

***Williams v. State*, 121 Nev. Adv. Op. 90 (Dec. 29, 2005)<sup>1</sup>**

**CRIMINAL LAW-JURY SELECTION**

**Summary**

A jury, selected from the third venire, convicted Gary Jerome Williams of battery with use of a deadly weapon causing substantial bodily harm on Robin Swope. On June 22, 2003, Williams and the victim (Robin Swope) engaged in an altercation after Swope saw Williams speaking to Swope's thirteen-year-old daughter. At trial, most details of the altercation were highly disputed including, who was the initial aggressor, who produced a knife, and whether Swope used highly inflammatory language.

In 1985, when he was seventeen, the State of Arkansas convicted Williams of aggravated battery, sentencing him to fifteen years confinement. The Nevada pre-sentencing report listed the Arkansas conviction as a juvenile offense. Williams moved to exclude the conviction under NRS 50.095(4).<sup>2</sup> Without addressing whether his conviction at seventeen years of age was a juvenile or adult conviction, the district court denied Williams motion.

During jury selection, Williams moved to dismiss the first venire<sup>3</sup> because it included only one African-American. The State did not object and the court granted the motion. In chambers, the court contacted the jury commissioner twice to ensure that a second venire would be randomly selected. The court and counsel stated that the second venire contained "specific inclusion of African-Americans,"<sup>4</sup> accomplished by inserting the African-Americans available for jury duty that day into the jury panel from which the venire would be selected. The State did not object to this method of selecting the venire. The second venire included six African-Americans, of which three were included in the first twelve jurors. The State then moved to dismiss the venire, stating that they did not feel it was randomly selected. Specifically, the State objected to the number of African-Americans included in the second venire, and requested a new venire. Williams objected and requested that the jury commissioner testify on the record as to the method used to select the second venire. Without obtaining such testimony, the court granted the State's motion and dismissed the second venire. The third venire included three African-American members. Neither party objected to the venire; one African-American served on the final jury.

Williams appealed arguing that the court erred in permitting use of his juvenile conviction to impeach him and that the court erred in dismissing the second venire because specific inclusion is permissible to avoid discrimination and that the State's motion to dismiss the second venire resulted in a *Batson* violation.<sup>5</sup>

<sup>1</sup> By Jacqueline A. Gilbert <sup>2</sup> Nev. Rev. Stat. § 50.095 (2003) permits the use of prior conviction to impeach a witness unless certain exceptions apply. Nev. Rev. Stat. § 50.095(4) provides that "Evidence of juvenile adjudications is inadmissible under this section."<sup>3</sup> The Court defined "venire" as "the group of persons sent to the district court from which a jury is chosen. A 'jury pool' is the entire group of persons called for jury service that day." Williams v. State, 121 Nev. Adv. Op. 90, note 1 (Dec. 29, 2005).<sup>4</sup> Williams v. State, 121 Nev. Adv. Op. 90 <sup>5</sup> Batson v. Kentucky, 476 U.S. 79 (1986) (holding that jurors cannot be excluded based on race).

The Nevada Supreme Court first determined that Williams failed to show that the selection process for the first venire violated any constitutional rights. Therefore, without reaching the question of whether specific inclusion can be used once a constitutional violation has occurred in jury selection, the Court held that specific inclusion is not permissible if there is no constitutional violation. Additionally, because the district court made no record as to how the second venire was constituted, there was no evidence to support dismissing the second venire. However, since the remedy for a non-randomly constituted venire is to grant a new venire, Williams had already received his remedy for the court errors in dismissing the first and second venires.

The Court did, however, determine that a *Batson* violation occurred when the State requested the second venire be dismissed. The Court relied on *Miller-El v. Dretke*<sup>6</sup> in determining that challenging entire venires so as to obtain fewer African-Americans in the venire is discriminatory and implicates *Batson*. After performing the *Batson* analysis, the Court stated that because the State did not object to specific inclusion as lacking randomness during the chambers meeting, but only objected to the venire upon learning of its racial make-up, the State had not and could not offer any race-neutral explanation for wanting the second venire dismissed. The Court reasoned that while the usual remedy to a *Batson* violation is a new venire, in this case that remedy would not be sufficient. The third venire, granted by the district court, effectively allowed the State to discriminate against the target class. Therefore the Court held that only a new trial would remedy the *Batson* violation.

Lastly, the Court found that the issue of guilt was closely contested, and that the State furnished no evidence that Williams' Arkansas conviction was not a juvenile conviction. Therefore, the Court held that the district court error in admitting the conviction was not harmless and reversed and remanded for a new trial.

## **Issues and Dispositions**

### **Issues**

1. Is specific inclusion of African-Americans in a jury venire permissible when there has been no finding of a constitutional violation in a previous venire?
2. Does *Batson* apply to dismissal of an entire venire?
3. Does a conviction of a person less than eighteen years of age, carrying a sentence usually associated with an adult offense, provide evidence of an adult, rather than a juvenile, conviction for purposes of exclusion under NRS 50.095(4)?

### **Dispositions**

1. No. Where no constitutional violation of the jury selection process has been proven, specific inclusion is not permissible.

<sup>6</sup> 545 U.S. \_\_\_\_, \_\_\_\_, 125 S.Ct. 2317, 2332-33 (2005) (holding that a jury shuffle, affecting the make-up of an entire venire, if used to discriminate against African-Americans by placing at the end of the venire, implicates *Batson* concerns).

2. Yes. A *Batson* analysis is the appropriate means to determine if objection to an entire venire is discriminatory.

3. No. Each conviction of a person below the majority must be evaluated individually to determine if that conviction was juvenile or adult for purposes of NRS 50.095(4).

## **Commentary**

### **Jury Selection**

#### **State of the Law Before *Williams***

##### ***Specific Inclusion***

The issue of specific inclusion is one of first impression. The Nevada Supreme Court has held that the Sixth and Fourteenth Amendments of the United States Constitution provide that a defendant is entitled to a jury venire selected from a fair cross section of the community.<sup>7</sup> A three part test is used to determine if the fair-cross-section requirement has been violated: (1) that there is a distinctive community group; (2) that the group's representation in the venire is neither fair nor reasonable compared to the representation in the community; and (3) that systematic exclusion in the jury-selection process caused the under-representation.<sup>8</sup> The Fifth Circuit has accepted specific inclusion to remedy discrimination issues and constitutional violations;<sup>9</sup> however, no jurisdiction has accepted specific inclusion without evidence of such violations. While there have been allegations that the jury selection process in Clark County, Nevada does not provide a fair representation of the community's population,<sup>10</sup> the selection process<sup>11</sup> has not been proven to systematically discriminate against African-Americans.

##### ***Batson Violation***

The issue of whether *Batson* applies to challenges of jury venires, not just to individual jurors, is also an issue of first impression. The *Batson* test requires that: (1) the defendant make a prima facie case for race discrimination in jury selection; (2) the State then provide a race-neutral reason for challenging jurors; and (3) the court determine if the defendant met the burden of establishing purposeful discrimination.<sup>12</sup> The jury pool and venire selection process must not "systematically exclude distinctive groups" and therefore fail to reasonably represent the community.<sup>13</sup> However, the seated jury need not mirror the community.<sup>14</sup> A juror challenge will survive a *Batson* analysis so long as the State can demonstrate any race-neutral explanation that is absent discriminatory intent and the court finds the reason to be credible.<sup>15</sup>

<sup>7</sup> *Evans v. State*, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996). <sup>8</sup> *Id.* at 1186, 926 P.2d at 275. <sup>9</sup> *See e.g. Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966) <sup>10</sup> *See Williams*, 121 Nev. Adv. Op. 90, note 14. <sup>11</sup> Nev. Rev. Stat. § 6.045 and Nev. Rev. Stat. § 6.090 provide the process by which juries are selected. <sup>12</sup> 476 U.S. at 96-98; *Foster v. State*, 121 Nev. \_\_\_, \_\_\_, 111 P.3d 1083, 1088. <sup>13</sup> *Evans*, 112 Nev. at 1186, 926 P.2d at 274. <sup>14</sup> *Id.*

<sup>15</sup> *Kaczmarek v. State*, 120 Nev. 314, 333; 91 P.3d 16, 29-30 (2004).

## **Effect of *Williams* on Current Nevada Law**

### ***Specific Inclusion***

Because the Nevada Supreme Court did not reach the issue of whether specific inclusion would be an appropriate remedy for a Constitutional violation of jury selection,<sup>16</sup> Nevada law will not change under *Williams*. However, the Court noted that the jury commissioner must be aware of the make-up of the community to ensure that the jury pool fairly represents the community.<sup>17</sup> The Court also noted that comparative disparities of greater than 50% between the community representation of a race and representation of that race in a jury venire indicate that the representation may not be fair and reasonable.<sup>18</sup> Without evidence that there has been history of systematic discrimination against any distinctive group, there is no constitutional violation based on the current jury pool and venire selection process.<sup>19</sup>

### ***Batson Violation***

*Williams* establishes that a *Batson* applies not only to challenges of individual jurors, but to entire venires when the challenge is tainted by discriminatory intent. Disliking the racial makeup of a venire will not be acceptable for challenging the venire. The usual remedy where a *Batson* violation has occurred is dismissal of the venire and calling a new venire. If this has been done by the trial court, then the defendant may have already received proper remedy and the error may be deemed moot on appeal. However, in cases such as this, where the entire venire has been challenged for discriminatory reasons, the usual remedy would “condone purposeful discrimination by the State.”<sup>20</sup> Therefore, the only possible remedies for future *Batson* violations where the venire is challenged will be remands for new trials.

## **Use of Juvenile Offense**

### **State of the Law Before *Williams***

NRS 50.095(4) clearly states that “[e]vidence of juvenile adjudications is inadmissible” for the purpose of impeaching a witness. Juvenile records may be used to demonstrate witness bias or prejudice.<sup>21</sup> Juvenile records may also be used to impeach a witness if the defense voluntarily opened those files and the witness lied about the contents of the file.<sup>22</sup> However, there is nothing in Nevada jurisprudence allowing for other exceptions.

<sup>16</sup> *Williams*, 121 Nev. Adv. Op. 90, note 19. <sup>17</sup> *Id.* at note 10. <sup>18</sup> *Id.* at note 9 (citing *Evans*, 112 Nev. at 1187, 926 P.2d at 275). <sup>19</sup> *Williams*, 121 Nev. Adv. Op. 90. <sup>20</sup> *Id.*

<sup>21</sup> *Pickard v. State*, 94 Nev. 681, 683, 585 P.2d 1342, 1343 (1978).

<sup>22</sup> *Cutler v. State*, 93 Nev. 329, 333, 566 P.2d 809, 812 (1977).

## **Effect of *Williams* on Current Nevada Law**

The *Williams* decision will not change Nevada law. Juvenile adjudications cannot be used for impeachment purposes. However, *Williams* does provide some guidance for using adjudications of persons under the age of eighteen for impeachment purposes. The court must require evidence that a minor was adjudicated as an adult, and not as a juvenile, in order to admit the conviction.

## **Conclusion**

In conclusion, challenges to entire jury venire are subject to a *Batson* analysis to determine if there is discriminatory intent to the challenges. However, without proof that the jury pool and venire selection process are failing to provide fair representation of the community, lack of racial representation may not be a constitutional violation.<sup>23</sup> Additionally, in order to avoid NRS 50,095(4) and use a crime committed while the witness was under the age of eighteen to impeach that witness, evidence must show that the specific adjudication was not as a juvenile.

<sup>23</sup> A judicial committee is being formed to review jury selection procedures and determine “what steps should be taken to increase jury participation.” The review is in response to suggestions that the jury pools in Clark County do not represent the diversity in the community. Matt Pordum, *Judicial committee to study jury pool diversity*, Las Vegas Sun, Jan. 10, 2006, available at <http://www.lasvegassun.com/sunbin/stories/text/2006/jan/10/519942356.html>. The *Williams* Court cited the Sun articles in its opinion. See *Williams*, 121 Nev. Adv. Op. 90 at note 9.