“OBJECT ANYWAY”: Reviving Batson’s Promise

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Let the Sunshine In!

1986

Batson v. Kentucky
1995
Top Gun II
BATSON Justifications: Articulating Juror Negatives

1. Inappropriate Dress — attire may show lack of respect for the system, immaturity or rebelliousness.
2. Physical Appearance — tattoos, hair style, disheveled appearance may mean resistance to authority.
3. Age — young people may lack the experience to avoid being misled or confused by the defense.
4. Attitude — air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.
5. Body Language — arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.
6. Rehabilitated Jurors — or those who vacillated in answering DA’s questions.
7. Juror Responses — which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.
8. Communication Difficulties — whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.
9. Unrevealed Criminal History — voir dire on “previous criminal justice system experience.”
10. Any other sign of defiance, sympathy with the defendant, or antagonism to the State.

Top Gun II                                      Jury Voir Dire
Let the Sunshine In!

2018
1990 to 2010
MSU RJA Study
Black Jurors
Struck
Black Jurors
Available

\[ \frac{\text{Non-Black Jurors Struck}}{\text{Non-Black Jurors Available}} = \text{\textquotedblright STRIKE RATIO\textquotedblright} \]
≈ 2/1
2011

Jury Sunshine Project
## WFU Jury Sunshine Project

### Black/White Removal Ratios for Largest Cities in NC

<table>
<thead>
<tr>
<th>City</th>
<th>Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Winston-Salem (Forsyth)</td>
<td>3.0</td>
</tr>
<tr>
<td>Durham (Durham)</td>
<td>2.6</td>
</tr>
<tr>
<td>Charlotte (Mecklenburg)</td>
<td>2.5</td>
</tr>
<tr>
<td>Raleigh (Wake)</td>
<td>1.7</td>
</tr>
<tr>
<td>Greensboro (Guilford)</td>
<td>1.7</td>
</tr>
<tr>
<td>Fayetteville (Cumberland)</td>
<td>1.7</td>
</tr>
</tbody>
</table>
So the question is not:

Are prosecutors violating Batson?
Prosecutors are violating Batson ALL THE TIME
That is so old news.
Let the Sunshine In!
North Carolina Supreme Court

Years since *Batson* 31
*Batson* claims heard 74
*Batson* reversals 0
Purposeful Discrimination Reversals

- West Virginia: 25%
- Maryland: 40%
- Virginia: 17%
- South Carolina: 33%
Friendly SCOTUS Case Law!!

*Miller-El v. Cockrell (Miller-El I), 537 U.S. 322 (2003)*

*Miller-El v. Dretke (Miller-El II), 545 U.S. 231 (2005)*

*Snyder v. Louisiana, 552 U.S. 472 (2008)*

*Foster v. Chatman, 136 S.Ct. 1737 (2016)*
When to use Batson?

ALWAYS
• Create appellate issue (no need to exhaust peremptories)
• Settle the case
• Get future jurors passed
• Strengthen later *Batson* objections
• Educate the court/prosecutor
• Help prosecutor check implicit bias
• Work for your client
• Alert attentive jurors to flawed, racially biased system
• There to do battle
• Right thing to do

So, object anyway!
Batson Motions 101 - Essentials

• Record jury selection
• Record juror race
Batson Motions 201

- Notice of intent to object to *Batson* violations
- Discovery motion – training materials
- Memorandum in support of *Batson* objection
- Preserve state’s notes*
1986
Batson v. Kentucky

Three Step Framework

1. *Prima facie* case
2. Race neutral justification
3. Purposeful discrimination
Step 1

“not intended to be a high hurdle for defendants to cross.”

*State v. Hoffman, 348 N.C. 548, 553 (2008)*
Step 1

- Total Strikes
- Historical Evidence
- Strike Rate
- Prosecutor’s History
- Comparative Juror Analysis
- Race of Parties
- Lack of Info/Qs
- Disparate Questions
The Defendant’s prima facie burden is light...

“[A] defendant satisfies the requirements of Batson’s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.” *Johnson v. California*, 545 U.S. 162, 170 (2005)
Strike Rate

One is one too many…

Prosecutor training and prior practices are relevant. Evidence that prosecutors were trained in how to evade the strictures of *Batson* and historical evidence of prior practices of DA offices is relevant to the determination of whether race was significant in the strike decision. *See Miller-El v. Dretke, 545 U.S. 231, 263-64*
Differential Questioning

“Contrasting *voir dire* questions” posed respectively to black and white prospective jurors “indicate that the State was trying to avoid black jurors”. *Miller-El v. Dretke*, 545 U.S. 231, 255
Step 2
Step 3

- Comparative Juror Analysis
- Use evidence from step 1
- Implausible and incredible reasons ≠ ok
- Prosecutor’s pattern/history
- Not race-neutral, not ok.
Significant Factor, Not Sole Reason

The question before the Court is whether race is “significant in determining who was challenged and who was not.” *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005).
You don’t have to disprove each and every reason.

- In *Foster v. Chatman*, after debunking three of eleven reasons given for one strike and five of eight reasons given for the other strike, the Court concluded that these two strikes were “motivated in substantial part by discriminatory intent.” *Foster v. Chatman*, 136 S.Ct. at 1754.
Comparative Juror Analysis

“If prosecutor's proffered reason for striking black panelist applies just as well to otherwise similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination.” *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005)
“A per se rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters” Miller-El v. Dretke, 545 U.S. 231, 247 n.6 (2005)
The court cannot provide the reason.

Proffered reasons must “stand or fall” on their own plausibility and their pretextual nature “does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false”. *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005).
You win! Relief?
“Reverse Batson”

• First, don’t do it! You’re not helping your client!

• Ask good questions and base your strike decisions on juror answers NOT stereotypes
Implicit bias

• What assumptions am I making about this juror?
• How would I interpret that answer if it were given by a juror of another race?