STRENGTHENING BATSON CHALLENGES WITH THE MSU STUDY
By Cassandra Stubbs, ACLU Capital Punishment Project
Durham, North Carolina

Introduction

With Batson v. Kentucky, the United Supreme Court created a burden shifting scheme intended to root out the insidious practice of discrimination in jury selection. Unfortunately, the promise of Batson has gone largely unfulfilled. The reality of the implementation of Batson in North Carolina has been particularly bleak: the North Carolina Supreme Court has never reversed a single case on Batson grounds. See Amanda S. Hitchcock, “Deference Does not by Definition Preclude Relief: The impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals,” 84 N.C. L. Rev. 1328, 1328 (2006). In contrast, Alabama appellate courts have acknowledged racial bias in 25 capital cases in recent years. See EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY, at 6 (Aug. 2010) (“EJI Study”). The lack of appellate response in North Carolina does not mean that North Carolina jury selection has been free from racial bias. To the contrary, an exhaustive study of jury selection in North Carolina cases over the past 20 years revealed pervasive and extensive discrimination against African-American jurors in capital cases. See Catherine M. Grosso & Barbara O’Brien, A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials, 97 IOWA L. Rev. 1531 (2012).

But the outlook is improving. The United States and North Carolina Supreme Courts have both issued decisions in recent years that offer new possibilities for success under Batson. And thanks to the extensive discovery and litigation from the North Carolina Racial Justice Act, we have new sources of historical and statistical evidence to use in formulating future challenges to discriminatory practices.

I. Problems with Batson and its implementation

Unfortunately, for years, the commitment of Batson to equal protection in jury selection frequently went unrealized. State and federal courts were weak enforcers of Batson, in part because of the weakness of the Batson burden shifting scheme. See e.g., Robert Mosteller, Responding to McCleskey and Batson: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases, 10 Ohio State J. Crim. Law 103, 111-13 (2012); Jeffrey Bellin and Junichi P. Semitsu, Widening Batson’s net to ensnare more than the unapologetically bigoted or painfully unimaginative attorney, 96 CORNELL L. Rev. 1075 (2011). Under the first step of Batson, the moving party must establish a prima facie case of purposeful discrimination under “the totality of the relevant facts.” Miller-El v. Dreke, 545 U.S. 231, 239 (2005). At step two, the burden then shifts to the non-moving party to give a “clear and reasonably specific” race neutral explanation. Id. In step three, the court must then decide whether the moving party has established purposeful discrimination. Id.

Much of the weakness of Batson enforcement can be attributed to the ease with which the non-moving party has been able to satisfy its burden at step two, and ultimately prevail. See, e.g., AMERICAN LAW INSTITUTE, REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE
DEATH PENALTY (April 15, 2009), 16 (describing the ease with which prosecutors can, intentionally or otherwise, ascribe their race based decision to purportedly race-neutral reasons and concluding, “[i]n short, there is little reason to put much faith in Batson as a strong protection against the racial skewing of capital juries”); Hernandez v. New York, 500 U.S. 352, 360 (1991) (plurality opinion) (prosecutor’s explanation at step two need not be “persuasive,” as long as it is not facially discriminatory); Miller-El, 545 U.S. at 240 (“...Batson’s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give. If any facially neutral reason sufficed to answer a Batson challenge, then Batson would not amount to much more than Swain.”); see also, Batson (Marshall, J., concurring) (predicting the shortcomings of the new test, “[i]f 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”).

But other factors have contributed to Batson’s failure to guard against racial discrimination, including judicial opinions that ensured extremely deferential review of trial court, the failure of trial counsel to raise and aggressively litigate Batson, and the hostility of trial judges to Batson claims. We reviewed the capital transcripts of over 150 death row inmates in North Carolina, and despite the fact that there is strong statistical evidence of disparities in the vast majority of these cases, we found that Batson challenges were made less than half the time, in only about 40% of the cases. Even more telling, we found only a small handful of cases, about 3% of the cases, in which the trial judge sustained a Batson objection.

II. New Legal Improvements

A. The Miller-El sea change: reinvigoration of Batson and the rise of comparative juror analysis

The power of Batson to prevent discriminatory strikes was given new life by recent Supreme Court cases Snyder v. Louisiana, 552 U.S. 472 (2008) and Miller-El v. Dretke, 545 U.S. 231 (2005). Both cases involved closer scrutiny of prosecutor explanations, and both defendants ultimately prevailed in the Supreme Court by comparing the proffered explanations of the prosecutors for strikes of African-American jurors to the white jurors for whom the prosecutors had not exercised peremptory strikes. This technique of juror comparison, referred to as “comparative juror analysis,” or CJA, was critical to the decisions. Both cases also involved other persuasive evidence, described below, and are excellent examples of the kind of evidence that counsel should seek to develop before trial.

1. Evidence from Miller-El v. Dretke:

   • Statistics from the jury pool (“In this case, the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors”):
     o Of 108 venire members, after cause strikes, there were 11 African-American venire members in the jury.
     o Of the 11 eligible African-American venire members, prosecutors struck 10 of the 11
     o In contrast, prosecutors struck 4 out of 31 of the eligible non-black venire members.
• **Difference in questioning** (for example, African-American venire members were given a preface about the process of capital punishment before they were questioned about their death penalty views; non-black venire members generally were not).

• **Comparative Juror Analysis.** “In this case, three of the State’s proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and did not serve on the jury.”

• **Historical evidence** of racial discrimination by District Attorney’s office.
  o Testimony by one Dallas County district judge that he had been warned as a DA, years before the trial, that he would be fired if he permitted any African-American to serve on a jury.
  o A flyer from the DA office, also years before the trial, that advised prosecutors to strike minorities (“Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.”).

2. **Evidence from Snyder v. Louisiana:**

• **Statistics** (Of the 36 eligible venire members post-cause challenges, 5 were African-American, and all 5 were struck)

• **Comparative Juror Analysis** (The State purportedly struck an African-American college student because the trial would be hardship for his student-teaching schedule, the State accepted numerous white venire members with similar hardships).

• **Historical evidence** of pattern of striking juries by other prosecutors in the county (presented in an amicus brief)

• **Information about prosecutor Jim Williams and other prosecutors in the county** (presented in an amicus brief)
  o Invoked OJ Simpson in closing argument to the all-white jury
  o Handed out neckties with images of the grim reaper and a hangman’s noose
Collectively these cases demonstrated the willingness of the Supreme Court to protect the rights of wrongfully excluded venire members, even in the context of capital cases, in the face of strong evidence of racially biased exclusion. This evidence should include, but not be limited to, statistical evidence of discrimination in the challenged case.

B. North Carolina Supreme Court acknowledges the sea change, and abandons the “sole factor” requirement

The North Carolina Supreme Court has explicitly recognized that Miller-El and Snyder altered the framework applied to Batson claims by the North Carolina courts. *State v. Borden*, 362 N.C. 277, 279, 658 S.E.2d 654, 655 (2008) (remanding to the trial court for a new Batson hearing so the court could consider comparative juror evidence under the “framework set forth in these Supreme Court decisions, which were not available ... at the time of the (previous) hearing”). Perhaps most concretely, the Supreme Court has now abandoned the requirement that the moving party show that race was the “sole” factor behind an individual strike. See *State v. Waring*, 346 N.C. at 443, 480, 701 S.E.2d 615, 639 (2010); compare, *State v. White*, 131 N.C. 734, 509 S.E.2d 462 (1998) (denying relief even though “race was certainly a factor” because the defendant failed to show that the challenge was “based solely upon race.”). Instead, a defendant may now prevail by showing that a race was a “motivating” factor in the prosecution’s strike. *Waring*, 346 N.C. at 480.

III. NEW EVIDENCE FROM THE RACIAL JUSTICE ACT.

In August 2009, the North Carolina General Assembly enacted a sweeping new statute, the Racial Justice Act (RJA), intended to remove the taint of racial bias from capital punishment. The law specifically provided relief if a defendant could prove that race “was a significant factor in decisions to exercise peremptory challenges during jury selection.” N.C. Gen. Stat. § 15A-2011 (a)(3). The law was first amended in 2012, and then ultimately repealed in 2013. Numerous cases are still pending under
the RJA, but the legacy of the statute may outlive any of these cases. A wealth of information was collected in preparation for the litigation under the Act, including statistical evidence, examples of comparative juror analysis, and historical evidence about trainings of prosecutors.

In the first case to proceed to evidentiary hearing under the RJA, Marcus Robinson alleged bias in jury selection statewide, in his judicial division, and in Cumberland County. The heart of his evidence was a large statistical study conducted by researchers at Michigan State University College of Law (herein MSU Study). The study examined strike patterns in every capital proceeding for every defendant on North Carolina’s death row in 2010, with one exception where the materials were not available. The study concluded overwhelmingly that the State engaged in a pattern of systemic discrimination against African-American venire members.

A. STATISTICAL EVIDENCE: THE MSU STUDY.

The MSU Study proceeded in two parts: Part 1, a large statewide study of race and strike decisions by North Carolina prosecutors in all of the death penalty proceedings for North Carolina’s current death row; and Part 2, a sophisticated controlled study that attempted to explore whether other factors would affect the observed relationship between race and strikes, based on a more detailed analysis of 25% of venire members included in Part I. A copy of the MSU article discussing their study is attached to these materials as an appendix.

The MSU researchers first collected relevant source materials for the death row cases. They gathered voir dire transcripts, jury questionnaires, clerks’ charts, and summonses. MSU researchers relied upon documents collected from courthouses, defense counsel files, and the North Carolina Supreme Court. The voir dire transcripts were critical for determining strike information. Jury questionnaires, when available, were an invaluable source of information about race. If questionnaires were not available, and the race of jurors was not reported in the transcript, the researchers often relied on public record searches from the North Carolina Board of Elections and/or Lexis-Nexis people finder databases to determine the race of the venire members. They were able to use summons information or transcript information to confirm the identity of jurors by matching it to current or prior addresses in the people finder databases.

For the 173 cases in the study, MSU researchers examined 7,421 venire members who were strike eligible. This meant that the MSU researchers did not include in their study venire members who had been excluded for cause based on hardship or some statutory criteria of ineligibility. All of the included venire members were questioned by the prosecutor, and either struck or passed. Of the 7,421 the researchers were able to document the race for all but 7 venire members.

The MSU researchers documented huge disparities in strike patterns statewide. Prosecutors struck 52.6% of the eligible black jurors, but only 25.7% of all other eligible jurors. In other words, prosecutors struck black jurors at twice the rate that they struck all other eligible jurors. These disparities persisted across time and geographic areas. Of all of the prosecutorial districts statewide, only three did not have disparities in strike rates. Similarly, of all of the counties statewide, only four counties did not have disparities in strike rates, and each of those four counties included only one case.
As a result of the MSU Study, capital litigators should be able to present evidence of the prior strike rates for the State, their prosecutorial district, and county when making Batson challenges. In addition, litigators should investigate whether the prosecutors in their case have been involved in prior death penalty cases. MSU calculated a strike rate for every death case for the defendants currently on death row. It is relatively easy math to calculate a strike ratio for an individual prosecutor based on prior cases (i.e., three prior cases, 4.0; 3.0; 2.0 – average ratio 3.0).

B. COMPARATIVE JUROR ANALYSIS

The MAR Court in the Robinson and later, in the next set of cases to proceed to hearing, the Augustine, Golphin, and Walters cases, found over a hundred instances of differential treatment of jurors. We have organized these instances of prior discrimination into charts by defendant and by county. You should review all of the examples in your county, and be prepared to argue those to the judge, and move in the relevant order from Robinson or Augustine, Golphin & Walters. The charts and prior orders are available on the IDS website. These charts are important concrete examples of past discrimination.

C. PRIOR BATSON TRAININGS

In 1995, the Conference of District Attorneys in North Carolina organized a “Top Gun” Training, where they provided a cheat sheet of pat, “race-neutral” explanations. The purpose of the document was clearly to teach prosecutors to circumvent, rather than comply, with Batson. See, e.g., People v.
Randall, 671 N.E.2d 60, 65-66 (Ill. App. Ct. 1996) (criticizing the effectiveness of Batson because of ease of which prosecutors could provide “pat race-neutral reasons for exercise of peremptory challenges,” and postulating, presumably in jest, that “[s]urely new prosecutors are given a manual, probably entitled ‘Handy Race-Neutral Explanations,’” or “20 Time-Tested Race-Neutral Explanations.”); State v. Marcus Robinson, MAR Order at 156-57 (“This Court finds that the training regarding race discrimination did not include training intended to teach prosecutors how to avoid discrimination in jury selection, but that the training was focused on how to avoid finding a Batson violation in case of an objection by opposing counsel.”). In at least one capital case, a prosecutor actually read aloud from the sheet in response to a Batson challenge, using categories that were patently incongruous with the case. See State v. Marcus Robinson, MAR Order at 156-7 (discussing State v. Parker, a Cumberland County capital prosecution).

We have obtained though public record requests a list of all of the District Attorneys in attendance at the Top Gun training. Trial counsel should review that list for prior participation by prosecutors in their counties. The “TOP GUN” CLE records and the Batson Training Guide are both available on the IDS website.

---

**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** re: 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*
IV. LESSONS

As every trial lawyer knows, jury selection is of critical importance. The ability to empanel a fair jury that will consider and weigh your evidence is a paramount goal. If you are able to show evidence of discrimination by the prosecution in prior cases, this will help reduce the ability of the opposing side to improperly exclude jurors based on race.

Checklist to prepare for trial:

1. File a motion for the court to note the race of every potential juror in jury selection. This is essential under North Carolina law to preserve any potential Batson issues for appellate review. See e.g., State v. Mitchell, 321 N.C. 650 (1988).

2. Consider filing a pre-trial motion for Batson related discovery. Although a large number of capital defendants have pending claims under the RJA and the vast majority have long-standing pending discovery motions, there has been little movement in many jurisdictions. Prosecutors, as a general rule, have not yet responded to requests for information about prior jury trainings for example. You can’t know if your District Attorney has a marked up copy of the “Batson Justifications” if you don’t ask for it.

3. Develop statistics regarding the District Attorney’s prior jury selection practices. Consider preparing an affidavit for your district and/or district attorney.
   a. Pull the relevant data for your area from the MSU Study: Pull the statewide, county, and district strike ratios from the MSU study. You should also look for individual strike rate ratios for the prosecutors involved in your case.
   b. Maintain strike data for serious felony cases in your jurisdiction. As a matter of course, defense counsel should maintain jury questionnaires, and data about strikes. For example:

<table>
<thead>
<tr>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
<th>F</th>
<th>G</th>
<th>H</th>
<th>I</th>
<th>J</th>
<th>K</th>
<th>L</th>
<th>M</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trial Date</td>
<td>Prosecutors Name</td>
<td>Defendant Name</td>
<td>Case No.</td>
<td>Presiding Judge</td>
<td>Defense Counsel</td>
<td>Total No. Jurors Questioned by State</td>
<td>Total No. Jurors Struck by State</td>
<td>Black Jurors Struck by State</td>
<td>White Jurors Struck by State</td>
<td>Latino Jurors Struck by State</td>
<td>Asian Jurors Struck by State</td>
<td>Women Struck by State</td>
</tr>
<tr>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

c. Consider calculating the strike rate for other serious felony cases in your district.
   i. Obtain transcripts, jury questionnaires, clerk charts, and summons lists for prior cases:
      1. Search Westlaw or Lexis to identify other cases that went through appeals by opposing counsel.
      2. Check court file for relevant jury selection materials.
      3. Check with North Carolina Court of Appeals (recent cases only) or the North Carolina Supreme Court for transcripts.
      4. Contact friendly appellate counsel for transcripts.
      5. If necessary, move in discovery for transcripts and jury selection materials.
   ii. Calculate strike rates for those cases.
      1. Use clerk charts or transcripts to determine strike information.
2. Use clerk charts or jury questionnaires, if available, to determine race of venire members. If not available, use public records as described in MSU report (see in particular, the “race coding appendix.”)

4. Prepare for comparative juror analysis by searching the transcript files for Batson objections (if your transcripts are “OCR” enabled, you will be able to search for Batson violations quickly). Catalog Batson proffered explanations in prior cases, and be prepared to bring copies of any sustained Batson objections, if found. Be sure to designate a team member who will track questionnaire information for the jurors so that you will be in the best position to respond to Batson explanations.

5. Review the CLE records to see if any of the current or former DAs in your district attended the Top Gun Training. If so, be prepared to introduce the “cheat sheet” and the CLE records.

6. Look for other relevant information.
   i. County RJA motions:
      1. Statistics about race in the county, or district.
      2. Anecdotes about city, county discrimination.
   ii. Newspaper files.
   iii. Public records requests or discovery motions for information about the office or opposing party and their jury selection trainings.

7. During trial.
   a. Track race and gender of every strike (and make sure the court is putting it on the record).
   b. If possible, develop ahead of time a chart of basic information about every venire member, including race, age, gender, marital status, and employment. This will assist with comparative juror analysis.
   c. Raise the challenge, if appropriate, and reference all of the information you have. Argue initially that your evidence, under the totality of the circumstances, satisfies the prima facie burden. Following any explanation for the peremptory strike by prosecutors, argue why you should prevail at Step 3, in light of all of the evidence. Be as specific as possible about why the proffered explanation is not persuasive in light of all of your evidence. If the prosecutor offers a demeanor based explanation, and you believe the explanation is not true, be sure to put your objection on the record and explain your groups. Sarcasm and silence are both losing strategies for appeal. Include at this step any evidence that prosecutors treated jurors of different races or genders with similar characteristics differently.

8. After trial.
   a. If your client is convicted, and you believe Batson was an issue, make sure jury questionnaires are preserved in the record.
   b. If you moved in discovery, and were denied access to materials used by the prosecution in jury selection, you should also consider asking the court to place those materials in the record.