, while the appellant easily establishes the first prong of the Duren/Fulton test (as African-Americans have long been considered a “distinctive” group), the appellant fails to establish the second and third prongs.¹⁰ The appellant offers no evidence that (1) African-Americans are unfairly and unreasonably represented in relation to the number of such persons in Clermont County, and (2) such under-representation is due to the systematic exclusion of African-Americans from the jury selection process.¹¹ There was no allegation that the jury array was not randomly chosen.¹² The appellant did not “allege that racist jury selection occurred.”¹³ The parties stipulated that the Clermont County Jury Information sheets do not elicit racial information, and that all the potential jurors who appeared in response to the call for jury duty on June 6, 2005, were Caucasian.¹⁴ The appellant failed to establish a prima facie case that his constitutional rights were violated by a jury that was not fairly or impartially drawn from Clermont County's venire.¹⁵

III. THE IMPACT OF IMPLICIT BIAS ON JURY SELECTION

There are not many guardrails for attorneys to prevent them from striking a person from the jury pool based on an improper reason. Without guardrails, implicit bias may creep into the analysis. Mostly, the attorneys have wide discretion to strike

⁶ *Phillips v. Value City Stores, Inc.*, No. 96APE12-1711, 1997 WL 578950, at *16 (Ohio Ct. App. Sept. 16, 1997).

⁷ See generally OHIO REV. CODE ANN. § 2313 (West 2023).

⁸ *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

⁹ *Fulton*, 57 Ohio St. 3d at 120.

¹⁰ *State v. Gulley*, No. CA2005-066, 2006 WL 1064062, at *3 (Ohio Ct. App. 2006).

¹¹ *Id.*

¹² *Id.* (citation omitted).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *State v. Gulley*, No. CA2005-066, 2006 WL 1064062, at *3 (Ohio Ct. App. 2006).

individuals from the jury pool. It is presumed that the attorneys are striking individuals from the jury pool based on permissible reasons. Generally, challenges for cause require some sort of explanation as to why that juror should be stricken. Conversely, peremptory strikes generally occur without the party giving a reason for the strike. It is not until the opposing party objects to the strike that the rationale for the strike is questioned.

The leading case that deals with using a peremptory strike for an improper reason is *Batson v. Kentucky*. In *Batson*, in exercising a peremptory strike to remove a prospective juror, the United States Supreme Court ruled that a party may not discriminate based on race.¹⁶ Later courts have ruled that *Batson* challenges are not limited to race either. *Batson* challenges can be applied to gender and other forms of discrimination as well.¹⁷

Operationally, if an attorney decides to use a preemptory challenge to strike a juror and the opposing party feels that strike was based on an improper reason, that party must follow a process delineated in *Batson*. First, the opponent of the preemptory challenge must make a *prima facie* case of prohibited discrimination. They must show (1) members of a cognizable group were preemptorily challenged and (2) an allowable inference of discrimination under the totality of the circumstances.¹⁸ This can include dissimilar treatment of equally situated jurors of different races. For instance, an attorney, knowing that a *Batson* challenge is a possibility, may ask a specific race of jurors more probing questions than other similarly situated jurors. That attorney may continue with the questioning, not relenting until that attorney has found something to justify the strike. However, this type of disparate probing will also violate the *Batson* rule.

If the opponent of the challenge establishes a *prima facie* case that the strike was improper, then the burden shifts to the proponent of the strike to offer a race-neutral explanation. That explanation need not satisfy the “challenge for cause” standard, but a general denial of discrimination is not enough. There must be some articulable explanation for the strike.

Examples of race-neutral reasons for a preemptory strike include, but are not limited to, evasiveness, demeanor, clothing, tattoos, hairstyle (unless that hairstyle is specific to a particular race, which would make a strike for hairstyle improper), employment, hobbies, intellect, attitude toward law enforcement, experiences with the criminal justice system, and political beliefs.

After the race-neutral reason is given, the Court must then determine whether the opponent of the preemptory strike has established purposeful discrimination.

If the court rules the race-neutral reason was the basis for the strike, then the strike will stand, and the individual will be removed from the jury. Conversely, if the court feels the race-neutral reason was not the basis for the strike, then that person will remain on the jury.

¹⁶ *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).

¹⁷ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

¹⁸ *Batson*, 476 U.S. at 96.

Despite the three-step process, the burden initially is on the opponent of the strike to prove purposeful discrimination. After the initial burden is overcome, then the proponent of the strike bears the burden to show that there was a permissible reason for the strike.

IV. DISCRIMINATION AND JURY SELECTION

Batson and the lineage of cases that follow discuss the various types of prohibited discrimination in jury selection. Those lineages of cases have held that discrimination based on financial status is not a prohibited form of discrimination. It is perfectly acceptable for an attorney to discriminate against a juror based on socioeconomic status. Not only may a juror be struck based on their lack of financial means but the jury process itself exacerbates the financial disparity between those able to serve on a jury and those not able to serve.

In Ohio, jurors receive daily compensation for their jury service. The rate varies from county to county. In Cuyahoga County, the daily rate for Common Pleas jurors is \$27 dollars.¹⁹ In Franklin County, that rate is \$30 per day.²⁰ Juror service can last for weeks or longer. Franklin County grand juries, for instance, are impaneled for four months.²¹ Further, there is no Ohio law that requires employers to compensate individuals for their jury service. For some people, this means that their entire financial means is around \$20 per day if they serve as a juror.

Given those dynamics, jurors face these limited possibilities when deciding whether to perform jury service or not:

- 1) Are they independently wealthy enough to not report to work during jury service?
- 2) Are they retired and therefore there is no need for an actual paycheck from an employer?
- 3) Does the juror work in a professional capacity and therefore has the ability to use flex time or leave time to serve on the jury?
- 4) Is the juror unemployed, thus eager to be a juror to earn the juror stipend?
- 5) Does the juror work at a job that does not allow her to take off work for jury duty?
- 6) Does the juror work at a place that requires the employee to be present and working to make money versus a salaried position?

¹⁹ *What to Expect During Jury Duty*, COMMON PLEAS COURT GENERAL DIVISION CUYAHOGA COUNTY, <https://cp.cuyahogacounty.gov/court-information/jury-duty/> [perma.cc/JKH6-NEY4].

²⁰ *Term of Service/Compensation*, FRANKLIN COUNTY COURT OF COMMON PLEAS, <https://www.fccourts.org/247/Term-of-Service-Compensation> [https://perma.cc/R6ZU-YKYN].

²¹ *Grand Jury*, FRANKLIN COUNTY COURT OF COMMON PLEAS, <https://www.fccourts.org/256/Grand-Jury> [https://perma.cc/PY4U-PGAK].

The fifth and sixth categories make up a large proportion of the potential jurors that are most like “a jury of the peers” of the defendants standing trial. Most of the defendants are trade workers or laborers. Yet, those individuals who are most similarly situated to them are left off of the jury pool because, financially, they are unable to forego a day’s or week’s worth of pay to sit for jury service.

The end result for the average defendant is likely to be a jury composed of persons who are either really in need of the \$20 per day juror stipend or individuals who do not have a concern with day-to-day juror pay. This dynamic may result in the lack of blue-collar jurors and lean more toward retirees, professional salaried employees, or those without jobs entirely.

Even though financial hardship does not automatically exclude a juror from the jury pool, potential jurors facing the reality of missing out on pay will likely be excused from jury service. Once the judge finds out that the individual will be distracted by the amount of money they are losing by sitting on the jury panel, and therefore, cannot provide the necessary attention the trial deserves, a challenge for cause is inevitable.

In *Chinnery v. Virgin Islands*, the court addressed whether socioeconomic status could be a valid race-neutral reason for striking a juror.²² The Chinnery court held that “the Superior Court continued to misapply *Batson* when it summarily rejected Chinnery’s race neutral explanation that he wished to strike the jurors due to the way they were looking at the alleged victim and because of the jurors’ social class.”²³ “[T]he [United States] Supreme Court has purposely set a relatively low bar at step two (of the *Batson* analysis). It, therefore, is rare for a case to be decided at this stage of the analysis. Indeed, ‘[t]he second step does not demand an explanation that is persuasive, or even plausible.’ Rather, the sole issue at step two ‘is the facial validity of the . . . explanation. Unless a discriminatory intent is inherent in the . . . explanation, the reason offered will be deemed race neutral.’”²⁴ Significantly, courts have, in numerous other cases, consistently characterized the same explanations Chinnery gave for wanting to strike prospective Jurors No. 3 and No. 4 as race-neutral.²⁵ Accordingly, the Superior Court, even if it could have

²² *Chinnery v. People of the Virgin Islands*, 55 V.I. 508, 518 (2011).

²³ *Id.* at 518.

²⁴ *Hardcastle v. Horne*, 368 F.3d 246, 257 (3d Cir. 2004) (quoting *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995)) (internal citation omitted).

²⁵ *See, e.g.*, *United States v. Katuramu*, 174 F. App’x 272, 275–76 (6th Cir. 2006) (holding juror’s socioeconomic class constitutes a race-neutral reason under *Batson*, even if counsel never questioned jurors about their socioeconomic status during *voir dire*); *United States v. Smalls*, 19 F.3d 1431, at *5 (4th Cir. 1994) (holding juror’s economic status is race-neutral); *United States v. Pofahl*, 990 F.2d 1456, 1466 (5th Cir. 1993) (same); *Rogers v. State*, 819 So. 2d 643, 649–50 (Ala. Crim. App. 2001) (holding way juror looked at defendant constituted race-neutral explanation under *Batson*); *Jones v. State*, 787 So. 2d 156, 156 (Fla. Dist. Ct. App. 2001) (holding way juror was looking at defendant was facially neutral reason for exercising peremptory challenge of juror); *Pleasants v. Alliance Corp.*, 543 S.E.2d 320, 325–26 (W. Va. 2000) (characterizing socioeconomic class and eye contact as facially neutral reasons for striking jurors under *Batson*); *Johnson v. State*, 959 S.W.2d 284, 291–92 (Tex. App.

proceeded to step two of the *Batson* analysis, erred when it rejected Chinnery's race-neutral explanation and, consequently, failed to apply step three.²⁶

Other courts have come to this holding as well. In *United States v. Pofahl*, the court held that “The prosecutor's explanations of his peremptory strikes—focusing on employment, economic status, attentiveness, and demeanor—were certainly non-racial.”²⁷ In fact, I’ve seen cases where a strike was based on the juror renting rather than owning a home (the logic being renters are not as invested in the community as homeowners).

CONCLUSION

Although there are guidelines for striking jurors, many defendants are disadvantaged by the composition of the jury pool. This is especially true if the defendant is a blue-collar or trade worker, who are rarely represented on the jury. Once the loose requirements for peremptory strikes come into play, many juries do not represent a “peer” to the defendant. Already at a disadvantage because of effects of the low jury stipend, the blue-collar defendant may be further burdened with a jury composed of jurors that are not his peers after the prosecutor uses peremptory strikes.

Eliminating peremptory strikes would go a long way toward fixing the disparity between the jurors and the defendant. If the goal of jury selection is to find a fair and impartial jury, the inquiry should stop there. “Bad vibes” or socioeconomic status themselves do not equate to being unfair and partial. The elimination of peremptory strikes would limit the jury selection process to the basic inquiry of the potential jurors. That inquiry should begin and end with the question, “Can this juror be fair?” Thus, if a strike does not rise to the level of challenge for cause, then the juror should remain. Although not a complete fix to the disparity between jurors and defendants, this would go a long way toward community representation on the jury.

1997) (holding socioeconomic background is a specific and race-neutral reason for striking prospective juror under step two of *Batson*).

²⁶ *Chinnery*, 55 V.I. at 518-19.

²⁷ *Pofahl*, 990 F.2d at 1466.