OUTLINE

JURY SELECTION AND VOIR DIRE

THE ROSSDALE GROUP CLE
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I. U.S. SUPREME COURT JURISPRUDENCE ON PEREMPTORY STRIKES (BATSON AND ITS PROGENY)


1. The Supreme Court held that peremptory strikes may not be exercised on the basis of race.

2. There is a three-part test for evaluating the equal protection challenges alleged against the State’s exercise of a peremptory strike:
   a. Defendant must make a prima facie showing of discrimination in the prosecutor’s use of the strike;
   b. If this showing is made, the prosecutor is then required to provide a race-neutral reason for the exercise of the challenge; and
   c. The court weighs the evidence to determine whether the defendant carried the burden of proving that the strike constituted purposeful discrimination on the basis of race.
B. Subsequent cases interpreting and expanding *Batson*


   The Supreme Court held that private litigants in a civil case may challenge peremptory strikes that are used to exclude jurors on account of their race.


   The Court held that the State can contest a defendant’s exercise of a peremptory challenge on the basis of race.


   The Court extended *Batson* to include challenging gender-based peremptory strikes.


   In the trial court’s determination of whether a defendant met the third requirement of *Batson* in establishing purposeful discrimination, the critical question is “the persuasiveness of the prosecutor’s justification for his peremptory strike.” The court further noted that this issue depends on whether the trial court finds that the race-neutral explanations of the prosecutor are credible. Some of the factors to be considered by the court in measuring credibility are the demeanor of the prosecutor,
whether the explanations are reasonable, and whether the rationale proffered is consistent with a recognized trial strategy.


A defendant may rely on “all relevant circumstances” to raise an inference of purposeful discrimination under *Batson*, including the statistical analysis of the jurors that were struck, and not just the reasons proffered by the State in making the peremptory challenge.


A defendant satisfies the first step in a *Batson* analysis, which is that the proponent must make out a *prima facie* case of improper discrimination by showing that the totality of the relevant facts gives rise to an inference of a discriminatory purpose, “by producing evidence sufficient to permit a trial judge to draw an inference that discrimination has occurred” and is not required to show that it is more likely than not that the peremptory challenges were based on impermissible group bias.


Although “the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercised the
challenge,” the trial court must also determine “whether the juror’s demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.”

The Court stated that the striking of even one prospective juror for a discriminatory purpose is forbidden by the Constitution.


The Court noted that no prior Supreme Court case required that in ruling on an objection to a peremptory challenge a judge must reject an explanation based on the juror’s demeanor unless the judge personally observed and recalled the aspect of the prospective juror’s demeanor upon which the explanation was based.


The Batson issue to a large extent turned on a credibility evaluation by the trial court and, therefore, that court’s determination of the defendant’s Batson claim was entitled to “great deference” and unless it was clearly erroneous, it must be sustained.
C. Preserving a *Batson* challenge

1. The challenge must be timely raised before the trial court.
   a. To give the trial judge the opportunity to develop a complete record of the jury selection process for appellate review.
   b. Raise the objection during voir dire both after opposing counsel’s strike and after he or she provides the alleged non-race-motivated reason(s) for striking.

2. Articulate the objection in a form that allows the trial judge an opportunity to weigh the evidence in ruling on the challenge and to correct the alleged improper strike.
II. OBJECTIVES OF VOIR DIRE

A. To uncover juror bias
   1. Establish bases for challenging a juror for cause.
   2. Develop information which will allow the effective use of peremptory challenges.

B. Is it the goal to impanel jurors who are fair and impartial or who will be sympathetic to your client’s case?

C. To preview the theories of your case to assess the reactions of the prospective jurors.
III. PRELIMINARY CONSIDERATIONS

A. Basic considerations

1. How many jurors and alternates will be selected?

2. To what extent will the court conduct voir dire as opposed to allowing counsel to question prospective jurors?

3. Clear understanding of the court’s jury selection system

4. The number of peremptory challenges for each party

5. Will the court allow “back strikes”?

B. Use of jury consultants

1. Identify significant issues that will affect how jurors view the evidence

2. Identify prospective jurors’ attitudes and opinions regarding those issues

3. Help familiarize trial counsel with controversial issues prevalent in the community

4. Mock trials with the assistance of jury consultants
   Preview of how a jury may decide the case and what issues will be important to jurors.

5. Focus groups

6. Community surveys
Surveys that assess community attitudes from which the consultant can develop a profile of a person who would be a good juror for your client’s case.

C. Use of jury questionnaires

1. Allows counsel to obtain information about prospective jurors prior to voir dire.

2. Motion for Jury Questionnaire, especially if the judge intends to severely restrict the time allotted for voir dire.

IV. PREPARATION FOR AND CONDUCTING VOIR DIRE

A. Prepare outline of points you intend to cover during voir dire

B. Questions that usually will be asked by the court
   1. Questions concerning minimal qualifications
   2. Whether potential jurors know any of the attorneys, parties, or witnesses
   3. Have any of the jurors heard or read about the case?
   4. Would jury service cause a severe personal or financial hardship?
   5. Does a potential juror have a medical problem or condition that would impair his or her ability to serve as a juror?

C. Basic voir dire
   1. Depends on whether you have used a jury questionnaire and/or what preliminary questions have been asked by the court
   2. Briefly discuss purposes of voir dire in layman’s terms
   3. Brief summary of facts
   4. Explore whether any prospective jurors have been employed by and/or had any relationship with any of the parties.
      a. If you are representing the plaintiff in a personal injury case, determine whether the prospective juror or his or
her family members have been employed by an insurance company.

b. In a personal injury case, determine if the prospective juror is employed in the field of medicine.

5. Burden of proof in a civil case versus criminal case.

6. Prior personal events that may interfere with or prevent a juror from rendering a fair and impartial verdict.
   a. Accidents
   b. Lawsuits
   c. Similar injuries

7. Previous jury experience.

D. Important considerations in speaking to prospective jurors during voir dire

1. Use common words/avoid legal jargon

2. Don’t interrogate potential jurors with a lot of leading questions.

3. Three types of questions
   a. Open ended questions
   b. Close ended questions
      Require just yes or no.
   c. “Scaled” questions
Are your beliefs about (a particular subject)

- Very favorable?
- Favorable?
- Neutral?
- Unfavorable?
- Very unfavorable?

4. Looping “good answers from jurors.”

Who else agrees?

5. Raising and lowering juror expectations

6. Listen!

E. Dealing with juror bias during voir dire

1. Frivolous lawsuits

2. Awarding damages in general

3. Intangible damages (i.e., pain and suffering, etc.)

4) Concern that accident litigation results in higher insurance premiums

5) Don’t sound greedy!

E. Cautions in conducting voir dire

1) Be credible

2) Be yourself