Batson Issues

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BATSON ISSUES:
BEEN HERE, DONE THAT, WHAT NOW

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PART I – BEEN THERE

The constitutional framework for the issue of how to address the exclusion of minorities from trial juries with the use of peremptory challenges was, of course, set out by the United States Supreme Court in *Batson v. Kentucky*, 476 US 79 (1986). In *Batson*, the prosecutor used his peremptory challenges to strike all four black persons on the panel, and a jury composed only of white persons was selected. Defense counsel moved to dismiss the jury, arguing that the prosecutor's actions violated his client's rights under the Sixth and Fourteenth Amendments to a jury drawn from a fair cross-section of the community and also arguing that the actions violated the Fourteenth Amendment requirement to equal protection of the laws. The trial judge held no hearing and denied the motion, observing that parties were entitled to use their peremptory challenges to "strike anybody they want to."

Justice Powell, delivering the opinion of the Court, cited *Swain v. Alabama*, 380 US 202 (1965) as establishing the proposition that denial of the right to serve on a jury on account of race violates the Equal Protection Clause. In very compelling language, Justice Powell described the harm caused by the insidious practice of racial discrimination in jury selection:

> Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try . . . . As long ago as *Strauder*, therefore, the Court recognized that, by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror . . . . The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice – 476 US at 87.

In looking at *Swain*, its history, and its requirements, the Court recognized that requiring proof of a pattern of discriminatory actions by a prosecutor over a number of cases did not address the problem from the viewpoint of an excluded juror nor the community at large, and the Court went on to overrule *Swain* to the extent that it was inconsistent with the Court's opinion. Thus, the Court ruled that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." 476 US at 96.

Thereafter, the Court set out a three-step, burden-shifting framework for the resolution of any challenge to a prosecutor's use of any one of his peremptory challenges. At the first step, the defendant must establish a prima facie case of purposeful discrimination under the totality of the relevant facts. At the second step, the burden then shifts to the prosecutor to provide a clear and reasonably specific race

neutral explanation. At the third step, the trial court must then decide whether the defendant has established purposeful discrimination. "In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' [citation omitted]. Circumstantial evidence of invidious intent may include proof of disproportionate impact." 476 US at 93. If such purposeful discrimination is found, the remedy in *Batson* itself is not clear. Some have argued that the appropriate remedy is to require that the challenged juror be seated on the jury; others have argued that the remedy should be to strike the jury panel and begin jury selection anew.

In response to the State's argument that the privilege of the unfettered exercise of peremptory challenges, though not guaranteed by the Constitution, was vitally important to the criminal justice system, the Court wrote:

> The reality of practice, amply reflected many state and federal opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race. 476 US at 99.

Finally, and interestingly, the Court said at Footnote 12 of the opinion, "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel."

Many will remember that Justice Marshall's concurring opinion questioned the efficacy and future enforcement in the courts of the majority's opinion and suggested that peremptory challenges be abolished altogether. In response to that position, the Court stated in Footnote 22:

> While we respect the views expressed in JUSTICE MARSHALL's concurring opinion concerning prosecutorial and judicial enforcement of our holding today, we do not share them. The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike any juror because of his race. We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes. Certainly, this court may assume that trial judges, in supervising <u>voir dire</u> in light of our decision today, will be alert to identify a <u>prima facie</u> case of purposeful discrimination. Nor do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution.

Though Justice Marshal joined the majority opinion, he wrote a separate concurring opinion with some amazingly strong and sadly prophetic thoughts:

> Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, see *People v. Hall*, 35 Cal.3d 161, 672 P.2d 854 (1983), or seemed "uncommunicative," *King*, *supra*, at 498, or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case," *Hall, supra*, at 165, 672 P.2d at 856? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strike on nonracial grounds, then the protection erected by the Court today may be illusory.
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> Nor is outright prevarication by prosecutors the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that this motives are legal." *King, supra,* at 502. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As JUSTICE REHNQUIST concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. *Post* at 476 U.S. 138; *see* also THE CHIEF JUSTICE's dissenting opinion, *post* at 476 U.S. 123. Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels – challenge I doubt all of them can meet. It is worth remembering that 114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in Page 476 U.S. at 1067-107 our society as a whole.

Since the original constitutional framework was set out in *Batson*, the United States Supreme Court has, from time to time, re-visited the issues of exclusion of jurors and has expanded upon the original holding.

In *Powers v. Ohio*, 499 US 400 (1991), the Court ruled that the defendant need not be of the same race or sex as the prospective juror who is peremptorily challenged. In *Johnson v. California*, 545 US 162 (2005), the Court ruled that the defendant's burden of proof was not "more likely than not" that the prosecutor had acted in a discriminatory manner; the Court explicitly ruled that the threshold showing required of a defendant is lower than the preponderance standard and is just strong enough to permit an inference of discrimination. In *Miller-El v. Dretke*, 545 US 231 (2005), the Court held that race is not required to be the sole factor for the use of the peremptory challenge; race or sex must only be shown to be a "significant" factor in the exercise of the challenge. In addition, the court recognized the probative value of juror comparison in the record and characterized such comparisons as often "more

valuable than . . . bare statistics." Finally, in *Snyder v. Louisiana*, 552 US 472 (2008), the Court engaged again in comparative juror analysis, which was critical to the decision granting relief to the defendant. In *Snyder*, among other evidence, the State peremptorily challenged an African-American college student purportedly because serving would be a hardship with his student-teaching schedule, while the State accepted other white jurors with similar hardships.

PART II – DONE THAT

The North Carolina Supreme Court has, of course, recognized that the holding of *Batson* applies to the states through the Fourteenth Amendment.

In one of the first cases decided under *Batson*, *State v. Jackson*, 322 NC 251, the Court ruled against the defendant, finding that the prosecutors used valid criteria in exercising peremptory challenges, concluding that they wanted a jury that was "stable, conservative, mature, government oriented, sympathetic to the plight of the victim, and sympathetic to law enforcement crime solving problems and pressures." Justice Frye wrote a concurring opinion, in which Justice Martin concurred, which included this language:

> . . . it is the province of the courts to ensure that they are used in such a manner not offensive to the constitutional rights of our citizens. We must remain alert to offers of proof made by the State that are but mere colloquial euphemisms for the very prejudice that constitutes invidious discrimination. 322 NC at 260.

In *State v. White*, 131 NC 734 (1998), the Court denied *Batson* relief to a defendant even though "race was certainly a factor," finding that the defendant had failed to show that the challenge was "based solely on race." However, In *State v. Waring*, 346 NC 443 (2010), in light of *Miller-El* and *Snyder*, the North Carolina Supreme Court has now abandoned the requirement that the defendant show that race was the "sole" factor behind a peremptory challenge of a prosecutor.

There is an interesting and informative collection of North Carolina *Batson* cases discussed and listed in a recent UNC Law Review article by Daniel R. Pollitt and Brittany P. Warren located at 94 N.C.L. Rev. 1957 (2016). Extensive research by those authors shows that of the 114 cases decided on the merits by the NC Supreme Court and NC Court of Appeals, the courts have not found a substantive *Batson* violation in any case in which the prosecutor has articulated a reason for the peremptory challenge of a minority juror. Moreover, of the forty-two cases decided by the Court of Appeals, the Court approved successful "reverse *Batson*" claims for purposeful discrimination against white jurors challenged by black defendants, in two cases.

In 2009, the North Carolina General Assembly passed the law entitled the Racial Justice Act to address the issue of potential racial bias in jury selection in capital cases. The law provided for relief from a death sentence if a defendant could prove that race "was a significant factor in decisions to exercise peremptory challenges during jury selection" and further provided that such showings could be

made with the use of statistical evidence, as is done, for example, in employment discrimination cases recognizing disparate impact and as noted in the *Batson* decision itself.

Even though the RJA was repealed in 2013, there was a large statistical study conducted by researchers at Michigan State University College of Law which examined the peremptory challenge patterns in every capital proceeding for all inmates on North Carolina's Death Row. The research showed that prosecutors in North Carolina peremptorily challenged black jurors at twice the rate that they challenged all other eligible jurors. These disparities were further found to exist across time and geographic areas. Indeed, of all of the prosecutorial districts in the state, only three did not show disparities in peremptory strike rates; of all the counties studied, only four did not show disparities in strike rates, and each of those four counties included only one case. Again, even though the RJA Has been repealed, this statistical evidence is likely to be presented in future cases in the trial courts in support of *Batson* challenges.

PART III – WHAT NOW

The most recent case decided by the United States Supreme Court is *Foster v. Chatman*, 195 L. Ed. 2d 1. This case was widely publicized in news stories as being an egregious set of facts. However, upon close examination of the opinion, it may well be that the "egregious" facts are not as unusual as might be thought and that one of the primary reasons that the Court was able to review these facts was because of a Public Records Act disclosure to the defendant. The case is significant not only because of the centrality of the Public Records Act disclosure but also because of the in-depth, fact-specific examination of the record by the Court in looking behind the reasons proffered by the prosecution for the peremptory challenges of two black prospective jurors. Finally, it is noteworthy that Chief Justice Roberts wrote the decision, with only Justice Thomas dissenting.

The record revealed that *Foster* was convicted of capital murder and sentenced to death in a Georgia court. During jury selection at his trial the State used peremptory challenges to strike all four black prospective jurors qualified to serve on the jury. *Foster* argued that the State's use of those strikes was racially motivated, in violation of *Batson*. The trial court rejected that claim, and the Georgia Supreme Court affirmed. *Foster* then renewed his *Batson* claim in a state habeas proceeding. While that proceeding was pending, *Foster*, through the Georgia Open Records Act, obtained from the State copies of the file used by the prosecution during his trial. Among other documents, the file contained (1) copies of the jury venire list on which the names of each black prospective juror were highlighted in bright green, with a legend indicating that the highlighting "represents Blacks"; (2) a draft affidavit from an investigator comparing black prospective jurors and concluding. "if it comes down to having to pick one of the black jurors, [this one] might be okay"; (3) notes identifying black prospective jurors as "B#1", "B#2," and "B#3"; (4) notes with "N" (for "no") appearing next to the names of all black prospective jurors; (5) a list titled "[D]efinite NO's" containing six names, including the names of all the qualified black prospective jurors; (6) a document with notes on the Church of Christ that was annotated "NO. No Black Church"; and (7) the questionnaires filled out by five prospective black jurors, on which each juror's response indicating his or her race had been circled.

> The State habeas court denied relief. It noted that Foster's *Batson* claim had been adjudicated on direct appeal. Because Foster's renewed *Batson* claim "fail[ed] to demonstrate purposeful discrimination," the court concluded that he had failed to show "any change in the facts sufficient to overcome" the state law doctrine of res judicata.

The United States Supreme Court held that the defendant had established purposeful discrimination in the State's peremptory strikes of two black prospective jurors, Marilyn Garrett and Eddie Hood. The Court found that even though the trial court had accepted the prosecution's justification for both strikes that the record "belied" much of the prosecution's reasoning.

The prosecution explained to the trial court that it made a last-minute decision to strike Garrett only after another juror, Shirley Powell, was excused for cause on the morning that the strikes were exercised. The Court hold that that explanation was flatly contradicted by evidence showing that Garrett's name appeared on the prosecution's list of "[D]efinite NO's" – the six prospective jurors whom the prosecution was intent on striking from the outset. The record also refuted several of the reasons that the prosecution gave for striking Garrett instead of Arlene Blackmon, a white prospective juror. For example, while the State told the trial court that it struck Garrett because the defense did not ask her for her thoughts about such pertinent trial issues as insanity, alcohol, or pre-trial publicity, the record revealed that the defense asked Garrett multiple questions on each topic. And though the State gave other facially reasonable justifications for striking Garrett, the Court found those difficult to credit because of the State's willingness to accept white jurors with the same characteristics. For example, the prosecution claimed that it struck Garrett because she was divorced and, at age 34, too young, but three out of four divorced white prospective jurors and eight white prospective jurors under age 36 were allowed to serve.

With regard to prospective juror Hood, the record similarly undermined the justifications proffered by the State to the trial court for the strike. For example, the prosecution alleged in response to Foster's pretrial *Batson* challenge that its only concern with Hood was the fact that his son was the same age as the defendant. But then, at a subsequent hearing, the State told the court that its chief concern was with Hood's membership in the Church of Christ. In the end, neither of those reasons for striking Hood withstood scrutiny. As to the age of Hood's son, the prosecution allowed white prospective jurors with sons of similar age to serve, including one who, in contrast to Hood, equivocated when asked whether Foster's age would be a factor at sentencing. And as to Hood's religion, the prosecution erroneously claimed that three white Church of Christ members were excused for cause because of opposition to the death penalty, when in fact that the record shows that those jurors were excused for reasons unrelated to their views on the death penalty. Moreover, a document acquired from the State's file contained a handwritten note stating, "<u>NO</u>. NO <u>Black</u> Church," while asserting that the Church of Christ does not take a stand on the death penalty. Other justifications for striking Hood fail to withstand scrutiny because no concerns were expressed with regard to similar white prospective jurors.

Foster reiterated the importance of comparative juror analysis, citing, *Miller-El*, ruling that evidence that a prosecutor's reasons for challenging a black prospective juror apply equally to another

similar white prospective juror who is passed and allowed to serve suggests purposeful discrimination. The Court reasoned:

> 'With respect to both Garrett and Hood, such evidence is compelling. But that is not all. There are also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file. Considering all of the circumstantial evidence that 'bears upon the issue of racial animosity." We are left with the firm conviction that the strikes of Garrett and Hood "were motivated in substantial part by discriminatory intent." 195 L. Ed. 2d 1

The importance of the *Batson* relief ordered in *Foster* has yet to play out in the lower courts, but it may signal new life for in-depth review of *Batson* claims, hearkening back to Justice Marshall's words in his concurring opinion in *Batson*.

In the aftermath of *Foster*, trial judges should be cognizant and careful in evaluating *Batson* claims. Because of the significance of comparative juror analysis, it is critical to pay close attention to the conducting of the voir dire and to make notes of both questions and answers of each member of the jury panel, as well as any information provided on a juror questionnaire. Issues to watch include:

- Prosecutors' Training materials and "demeanor" explanations (see Attachment)
- Membership in African-American organizations, such as the NAACP, or certain African-American Churches
- Explicit race-based questions. For example, questioning an African-American juror about ever having had a negative encounter with a law enforcement officer during a traffic stop (particularly if the case has nothing to do with a traffic stop).
- Irrational reasons. For example, attempting to challenge an African-American woman who was the civil trial coordinator in a TCA Office because "she knew some public defenders," when in fact she knew district attorneys and all the participants in the court system in connection with her employment.
- Misrepresentations of the record (this is where reference to one's own notes is critical).
- MSU study results by county and prosecutorial district

As we move forward and encounter *Batson* issues, it is important to remember that the effect of exclusion of people of color and women from juries not only adversely affects the excluded juror but also tends further to foster disrespect and lack of trust in the judiciary in the minority community.

We must all recognize not only explicit racial bias but the pervasive persistence of implicit racial bias which we all share, to one degree or another. If we recognize our own short-comings and renew our commitment to the ideals of justice and fairness for all under our Constitutional principles, we shall all serve our communities and the judiciary well.