

161 A.D.3d 608, 78 N.Y.S.3d  
39, 2018 N.Y. Slip Op. 03731

**\*\*1** The People of the State  
of New York, Respondent,

v

Davawn Robinson, Appellant.

Supreme Court, Appellate Division,

First Department, New York

4695/09, 6352

May 24, 2018

CITE TITLE AS: People v Robinson

### HEADNOTE

Crimes

Jurors

Challenge to Jury—Prosecution's Peremptory Challenge  
after Defendant's Peremptory Challenges Constituted  
Reversible Error

Seymour W. James, Jr., The Legal Aid Society, New York  
(Mitchell J. Briskey of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Oliver  
McDonald of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce  
Allen, J.), rendered August 15, 2012, convicting  
defendant, after a jury trial, of manslaughter in the  
second degree, and sentencing him to a term of 4 to 15  
years, unanimously reversed, on the law, and the matter  
remanded for a new trial.

During jury selection, after the parties had questioned a  
round of prospective jurors, the court asked for challenges  
to the first 12 jurors seated in the jury box. The People  
challenged Ms. C. for cause, and the court denied the  
challenge; defense counsel made several cause challenges  
which the court also denied. The People then made a  
number of peremptory strikes, but did not challenge Ms.  
C. The court asked if the remaining jurors, among which  
was Ms. C., were acceptable, and the People answered,  
“Yes.”

Defense counsel then began to exercise her peremptory  
challenges, striking several prospective jurors, who were

seated both before and after Ms. C.'s position, but did  
not make a challenge to Ms. C. During that process,  
the People interrupted and stated that they had made  
a mistake, and sought to belatedly make a peremptory  
challenge to Ms. C. Defense counsel objected, and the  
court directed her to continue her challenges. \*609  
After further jury selection and a lunch recess, the court  
permitted the People to belatedly exercise a peremptory  
challenge to Ms. C., and offered defense counsel the  
opportunity to “go through the whole list [of prospective  
jurors] starting from the beginning” and “change any” of  
their prior peremptory challenges. Counsel declined the  
court's proposed remedy, arguing that other than seating  
Ms. C. on the jury, the only appropriate remedy was a  
mistrial. The court denied that application.

On appeal, defendant argues that the court improperly  
permitted the People to exercise their belated peremptory  
challenge. At the outset, we reject the People's argument  
that defendant's current claim is unpreserved and waived.  
Defense counsel made a timely and specific objection  
when the People attempted to challenge Ms. C. Moreover,  
when the court decided to seat the juror, counsel promptly  
moved for a mistrial. Thus, the issue is fully preserved and  
properly before us.

On the merits, we believe that a reversal is warranted.  
The rules for selecting a jury are set forth in the  
Criminal Procedure Law. After questioning of the jurors  
is complete, each party, starting with the People, may  
challenge the jurors for cause (CPL 270.15 [2]). After both  
parties have been given the opportunity to make cause  
challenges, the court must allow them to peremptorily  
challenge any remaining prospective juror (*id.*). “The  
[P]eople *must* exercise their peremptory challenges first  
and *may not*, after the defendant has exercised his  
peremptory challenges, make such a challenge to any  
remaining prospective juror who is then in the jury  
box” (*id.* [emphasis added]). Thus, “[i]n no event may the  
People exercise a peremptory challenge after the defendant  
has exercised his or her peremptory challenges” (*People  
v Powell*, 13 AD3d 975, 977 [3d Dept 2004], *lv denied* 4  
NY3d 889 [2005]).

“The right of peremptory challenge given to an accused  
person is a substantial right,” and **\*\*2** the order in which  
peremptory challenges are made “is matter of substance”  
“intended for the benefit of the defendant” (*People v  
McQuade*, 110 NY 284, 292-294 [1888] [addressing similar

predecessor statute]). The statute governing the order for peremptory challenges is not a “mere rule of procedure,” but is “a right secured to the defendant” (*id.* at 295). The requirement that the People make peremptory challenges first “is imperative,” and violation of that rule is “a substantial, and not a mere technical error” (*id.* at 292, 295; see *People v Luciano*, 10 NY3d 499, 503-504 [2008] [noting that the Court of Appeals has “strictly constru(ed)” the statutory language governing the order of peremptory challenges \*610 “without exception”]; *People v Alston*, 88 NY2d 519, 529 [1996] [“the one persistently protected and enunciated rule of jury selection (is) that the People make peremptory challenges first, and that they never be permitted to go back and challenge a juror accepted by the defense”]).

In *People v Williams* (26 NY2d 62 [1970]), after both parties had exercised peremptory challenges, the court allowed the People to make a peremptory challenge to a previously unchallenged juror. The Court of Appeals reversed the judgment of conviction and ordered a new trial, observing that the requirement that the People exercise peremptory challenges first has been construed “very strictly,” and “has been consistently . . . followed” and “firmly reiterated” (*id.* at 63, 64-65). Similarly, the Court of Appeals affirmed a Second Department decision, for the reasons stated therein, that found reversible error where the trial court permitted the People to exercise a peremptory challenge after they had already completed their peremptory challenges, and while defendant was in the process of exercising his peremptory challenges

(*People v De Conto*, 80 NY2d 943 [1992], *affg* 172 AD2d 684 [2d Dept 1991]).

The facts of this case are identical to those in *De Conto*. The People here had completed their peremptory challenges for the round, and expressly told the court that the remaining prospective jurors, including Ms. C., were acceptable. It was only while defense counsel was making her peremptory challenges that the People sought to belatedly challenge Ms. C. Under these circumstances, the court's decision to allow the challenge and excuse the juror constitutes reversible error (see *De Conto*, 80 NY2d at 943). Although the People contend that there was no bad faith in their belated request to exercise the peremptory challenge, CPL 270.15 (2) does not contain an exception for good faith. Nor has the Court of Appeals recognized a good faith exception in its decisions strictly construing the statute.

We decline to follow *People v Levy* (194 AD2d 319 [1st Dept 1993], *appeal dismissed* 82 NY2d 890 [1993]) and its progeny. Those decisions cannot be reconciled with the Court of Appeals' affirmance in *De Conto* and the principles consistently enunciated by settled Court of Appeals jurisprudence (see *Luciano*, *Alston*, *Williams*, *McQuade*). Concur—Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

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**UNITED STATES OF AMERICA,**

-v-

**Defendant.**

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***DEFENDANT'S PROPOSED EXAMINATION OF JURORS***

The Defendant respectfully requests, in accordance with Rule 24(2)(B) of the Federal Rules of Criminal Procedure, that the Court include the following questions during its examination of prospective jurors. It is further requested that the Court pursue more detailed questioning if a particular juror's answer reveals that further inquiry is appropriate. In such circumstances, it is requested that the Court close with an inquiry as to whether that particular fact or circumstance would influence the juror in favor of or against the government or the defendant.

***1. Read a brief statement of the case and then inquire:***

- a. Have any of you read or heard anything about this case?
- b. Given this brief description of the facts, is there anything about this case that would cause you to believe that you could not consider the evidence fairly and impartially according to the law as the Court will instruct you at the conclusion of the case?

***2. Introduce all parties and then inquire:***

- a. Do you know any of the parties either professionally or socially?

***3. Read the names and titles of any witnesses and then inquire:***

a. Do any of you know or think you might know any of these witnesses?

***4. Have you or any members of your family or close friends or associates, ever been the victim of criminal conduct?***

a. If yes, please explain the facts and circumstances and what if any role you played in the investigation and/or prosecution of the matter?

b. Do you think this experience will prevent you from being a fair and impartial juror in this case?

***5. Have you or any members of your family or close friends or associates ever been convicted of a crime?***

a. If yes, which family member, what offense and the disposition?

b. Do you think this experience will prevent you from being a fair and impartial juror in this case?

***6. Have you or any members of your family or close friends or associates ever served as or were employed by a law enforcement agency?***

a. If yes, the name of the agency and the relationship to the individual?

b. Do you think that relationship will prevent you from being a fair and impartial juror in this case?

***7. If a witness is a member of law enforcement would you give greater or lesser wight to that person's testify solely as a result of their employment?***

**8. Do you or any member of your family have legal training or legal employment experience?**

- a. Will this cause you not to be able to be a fair and impartial juror?
- b. Will you accept the law as the Court will instruct you at the end of the case, even if you believe the law as given is incorrect?

**9. The burden of proof in a criminal case is on the government to prove the guilt of the defendant beyond a reasonable doubt. This burden is higher than that in a civil case where the burden of proof is merely a preponderance of the evidence. Does anyone have any difficulty in holding the government to its high standard of proof?**

**10. Here are some basic principles of law that apply in every criminal case:**

- a. An indictment is not evidence and raises no inference of guilt whatsoever.
- b. The government has the burden of proof and must satisfy you of the guilt of the defendant beyond a reasonable doubt.
- c. The defendant does not have to testify or call any witness or produce any evidence and you may not draw any negative inference if the defendant elects not to testify. Alternatively, if the defendant does testify, would you be more or less likely to accept his testimony because he is accused of a crime?
- d. If a defendant testified or called witnesses, would you require him to prove he was not guilty?
- d. The defendant is presumed innocent unless and until his guilt is proven beyond a reasonable doubt.
- e. You must wait until the entire case is over and I have charged you on the law before making up your minds on the innocence or guilt of the defendant.

**Does anyone believe that they would have difficulty following these principles of law?**

***11. The defendant is African American. Will that fact in and of itself cause you not to be able to be fair and impartial?***

***12. Ladies and gentlemen, you have been handed a sheet with 10 separate questions.*** Please answer the questions in a loud and clear voice. The last question deals with prior jury service. With respect to civil cases, just tell us the number of cases on which you have served and if a verdict was reached. With respect to criminal cases, please indicate the nature of the crime and the verdict, and whether any participant spoke to you after the verdict and what if any effect that had on you? ( a copy of the proposed questions is annexed as Exhibit A)

***13. Did any of you know each other before this morning?***

***14. If there are any matters that you would prefer to discuss privately that may affect your ability to be a fair and impartial juror, please let the Court know.***

Dated: Kew Gardens, New York  
November 16, 2015

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