Discrimination in Jury Selection: A History of Batson Challenges

Shawn Y. Libman
Eddie L. Holiday III
Bowman and Brooke LLP
Two Alhambra Plz Ste 800
Miami, FL 33134-5214

Shawn Libman is a Partner at the firm of Bowman and Brooke LLP, in Miami, Florida. She earned her JD from the University of Miami in 2004 and is admitted to practice law before the State and Federal Courts of Florida. She focuses her practice on civil defense litigation in premises liability cases.

Eddie L. Holiday III is an Associate at the firm of Bowman and Brooke LLP, in Miami, Florida. He earned his JD from Howard University and is admitted to practice law before the State and Federal Courts of Florida. He focuses his practice on civil defense litigation including premises, negligent security, toxic tort, products, and government liability cases.

Race and Discrimination are on everyone's mind in today's world. You may not think that these issues have any relevance to your cases but ignoring these issues could set you up for failure when facing a *Batson*[i] Challenges during the jury selection process. A *Batson* challenge is made during voir dire and challenges the use of a peremptory strike on the grounds that it was improperly used to strike a potential juror on the grounds of race, sex, ethnicity, religion or against another cognizable group. The last thing you want is to be faced with a Batson challenge and not know how to address it.

The history of racial discrimination in the United States sets the stage for the laws we see today. We must first understand how we got here before evaluating how to address it in your case.

History That Set the Stage for *Batson*

Following the Civil War, the 13th, 14th, and 15th Amendments to the Constitution abolished slavery, guaranteed basic civil rights and gave African-Americans equal protection under the law. The United States entered a period of Reconstruction (1865-1877), and in that world the Civil Rights Act of 1875 was passed. That bill was drafted by Senator Charles Sumner with the assistance of John Mercer Langston (then Dean of the Howard University School of Law and later on the first Black U.S. Representative of Virginia and ultimately passed by President Ulysses S. Grant.)

Section 4 of the Civil Rights Act of 1875 is the pertinent language that sets the stage for *Batson.* It states that "no citizen possessing all other qualification which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be find not more than five thousand dollars." [ii]

One of the first major cases to address this issue head-on was *Strauder v. West Virginia*, 100 U.S. 303 (1880). In 1872, Mr. Strauder, a former slave, was on trial for murdering his wife and threatening his step-daughter who witnessed the murder to remain quiet before fleeing to Pennsylvania, where he was ultimately arrested. A jury of all White men sat on the grand jury and returned an indictment for murder. Mr. Strauder moved to quash the indictment and remove the case to federal court in 1873 on the grounds that non-White citizens were precluded from serving on a grand or petit jury. In West Virginia there was an 1873 Statute that provided "all White male persons, twenty-one years of age and not over sixty, and who are citizens of this State, shall be liable as jurors." The judge denied the removal and Mr. Strauder pled not guilty and proceeded to jury trial which was composed of an all-White male jury. An objection was also entered and overruled. The jury returned a guilty verdict and Mr. Strauder was sentenced to death. Mr. Strauder moved for a new trial on the grounds that he did not have an impartial jury due to none of the jurors being Black. The court overruled the motion. On Appeal the West Virginia Supreme Court affirmed the trial court's ruling and relied on *The Slaughter-House Cases*, 83 U.S. 36 (1873)[iii] and *Bradwell v. Illinois*, 83 U.S. 130 (1872)[iv] to find that the Fourth Amendment had not been "intended to protect citizens of any State against unjust legislation by their own State."

The *Strauder* case was then appealed to the Supreme Court. The Supreme Court held that the categorical exclusion of Blacks from juries for no other reason than their race violated the Equal Protection Clause since the very purpose of the Clause was "to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by White persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States."[v] Unlike future cases where courts state that a law barring Blacks from juries violate the rights of potential jury members, the *Strauder* Court stated that such exclusion violated the rights of Black criminal defendants since juries would be "drawn from a panel from which the State has expressly excluded every man of defendant's race."[vi]

The next key case was *Virginia v. Rives*, 1001 U.S. 313 (1880). In *Rives*, two Black men were arrested for the murder of a White man. The grand juror composed of all White men returned a true bill of indictment for murder. During the voir dire for the trial jury, the defendants moved the trial court judge to modify the jury to allow one-third of the jury to be composed of Black men. The judge denied the motion stating that he didn't believe he had the authority to change the venire because the jury selection had been regularly drawn from the jury-box according to the law. Before the trial, the defendants petitioned to remove the case to federal court for violation of their civil rights. They argued: (1) the law allowed all men twenty-one years old up to sixty, who are entitled to vote in the State are able to be jurors but no Black jurors were selected; (2) strong prejudice in the community existed in the community against them solely because they were Black; and (3) no Blacks have ever been allowed to serve as a juror in any civil or criminal case.

The Supreme Court disagreed. The Court ruled that the fact that the defendants were indicted and tried by an all-White jury or that Blacks had never been allowed to serve as jurors in the past fall short of showing any civil rights were denied. The Court also ruled:

> The privilege for which they moved, and which they also asked from the prosecution, was not a right given or secured to them, or to any person, by law of the State, or by any act of Congress, or by the Fourteenth Amended of the Constitution. It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State court.[vii]

After *Strauder* and *Rives*, the Supreme Court was faced with 5 cases which were consolidated and are now referred to as the *Civil Rights Cases*, 109 U.S 3 (1883). In 1883, the Supreme Court held that the Civil Rights Act of 1875 was unconstitutional. This 8-1 decision struck down the critical provisions in the Civil Rights act prohibiting discrimination in public places and barred Congress from remedying racial segregation and, in effect, legalizing the notion of "Separate but Equal" (later clarified in the 1896 Supreme Court Decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896)). Notably, *Strauder* was not actually overturned by the *Civil Rights Cases* and striking a Black juror for "cause" was still a violation of the 14th Amendment.

***Batson v. Kentucky*, 476 U.S. 79 (1986)**

It was not until over 100 years later that the Supreme Court ruled that using peremptory strikes to eliminate Black jurors was a violation of the 14th Amendment of the Constitution in *Batson v. Kentucky*, 476 U.S. 79 (1986). Mr. James Batson was a Black man convicted of burglary by an all-White jury in Kentucky in 1982. His jury was all White because the prosecutor used his peremptory challenges to remove every Black potential juror. At the time, lawyers could remove prospective jurors with peremptory challenges without giving a reason and not being challenged. Mr. Batson insisted that his lawyer object to the State's removal of Black jurors. The objections were denied, but it paved the way for the issue to go up to the Supreme Court. The Supreme Court cited back to *Strauder* and held that peremptory strikes may not be used to exclude jurors based solely on their race and a race-neutral reason has to be provided if the peremptory strike is challenged.

It was not until 1991 that *Batson* was expanded to apply to civil cases. In the case of *Edmonson v. Leesville Concrete Co*., 500 U.S. 614 (1991), Mr. Thaddeus Edmonson was a Black construction worker that was injured during work and sued Leesville Concrete Co. for negligence. During the jury selection process, Leesville used 2 of their 3 preemptory challenges on Black prospective jurors. Edmonson cited *Batson* and requested that the trial court request the defense to give a race-neutral reason for the challenges. The Court refused stating that *Batson* only applied to state actors, i.e., prosecutors. On appeal, the Supreme Court held that while the litigants were private parties, the shaping of a jury for a trial (a traditional government function) through the use of peremptory challenges make the private litigants "state actors" and thus *Batson* applied to both criminal and civil trials.

Cause and Peremptory Challenges

When talking about *Batson* challenges, we need to remind ourselves of the different types of strikes that are used during voir dire. Those are strikes for cause and peremptory strikes.

A cause strike is when we move to strike a juror because they are not capable of rendering a fair and impartial verdict. For example, a juror made a statement during voir dire that all corporations are evil. You have a clear reason that this juror would be bias against your client, and it has nothing to do with a discriminatory reason. A peremptory strike is when we move to strike a juror without having to give a reason. In Florida, we only get 3 of those in civil cases[viii]. In criminal cases both sides have 3 peremptory strikes in misdemeanors, 6 in felonies and 10 in capital felonies cases[ix]. A *Batson* challenge arises after a peremptory strike. As a reminder, the lawyer striking doesn't have to give a reason and that is where it may be suspect it has something to do with discrimination.

How to Make a *Batson* Challenge

Batson sets out a three-step burden shifting procedure to assess peremptory strikes for discrimination:

> (1) The moving party bears the initial burden of establishing a prima facie case that the opposing party has intentionally used its peremptory challenge to discriminate against a protected group (i.e. race, gender, ethnicity) – this is based on a totality of relevant facts.

(2) The burden shifts to the party exercising the peremptory challenge to articulate a facially non-discriminatory (race, gender, ethnicity neutral) reason for striking the juror.

(3) The trial court must determine, based on the arguments presented, whether the proffered reason for the peremptory strike is genuine or pretextual.

Building the case for a *Batson* challenge starts during the voir dire. It is important to keep notes during the voir dire process so you can later create a record when either making or defending against the *Batson* challenge. Your notes should keep track of whether any group of jurors were focused on over another, whether questions were limited to one group, and whether there is some pattern created that can show discriminatory intent. Also keep track of non-verbal communication as that won't be typed into the record unless you explain it to the Court.

Batson challenges can be made numerous times through the voir dire process. The first can happen as soon as the first peremptory strike is made. However, even if you didn't raise the *Batson* challenge immediately, you can go back and make the challenge later if you see a pattern of discrimination. Make sure that a record is created and explain to the Court any patterns created through questions and strikes.

A *Batson* challenge would start with a peremptory strike. A party who wants to make the *Batson* challenge will respond to the peremptory strike by telling the Court that the *Batson* challenge is being made. On the record, that lawyer would then identify the Juror (by name and Juror number) and state the juror's protected group.

The party making the peremptory strike then responds with their neutral reason. Under *Batson*, the neutral reason should have some connection to the case. Most States also require this connection. If the neutral reason has no connection to the case then the peremptory strike could be denied. Some neutral reasons that could potentially pass the test are age, immaturity, mental capacity, reluctance to serve, past jury service, and demeanor. However, these factors still need to be tied to the case and it would be unwise to just have a list of neutral reasons ready like a check-list. The lawyer defending the peremptory strike should also be ready to show that they applied the neutral reason consistently against all members of the jury pool. For example, if they claim that the occupation is the neutral reason they should make sure that a juror of a different race with the same occupation didn't end up on the jury. The lawyer should also avoid being vague and claiming they had a "bad feeling" or felt "uncomfortable" by the juror. There needs to be more to justify the strike.

Last, the Judge decides whether or not to allow the peremptory strike. First, the Judge needs to acknowledge on the record whether the juror is actually in a protected class. This is an important first step and shouldn't be missed on the record or it could lead to a problem on appeal. Next, the Judge decides whether there was actually a neutral reason given. Last, the Judge determines if that neutral reason was genuine or pretextual. The trial court's Batson findings receive substantial weight "because the trial judge is in the best position to evaluate context, nuance, and the demeanor of the prospective jurors and the attorneys."[x] The Judge evaluates whether the moving party proved discrimination by a preponderance of the evidence and can rely

on the totality of circumstances[xi] when reaching that conclusion. Notably, the justification must be clear and neutral, but doesn't need to rise to the level of a cause challenge.

Recent Court Rules/Legislation/Task Force Recommendations

States across the country are examining *Batson* and making attempts to give it more teeth. From coast to coast, there has been an evolving debate over *Batson's* procedures for peremptory challenges.

Washington State General Rule 37-

In April 2018, the Washington Supreme Court became the first court in the United States to implement a court rule (General Rule (GR) 37) specifically designed to eliminate both implicit and intentional racial bias in jury selection. General Rule (GR) 37 applies in both civil and criminal jury trials.

GR 37 has made various modifications to the *Batson* challenge format including: (1) removing the prima facie standard for step 1 in its entirety—now, a party only need to make the objection under GR 37 to initiate step 2; (2) bolstered step 2 by creating a list of "common pretextual" reasons that are presumptively invalid such as: (i) having prior contact with law enforcement officers, (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling, (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime, (iv) living in a high-crime neighborhood, (v) having a child outside of marriage, (vi) receiving state benefits, (vii) not being a native English speaker; and (3) substituting the "genuine vs. pretextual" standard for a standard whereby if the court finds that an objective observer "could view" race or ethnicity as a factor in the peremptory strike, then the strike must be denied.

Although this Court Rule is relatively new, the Supreme Court of Washington State has already ruled on its applicability in *State of Washington v. Karl Pierce*, 455 P. 3d 647 (Wash. 2020). In *Pierce*, a defendant was tried by a jury and convicted of first-degree murder. The defendant appealed his conviction on the grounds that his jury was not fairly selected because the prosecutor improperly elicited a conversation about the death penalty during voir dire and improperly used a peremptory strike to dismiss a Black juror. The Washington Supreme Court found that while the prosecutor did not explicitly raise the death penalty during voir dire, as a direct result of his questions, ten jurors all expressed concerns about sitting on a possible death penalty case. As a result of the questions, all of the potential jurors' minds were drawn to the possible sentence, which could have had an "unfair influence on a jury's deliberations.

As for the *Batson* challenge, Juror No. 6 stated during the State's voir she did not feel comfortable sitting on a case that may result in the death penalty. After a lengthy examination by the defense, Juror No. 6, stated that she could fairly and impartially follow the law. The trial court denied the State's cause challenge. The State attempted to use a peremptory challenge based on Juror No. 6's questionnaire answers that she had a brother who was convicted of attempted murder and that the process of conviction and sentence left a bad taste in her mouth. The trial court granted the State's peremptory challenge over defense's objection.

The Washington Supreme Court found that there were two jurisprudential landscape changes that required a re-trial: (1) *Washington v. Townsend*, 20 P. 3d 1027 (Wash. App. Div. 3, 2001) an appellate court decision that made it clear that it was error to tell potential jurors during *voir dire* that they were not being asked to sit on a death penalty case; and (2) the promulgation of GR 37. The Supreme Court held that the appellate court decision in *Townsend* was incorrect and harmful because it "artificially prohibits informing jurors whether they are being asked to sit on a death penalty case," and overruled it. The Washington Supreme Court also analyzed GR 37 and ruled that the State's peremptory reason that her brother was convicted of attempted murder was a presumptively invalid reason and that "an objective observer could conclude that race was a factor in the State's peremptory challenge to Juror 6." The court remanded the matter back to the trial court.

California AB 3070/Cal. Code of Civ. Proc. §231.7-

In August 2020, the California legislature passed AB 3070, which was signed by Governor Gavin Newsome on September 30, 2020 (which will become California Code of Civil Procedure Section 231.7). Beginning on January 1, 2022, it will apply to objections to peremptory challenges in criminal cases. AB 3070 will not apply to civil cases until January 1, 2026.

Similar to Washington State's GR 37, AB 3070 modifies Step 1 by removing the prima facie requirement, but still requires that an objection be made by stating a party's peremptory challenge is being made on the basis of the juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation. Step 2 also included a list of presumptively invalid reasons like "dress, attire, or personal appearance." However, unlike Washington State's GR 37, the presumptively invalid reason may still be used if there is a clear and convincing evidence that an objectively reasonable person could view the rational as unrelated to the prospective juror's race, ethnicity, gender, etc. As for Step 3, AB 3070 removes the "genuine vs. pretextual standard" and in its place the court must determine if "there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender. . . [as] a factor in the use of the peremptory challenge." If the court decides that a non-neutral reason was a factor in the peremptory strike, then the *Batson* challenge shall be sustained.

Connecticut- Jury Selection Task Force

A judicial task force charged with finding ways to promote racial equality on Connecticut juries made several recommendations to the Judicial Branch's Chief Justice on December 31, 2020. The 51-page report recommended the following: (1) the automatic right to opt-out of jury duty should be reset to age 75 instead of 70 as individuals have a longer life expectancy; (2) legal and permanent residents who are not citizens should be allowed to serve on juries; (3) eliminate the ban forbidding convicted felons to be called for jury service and allow them to serve seven years after the completion of their sentence; (4) adjust the jury summoning process to better ensure a fair cross section of the populace; (5) recommend paying unemployed or part-time employed jurors the prevailing minimum wage, along with reimbursement for travel and family care expenses; (6) include revising the criminal jury instructions on implicit bias and adding a rule aimed at eliminating the unfair exclusion of potential jurors based upon race or ethnicity.

Interesting Examples of Batson Challenges

The United States Court of Appeals for the Eleventh Circuit in *United States v. Allen-Brown*, 243 F. 3d 1293 (11th Cir. 2001) tackled the issue of whether a trial court erred by: (1) denying peremptory strikes to White jurors under *Batson*; and (2) denying peremptory strikes considering the strikes were used by a criminal defendant to obtain a racially diverse jury. As to the first issue about whether *Batson* applies to White jurors, the Eleventh Circuit held that "although the peremptory challenges at issue in *Batson* were made by a government prosecutor against African-American jurors, by its terms *Batson* is not limited to members of racial minorities. It applies to anyone who is excluded from jury participation on account of his race."[xii] In regards to the concept of *Batson* being permitted if it is used to create a more diverse jury, the appellate court explained that the "Constitution right at issue here is the potential juror's right not to be excluded on the basis of race. The rights of the jurors do not depend on which party to the case may assist in violating them."[xiii] By grounding the jurors' rights to the Equal Protection Clause, the Eleventh Circuit conducted a strict scrutiny analysis and found that there was no compelling justification for race-based discrimination during voir dire. As such, the appellate court found there was no error or abuse in the trial court's scrutiny of the defenses' peremptory challenges.

The case of *State v McFadden*[xiv], the lawyer defending a strike gave a neutral reason that the juror didn't have a driver's license, had bright red hair, and she seemed hostile. The Trial Court found that the driver's license issue was irrelevant and that there was no hostility. However, the Court allowed the juror to be stricken because of the red hair. On appeal it was reversed because the juror was also neatly dressed and her hair was fashionable in the local Black community. It was held on appeal that the reasons were subjective, stereotypical assumptions about the juror and the whole case was reversed.

In *Beal v. State*[xv], the Florida Third District Court of Appeals addressed the issue of whether the State's peremptory challenge of a White male juror was proper, after the trial court found that White males were not a protected class and therefore failed to require the State to provide a gender neutral explanation for the strike. The case was reversed for a new trial with a reminder that White males falls under the class of "gender", which is a protected class in the context of jury selection.

The Supreme Court had an interesting take on a Batson challenge in the case of *Foster v Chatman*[xvi]. In *Foster*, a Black juror was stricken because her cousin was incarcerated. It was questioned whether this justification was pretextual because the prosecutor didn't ask any questions about the actual arrest and just relied on assumption about the relationship between the juror and her cousin. There we get an interesting take from Judge Sotomayor who noted that she had 2 cousins who have been arrested but their whereabouts were unknown to her. Based on that, it was held that the fact that they were cousins wasn't enough to justify the strike. The prosecution tried to also argue that because the Defendant was claiming he came from a deprived background, the juror's work as a teacher's aide in a Head Start program predisposed her to a bias. The defense responded by noting that one of the jurors on the panel was a White teacher's aide. This is a textbook case where the justification was not applied the same across the panel.

Future of Batson Challenges?

The most common types of Batson challenges usually arise in cases related to race. However, *Batson* protects any "cognizable group." We should remember that Batson isn't limited

to race. It protects any "cognizable group[xvii]." Historically that has included race, religion, ethnicity, gender, national origin, and in more recent years sexual orientation[xviii].

What can we expect for the future of Batson? Gender identity, transgender and gender non-conforming jurors are at risk for being discriminated against. The Courts are already considering gender-based Batson challenges thanks to the Supreme Court case of J.E.B v. Alabama ex rel. T.B., 511 U.S. 127 (1994). It probably won't be too far in the future that we see the first *Batson* challenge to address discrimination on the grounds of gender identity.

Conclusion

There is a lot to consider when going in trial, and the potential for a *Batson* challenge should not be overlooked. When preparing for trial, you should take the time to consider what your idea jury looks like. Then take a step back and consider whether there is a potential for a *Batson* challenge when selecting that jury. In today's social climate, we should be encouraging conversations to confront stereotypes and whether we need to be more inclusive the jury selection process. Of course, as defense lawyers we also need to consider the obligations to our clients and protect against the case being overturned on appeal.

---

[i] *Batson v. Kentucky*, 476 U.S. 79 (1986)
[ii] For reference, $5,000 in 1875 is the equivalent to $118,000 today.
[iii] Holding that Fourteenth Amendment only protects the privileges and immunities pertaining to citizenship of the United States, not those that pertain to state citizenship.
[iv] Holding that the Supreme Court of Illinois refusing to grant a woman a license to practice law in the state court on the grounds that females were not eligible under the Illinoi state law not to be a violation of any provisions of the federal Constitution.
[v] *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880)
[vi] *Id* at 309.
[vii] Virginia v. Rives, 100 U.S. 313, 322-23, 25 L.Ed. 667 (1880)
[viii] Fla. R. Civ. P. 1.431(d); sets forth the number of challenges. Also, each party is entitled to 3 peremptory challenges of jurors, but when the number of parties on opposites sides is unequal, the opposing parties are entitled to the same aggregate number of the peremptory challenges to be determined on the basis of 3 peremptory challenges to each party on the side with the greater number of parties (i.e. 1 Plaintiff v. 2 Defendants = 6 peremptory challenges for Plaintiff and 3 peremptory challenges for each of the 2 Defendants).
[ix] Fla. R. Crim. P. 3.350.
[x] Richards v. Relentless, Inc., 341 F.3d 35, 45 (1st Cir. 2003)
[xi] Courts have considered the final composition of the jury compared to the initial panel; the number of available peremptory strikes; the race of jurors excused by peremptory challenge or cause; who made the strikes and what order; and the percentage of the racial group in the jury pool and community. *United States v. Beverly*, 369 F.3d 516, 527 (6th Cir. 2004).
[xii] *United States v. Allen-Brown*, 243 F. 3d 1293, 1297 (11th Cir. 2001) citing *Batson v. Kentucky,* 476 U.S. 79, 87 (1986).
[xiii] *Id at* 1298 (11th Cir. 2001) citing *Batson v. Kentucky,* 476 U.S. 79, 87 (1986).
[xiv] State v McFadden, 216 S.W.3d 673 (Mo. 2007)
[xv] *Beal v. State*, 277 So. 3d 246 (Fla. 3d DCA 2019)
[xvi] *Foster v. Chatman*, 136 S. Ct. 1737 (2016)
[xvii] A cognizable group is a recognizable, distinct class, singled out for different treatment under the laws. Castaneda v Partida, 430 U.S. 482 (1977)

[xviii] It was only in recent history that sexual orientation became protected. California was the first to use Batson to protect against discrimination for sexual orientation in the *People v Garcia*, 77 Cal. App. 4th 1269 (Ca. App. Div. 4, 2000)