Batson and Beyond: When Race Plays a Role in Voir Dire

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What is a “Batson” Challenge?

• An objection to opposing party’s use of peremptory strikes made due to:
  • Race (Batson v. Kentucky, 476 U.S. 79 (1986))
  • National origin (Hernandez v. NY., 500 U.S. 352 (1991))
  • Gender (J.E.B. v. Alabama, 511 U.S. 127 (1994))

Who can raise a Batson Challenge?

• Defendant
• Prosecutor
• Of any race, national origin, or gender
• Need not be same as struck juror (Powers v. Ohio, 499 U.S. 400 (1991))
Standing to Raise *Batson*

- Equal Protection violation & standing when:
  - State purposefully excludes jurors of defendant's race (gender or national origin)
  - Third-party standing rule: state purposefully excludes jurors based on race, even if jurors' race not shared with defendant (*Powers v. Ohio*)

Why Raise Batson?

1) More Diversity = More Acquittals:
   - Diverse jury increases the likelihood of one or more jurors embracing your defense narrative
   - Bronx acquittal rate is high because juries are diverse
   - D.C. acquittal rate is high because juries are diverse
   - Example in Jonathan Broun’s capital case – holdout for 2nd degree

Why Raise Batson?

- 2) Show your client PD will fight for him, fight for justice
Why raise Batson?

3) ABA Guidelines require it:
   - Defense attorneys must "rais[e] any appropriate issues concerning the method by which the jury panel was selected and the exercise of both challenges for cause and peremptory challenges." (ABA Defense Standard 4-7.2)
   - ABA Guidelines are used to determine if we are effective (Wiggins v. Smith, 539 U.S. 510 (2003))

Why Raise Batson?

• 4) Deter Discrimination by Prosecutor
• 5) Preserve Appellate Issue (in case you lose)
• 6) Create Systematic Record for Future Batson Challenges

Great, Brian, Sonya, but . . .

• how do we do it?
Tools for Raising Batson:

• 1) Know the 3-step procedure

• 2) Know the case law

• 3) Know the facts, including the prosecutor’s discrimination in this trial, other trials, and in anything s/he does – (more on that later).

The Batson 3-Step: overview

• Step 1: Defense (objecting party) shows Prima Facie case of discriminatory use of peremptories

• Step 2: Prosecutor (opposing party) must provide race-neutral reason for challenged strike(s)

• Step 3: Defense (objecting party) has burden of demonstrating intentional discrimination

Step 1: Making Your Prima Facie Case

Look to the “the totality of the relevant facts.” (Miller-El v. Dretke, 545 U.S. 231 (2005) (quoting Batson v. Kentucky)).

What are those?
Step 1: Making Your Prima Facie Case

• Demonstrate Numerical Use of Strikes in Discriminatory Manner (e.g., 2/3 strikes to remove only 2 African Americans)
• Side by side comparisons of prosecutor’s strikes with accepted jurors
• Factor in cause challenges, especially if discriminatory
• Disparate questioning (including number and type of questions)

Step 1: Making Your Prima Facie Case

• Prosecutor’s use of race in other aspects of the case. (OJ example in Snyder v. Louisiana)
• Excluded jurors same race as defendant
• Race otherwise an issue in case
• Prosecutor’s questions & statements during voir dire (including treatment of jurors)
• Strikes of jurors from protected class expected to be helpful to the State

Step 1: Making Your Prima Facie Case

• Prosecutors’ discrimination in other cases:
  - record concerning past Batson challenges, successful and unsuccessful
  - rely on particulars about ADA trying case
  - rely on particulars about elected DA
  - rely on particulars about DA office
  - rely on their discriminatory tactics, e.g., disparate questioning
Step 1: Making Your Prima Facie Case

• Culture of discrimination in DA’s Office?
  – Learn the culture and practices of the DA’s Office
  – Do they have a manual or training materials supporting your claim
  – Do charging decisions reflect racism?
  – Do prosecutors use racial slurs or code words for racial minorities?

- Even seemingly non-official conduct by prosecutor can reflect discrimination pertinent to your burden at Step 1.

- For example . . . former Harris Co. TX DA Chuck Rosenthal’s racist emails . . .

Batson Step 1: Quick Tip

• End your challenge by asking for the Prosecutor to provide a race-neutral reason for each challenged strike

• Once the Prosecutor gives a Race Neutral Reason, Step 1 becomes moot (State v. Bell, 359 N.C. 1 (2004))
Batson Step 1: Quick Tip 2

- **Making a strong prima facie case is key for 2 reasons:**
  - 2) The strength of the prima facie case is pertinent at Step 3, where ultimate determination made. (Miller-El v. Cockrell, 537 U.S. 322 (2003)).

Step 2: The Race-Neutral Reason

- Burden shifts to prosecutor to give race-neutral reason for strikes

  • Reason need not be “persuasive or even plausible.” (Purkett v. Elem, 514 U.S. 765 (1995)).

  - The juror has long unkempt hair, a mustache, and a goatee type beard.
Step 2: The Race-Neutral Reason

• What does defense counsel do at Step II?
  – Object if the answer relies in any part on race
  – For example,
    • Use of neighborhood as proxy for race
    • “reminds me of [known African American].”

Step 2: The Race-Neutral Reason

• Is any reason insufficient at Step II?
  • Bare denial of discriminatory intent will not suffice.

Step 3: Proving Intentional Discrimination

• Burden shifts to defense (party objecting to strike) to show “purposeful discrimination.”
• Must show Prosecutor’s stated reasons are a pretext for discrimination
Step 3: Proving Intentional Discrimination

• How?
  • A. Facts outside Batson challenge:
    – Reemphasize reasons at Step 1
    – Add any new Step-1 type reasons you were unable or did not think to raise at Step 1
    – Raise evidence that the prosecutor lacks credibility, e.g., instances of dishonesty or lack of candor to the court or counsel (discovery/Brady violations), inconsistent use of reasons in other cases, or rote responses to Batson challenges.

Step 3: Proving Intentional Discrimination

• B. Facts internal to the Batson challenge
  – Key tactic: demonstrate disparate treatment of similar jurors (side by side analysis)
  – Disparate questioning produced the race-neutral reasons the prosecutor proffers
  – Dispute veracity of prosecutor’s demeanor allegations:
    • Not true
    • Not truly important to prosecutor

Step 3: Proving Intentional Discrimination

Example of side by side analysis
State’s race-neutral reason: doesn’t like teachers

<table>
<thead>
<tr>
<th>Struck Juror</th>
<th>Accepted Juror</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American</td>
<td>White</td>
</tr>
<tr>
<td>High School Teacher</td>
<td>Junior High Teacher</td>
</tr>
</tbody>
</table>
Step 3: Quick Tips

• Although we have the burden at Step III, we can win:
  – “[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.”) (Hernandez v. New York, 500 U.S. 352 (1991)).

• Comparative analysis need not involve jurors “identical in all respects.” (Miller-El v. Dretker, 541 U.S. 231, 247 n.6 (2005))

Remedy

• When you win the Batson challenge, what do you get?

Be Creative

• Neither the North Carolina Supreme Court nor the United States Supreme Court has set out the proper remedy for a Batson violation at the trial level.
Remedy


- *McCollum* noted that reseating improperly struck juror, who knows he was struck, would be unfair to State.

Remedy

- But North Carolina courts have not said much else on remedy.

- And it is possible to eliminate *McCollum’s* concern by conducting strikes at the bench, outside the jury’s hearing.

Any of the following could be appropriate:

- Mistrial
- Entire venire reseated
- Jury panel discharged & new panel assembled.
- Prosecutor loses all peremptory challenges
- All persons struck by prosecutor are placed back on the panel
- Defense is given additional challenges equal to the number of challenges lost by the prosecutor.
2 Key Supreme Court Cases


- Relied on 2 Types of Evidence to find discrimination:
  1) Side by Side Analysis
  2) “*All relevant circumstances . . .*”

Key Supreme Court Cases: *Miller El*

- **Struck**  
  - Fields (black) many white jurors  
  - favored death penalty favored DP  
  - brother had conviction

- **Accepted**  
  - Fields (black) many white jurors  
  - favored death penalty favored DP  
  - brother had conviction

Key Supreme Court Case: *Miller El*

- Miller-El’s “*all relevant circumstances . . .*”  
  - Jury shuffle to eliminate black jurors  
  - Use of disparate questioning  
  - Dallas DA’s office policy of excluding African Americans, proven by DA manual  
  - Notes reflecting the prosecutor wrote down race of jurors  
  - Struck 10 of 11 qualified African Americans
2 Key Supreme Court Cases

- But, you say, my case does not involve *Miller-El* circumstances.

- Do we need these kind of circumstances to sustain a *Batson* challenge?

Key Supreme Court Case: *Snyder*

Answer: No (but still dig for those other circumstances).


Key Supreme Court Case: *Snyder*

**Side by side analysis:**

<table>
<thead>
<tr>
<th><strong>Struck</strong></th>
<th>Accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Struck</td>
<td>Accepted</td>
</tr>
<tr>
<td>Brooks (black)</td>
<td>1) Laws (white)</td>
</tr>
<tr>
<td>Student teacher</td>
<td>had his own business</td>
</tr>
<tr>
<td>Had to finish</td>
<td>had to take care of</td>
</tr>
<tr>
<td>his “hours”</td>
<td>sick wife &amp; kids</td>
</tr>
<tr>
<td>State said he</td>
<td>2) Donnes (white)</td>
</tr>
<tr>
<td>would rush a</td>
<td>had urgent work</td>
</tr>
<tr>
<td>verdict</td>
<td>commitment coming</td>
</tr>
</tbody>
</table>
Key Supreme Court Case: *Snyder*

- What about the other “relevant circumstances?”
- None, SCOTUS said disparate treatment of Brooks by “itself” proved intentional discrimination
- SCOTUS did not mention O.J. Simpson shenanigans

Key Supreme Court Case: *Snyder*

- *Snyder* reaffirms that the prosecutor’s racially discriminatory strike of even a single juror violates the Equal Protection Clause and is prohibited.

Practice Implications

During trial:
1) Move to have the trial court ask each prospective juror his or her race (sample motion)
2) Move for transcription of voir dire (sample motion)
3) Keep *detailed* notes on voir dire (using sample sheet distributed). Make your team the reliable record expert in the room!
4) Use a second chair, paralegal, or intern during voir to record this vital information
Practice Implications

5) Ask that peremptories be conducted outside jurors’ presence
6) Make Batson challenges!
7) Loop into your challenge struck jurors for whom court rejected prima facie case in previous rounds

Practice Implications

8) Ask for a hearing: “Upon timely objection to peremptory challenges for alleged discrimination, the court shall hold a hearing to determine if a prima facie case of discrimination has been made.” (Batson v. Kentucky)
9) If hearing is denied, make proffer of evidence you would establish.
10) If hearing is granted, put on your evidence & cross examine prosecutor

Practice Implications

Between trials:
1) Maintain Batson file with:
   - Copies of voir dire from previous trials, including Batson challenges and prosecutor’s stated reasons for strikes
   - Copies of Batson facts sheet for each trial
   - Maintain sub files for each ADA
Practice Implications

- 2) Be on the lookout & maintain evidence of systemic discrimination in DA’s Office (manuals, culture of discrimination, charging decisions, etc).
- 3) Prepare to integrate findings at next trial

Practice Implications

- The prosecutor, too, can raise a Batson challenge:
  - What should our response be?

Practice Implications

- Do not say that you are only responding to the prosecutor’s discriminatory conduct.
  
  Do dispute that the prosecutor has made out a prima facie case of discrimination.
  
  Do give credible, race-neutral reasons for your strikes, if the court asks for them.
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