

1 Chief Deputy District Attorney Kim Parker
Supreme Court #11203
2 Deputy District Attorney Ann Swegle
Supreme Court #10920
3 Office of the District Attorney
535 North Main, 2nd Floor
4 Wichita, Kansas 67203
[316] 666-3600
5

FILED _____

2009 NOV 20 P 3:48

CLERK OF DISTRICT COURT
18TH JUDICIAL DISTRICT

BY _____

6
7 IN THE EIGHTEENTH JUDICIAL DISTRICT
8 DISTRICT COURT, SEDGWICK COUNTY, KANSAS
9 CRIMINAL DEPARTMENT

10
11 STATE OF KANSAS,
12 Plaintiff,

13 vs.

14 SCOTT P. ROEDER,
15 Defendant

Case No.: Case No. 09 CR 1462

16
17
18 **STATE'S RESPONSE TO DEFENDANT'S MOTION FOR ORDER PROHIBITING**
JURY SELECTION IN VIOLATION OF *BATSON V. KENTUCKY*

19 Comes Now the State of Kansas by and through its attorneys, Chief Deputy District
20 Attorney Kim T. Parker and Deputy District Attorney Ann Swegle and submits this response to
21 the defendant's motion for order prohibiting jury selection in violation of *Batson v. Kentucky*,
22 476 U.S. 79 (1986).

23 In his motion, defendant frames the questions presented as follows:
24
25

1 1. Whether the use of peremptory jury strikes by the prosecution, on the basis of a panelist's
2 beliefs and actions as religious, pro-life, or pro-abortion, would be a violation of *Batson v.*
3 *Kentucky*.

4 2. Whether the use of peremptory jury strikes by the prosecution, on the basis of a panelist's
5 status as a woman, or a racial/ethnic minority, in conjunction with beliefs and actions as
6 religious, pro-life, or pro-abortion, would be a violation of *Batson v. Kentucky*.

7 The core of each question is the existence of a *Batson* violation under hypothetical, not
8 real, circumstances. The State responds as follows:

9 **I. The issue of a *Batson* violation cannot be addressed until a peremptory strike is exercised
10 and a challenge made by the opposing party. Therefore, these issues are not ripe for
11 review.**

12 It is axiomatic that a claimed constitutional violation in the context of a jury selection
13 procedure cannot be addressed or resolved until such time as the challenged action has occurred.
14 The procedure for addressing alleged *Batson* violations occurs after the questioned jury strike.
15 See *State v Vargas*, 260 Kan. 791,926 P.2d 223 (1996) At this pre-trial stage, there is simply
16 nothing for the Court to rule on and therefore no judicial action should be take.

17
18 **II. The defendant's motion, in addition to being premature and improperly assuming the
19 State will not follow the law, is fatally deficient in that it makes factual assertions with no
20 evidentiary bases to support them and it offers no controlling, on point legal authority for
21 the illogical extension of *Batson* that it requests.**

22 The State has every intention of following the law, in jury selection and in all phases of
23 this prosecution. Through his motion, the defendant seeks a pre-trial ruling that would vastly
24 expand the scope of *Batson* and its progeny, which includes *J.E.B. v. Alabama*, 511 U.S. 127
25 (1994), a case that found an equal protection violation from a peremptory strike based on gender

1 as well as race, as recognized in *Batson*. The immutability of characteristics as race and gender
2 underscore the weakness of the defendant's claim that pro-life or pro-abortion activists –
3 presumably people of both genders; all races; different religious affiliations and beliefs,
4 nationalities, political affiliation and socio-economic statuses – are a “cognizable group” for
5 purposes of an equal protection analysis. And, of course, no evidence has been offered in
6 support of this extreme claim. Nor has there been any showing that people with “religious”
7 beliefs or actions are a “cognizable group”

8 The elements of a cognizable group are set out in the defendant's brief in a citation from
9 *Murchu v. United States*, 926 F.2d 50 (1991). Restated, they are:

- 10 1. The group is deniable and limited by some clearly identifiable factor,
- 11 2. A common thread of attitudes, ideas or experiences runs through the group,
- 12 3. A community of interests exists among the group's members, such that the group's interest
13 cannot be adequately represented if the group is excluded from the jury selection process,
- 14 4. Members are experiencing unequal, i.e. discriminatory treatment and need protection from
15 community prejudices, the test being not whether group members see themselves as distinct, but
16 whether others, by treating them unequally, put them in a distinct group.

17 Defendant's bald allegations are not proof of a “cognizable group”. Only time will tell
18 whether any potential jury members are members of some “cognizable group”, but no evidence
19 or controlling authority has been cited to the Court to allowed it to rule that an amorphous group
20 of people with “religious”, “pro-life”, or “pro-abortion” beliefs and actions should be recognized
21 as a “cognizable group” for the purposes of equal protection analysis.

22
23 The use and function of peremptory challenges was reviewed in *United States v. Dejesus*,
24 347 F.3d 500 (3rd Cir. 2003), a case where defendant's challenges to peremptory strikes by the
25 prosecution based on racial and religious discrimination were not upheld. The Court stated:

1
2 Peremptory challenges are a part of our common law heritage and play a crucial
3 part in empaneling fair and impartial juries. The decision to exercise a peremptory
4 strike need not be supported by any reason. It is usually based on educated
5 guesses about probabilities based on the limited information available to an attorney
6 about prospective jurors. The challenge is intended for those situations in which an
7 attorney cannot articulate a specific conflict, but has some reason to believe a juror may
8 be less desirable than other jurors who may be called. *See Uwaezhoke*, 995 F.2d at 394 n.
9 5. Nonetheless, the Supreme Court established in *Batson* that in order to maintain the
10 “dignity of persons” and the “integrity of the courts,” the Equal Protection Clause must
11 prevent prosecutors from using peremptory strikes to remove jurors on the basis of race.
Powers v. Ohio, 499 U.S. 400, 402, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). The
Supreme Court extended that logic to peremptory strikes based on gender in *J.E.B. v.*
Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). But it
remains the rule that peremptory strikes are presumptively valid until it is shown that they
were exercised on an unconstitutional basis, such as race or gender, and they continue to
serve an important role in empaneling fair and impartial juries. Against this background,
we consider defendant's race and religion-based challenges.

12 347 F.3d at 505 -506.

13 In *Dejesus*, the prosecution's peremptory challenges of 2 jurors who indicated heightened
14 religious activity and beliefs were upheld against the defendant's claim that they constituted an
15 unconstitutional racial and religious discrimination. In explaining its rejection of the religious
16 discrimination claim, the Court stated:

17 But the government did not refer to the religious affiliation of either juror in articulating
18 its reasons for striking Bates and McBride. Instead, the government said that their
19 unusual amount of religious activity suggested strong religious beliefs, which could
20 prevent them from convicting the defendant. The District Court agreed, stating that:
21 “faced with a prospective juror whose answers to neutral questions regarding hobbies,
22 pastimes, reading materials, television programs and the like reveal a rather consuming
23 propensity to experience the world through a prism of religious beliefs, it is rational for a
24 prosecutor to act upon the concern about the reluctance to convict.” (App. at 30-31).

25 Even assuming that the exercise of a peremptory strike on the basis of religious affiliation
is unconstitutional, the exercise of a strike based on religious beliefs is not. Addressing
the precise issue presented in this case, the Seventh Circuit held that “[i]t is necessary to
distinguish among religious affiliation, a religion's general tenets, and a specific religious
belief It would be proper to strike [a juror] on the basis of a belief that would prevent
him from basing his decision on the evidence and instructions, even if the belief had a
religious backing....” *Stafford*, 136 F.3d at 1114. Several state courts have made a similar

1 distinction between strikes based on beliefs and membership in a protected class. *See,*
2 *e.g., Fuller*, 356 N.J.Super. at 279-80, 812 A.2d at 397 (finding permissible a peremptory
3 strike based on prosecutor's inference from juror's traditional Muslim clothing that juror
4 was religiously devout and therefore likely to be defense-oriented); *Purcell*, 199 Ariz. at
5 328, 18 P.3d at 122 (holding strike constitutional because it was based on juror's personal
6 beliefs rather than religious affiliation); *Card v. United States*, 776 A.2d 581, 594-95
7 (D.C.Ct.App.2001) (finding strike based upon inferred allegiance to Louis Farrakhan
8 related to a "genuine race-neutral concern regarding the potential juror's desire to
9 hamstring any possible conviction.").

6 The distinction drawn by the District Court between a strike motivated by religious
7 beliefs and one motivated by religious affiliation is valid and proper. The District Court's
8 finding that the government struck jurors Bates and McBride out of concern that their
9 heightened religiosity would render them unable or unwilling to convict was not
10 erroneous.

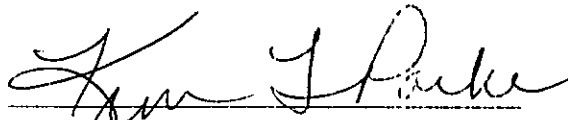
10 347 F.3d at 510 - 511.

11 *Dejesus* makes clear that a potential jurors actions and beliefs that lend support to a
12 concern that a juror may not follow the law, e.g. be unwilling to convict if the conviction is
13 supported by the evidence and the law, are permissible bases upon which to use a peremptory
14 challenge. That has been and remains the state of the law. Challenges based on the prospective
15 juror's relevant personal beliefs are not improper and have always been appropriate because
16 those beliefs are relevant to suitability for jury duty. To deny challenges due to personal
17 sympathies and prejudices that would interfere with the juror's ability to follow the law, would
18 undercut the essentials of jury selection. The government has the right to expect jurors to follow
19 the law applying the law fairly and impartially in a given case.

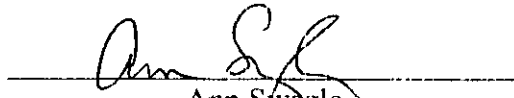
22 WHEREFORE, based upon the above and foregoing, the State of Kansas respectfully
23 requests the Court overrule the defendant's motion.

25 Respectfully Submitted,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



Kim T. Parker
Chief Deputy District Attorney, #11203




Ann Swagle
Deputy District Attorney, #10920

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was hand-delivered on this 20th day of November, 2009 to the following:

Mr. Charles S. Osburn
Mr. Mark Rudy
Public Defender's Office
604 N. Main, Suite D
Wichita, KS 67203

And a copy hand-delivered to the chambers of the Honorable Warren Wilbert on the same date.



Ann Swagle
Deputy District Attorney