EQUAL PROTECTION IN JURY SELECTION

BATSON, MILLER-EL AND BEYOND

LOUISIANA STATE BAR ASSOCIATION
2017 "NATCHITOCHES LIGHTS" CLE

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Constitution of the United States of America
Amendment XIV
(ratified on July 9, 1868)

…nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Strauder v West Virginia
U.S. Supreme Court 1879

The Supreme Court emphasized both the equal protection rights of jurors and a defendant's right to have a jury selected without racial discrimination.

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Swain v. Alabama
U.S. Supreme Court 1965

Held that the State's purposeful or deliberate denial of participation as jurors on account of race violates the 14th Amendment Equal Protection Clause.

purposeful = systematic pattern

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Batson v. Kentucky
476 U.S. 79, 106 S.Ct. 1712 U.S.,1986.

…the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors.

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Batson three-part process

(1) defendant must make prima facie showing that peremptory challenge has been exercised on basis of race,

(2) if that showing has been made, prosecution must offer race-neutral basis for striking juror in question, and

(3) in light of parties' submissions, trial court must determine whether defendant has shown purposeful discrimination.

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We will return to the 3-step process set forth more than 30 years ago.

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Batson made clear that a violation constitutes a structural defect; it can never be harmless error.

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In his concurring opinion Justice Thurgood Marshall foreshadowed that Batson would be a "failed promise" to address Equal Protection violations in jury selection.

"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 – a challenge I doubt all of them can meet."

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Justice Marshall suggested total elimination of peremptory challenges.

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In recent years Justices Breyer, Souter and Ginsburg have called for banning peremptory challenges.

For example, in the concurring opinion in **Rice v. Collins** Justice Breyer wrote:

"Legal life without peremptories is no longer unthinkable".

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Powers v Ohio, 499 U.S. 400 (1991)

Held that because a defendant is not only asserting his own rights but also asserting the equal protected rights of jurors, a white criminal defendant can object to the exclusion of African American prospective jurors.

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Batson Progeny

Georgia v. McCollum, 112 S.Ct. 2348 (1992)

- held that defense lawyers may not use race-based peremptory challenges
- Individual jurors have right not to be discriminated against
- Defendant is a state actor when using the challenge to help create a jury

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Georgia v McCollum
(continued)

The prosecutor can also object to the equal protection violation by the defendant's racially discriminatory use of peremptory challenges.

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Batson Progeny

J.E.B. V. Alabama,

114 S.Ct. 1419 (1994)

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Batson Progeny

J.E.B. V. Alabama, 114 S.Ct. 1419 (1994)

- held that the Equal Protection Clause of the 14th Amendment prohibits discrimination in jury selection on the basis of gender
- Rejects the assumption that an individual will be biased in a particular case solely because of the fact that the person happens to be a woman or a man.

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Batson Progeny

Edmonson v. Leesville Concrete Co., 111 S.Ct. 2077 (1991)

- held that private parties in **civil** cases could not exercise their peremptory challenges in a racially discriminatory manner.

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There are equal protection issues for both sides of civil or criminal jury selection and each side has standing to assert Equal Protection of the juror.

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About 15 years later **Miller-El** is decided…

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Miller-El v. Cockrell
537 U.S. 322, 123 S.Ct. 1029,2003 and Miller-El v. Dretke 545 U.S. 231, 125 S.Ct. 2317, 2005

- Of the 108 possible jurors reviewed by the prosecution and defense, 20 were African-American. Nine of them were excused for cause or by agreement of the parties.
- Of the 11 African-American jurors remaining, however, all but 1 were excluded by peremptory strikes exercised by the prosecutors.
- On this basis 91% of the eligible black jurors were removed by peremptory strikes.

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Miller-El v. Cockrell
537 U.S. 322, 123 S.Ct. 1029,2003 and Miller-El v. Dretke 545 U.S. 231, 125 S.Ct. 2317, 2005

- The Supreme Court stated "Happenstance is unlikely to produce this disparity".
- In contrast the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner's jury.

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Miller-El v. Cockrell
537 U.S. 322, 123 S.Ct. 1029,2003 and Miller-El v. Dretke 545 U.S. 231, 125 S.Ct. 2317, 2005

An example of the questioning that was used

23

Miller-El, Continued

Most African-Americans (53%, or 8 out of 15) were first given a detailed description of the mechanics of an execution in Texas:

"[I]f those three [sentencing] questions are answered yes, at some point [,] Thomas Joe Miller-El will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death ... as the result of the verdict in this case if those three questions are answered yes."

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Miller-El, Continued

Very few prospective white jurors (6%, or 3 out of 49) were given this preface prior to being asked for their views on capital punishment. Rather, all but three were questioned in vague terms:

"Would you share with us ... your personal feelings, if you could, in your own words how you do feel about the death penalty and capital punishment and secondly, do you feel you could serve on this type of a jury and actually render a decision that would result in the death of the Defendant in this case based on the evidence?"

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Supreme Court wrote,

…disparate questioning created the appearance of divergent opinions even though the venire members' views on the relevant subject might have been the same.

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* * *

…if the use of disparate questioning is determined by race at the outset, it is likely that a justification for a strike based on the resulting divergent views would be pretextual.

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Miller-El expanded upon the type and quantum of evidence to be considered in **Batson's** 3rd step – (whether, in light of the parties' submissions, the party asserting the **Batson/Miller-El** violation has shown purposeful discrimination)

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If we get past **Batson's** first and second steps and we are now within step 3, all relevant circumstances and the "quantum of evidence" can be considered by the trial court.

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Let's now more closely examine the 3-step process:

Step 1 – There must be (an objection and) a prima facie showing that your opponent has exercised a peremptory challenge on the basis of race.

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You might ask: What is a prima facie showing?

Answer: Enough evidence to establish a fact or raise an inference which can be rebutted.

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At this stage, the legal argument centers only on whether a prima facie showing is established. If the trial court concludes no prima facie showing, the inquiry stops there.

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At this point, and without a ruling on the issue of prima facie showing, the opponent does not launch into articulating a race neutral basis or reasons for the peremptory challenge.

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According to Hernandez v. New York, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866 (1991), "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot."

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I prefer to cite U.S. Supreme Court and Louisiana Supreme Court cases but the Federal 8th Circuit rendered U.S. v Harding (7/28/17). The Court reiterated the U.S. Supreme Court rule from Hernandez that any claim regarding Batson Step 1 is moot once everyone moves on to Steps 2 and 3.

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If and when the trial court has concluded that a prima facie showing has been made, then we move to Step 2.

Step 2 provides "if that showing has been made, the prosecution (in this instance the opponent) must offer a race-neutral basis for striking the juror in question.

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Who provides the race neutral reason? The opponent of the Batson objection, that is, the lawyer who issued the peremptory challenge.

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It cannot be the trial judge supplying those reasons!

In State v. Crawford, 218 So.3d 13 (2017), following a defense Batson objection, the judge went through each of the state's peremptory challenges, articulating reasons for the state's strikes. He then stated "there is no prima facie showing at all as to systematic exclusion on the basis of race…"

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The Louisiana Supreme Court concluded that the trial judge impermissibly "conflated" the three steps of Batson. Significantly, the race neutral reasons are for the lawyer (here, the prosecutor) to articulate, not the judge.

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Step 3: In light of the parties' submissions, the trial court must determine whether the defendant (or the one lodging the Batson objection) has shown purposeful discrimination.

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An obvious problem in Crawford is that if the judge has supplied the race neutral reasons and framed that issue in Step 2, how would he or she evaluate the credibility to be assigned to those explanations?

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If we get past Batson's first and second steps and we are now within Step 3, all relevant circumstances and the quantum of evidence can be considered by the court. See Miller-El v Cockrell.

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Snyder v. Louisiana
128 S.Ct. 1203
U.S.La.,2008.
March 19, 2008

U.S. Supreme Court reiterated:

The three part test **Batson**.

Trial court must be sustained unless clearly erroneous.

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Snyder v. Louisiana
(Continued)

Step three of Batson test involves an evaluation of the prosecutor's credibility, and the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge.

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Snyder v. Louisiana
(Continued)

In evaluating Batson claims, race-neutral reasons for peremptory challenges often invoke a juror's demeanor, such as nervousness or inattention, making the trial court's first-hand observations of even greater importance.

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Snyder v. Louisiana
(Continued)

When defense counsel made a Batson objection concerning the strike of a prospective juror, a college senior who was attempting to fulfill his student-teaching obligation, the prosecution offered two race-neutral reasons for the strike.

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The prosecutor explained:

"I thought about it last night. Number 1, the main reason is that he looked very nervous to me throughout the questioning. Number 2, he's one of the fellows that came up at the beginning [of *voir dire*] and said he was going to miss class. He's a student teacher. My main concern is for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase. Those are my two reasons."

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Snyder v. Louisiana
(Continued)

U.S. Supreme Court noted there were white jurors who seemed to have more significant problems (i.e. a mans wife just had a hysterectomy, another was a builder who had to finish a house, another with important business obligations.)

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Supreme Court found,

The proferred reason of schedule conflict is pretextual in light of the prosecutor's treatment of two similarly situated white jurors and there was no judicial finding that Mr. Brooks was nervous (demeanor based reason). Specifically, the trial judge provided no reasons in his ruling sustaining the DA's use of the peremptory challenge.

49

Alex v. Rayne Concrete Service, et al, 950 So.2d 138, La., 2007.

- Civil jury trial.
- First trial ended in a mistrial.
- Motion for New Trial granted as to second trial.
- On third civil jury trial, all white jury; African-American plaintiff.

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Alex v. Rayne Concrete Service, et al (Continued)

Two main issues:

(1) Must a party seek review of a Batson/Edmonson/Miller-El challenge by supervisory writ application, or may the party wait until conclusion of the trial and seek appellate review?

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Alex v. Rayne Concrete Service, et al (Continued)

On the first issue, the Supreme Court answered that while a supervisory writ is appropriate and will be considered, the Court recognized the difficult practicalities of seeking supervisory writs during jury trial. The aggrieved party may seek supervisory writs or appellate review. (Remember, a Batson/Miller-El violation is a structural defect.)

52

Alex v. Rayne Concrete Service, et al (Continued)

(2) Was there a Batson/ Edmonson/Miller-El violation regarding the peremptory challenge of one particular juror?

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Alex v. Rayne Concrete Service, et al (Continued)

The reason given by defense counsel was his "gut-feeling" and the trial court erroneously stated on the record:

Trial Judge erroneously said…

"I don't believe it (Batson/Miller-El) applies in civil matters, but I think it's applicable in criminal matters…"

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After reviewing the appellate jurisprudence that has addressed "gut feeling" explanations, we agree that although "gut feelings" may factor into the decision to utilize a peremptory challenge, this reason, if taken alone, does not constitute a race-neutral explanation. We find such a reason as "gut feeling" is most ambiguous and inclusive of discriminatory feelings. Such an all inclusive reason falls far short of an articulable reason that enables the trial judge to assess the plausibility of the proffered reasons for striking a potential juror. Whatever is causing the "gut feeling" should be explained for proper evaluation of the proffered reason. Batson made it clear the neutral explanation must be one which is clear.

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Alex v. Rayne Concrete Service, et al
(Continued)

It should be noted that a **Batson/Edmonson** violation is a structural defect which in criminal cases requires reversal and remand; however, in civil cases, the courts of appeal and the Louisiana Supreme Court have the authority to decline remand and conduct trial de novo. In this case, the Supreme Court remanded for a fourth trial.

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State v. Felton Dorsey

Defense lodged a Batson/Miller-El objection towards the conclusion of voir dire, claiming as a basis that the District Attorney peremptorily challenged 62.5% of the black jurors.

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State v. Felton Dorsey

The District Court initially found a prima facie case under the first step of Batson and ordered the prosecution provide race neutral reasons in accordance with step 2 of Batson.

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State v. Felton Dorsey

- The prosecutor objected and asked the court to articulate its reasons for finding a prima facie case
- The prosecutor objected that the only argument made for the prima facie case were statistics

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State v. Felton Dorsey

- The prosecutor disputed the prima facie case, pointing out that all of the jurors in question had indicated a preference for a life sentence
- The prosecutor also noted that the State had exercised peremptory challenges against all jurors who had given such responses regardless of race

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State v. Felton Dorsey

- The trial court vacated its finding that there was a prima facie case
- The Louisiana Supreme Court found no error
- A "pattern" of strikes is only one factor to consider in evaluating a prima facie case
- The record reflected no disparate questioning or use of challenges

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State v. Felton Dorsey

- The Batson inquiry is a "fact-intense" examination, not a "number game."

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CONCLUSIONS

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Conclusion 1

A peremptory challenge based on race or gender violates the Equal Protection Clause of the 14th Amendment of (a) the prospective juror and (b) the party asserting it.

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Conclusion 2

Batson and Miller-El applies to all parties in civil as well as criminal cases.

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Conclusion 3

A Batson/Miller-El violation is an Equal Protection violation; it is a structural defect and can never be deemed harmless error.

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Conclusion 4

Any proven Equal Protection violation of any one juror is enough for reversal.

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Conclusion 5

In criminal cases reversal and remand is the norm. On occasion, however, the Louisiana Supreme Court has remanded for clarification of the record. There is no de novo review of a criminal trial. In civil cases, the remedy may be a de novo review or a reversal and remand.

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Conclusion 6

Unless and until the trial court concludes that a prima facie showing has been made, there need not be any articulation of race neutral reasons. And if the judge, without argument, immediately finds a prima facie showing, and before racial neutral reasons are articulated, there can be the request to vacate that order – as done in State v. Dorsey.

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Conclusion 7

Disparate questions determined by race which lead to disparate and divergent answers can be deemed pretextual.

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Conclusion 8

Demeanor-based race-neutral explanations should be accepted or rejected by the trial judge as, obviously, the "cold record" does not evidence a demeanor issue and without trial court validation or rejection, it remains an open question, which is problematic for appellate review.

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Conclusion 9

Treating similarly situated people differently may lead to an inference that the challenge is race based.

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Conclusion 10

- There is no federal constitutional right to peremptory challenge.
- There is a state constitutional right to peremptory challenges in criminal cases.
- There is neither a federal or state constitutional right to peremptory challenges in a civil case.

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Conclusion 11

Some United States Supreme Court justices have indicated that they want to abolish peremptory challenges on Equal Protection grounds.

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Conclusion 12

Remember that 31 years ago, in 1986, Justice Thurgood Marshall foreshadowed that Batson would be a "failed promise" to address Equal Protection violations in jury selection. While effective advocacy is both required and admirable, we (lawyer and judges) must always scrupulously adhere to the law, making sure there are no equal protection violations and that Batson is not a "failed promise."

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Conclusion 13

The lawyer's oath of admission (in part):

I will support the Constitution of the United States and the Constitution of the State of Louisiana.

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Conclusion 14

The judge's oath of office:

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Conclusion 15

Thank you LSBA and
all who are here.

Enjoy the Natchitoches lights!

79