

STATE OF MICHIGAN  
IN THE SUPREME COURT  
(On Appeal from the Michigan Court of Appeals)

ANTHONY PELLEGRINO, as Personal  
Representative of the Estate of SHIRLEY  
ANN PELLEGRINO, Deceased, and  
ANTHONY PELLEGRINO, Individually

Supreme Court No. 1 37111  
COA Docket No. 274743  
(Judges Gleicher and Borrello,  
O'Connell, Dissenting)

Plaintiffs-Appellees,

Case No. 03-325462-NI  
Hon. Michael J. Callahan

v

AMPCO SYSTEM PARKING,

Defendant-Appellant,

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**BRIEF *AMICI CURIAE* ON BEHALF OF THE  
STATE BAR OF MICHIGAN**

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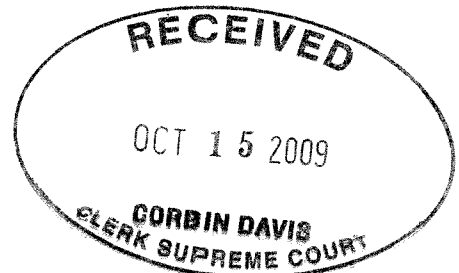


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**STATEMENT OF BASIS OF JURISDICTION**

This motion and accompanying brief are being filed within the time limit under MCR 7.306(D).

**STATEMENT OF QUESTION PRESENTED**

- I. BECAUSE EXISTING CASE LAW PROVIDES NECESSARY GUIDANCE ON A CASE-BY-CASE BASIS AND PROTECTS PUBLIC CONFIDENCE IN THE JUSTICE SYSTEM, DOES MCR 2.511(F)(2) AID A TRIAL COURT AND IS IT NECESSARY IN ADDRESSING THE PROBLEM OF RACIAL DISCRIMINATION IN THE JURY SELECTION PROCESS?

*Amici Curiae* answers “No.”

## STATEMENT OF FACTS

In granting leave in this case on May 7, 2009, the Supreme Court limited the issue to be briefed to "whether the defendant is entitled to a new trial based on the violation of MCR 2.511(F)(2)." MCR 2.511(F) was adopted by this Court on November 23, 2005, and reads as follows:

(F) Discrimination in the Selection Process.

- (1) No person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex.
- (2) Discrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection.

By way of background, MCR 2.511(F) was developed and recommended to the Court in 2003 by the Court's Committee on the Rules of Criminal Procedure. The State Bar of Michigan Board of Commissioners, at the recommendation of its Standing Committee on Justice Initiatives, opposed adoption of the new rule in July of 2005. Although the number of the rule as proposed and commented upon in the State Bar submission is different than the number of the rule adopted, the substance of the rule is the same.

The State Bar position on this matter is not taken on behalf of either appellant or appellee. It is submitted here, consistent with its July 2005 policy position on the court rule involved in this appeal.

## ISSUE PRESENTED

- I. MCR 2.511(F)(2) DOES NOT AID A TRIAL COURT AND IS UNNECESSARY IN ADDRESSING THE PROBLEM OF RACIAL DISCRIMINATION IN THE JURY SELECTION PROCESS BECAUSE EXISTING CASE LAW PROVIDES NECESSARY GUIDANCE ON A CASE-BY-CASE BASIS AND PROTECTS PUBLIC CONFIDENCE IN THE JUSTICE SYSTEM.

In granting leave in this case on May 7, 2009, the Supreme Court limited the issues to be briefed to "whether the defendant is entitled to a new trial based on the violation of MCR 2.511(F)(2)." MCR 2.511(F) was adopted by this Court on November 23, 2005 and reads as follows:

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The State Bar of Michigan Board of Commissioners, upon the recommendation of its Standing Committee on Justice Initiatives, opposed adoption of this rule in August of 2005. Although the number of the rule as proposed and commented upon in the State Bar submission is different than the number of the rule adopted, the substance is the same.

The State Bar's position is predicated upon the conviction that (1) existing case law is sufficient to address the question of individual challenges to jury composition, and (2) discrimination in our justice system undermines public confidence in the fairness of the system.

**A. PUBLIC CONFIDENCE IN THE JUSTICE SYSTEM IS IMPROVED WHEN DISCRIMINATION IS ELIMINATED.**

The State Bar position is based on the principle that discrimination in our justice system and in the jury process undermines public confidence in the fairness of the system. See *Johnson v California*, 545 US 162 (2005).

"[T]he overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race. Yet the harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the

entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. *Batson*, 476 U. S., at 87; see also *Smith v. Texas*, 311 U. S. 128, 130 (1940). (For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but it is at war with our basic concepts of a democratic society and a representative government.) *Johnson*, 171-172.

The principles stated in *Johnson* have been a central part of the State Bar's work to improve the administration of justice for many decades.

“The appearance of bias, as well as the reality of bias, damages our profession and our courts in their fundamental role as protector of freedom and dispenser of justice. In a very real sense, the implementation of these recommendations continues the process of insuring that the Michigan justice system accurately reflects the diversity of the constituency it serves, and that participants at all levels are afforded a level playing field upon which to operate. As we continue to strive for a bias-free society and justice system, lawyers, judges and their leaders must be in the forefront of this effort. This report, coupled with the 1989 [Michigan Supreme Court Reports on Racial/Ethnic Issues in the Courts and Gender Issues in the Courts], will provide the members of our justice system with the knowledge and awareness needed to more ably continue this elusive undertaking.” Executive Summary, Report of the State Bar of Michigan Task Force on Racial/Ethnic and Gender Issues in the Courts and the Legal Profession, 1998

The State Bar has continued to address these issues, first through its Open Justice Commission (1998-2003) and now through its Equal Access Initiative of the Standing Committee on Justice Initiatives. The State Bar Strategic Plan, at 1.9, continues to direct resources to addressing these issues, and it is because of these reasons that the Board of Commissioners adopted a position against the subject court rule.

**B. EXISTING CASE LAW IS SUFFICIENT TO ADDRESS THE PROBLEM OF RACIAL DISCRIMINATION IN THE JURY SELECTION PROCESS**

The State Bar's position is also based on its recognition that a long line of case law addresses the question of a fair jury composition. Beginning with *Strauder v West Virginia*, 100 US 303 (1880), the United States Supreme Court held that a state denies a defendant equal protection when it puts

him on trial before a jury from which members of his race have been purposefully excluded. While a defendant has no right to a jury composed in whole or in part of persons of his own race, the Equal Protection Clause guarantees the defendant that the state will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. In addition, the selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our justice system.

In *Swain v Alabama*, 380 US 203 (1986), the court held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire. The *Swain* method of demonstrating that exclusion required a defendant to prove that a prosecutor “in case after case, whatever the circumstances, whatever the crime and whoever the defendant ... is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries.” That method was overturned in *Batson v Kentucky*, 476 US 79 (1986).

The *Batson* court held the same equal protection principles are applied to determine whether there is discrimination in selecting the venire also govern the state’s use of peremptory challenges to strike individual jurors from the petit jury. It set forth the now well-known three-step process for reviewing questions of alleged discrimination in the jury selection process:

1. A defendant might establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial. The defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant’s race. The defendant may also rely on the facts that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant

must show that such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race.

2. Once the defendant makes a prima facie showing, the burden shifts to the state to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut a prima facie showing by stating that he challenged the jurors on the assumption that they would be partial to the defendant because of their shared race or by affirming his good faith in individual selections.

3. The trial court then has the duty to determine if the defendant has established purposeful discrimination.

Following *Batson*, the Court in *Johnson* provided a succinct rationale for the proposition that *Batson* challenges should be addressed on a case-by-case basis, and that *Batson's* burden-shifting framework, when properly applied, addresses real or perceived bias in the jury selection process. Additionally, the pattern and practice of abuses described in *Miller-El v Dretke*, 545 US 231(2005) still illustrate the importance of examining jury selection issues on a case-by-case basis. MCR 2.511(F)(2) does nothing to further *Batson's* purposes which, as discussed in *Johnson*, are to eradicate discrimination from our civic institutions and prevent undermining public confidence in the fairness of our system of justice. *Johnson*, citing *Batson*, 476 US at 87.

In *Edmonson v Leesville Concrete Co.*, 500 US 614 (1991), the Supreme Court extended *Batson's* reach to the use of peremptory challenges by private litigants in civil cases like those to which MCR 2.511(F)(2) applies. In fact, the *Batson* rule now applies regardless of the race of the potential juror or the defendant, *Powers v Ohio*, 499 US 400 (1991), whether the challenging party is the defense or the prosecution, *Georgia v McCollum*, 505 US 42 (1992), or whether the challenge is to race-based or

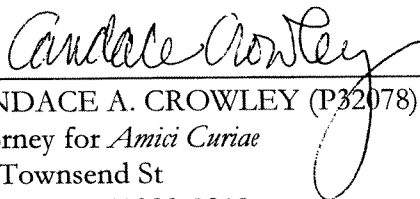
gender-based strikes, *J.E.B. v Alabama ex. Rel. T.B.*, 511 US 127 (1994).<sup>1</sup> *Batson* and its progeny constitute the existing case law that controls questions regarding the parties' use of peremptory strikes, and represent a comprehensive, thoughtful and most fair manner of handling questions of jury composition. The case law approach is consistent with the access and fairness concepts supported by the State Bar of Michigan, and is consistent with principles assuring inclusion of all qualified groups in jury service as required by the Constitution and the laws enacted under it.

**CONCLUSION**

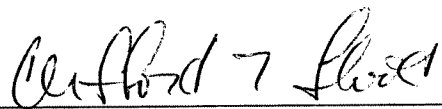
Application of existing case law on a case-by-case basis in the jury selection process is the most appropriate method of assuring the inclusion of all qualified people in jury services as required by our Constitution and the laws enacted under it, and public confidence in the fairness of our justice system is more likely achieved by applying existing case law. For these reasons, the State Bar of Michigan asks this Court to strike MCR 2.511(F) (2) as unnecessary in the jury selection process.

STATE BAR OF MICHIGAN

Dated: 10-15-09

  
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<sup>1</sup> See the American Bar Association Principles for Juries and Jury Trials, and Commentary to Principle 11. "Courts should ensure that the process used to empanel jurors effectively serves the goal of assembling a fair and impartial jury."