Part 1: PRESENTING AND RESPONDING TO *BATSON* OBJECTIONS AT THE TRIAL COURT LEVEL

by
David V. Wilson II
Hays, McConn, Rice & Pickering, P.C.

Introduction

For years, practitioners in U.S. courts had unfettered discretion to use their peremptory challenges on members of a jury panel. In *Swain v. Alabama*, 380 U.S. 202 (1965), the U.S. Supreme Court opened the door slightly for objections to peremptory challenges, allowing a criminal defendant to challenge a prosecutor's use of peremptory strikes by proof of repeated strikes of African Americans over a number of cases. However, this burden of proof proved difficult, if not impossible. Finally, in *Batson v. Kentucky,* 476 U.S. 79 (1986), the U.S. Supreme Court threw open the door for challenges to the discriminatory use of peremptory strikes against panel members, ruling that a prosecutor's discriminatory use of such strikes against venire persons of the same race as the defendant violated the Equal Protection Clause of the Fourteenth Amendment.

Since 1986, the prohibition against the discriminatory use of peremptory challenges has been extended to criminal defense counsel in *Georgia v. McCollum*, 505 U.S. 42 (1992). Additionally, it has been extended to civil litigants. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628-31 (1991). The logic for these extensions was that both litigants and potential jurors have an Equal Protection right to jury selection procedures that are not impermissibly discriminatory. *See J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994).

Indeed, at least one appellate court has ruled that the trial judge can raise the issue *sua sponte,* without waiting for an objection. *See People v. Bell,* 473 Mich. 275, 285-287 (2005). However, the usual practice is that trial counsel for either side must timely make an objection,

make a record, and secure a ruling from the Court. It is therefore incumbent upon all trial lawyers to be familiar with the procedures for making and responding to *Batson* challenges.

The Batson Objection and When to Make It

Significantly, in *Batson* itself, the Supreme Court intentionally did not specify the procedural mechanism for making an objection to the other side's peremptory challenges. Specifically, the Court stated "in light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how to best implement our holding today." *Batson* 476 U.S. at 100, n.24. The *Batson* court did outline three general requirements for a litigant to establish: first, that he is a member of a cognizable racial group; second that peremptory challenges have been used to remove members of the litigant's race from the jury; and third, that the facts and other relevant circumstances raise an inference that the prosecutor used peremptories in a racially discriminatory manner. *See Batson*, 476 U.S. at 96 (Marshall, J, concurring). However, in *Powers v. Ohio*, 499 U.S. 400 (1991), the Court eliminated the requirement of racial similarity between the defendant and the panel member. Thus, the current rule is that to make a *prima facie* showing of a *Batson* violation one must only show: (1) that the peremptory strikes which are being challenged removed from the panel members of cognizable protected group; and (2) the totality of the relevant facts give rise to an inference the attorney excluded people from the panel with a discriminatory purpose. *See Johnson v. California*, 545 U.S. 162, 168 (2005). "Cognizable protected group" currently includes racial groups, as set forth in *Batson*, ethnic groups, as set forth in *Hernandez v. New York*, 500 U.S. 352 (1991), and both genders, as set forth in *J.E.B. v. Alabama*, 511 U.S. 127 (1994). The U.S. Supreme Court has not yet decided whether religion-based peremptory challenges are unconstitutional, and some circuits have held that strikes based on religious

activity or specific beliefs, as opposed to religious affiliation, are permissible. *See U.S. v. Brown*, 352 F.3d 654, 668-669 (2nd Cir.); *U.S. v. DeJesus*, 347 F.3d 500 (3rd Cir. 2003).

Jurisdictions vary on when the *Batson* objection must be articulated to the trial court. For example, Texas Code of Criminal Procedure Art. 35.261(a), only requires that a *Batson* objection be made after the parties have delivered their list of peremptory challenges to the clerk and before the Court has empanelled a jury. However, in federal practice, a party must make a *Batson* challenge before the Court completes the voir dire process, meaning prior to empanelling the jury and dismissing the excluded panelists. *See Garcia v. Excel Corp.*, 102 F.3d 785, 759 (5th Cir. 1997). The difference is significant in that one of the remedies the *Batson* opinion contemplated is seating improperly excluded jurors, which obviously cannot be done after their dismissal from the courtroom. Thus, whatever one's jurisdiction, the best practice is to make one's objection before the venire is excused from the courtroom and prior to the trial judge swearing in the jury.

Presenting the Batson Objection

As discussed above, a *prima facie* case of a *Batson* violation, which shifts the burden to opposing counsel, is made when peremptory strikes were used to remove members of a cognizable protected group and the totality of the relevant facts give rise to an inference that opposing counsel excluded those persons for a discriminatory purpose. *See Johnson*, 545 U.S. at 168. Such a *prima facie* case can be made by offering a wide variety of evidence, so long as the totality of the facts gives rise to the inference of discriminatory purpose. One common method of doing so is articulating a comparative analysis of the panel demonstrating there was a pattern of striking a disproportionate number of members of the cognizable protected group. *See Miller-L v. Cockrell*, 537 . 322, 331 (2003). Another example would be racially disparate questioning

during the voir dire process. *See Holloway v. Horn*, 355 F.3d 707, 722 (3rd Cir. 2004). For example, in *Dewberry v. State*, 776 S.W.2d 589 (Tex. Crim. App. 1989), the prosecutor striking five out of six black venire members was held to constitute a *prima facie* case. Similarly, in *Salazar v. State*, 795 S.W.2d 187 (Tex. Crim. App. 1990), the Court found exercising one strike against the only Hispanic venire member constituted a *prima facie* case.

The necessity of making a *prima facie* case, and the ability to point to disparate questioning of the panel members underscores the need to have the entire voir dire process recorded by the court reporter. It obviously would be very difficult to make a *prima facie* case regarding disparate questioning that an appellate court could ultimately review, if that questioning was not recorded. Whether or not voir dire examination itself was recorded, the movant must make a record of the *Batson* challenge in some fashion. This can be done by describing on the record the overall make up of the jury panel and specifying those members, by juror number or name, who were struck by peremptory challenges and members of a cognizable group. *See Williams v. Woodford*, 384 F.3d 567, 584 (9th Cir. 2004). Counsel could state how many members of cognizable groups were on the overall panel, including which cognizable groups they were members of, as well as the number of jurors who were struck via peremptory challenge that were members of those cognizable groups. Theoretically, even if voir dire examination is not recorded, one could ask the trial court to take judicial notice of questioning that had taken place during voir dire examination, although this would force counsel and the litigant to rely on the trial court's recollection as opposed to a contemporaneous record.

However one chooses to present the supporting evidence, the best practice is to ask the trial court for a determination that a *prima facie* case has been made. If so, the burden shifts to

opposing counsel to articulate facially neutral reasons for the peremptory challenges. *See Johnson*, 545 U.S. at 168.

Responding to the Batson Objection

In response to a *Batson* challenge made by opposing counsel, counsel should first dispute whether a *prima facie* case has been made. Specifically, counsel should argue that the proponent of the *Batson* objection did not establish that the totality of the relevant facts give rise to an inference that venire persons were excluded with a discriminatory purpose, as set forth in *Johnson*. *See Johnson*, 545 U.S. at 168. One could, for example, point to members of the same cognizable group who were not challenged. If the allegation of racially disparate questioning has been made, one could point to the same questions propounded to venire persons who were not members of the cognizable group.

If the trial court finds a *prima facie* case has been made, counsel should give reasons for their challenged strikes which are facially neutral, clear, reasonably specific and related to the lawsuit on trial. *Gibson v. Bowersox*, 78 F.3d 372, 374 (8th Cir. 1996). It should be emphasized that the explanation must only be neutral to the venire member's membership in a cognizable group, and not necessarily persuasive or plausible. *See Pirkett v. Elem*, 514 U.S. 765, 767-768 (1995). Since counsel is essentially providing testimony regarding the facially neutral reasons at this stage of the hearing, in most jurisdictions counsel would be sworn, and subject to cross-examination. *See Goode v. Shoukfeh*, 943 S.W.2d 441, 450 (Tex. 1997).

After counsel has presented the alleged facially neutral reasons for the peremptory challenges, the proponent of the *Batson* objection must demonstrate that the reason given was pre-textual or otherwise inadequate. A useful tool in challenging and cross-examining the responding counsel's alleged neutral reasons is Federal Rule of Evidence 612(1). Specifically, if

the responding counsel uses his or her voir dire notes to refresh his or her recollection while giving testimony during the *Batson* hearing, the proponent of the *Batson* objection is entitled to examine the notes. However, if the notes are used only prior to the hearing, as opposed to during the testimony, the issue of requiring production of the notes would be within the trial court's discretion. *See* Federal Rule of Evidence 612(2).

The Court's Decision and Any Remedies

After both sides have presented their positions, it becomes the role of the trial court to decide if the proponent of the *Batson* objection demonstrated purposeful discrimination. *See Murray v. Groose*, 106 F.3d 812, 814-15 (8th Cir. 1997). The Court is allowed to make credibility determinations regarding the testimony of the responding counsel, including his demeanor, accepted trial strategy, and the reasonableness of the explanations. *See Cockrell,* 537 U.S. at 339. The proper test is whether the protected characteristic was the main reason counsel made the peremptory strike, not simply whether it was the sole factor of motivating the strike. *Murray*, 106 F.3d at 814.

Once the Court makes a determination that the *prima facie* case of a discriminatory use of peremptory challenges has not been rebutted, the *Batson* case requires the trial court to act to remedy the situation. The *Batson* court itself specifically left open the question whether this remedy is to "discharge the venire and select a new jury from a panel not previously associated with the case" or to resume selection with the improperly challenged jurors reinstated on the venire. *Batson*, 476 U.S. at 99, n.24. The U.S. Supreme Court has, since *Batson*, left both of those options as potential remedies. By contrast, the aforementioned Texas statute limits the trial court's remedy to calling a new array in a criminal case. *See* Texas Code of Criminal Procedure

Art. 35.261. However, in civil cases in Texas, trial courts may call a new panel or reinstate the challenged panelist. *See Price v. Short,* 931 S.W.2d 677, 682 (Tex. App.—Dallas 1996, no writ).

Conclusion

A review of the foregoing procedures for making and responding to a *Batson* objection underscore two things. First, one only makes the difficult challenge of protecting the clients' and the jurors' equal protection rights more difficult when one waives a court reporter in the voir dire process. Second, counsel who is exercising peremptory challenges needs to be prepared to articulate clear, facially neutral reasons for those challenges, despite the fact that they still carry the increasingly inaccurate label " peremptory".

BATSON **OBJECTIONS AT TRIAL AND ON APPEAL**

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David V. Wilson II
Shareholder
Hays, McConn, Rice & Pickering, P.C.
1233 West Loop South, Suite 1000
Houston, Texas 77027
713-654-1111