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Expert Analysis

'Batson' Update: Second Circuit Cases Highlight Issues in Making Challenges

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The *Batson* decision is now more than 20 years old and continues to spawn frequent litigation. In *Batson v. Kentucky*, the U.S. Supreme Court held that purposeful racial discrimination by the prosecution during jury selection violates a criminal defendant's right of equal protection by denying him "the protection that a trial is intended to secure."[1] Since that decision in the mid-1980s, the core *Batson* holding has been expanded considerably by the Court. It now covers not only racial discrimination, but also discrimination based on other classifications, such as gender[2] and ethnicity.[3] In addition, *Batson* has been held to apply to criminal defendants as well as the government.[4] Finally, the Supreme Court found that *Batson* also applies in the civil context and that civil litigants cannot discriminatorily exercise peremptory challenges.[5]

Under *Batson*, courts examining allegations of discrimination during jury selection should engage in a three-step process. First, the challenging party is required to establish a prima facie case of purposeful discrimination in the exercise of peremptory challenges. If the challenging party adequately establishes such a case, the burden shifts to provide a neutral explanation for the peremptory challenge. Once the challenging party has made its prima facie case and the challenged party has tendered an explanation for the challenged strike, the court must determine whether the challenging party has established purposeful discrimination. If it is found that the strike was discriminatory, it is voided and the juror is put back on the jury.

Step One: Establishing a prima facie case: The first step in a *Batson* challenge is merely an evidentiary threshold requirement and mandates only that the challenging party produce evidence "sufficient to permit the trial judge to draw an inference that discrimination has occurred."[6] This determination is highly fact-specific and may be based on a statistical analysis examining the percentage of challenges exercised vis-à-vis the original make-up of the jury pool. As reported cases demonstrate, the Supreme Court's "confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the [] use of peremptory challenges creates a prima facie case of discrimination"[7] has proven largely correct.

Step Two: A neutral explanation: Once a prima facie case has been made by the challenging party, the burden shifts to the other side to provide a credible, neutral, non-discriminatory explanation for excusing the juror in question. A neutral explanation is one based on something other than race, gender or ethnicity. The ingenuity of the trial attorney is often tested at this stage.

An open issue exists among federal courts regarding whether a *Batson* violation has occurred when the challenged party offers both discriminatory and non-discriminatory explanations for a peremptory strike. Some courts have held that any evidence that a discriminatory reason played a role in the challenged party's decision to strike the juror, no matter how small, results in a *Batson* violation as the discriminatory basis "taints" the entire challenge. As phrased by one Court, stating that "even where the exclusion of a potential juror is motivated in substantial part by constitutionally permissible factors (such as a juror's age), the exclusion is a denial of equal protection and a *Batson* violation if it is partially motivated as well by the juror's race or gender."[8] Of course, attorneys who make discriminatory challenges are not likely to admit it.

Other courts, including the U.S. Court of Appeals for the Second Circuit,[9] have held that non-discriminatory reasons can salvage a peremptory strike, so long as the strike would have been exercised even absent the impermissible considerations.[10]

Step Three: The court's analysis: Once a neutral explanation has been proffered by the challenged party, the court must determine whether the challenging party has established *purposeful discrimination*. The Supreme Court has stated that "[t]he rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected."[11]

Courts consider a variety of factors in making this decision, including the types of questions and statements made by the attorneys during the jury selection process and whether a pattern of strikes against certain types of jurors exists.[12] Among the permissible non-discriminatory reasons found for peremptory challenges are: age, family situation, lack of mental ability, criminal background of juror or family members, negative opinions of law

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enforcement, language barriers, demeanor, and a demonstrated reluctance to serve as a juror.[13]

Second Circuit Cases

Three recent cases from the Second Circuit serve to illustrate how *Batson* is interpreted and continues to generate litigation.

'United States v. Thompson'

United States v. Thompson[14] involves a reverse-*Batson* racial challenge raised by the government against defendants indicted on drug conspiracy charges. During jury selection, the defense exercised 14 peremptory challenges, 12 of which were against white jurors, and two of which were against Latino jurors.

The district court determined that based on these statistics in the context of the whole of the venire, the government had met its burden of proving a prima facie case of discrimination. At a *Batson* hearing, which focused specifically on the challenge of Juror Two, the defendants offered a number of race-neutral reasons for their decision. First, they noted that the brother of the juror's fiancée was a police officer. In addition, they objected to the fact that the juror was a long-time resident of Westchester County, lived a "sheltered" life with her parents, and taught second grade at a school in the Bronx, where the alleged criminal activity had occurred.

The district court rejected these neutral explanations as insufficient to overcome the factual inference of discriminatory motive, stating that "[o]ther than race, I really don't see a legitimate difference between [Juror Thirty], who spent a career teaching kids in the Bronx, who[m] you chose to keep, and [Juror Two]."

Accordingly, Juror Two was reinstated to the jury. With respect to the juror's future familial relationship with a police officer, the district court noted that Juror Two had not emphasized this fact, but had mentioned it only in response to the court's question about contacts with law enforcement. In addition, after further questioning, Juror Two opined that she did not believe that her future brother-in-law's employment would affect her because she did not discuss his work with him. Moreover, the district court noted that the defendants had seated a Latino juror who had a retired undercover police officer as a brother.

The defense also objected to the fact that Juror Two was a longtime resident of Westchester County and might have preconceived notions of the defendants who were from the Bronx. The district court noted that Juror Two resided in the Yonkers section of the county, however, stating that "Yonkers is more like the Bronx than Westchester." In addition, the district court rejected the defendants' assertion that Juror Two seemed sheltered because she lived with her parents or would be biased because of her occupation as a school teacher in the Bronx. Rather, based on its own observations and the fact that the defense had seated an African American juror who was a retired teacher from the Bronx, the district court found these neutral explanations incredible.

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On appeal, the Second Circuit noted that it would set aside a trial court's finding of fact regarding the question of discriminatory intent only if it were clearly erroneous. Evaluating the defendants' proffered non-discriminatory bases for striking Juror Two, the court concluded that none of the district court's findings were clearly erroneous.

Finally, the circuit panel dismissed the defendants' argument that a black criminal defendant should not be subject to a *Batson* challenge for strikes on white jurors because "the potential social harms identified in 'race-related' cases involving racial minorities…are not implicated.'" But the Second Circuit, in reliance upon *Georgia v. McCollum*, where the Supreme Court held that "[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same—in all cases, the juror is subjected to open and public racial discrimination,"[15] affirmed the district court.

'Brown v. Alexander'

The defendant in *Brown v. Alexander*[16] was convicted in New York state court for criminal sale of a controlled substance in or near school grounds. After this conviction was affirmed by the Appellate Division and the state Court of Appeals, Brown filed a writ of habeas corpus asserting that the state trial court unreasonably applied *Batson* when it ruled she had not made out a prima facie case of race discrimination by the prosecutor in jury selection during the state criminal trial.

Of the 12 potential jurors selected by the trial court during the first round of voir dire, the prosecutor exercised six peremptory challenges, five against African-Americans. During the second round of voir dire, the prosecutor exercised only two peremptory challenges, both against prospective jurors who were African-American. At this point, the defendant asserted a *Batson* challenge. After hearing defense counsel's position, the court denied the defendant's application to have the jurors reinstated, stating "based on what you've said up to this point and what you have pointed out up to this point I'm not going to require the People to offer an explanation for their peremptory challenges. You can renew the application later [and] we'll see where the challenges go from this point on."[17]

The defendant never renewed the application with the trial court, but raised the trial court's decision as an issue in the appeal of her conviction. Both the Appellate Division, First Department, and the New York Court of Appeals affirmed the conviction.

In considering Brown's habeas petition, the Second Circuit, focusing specifically on the first stage of the inquiry, noted that the Supreme Court did not establish a bright-line rule for determining what constituted a prima facie case. "Instead, the Court instructed trial judges to consider whether 'all relevant circumstances' and facts before them give rise to an inference of discrimination."

Although the *Batson* Court acknowledged that a pattern of strikes against African-American jurors may give rise to such an inference, the Second Circuit noted that *Batson* "left substantial discretion in the hands of the trial court." It acknowledged that it "had 'no doubt that statistics, alone and without more, can, in appropriate circumstances, be sufficient to establish the requisite prima facie showing.'"[18]

However, in relying on statistics, the court noted that Second Circuit law makes it clear that only a rate of minority challenges "significantly higher" than the minority percentage of the original jury pool would support a statistical inference of discrimination. A well-developed factual record in this respect "would likely include

evidence such as the composition of the venire, the adversary's use of peremptory challenges, the race of the potential jurors stricken, and a clear indication as to which strikes were challenged when and on what ground, and which strikes were cited to the trial court as evidence of discriminatory intent."[19]

Having considered the established federal law at issue, the circuit turned to the question of whether the state court decisions were contrary to or involved an unreasonable application of that law, the standard required to support a habeas petition. "We have 'held, on habeas review, that a state court does not act unreasonably where it denies a *Batson* challenge early in the jury selection process.'"

Rather, the court noted, the need to examine statistical disparities may require a "wait-and-see" approach. Accordingly, the court concluded, the trial court did not act unreasonably in rejecting the defendant's early application in this case and that the appellate courts acted reasonably in affirming the trial court's decision. The failure to renew the motion became fatal. The Second Circuit opined that the state courts' decisions were reasonable and proper in light of these facts. The court added a note of caution to its decision, however.

> This is not to say that statistics alone can never establish a prima facie *Batson* claim prior to the completion of jury selection. There are likely circumstances in which the numbers of minority members struck, seated, and on the venire would justify *Batson*'s burden-shifting long before the last juror was seated. Nor do we mean to suggest that the petitioner here could not have established a prima facie case on a complete record in this case following a proper motion in light of that record.[20]

'Dolphy v. Mantello'

Just weeks ago, in *Dolphy v. Mantello*,[21] the Second Circuit considered another habeas petition alleging that the state trial court incorrectly applied *Batson* during the trial of drug, weapon and attempted assault charges. At trial, the prosecutor peremptorily struck the only African American juror in the jury pool. The defendant brought a *Batson* challenge, and the trial court found that a prima facie showing of discrimination had been made. Accordingly, the burden shifted to the prosecution to provide a race neutral explanation for its removal of the juror. The prosecutor explained that he struck the juror because of her weight, opining that in his view overweight people tend to be more sympathetic to criminal defendants.

The trial court asked the prosecutor whether he was "saying that race had nothing to do with it," to which he responded "that's correct." The trial court then ruled that the strike would stand. Defense counsel immediately renewed the objection, arguing that the prosecutor had allowed overweight people on juries in other cases. The court rejected this argument as irrelevant, finding that a sufficient race neutral explanation had been offered. At the conclusion of jury selection, defense counsel moved for a mistrial, observing that two of the seated jurors were overweight. The trial court again allowed the government's peremptory challenge to stand, noting that the excused juror was "grossly overweight" as compared to those jurors who remained.[22]

Dolphy's subsequent conviction on all counts was affirmed by the Appellate Division and the Court of Appeals denied the defendant's leave to appeal. The defendant filed a habeas petition in the Northern District of New York. The magistrate judge to whom the matter was referred concluded that the trial court had misapplied *Batson* by accepting the prosecution's proffered race-neutral explanation without assessing its credibility or pretext. The district court disagreed and rejected the magistrate's recommendation with respect to Dolphy's *Batson* claim, finding that "the required credibility finding was implicit in the trial court's rejection of the defendant's *Batson* challenge."

On appeal, the circuit noted that the third step of the *Batson* inquiry "requires a trial judge to make an ultimate determination on the issue of discriminatory intent based on all the facts and circumstances." While the court noted that there were no "magic words" or formula to be used by the court in this process, "we have repeatedly said that a trial court must somehow 'make clear whether [it] credits the non-moving party's race-neutral explanation for striking the relevant panelist.'"[23]

Applying this standard, the circuit court found that the trial court failed to complete this third step of its *Batson* analysis. "While the prosecution's proffered explanation was facially race-neutral, it rested precariously on an intuited correlation between body fat and sympathy for persons accused of crimes." The trial court's conclusory findings regarding the prosecutor's explanation did not indicate that the trial court found this explanation credible. For this reason, the circuit vacated the district court's findings and remanded the matter for further proceedings to determine whether the prosecutor's state of mind could be recreated or the passage of time made it impossible to determine if the race-neutral explanation was pretextual. In the latter instance, Dolphy was to be granted a new trial.

The Second Circuit cases are useful in highlighting issues counsel should keep in mind when making a *Batson* challenge. As in all aspects of trial law, making a complete record is essential.

1. 476 U.S. 79, 86 (1986).
2. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).
3. *Hernandez v. New York*, 500 U.S. 352 (1991) (plurality opinion).
4. *Georgia v. McCollum*, 505 U.S. 42 (1992).
5. *Edmonson v. Leesville Concrete Co. Inc.*, 500 U.S. 614 (1991).
6. *Johnson v. California*, 545 U.S. 162, 170 (2005).
7. *Batson*, 476 U.S. at 97.
8. *Robinson v. United States*, 890 A.2d 674, 681 (D.C. 2006).
9. *Howard v. Senkowski*, 986 F.2d 24 (2d Cir. 1993).
10. James R. Gadwood, "The Framework Comes Crumbling Down: Juryquest in a *Batson* World," Boston University Law Review (February 2008).
11. *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005).
12. Hon. Theodore McMillian & Christopher J. Petrini, "*Batson v. Kentucky*: A Promise Unfulfilled," 58 UMKC L. Rev. 361, 366 (1990).
13. Alexis Straus, "(Not) Mourning the Demise of the Peremptory Challenge: Twenty Years of *Batson v. Kentucky*," Temple Political and Civil Rights Law Review (Fall 2007).
14. 528 F.3d 110 (2d Cir. 2008).
15. 505 U.S. 42, 29 (1992).
16. 543 F.3d 94 (2d Cir. 2008).
17. Id. at 98.
18. 543 F.3d at 101 (citing *Overton v. Newton*, 295 F.3d 270, 278-79 (2d Cir. 2002)).
19. Id. (citing *Sorto v. Herbert*, 497 F.3d 163, 171-72 (2d Cir. 2007)).
20. Id. at 103.
21. __F.3d__, 2009 WL 50496 (2d Cir. Jan. 9, 2009).
22. 2009 WL 50496, *1.
23. Id. at *3 (citing *Messiah v. Duncan*, 435 F.3d 186, 198 (2d Cir. 2006)).