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Peremptory Exclusion of Spanish-Speaking Jurors: Could Hernandez v. New York Happen Here

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PEREMPTORY EXCLUSION OF SPANISH-SPEAKING JURORS: COULD *HERNANDEZ v. NEW YORK* HAPPEN HERE?

I. INTRODUCTION

Unlike most southwestern states, New Mexico can boast that its hispanic residents have traditionally held political offices in proportion to their population.[1] New Mexico is also the only Southwestern state where Hispanics are not under represented in the judiciary and bar.[2] What is not clear, however, is whether Hispanics are adequately represented as jurors in the administration of New Mexico's criminal justice system.[3]

The nature and scope of Hispanic participation on juries has long been an important issue in New Mexico. In 1881, murder convict Richard Romine argued that his right to a trial by jury had been violated where the jurors who sat in his trial were all Mexicans.[4] The Supreme Court of the Territory of New Mexico rejected the argument, stating:

> We cannot shut our eyes to the peculiar circumstances of this territory, taken from the Republic of Mexico in 1846, and nearly all of whose inhabitants in the years first succeeding the annexation, understood no English.[5]

Over one hundred years later, the United States Supreme Court may have opened the door for the resurrection of Romine's argument that New Mexico's Spanish-speaking citizens are not competent to serve as jurors.

In *Hernandez v. New York*,[6] the United States Supreme Court reviewed Dionisio Hernandez's complaint that his prosecutor had purposely discriminated against "Latinos"[7] by exercising his peremptory challenges to remove all jurors who understood Spanish.[8] Hernandez, who was Puerto Rican, was convicted for attempted murder and criminal possession of a weapon by a jury which contained no Latinos. The New York Supreme

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1. Ricardo Tostado, *Political Participation*, *in* HISPANICS IN THE UNITED STATES 246 (1980).
2. Leo Romero & Luis Stelzner, *The Criminal Justice System*, *in* HISPANICS IN THE UNITED STATES 222-223 (1980).
3. A 1978 study of juries in New Mexico's Second Judicial District concluded that there was "no great deviation of minority groups serving on juries surveyed when compared to the census figures for the State." FAY F. DAVIS, A STUDY OF THE JURY IN THE DISTRICT COURT, SECOND JUDICIAL DISTRICT, STATE OF NEW MEXICO 15 (1978). This conclusion, however, is flawed because it was based on a comparison of the state's Hispanic population (29%) with the percentage of jurors in the Second Judicial District who were Hispanic (18%), *id.* at 16, rather than on a comparison of the number of Hispanic jurors to the percentage of eligible Hispanic jurors in Bernalillo County.
4. New Mexico v. Romine, 2 N.M. (Gild.) 114 (1881).
5. *Id.* at 123.
6. 111 S. Ct. 1859 (1991).
7. The United States Supreme Court referred to the excluded jurors as "Latinos." *Id.* at 1864.
8. *Id.*

Court's Appellate Division and the New York Court of Appeals affirmed Hernandez's conviction.[9] On certiorari, the Supreme Court held that the removal of the bilingual jurors was justified in light of their reluctance to defer to the interpreter's version of the Spanish-language testimony.[10]

Hernandez potentially could open the door to the wholesale disqualification of Hispanics from New Mexico juries.[11] Presumably, New Mexico's elected prosecutors would find the purposeful exclusion of Hispanics from jury service inconsistent with their professional ethics or, at the least, their political aspirations.[12] For the criminal defendant facing a jury that does not speak his language, however, the whim of his prosecutor is a thin reed on which to rely. To prevent the purposeful exclusion of Spanish-speakers from juries, criminal defendants should dust off their copy of the New Mexico Constitution and familiarize themselves with the jurisprudence of jury selection.

A. Peremptory Challenges, Race, and Batson

Over a century ago, the Supreme Court declared laws which limited jury service to white males violative of the Fourteenth Amendment because such discriminatory laws:

> [are] practically a brand upon [Blacks], affixed by law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.[13]

For years, however, states were still able to exclude minority groups from participating as jurors in the criminal trials of minority defendants by exercising peremptory challenges against African-Americans, Hispanics, and other ethnic groups.[14]

A peremptory challenge gives the litigant the right to strike jurors from the venire without being required to assign a reason for the challenge.[15]

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9. People v. Hernandez, 552 N.E.2d 621 (N.Y. 1990); People v. Hernandez, 528 N.Y.S.2d 625 (A.D.2d 1988).

10. *Hernandez*, 111 S. Ct. at 1872-73.

11. Close to 1/3 of the population of New Mexico speaks Spanish; over 100,000 New Mexico citizens do not speak English "very well." UNITED STATES BUREAU OF THE CENSUS, SELECTED SOCIAL CHARACTERISTICS, table 1 (1990).

12. Elected officials, however, have not had to fear alienating Hispanic voters. Studies have shown that Hispanics as a voting bloc suffer from low voter turn-out, disunity and lack of strong party affiliation, ineligibility due to age or citizenship, and dilution because of their geographic concentration. Tostado, *supra* note 1, at 238-41.

13. Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

14. *See* Batson v. Kentucky, 476 U.S. 79, 103-04 & n.3 (1986) (Marshall, J., concurring).

15. Historically, the peremptory challenge was only available to the criminal defendant:

> In criminal cases . . . there is . . . allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons: 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner . . . should have a good opinion

The decision to strike a potential juror is based as much on the attorney's trial experience and judgment as his "seat-of-the-pants instincts."[16] Generalizations about certain professions, religious followings, and ethnic backgrounds pervade this stage of the jury selection process.[17]

In 1965 the United States Supreme Court in *Swain v. Alabama* held that a prosecutor's "purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause."[18] However, the Court also held that a criminal defendant could not rebut the presumption of the state's proper use with evidence of discriminatory challenges in his case alone; the defendant had to demonstrate that the prosecutor systematically discriminated against black jurors in criminal trials as a whole.[19] Given the limited resources of most criminal defendants, and given the fact that, in many jurisdictions, the voir dire proceedings are not transcribed, the *Swain* burden of proof is usually insurmountable.[20]

Twenty years later, in the landmark case of *Batson v. Kentucky*, the Court overruled *Swain*'s requirement of "systematic" exclusion.[21] The Court stated that "a single invidiously discriminatory governmental act [is not] immunized by the absence of such discrimination in the making of other comparable decisions."[22] Thus, the Court announced a three-step test for evaluating an objection to a prosecutor's peremptory challenge. First, a defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race.[23] Second, if the requisite showing has been made, the burden then shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question.[24] Finally, the trial court must determine whether the

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> of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

Lewis v. United States, 146 U.S. 370, 376 (1892).

16. Batson v. Kentucky, 476 U.S. 79, 138 (1986) (Rehnquist, J., dissenting).

17. Swain v. Alabama, 380 U.S. 202, 220 (1965).

18. *Id.* at 203-04.

19. The Court stated that the presumption of proper use of the peremptory challenge may be rebutted where:

> in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, 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.

Id. at 223.

20. *See* United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977); United States v. Carter, 528 F.2d 844 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976); United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971).

21. 476 U.S. 79, 93 (1986).

22. *Id.* at 95 (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 n.14 (1977)).

23. *Id.* at 96-97.

24. *Id.* at 97.

defendant has carried his burden of proving purposeful discrimination.[25]

B. *Batson and Hispanics*

Though the question of whether states could discriminate against Hispanics during jury selection was answered long ago,[26] the Court had never heard a *Batson* challenge raised by a Hispanic defendant until *Hernandez v. New York*.[27] As the *Hernandez* decision ultimately turned on its evaluation of the relationship between Spanish-language ability and ethnicity, the Supreme Court may have determined whether the seminal *Batson* case would have any meaning and effect for Hispanic-Americans.[28]

II. *HERNANDEZ v. NEW YORK*

Dionisio Hernandez was arrested and charged for attempted murder and criminal possession of a firearm.[29] On voir dire, the prosecutor asked the two bilingual members of the venire whether they could accept the interpreter as the final arbiter of what was said by each of the Spanish-speaking witnesses.[30] In response to the prosecutor's question, the two "looked away . . . and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter."[31] The prosecutor used his peremptory challenges to exclude both jurors.[32]

Hernandez objected that the prosecutor was using his peremptory challenges to strike Latinos from the jury.[33] The prosecutor offered an explanation for the strikes before the trial judge could rule on whether Hernandez had met the first prong of the *Batson* test by making a prima facie case of purposeful discrimination.[34] The prosecutor, acknowledging that the jurors had indicated their willingness to follow the interpreter, said, "I believe that in their heart they will try to follow [the interpreter]."[35] However, the prosecutor expressed doubts as to their ability to do so. The prosector told the court, "I feel very uncertain that they would be able to listen and follow the interpreter."[36] Accepting the explanation that the prosecutor was concerned that the two bilingual jurors might have an undue impact upon the jury, the trial court denied Hernandez's motion and ordered that the case proceed to trial.[37]

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25. *Id.* at 98.
26. *See* Castaneda v. Partida, 430 U.S. 482 (1977); Hernandez v. Texas, 347 U.S. 475 (1954).
27. 111 S. Ct. 1859 (1991).
28. *Accord* Pemberthy v. Beyer, 800 F. Supp. 144 (D.N.J. 1992); United States v. Alcantar, 897 F.2d 436 (9th Cir. 1990).
29. *Hernandez*, 111 S. Ct. at 1864.
30. *Id.*
31. *Id.* at 1865.
32. *Id.* at 1864.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 1865.

On certiorari, the United States Supreme Court focused solely on whether the prosecutor's explanation was race-neutral.[38] The Court concluded that the prosecutor's concern about the juror's language ability would apply regardless of the juror's race. The fact that both Latinos and non-Latinos might equivocate before agreeing to try to accept the translator's rendition of the Spanish testimony supported the prosecutor's claim that he was not attempting to strike Latin jurors based on race:

> Nothing in the prosecutor's explanation shows that he chose to exclude the jurors who hesitated in answering questions about following the interpreter *because* he wanted to prevent bilingual Latinos from serving on the jury.[39]

Therefore, the plurality found the prosecutor's explanation to be facially neutral and not inherently discriminatory. "Unless a discriminatory intent is inherent in the prosecutor's explanation," Justice Kennedy wrote, "the reason offered will be deemed race neutral."[40]

Justices Stevens, Marshall, and Blackmun argued in dissent that the prosecutor's explanation was only a pretext and that his real intention for the peremptory strikes was a desire to try Dionisio Hernandez before a non-Latino jury.[41]

The plurality shared the concern that a prosecutor's facially race-neutral explanation should not be allowed to insulate the peremptory strikes if the true intention is to discriminate purposely:

> It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.[42]

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38. The Court stated that if, as was the case in *Hernandez*, a prosecutor offers a race-neutral explanation for the strikes, the first step of the *Batson* inquiry—whether the defendant had made a prima facie case of purposeful discrimination—becomes moot. *Id.* at 1866.

39. *Id.* at 1867-68 (emphasis in original).

40. *Id.* at 1866.

41. *Id.* at 1876 (Stevens, J., dissenting). Justice Marshall stated in his concurrence in *Batson* that:

> [a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed "uncommunicative," or "never cracked a smile" and, therefore, "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case"? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Batson, 476 U.S. at 106 (Marshall, J., concurring) (citations omitted).

42. *Hernandez*, 111 S. Ct. at 1872-73. Justices O'Connor and Scalia were not willing even to acknowledge, as the plurality had, that the exclusion of bilinguals might well result in the disproportionate removal of prospective Latino jurors. Justices O'Connor and Scalia, parting ways with the plurality on the question of the relationship between language and race, said that:

> [n]o matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race.

Id. at 1874 (O'Connor, J., concurring in judgment).

However, whether a prosecutor's explanation is pretextual is a question of fact left for the most part to the determination of the trial court.[43] As the Court did not find the trial court's rejection of Hernandez's *Batson* claim to be "clearly erroneous," the conviction was affirmed.[44]

According to the plurality, *Hernandez* does not stand for the proposition that Spanish-speakers are unqualified for jury service where an interpreter would be used during trial:

> Our decision today does not imply that exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases . . . . We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors.[45]

However, if the peremptory strikes against the bilingual jurors in *Hernandez* were permissible because they "equivocated", then virtually every bilingual juror may be stricken from the venire. The fact is that most bilingual jurors will have a difficult time disregarding what a witness says in Spanish.[46] An instruction to ignore what is said in Spanish and accept only what is interpreted in English is likely to have an unsettling affect on most bilingual jurors. Thus, notwithstanding the plurality's attempt to decide the case on narrow grounds, *Hernandez* may serve as a blue print to exclude all bilinguals qua bilinguals.

III. CAN IT HAPPEN HERE?

Though the peremptory exclusion of bilingual jurors may not violate the Equal Protection Clause of the United States Constitution, such a practice would likely be held unconstitutional under New Mexico law.[47] New Mexico's courts forbade the discriminatory exercise of peremptory challenges long before *Batson*;[48] therefore, it would not be surprising if

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43. *Id.* at 1869-71, 1873.
44. *Id.* at 1873.
45. *Id.* at 1872.
46. *See* SUSAN BERK-SELIGSON, THE BILINGUAL COURTROOM 194 (1990). Berk-Seligson argues that:
> [c]learly the impact of the interpreter is greater on non-Hispanic listeners. They must rely entirely on the English rendition of the interpreter to be able to understand a witness's testimony. Hispanic listeners do tune in to the Spanish source testimony; however, they are also to a large degree affected by the interpreter's version of the testimony as well.

Id. at 194.
47. As Justice Kaye of the New York Court of Appeals said in his dissent to that court's affirmance of Hernandez's conviction:
> [I]t cannot be assumed that State law would proceed in lockstep with Federal law as the Federal law on this issue emerges . . . [just because] the United States Supreme Court has overruled *Swain* in *Batson* does not mean that the laboratories operated by leading state courts should now close up shop.

People v. Hernandez, 552 N.E.2d 621, 626-27 (N.Y. 1990) (Kaye, J., dissenting) (quoting State v. Gilmore, 511 A.2d 1150, 1157 (N.J. 1986)).
48. State v. Crespin, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980). Only four other jurisdictions—California, Massachusetts, Delaware, and Florida—offered criminal defendants greater protection during the selection of the jury than the Supreme Court did in *Swain*. *See Batson*, 476 U.S. at 82 n.1.

New Mexico gives bilinguals the protection denied to them after *Hernandez*.

A. Constitutional Protection of Spanish-Speakers

New Mexico's Constitution is unique in the amount of protection given to its Spanish-speaking citizens.[49] Such protections were part of the fabric of the original document. The ballots used to ratify the New Mexico Constitution were written in English and Spanish.[50] Until 1932, every New Mexico law had to be published in Spanish and English.[51] Proposed amendments to the constitution still must be published in Spanish.[52] Neither the United States Constitution nor the constitution of any other state contains any comparable provisions giving official recognition of any particular language other than English.[53]

The framers of the New Mexico Constitution clearly envisioned a bilingual jury pool. The ability to speak English was not a required qualification for jury service before statehood,[54] and it is not now.[55] Article VII, section 3 of the New Mexico Constitution states:

> The right of any citizen of the state to . . . sit upon juries, shall never be restricted, abridged or impaired on account of . . . language . . . or inability to speak, read or write the English or Spanish languages except as may be otherwise provided in this constitution.[56]

Admittedly, Article VII, section 3 speaks to the inability to communicate in English or Spanish. But read in the light of New Mexico's history, tradition, and demographics, Article VII, section 3 represents a choice made by the citizens of this state to accommodate each other's chosen mode of communication in politics and in the administration of justice. The framers of the New Mexico Constitution not only foresaw a bilingual venire, they also conferred rights on Spanish-speakers to serve on petit juries.

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49. For instance, New Mexico's constitutional recognition of the two languages is most profound in the field of education. For example, the New Mexico Constitution requires the state to provide training for all teachers who want to become proficient in both Spanish and English. N.M. CONST. art. XII, § 8. In addition, Spanish-speaking children have an absolute right to attend the state's public schools. N.M. CONST. art. XII, § 10.

50. N.M. CONST. art. XXII, § 14.

51. N.M. CONST. art. XX, § 12.

52. N.M. CONST. art. XIX, § 1.

53. Numerous states have constitutional provisions or statutes designating English as the official language. *See, e.g.*, ALA. CONST. Amend. 509; ARIZ. CONST. art. XXVIII; ARK. CODE ANN. 1-4-117 (Michie 1987); CAL. CONST. art. III, § 6; COLO. CONST. art. II, § 30; FLA. CONST. art. II, § 9; 1986 GA. LAWS 529 (1981); HAWAII CONST. § 4; ILL. REV. STAT. ch. 1, § 3005 (1969); IND. CODE ch. 10, § 1 (1984); KY. REV. STAT. ANN. § 2.013 (1984); MISS. CODE ANN. § 3-3-31 (1987); NEB. CONST. art. I, § 27; N.C. GEN. STAT. ch. 145, § 11 (1987); S.C. CODE ANN. § 1-1-(696-698) (Law. Co-op. 1987); TENN. CODE ANN. § 4-1-404 (1984); VA. CODE ANN. § 22.1-212.1 (Michie 1986).

The Commonwealth of Puerto Rico recognizes both English and Spanish as official languages. *See* P.R. LAWS ANN. tit. 1, § 51 (1902).

54. *See* Territory of New Mexico v. Romine, 2 N.M (Gild.) 114, 122 (1881).

55. *See* N.M. STAT. ANN. § 38-5-1 (Cum. Supp. 1992).

56. N.M. CONST. art. VII, § 3.

B. Representative Cross-Section

The New Mexico equivalent of the Sixth Amendment guarantees a criminal defendant "an impartial jury of the county or district in which the offense is alleged to have been committed."[57] Like the United States Supreme Court,[58] New Mexico's courts have equated "impartiality" with "representativeness" for purposes of Sixth Amendment analysis.[59]

Unlike the United States Supreme Court,[60] the New Mexico Supreme Court has held that the protection of the state's equivalent of the Sixth Amendment continues even after the venire has been drawn.[61] A prosecutor's peremptory exclusion of a cognizable group from a jury would skew the "representativeness" of the jury, and would therefore violate New Mexico's constitutional guarantee of an impartial jury.[62] In order to raise a claim that a prosecutor had used peremptory challenges to skew the cross-sectionalism of the jury:

> The party must show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in this group—and that in all other respects they are as heterogenous as the community as a whole . . . [T]he defendant need not be a member of the excluded group in order to complain of a violation of the representative cross section rule . . . .[63]

Once the defendant has made such a showing, the burden shifts to the state to offer a race-neutral explanation of the strikes.[64]

Whether a prosecutor's peremptory exclusion of Spanish-speakers from the venire would violate the representative cross-section rule would depend on whether bilinguals are an "identifiable group" for purposes of the rule. In *State v. Gonzales*,[65] for example, the New Mexico Court of

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57. *Id.* art. II, § 14.

58. *See* Taylor v. Louisiana, 419 U.S. 522, 528 (1975) ("[T]he 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.").

59. *See, e.g.*, State v. Aragon, 109 N.M. 197, 784 P.2d 16 (1989); State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App.), *cert. denied*, 111 N.M. 706, 809 P.2d 56 (1991).

60. In Lockhart v. McCree, 476 U.S. 162, 173 (1986), the Court stated:

> We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.

61. *Aragon*, 109 N.M. at 201, 784 P.2d at 20. The court stated that "we feel that the state should not be able to accomplish indirectly at the selection of the petit jury what it has not been able to accomplish directly at the selection of the venire." *Id.*

62. *Id.*

63. *Id.* at 200, 784 P.2d at 19 (quoting Fields v. People, 732 P.2d 1145, 1156 (Colo. 1987)). This test was first adopted by the New Mexico Court of Appeals in State v. Crespin, 94 N.M. 486, 488, 612 P.2d 716, 718 (Ct. App. 1980). The test was first articulated by the California Supreme Court in People v. Wheeler, 583 P.2d 748 (Cal. 1978).

64. *Aragon*, 109 N.M. at 202, 784 P.2d at 21.

65. 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991).

Appeals held that women were an identifiable group for purposes of the representative cross-section rule because of the constitutional prohibition against gender-based discrimination.[66] Consequently, prosecutors are precluded from the systematic use of peremptory challenges to eliminate persons from the jury on the basis of their gender.[67]

Gonzales demonstrates that the fair cross-section requirement is not limited to race and may include other groups, especially those groups that can claim the state constitution's special recognition or protection.[68] Clearly, in light of Article VII, section 3 of the New Mexico Constitution, Spanish-speakers can claim special protection from discrimination during the selection of a jury. Therefore, the representative cross-section rule forbids a New Mexico prosecutor from excluding Spanish-speakers from the venire because of their language ability.

C. *Equal Protection*

New Mexico's constitution guarantees all persons "equal protection of the laws."[69] In determining whether a prosecutor's peremptory challenges violate this guarantee, New Mexico follows the traditional three-step *Batson* test.[70] To establish a prima facie case of purposeful discrimination in the use of peremptory challenges, a defendant must show that: (1) the state has exercised its peremptory challenges to remove members of a cognizable racial group from the jury panel; and (2) these facts and any other relevant circumstances raise an inference that the state used its challenges to exclude members of the panel solely on account of their race.[71]

Whether a defendant could make a prima facie case of purposeful discrimination ultimately depends on whether Spanish-speakers are a "cognizable racial group." Hispanics certainly are a cognizable racial group.[72] But unlike the representative cross-section rule, the state's *Batson* test has never been held to protect groups defined by something other than race. Thus, the exclusion of bilingual jurors who express some hesitancy about their ability to defer to the court interpreter would not likely violate New Mexico's equal protection guarantee unless the pro-

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66. *Id.* at 599, 808 P.2d at 49; *see* N.M. CONST. art. II, § 18 ("Equality of rights under law shall not be denied on account of the sex of any person.").

67. *Gonzales*, 111 N.M. at 598, 808 P.2d at 48.

68. *Cf.* State v. Lopez, 96 N.M. 456, 631 P.2d 1324 (Ct. App. 1981) (holding that absence of members of the La Raza Unida political party from the venire did not violate defendants' rights to fair cross section where defendants offered no proof that registered voters who did not vote were a cognizable group).

69. N.M. CONST. art. II, § 18.

70. *See* State v. Sandoval, 105 N.M. 696, 736 P.2d 501 (Ct. App. 1987).

71. *See Gonzales*, 111 N.M. at 596, 808 P.2d at 48; State v. Moore, 109 N.M. 119, 125, 782 P.2d 91, 96 (Ct. App. 1989); State v. Jim, 107 N.M. 779, 781, 765 P.2d 195, 197 (Ct. App. 1988); State v. Goode, 107 N.M. 298, 301, 756 P.2d 578, 581 (Ct. App. 1988).

72. *See, e.g.*, State v. Sandoval, 105 N.M. 696, 736 P.2d 501 (Ct. App. 1987); State v. Lara, 110 N.M. 507, 797 P.2d 296 (Ct. App.), *cert. denied*, 110 N.M. 330, 795 P.2d 1022 (1990).

secutor's explanation was a pretext for excluding Hispanics from the jury.[73]

IV. CONCLUSION

The ability to consult with each other, to discuss the weight of the evidence and the credibility of the witnesses, and finally to reach an agreement is by no means easy even when all the jurors speak English. As one court put it, "Many jurors have somewhat less than perfect hearing or vision, or have other limitations on their abilities to assimilate or evaluate testimony and evidence."[74]

Though problems of misinterpretation and misevaluation occur between individuals who speak the same language,[75] it is easy to single out the case of the bilingual juror because an interpreter can rarely convey precisely and exactly the same idea and intent of the speaker.[76] The exclusion of bilingual jurors, however, will hardly solve the problem inherent in trials involving testimony in languages other than English. It is not unusual for lawyers, especially during depositions, to ask the interpreter for a clarification of a certain word or phrase.[77] A number of courts allow criminal defendants to employ their own interpreters as a check on the official court interpreter.[78]

In light of the growing tide of appeals by criminal defendants claiming that the court did not accurately interpret the foreign-language testimony used to convict them,[79] bilingual jurors may serve as an appropriate check on the accurate interpretation of foreign-language testimony.[80] On the

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73. The most common factors noted by courts holding a state's explanations to be pretextual are: (1) where white and non-white panel members receive varying treatment; (2) where the prosecutor fails to question panel members about the concerns he later raises about their impartiality or ability; (3) where the panel member's race is linked with an assumption that the member will act in a certain way or hold certain beliefs; (4) where the explanation is not related to the case being tried; and (5) where there is a historical pattern of challenges against a particular group. *Goode*, 107 N.M. at 302-03, 756 P.2d at 582-83.

74. United States v. Dempsey, 830 F.2d 1084, 1088 (10th Cir. 1987).

75. *See generally* THOMAS KOCHMAN, BLACK AND WHITE STYLES IN CONFLICT (1981).

76. *See* United States v. Zambrana, 841 F.2d 1320, 1337 (7th Cir. 1988) ("It is axiomatic that a translation of most foreign languages to English (and visa versa) can never convey precisely and exactly the same idea and intent comprised in the original text . . . .").

77. *See, e.g.*, United States v. Powell, 771 F.2d 1173, 1175 (8th Cir. 1985).

78. *See, e.g.*, People v. Siripongs, 754 P.2d 1306 (Cal. 1988); Liveoak v. State, 717 S.W.2d 691 (Tex. Ct. App. 1986); *see also*, United States v. Dempsey, 830 F.2d 1084, 1088 (10th Cir. 1987).

79. *See, e.g.*, United States v. Perez, 658 F.2d 654 (9th Cir. 1981).

80. *See* People v. Hernandez, 552 N.E.2d 621, 628-29 (N.Y. 1990) (Kaye, J., dissenting):

> If the interpreters employed by our criminal courts are as accurate as they should be, given that the defendant's liberty may depend upon the translator's words, then there should be no disagreement between the translator and jurors fluent in Spanish. Surely [the State does not have a valid interest in permitting the errors to go unnoticed] if the translator is rendering a witness' testimony inaccurately into English . . . . [I]f . . . the jurors . . . become involved in disputes about nuance and word choice, that could be adequately addressed by an instruction that Spanish-speaking jurors are to adhere to the official translation only, and bring any errors they may discern to the attention of the court, but under no circumstances to the attention of their fellow jurors.

other hand, the ability to speak Spanish admittedly may complicate a trial.[81] Ultimately, however, excluding Hispanics from jury service because of their language ability is tantamount to excluding Blacks because of their skin color—a practice held unconstitutional over a century ago.[82]

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81. In *State v. Gallegos*, for example, the New Mexico Court of Appeals reversed a rape conviction after discovering that one of the jurors did not understand English. The court stated:

> It is self-evident that a juror who does not possess a working knowledge of English would be unable to serve because he cannot possibly understand the issues or evaluate the evidence to arrive at an independent judgment as to the guilt or innocence of the accused. *Such would not be the case if testimony and evidence were translated.*

State v. Gallegos, 88 N.M. 487, 489, 542 P.2d 832, 834, (Ct. App.), *cert. denied*, 89 N.M. 6, 546 P.2d 71 (1975) (citations omitted) (emphasis added). *But see* State v. Gomez, 112 N.M. 313, 815 P.2d 166 (Ct. App. 1991) (refusing to hold that court appointment of uncertified interpreter deprived Spanish-speaking defendant of due process because of absence of essential facts in the record); *see also*, United States v. Perez, 658 F.2d 654, 662 (9th Cir. 1981) (allowing the removal of a juror who challenged court's interpreter); *accord* People v. Carbrera, 281 Cal. Rptr. 238, 240 (Cal. Ct. App. 1991) (holding a bilingual juror's "re-interpretation" of the testimony for other jurors to constitute juror misconduct).

82. Strauder v. West Virginia, 100 U.S. 303, 310 (1879).