The Shrinking Strike Zone: Avoiding Problems During Jury Selection in the Age of *Batson*

By Sean G. Overland

Is your race-neutral explanation enough to survive a *Batson* challenge? In February, the Supreme Court handed down its decision in the case of *Thaler v. Haynes*, the latest in a string of cases originating with *Batson v. Kentucky* in 1986. In *Batson*, the Court outlawed the use of race-based peremptory challenges during jury selection. Attorneys can no longer strike racial minorities from a jury without an acceptable "race neutral" explanation for the strike. The intent of *Batson* was to eliminate the discriminatory use of peremptory challenges that often resulted in all-white juries in many parts of the country.

Despite its noble intent, the *Batson* decision has been widely criticized as vague, unclear and difficult to enforce. Indeed, since 1995, all of the Supreme Court's rulings on the *Batson* line have been clarifications of the *Batson* procedures, including what constitutes a discriminatory peremptory challenge and what are acceptable, race-neutral explanations for a challenged strike. After briefly describing the history of the *Batson* line and the three-step process involved in a *Batson* hearing, I discuss the most recent *Batson* decisions and offer some tips to help attorneys avoid *Batson* problems during jury selection.

Expanding the Scope of *Batson*: The First Ten Years

Following *Batson*, the Court handed down a series of rulings expanding the decision. In 1991, the Court decided *Edmonson v. Leesville Concrete Company*, which extended *Batson's* ban on race-based peremptories to the parties involved in civil litigation. *Edmonson* involved a black construction worker who sued his employer for negligence after sustaining a workplace injury. During jury selection, the defendant company used two of its three peremptory challenges to remove black jurors from the panel. The plaintiff objected, citing *Batson*. The court overruled the objection, pointing out that *Batson* applied only to prosecutors in criminal trials. However, the Supreme Court reversed the decision of the lower court, thereby including civil trials within the jury selection rules established under *Batson*.

The following year, the Court outlawed race-based peremptories made by criminal defendants. *Georgia v. McCollum* involved the trial of three white defendants charged with assaulting a black couple. The defense attorney admitted that he planned to strike all of the black jurors from the panel and the prosecution objected. The trial court upheld the strikes, as did the Georgia Supreme Court, but upon review, the U. S. Supreme Court reversed.

The Court has expanded the list of prohibited peremptories to include strikes based on gender and ethnicity. *J.E.B. v. Alabama* banned strikes based on gender. In *J.E.B.*, prosecutors struck all of the male jurors in a paternity and child-support case against a male defendant. The all-female jury found that the defendant was the father and therefore owed child support to the mother. On appeal, the Court ruled that peremptory strikes made solely on the basis of gender, like those based solely on race, violated the Equal Protection Clause of the Fourteenth Amendment. The Court's ruling in *Hernandez v. New York* extended *Batson* protections to Latinos. And in *Powers v. Ohio*, the Court decided that any litigant, regardless of race, may make a *Batson* objection.

Expanding *Batson*

Case in *Batson* Line	Result
1986: *Batson v. Kentucky*	Banned peremptory challenges based solely on juror's race
1991: *Powers v. Ohio*	Expanded protections to defendants of any race
1991: *Hernandez v. New York*	Expanded ban to peremptory strikes based on ethnicity
1991: *Edmonson v. Leesville*	Expanded ban to civil litigation
1992: *Georgia v. McCollum*	Expanded ban to strikes made by criminal defendants
1994: *J.E.B. v. Alabama*	Expanded ban to strikes based on gender

Batson in Practice

A *Batson* challenge to a peremptory strike involves a three-step process.

1) A litigant wishing to challenge one or more of the opponent's strikes must first demonstrate a prima facie case of discrimination in the use of those peremptories.

2) If a prima facie case is established, the attorney who made the challenged strike must offer a race-neutral (or gender-neutral, as the case may be) explanation for the peremptory.

3) Finally, in step three, the judge must decide whether the challenged peremptory was the result of purposeful race or gender discrimination.

Although the Court outlined the three steps of a *Batson* challenge, the ruling only vaguely defined the standards to be used during each of the three steps. As a result, lower courts have had to develop their own *Batson* standards. In his research on lower courts' implementation of the *Batson* rules from 1986 to 1993, Mililli (1996) identified at least eight different standards in use by lower courts for establishing a prima facie case of

discrimination during the first stage of a *Batson* hearing. The eight different methods ranged from a judge simply ensuring that a "sufficient number" of minorities sit on a jury, to more sophisticated analyses that compared the percentage of peremptory challenges used against minority citizens with the percentage of minorities in the jury venire (pp. 471-472). Mililli's (1996) study found that in most *Batson* hearings (62%), the court found in the first step of the hearing that there was a prima facie case of discrimination.

In the second stage of a Batson hearing, the attorney must provide race neutral explanations for the challenged strikes. However, what constitutes an acceptable "race neutral" explanation was left undefined in the original *Batson* decision. As a result, most trial judges and appeals courts have granted attorneys a great deal of leeway with their explanations. Raphael and Ungvarsky (1994) looked at over 2,000 *Batson* hearings conducted between 1986 and 1992 and found that judges rejected only a very small percentage of explanations. In fact, the only "explanations" that were often rejected were either no explanation at all or the attorney admitting that the strike was based on the juror's race. Raphael and Ungvarsky (1994) found twelve common categories of race-neutral explanations that judges typically accepted, including the juror's prior experience with the criminal justice system, age, occupation, marital status, demeanor, education, socio-economic status and religion, among others. In fact, Raphael and Ungvarsky (1994) found that, "there are a number of cases in which courts accepted as a neutral explanation the prosecutor's statement that she struck a juror because, among other reasons, the juror was black" (p. 236). Mililli's (1996) study found that trial courts accepted attorneys' neutral explanation in 78.4% of *Batson* hearings. As a result, only about 17% of *Batson* objections are eventually sustained. Ironically, Millili (1996) found that he highest rate of successful *Batson* challenges (53% success rate) are made against peremptories used to strike white jurors.

The original *Batson* decision also failed to prescribe a remedy for a *Batson* violation. The decision mentions two possible remedies, but endorses neither of them. One possible remedy is to replace the entire venire and repeat the jury selection process. However, replacing the entire venire might give attorneys a perverse incentive to make discriminatory peremptory strikes, in the hope that the second venire might be "better" for their case than the first. The other option is to reinstate the struck jurors. However, this option raises questions about the impartiality of those jurors, as they will have probably witnessed their dismissal, and may hold a grudge against the litigant who struck them.

Clarifying *Batson*: Supreme Court Decisions from 1995 to 2010

Almost ten years passed after the original *Batson* decision before the Supreme Court offered some guidance on its implementation. The Court's short per curiam opinion in *Purkett v. Elem* (1995) weighed in on the nature of an acceptable "race neutral" explanation during the second step of a *Batson* hearing, and the Court's ruling came as something of a shock. *Purkett* involved peremptory strikes used by a state prosecutor to remove two black jurors from a Missouri robbery trial. When the defense objected to the strikes, citing *Batson*, the prosecutor offered the following race-neutral explanation:

> I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to be not a good juror for that fact, the fact that he had long hair hanging down shoulder-length, curly, unkempt hair. Also he had a moustache and goatee type beard. And juror number twenty-four also has a moustache and goatee type beard. Those are the only two people on the jury...with facial hair...And I didn't like the way they looked, with the way the hair is cut, both of them. And the moustaches and the beards look suspicious to me (p. 765).

The Supreme Court upheld the prosecutor's strikes and stated that race-neutral explanations need be only that: race-neutral. The explanations need not be "persuasive or even plausible" (p. 768). The *Purkett* decision seemed to make a *Batson* challenge nothing more than a mild procedural hassle for attorneys wishing to use their

peremptory challenges as they saw fit. However in 2005, the Court revisited *Batson* and began handing down rulings seeking to clarify and strengthen the *Batson* rules.

In the first of these decisions, *Johnson v. California*, the Court held that California's standard for evaluating a prima facie case of discrimination in the first step of a *Batson* hearing was too restrictive. California had required attorneys raising a *Batson* objection to show a "strong likelihood" of discrimination in the use of the strikes. Under *Johnson*, the Court ruled that just an "inference" or even a "suspicion" of discrimination was enough to establish a prima facie case of discrimination. The Court therefore struck down California's more demanding requirement. In the second case in 2005, *Miller-El v. Dretke*, the Court overturned a murder conviction because an explanation given by the prosecutor for a peremptory strike used against a black juror also applied to white jurors who were not struck from the jury.

In March of 2008, the Court decided *Snyder v. Louisiana*, holding that the judge in Snyder's first-degree murder trial erred when he allowed the prosecutor's peremptory challenge of a black juror. The juror in question, Mr. Jeffrey Brooks, was a student teacher at the time of jury selection and initially explained to the court that jury duty would be a hardship for him because it would interfere with his teaching responsibilities. However, the court contacted Mr. Brook's school and received permission for him to miss work. Nonetheless, the following day, the prosecutor struck Mr. Brooks. When defense counsel objected, the prosecutor explained the strike:

> 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 (pp. 5-6).

The Court rejected this explanation as unpersuasive, pointing out that Mr. Brooks seemed satisfied when informed that the dean would "work with him" to make up any missed student teaching. The Court also pointed out that other jurors had more pressing work and family conflicts that would certainly make them eager to avoid a lengthy trial, yet these jurors were not stricken by the prosecutor. The Supreme Court held that, "the explanation given for the strike of Mr. Brooks is by itself unconvincing and suffices for the determination that there was *Batson* error" (pg. 5). *Snyder* seems to re-affirm *Miller-El*, in which the Court held that an explanation for a challenged strike will fail if the explanation also applies to other jurors who were not struck.

The most recent Supreme Court decision in the *Batson* line came last month. *Thaler v. Haynes* stems from the trial of Anthony Haynes, who was convicted of murdering a police officer in Texas. Two judges presided over the jury selection for Haynes' trial. The first judge heard the questioning of the jurors, but another judge presided over the attorneys' use of their peremptory challenges. The defense objected to the prosecutor's peremptory strike of an African-American juror, citing *Batson*. During the subsequent *Batson* hearing, the prosecutor claimed that the juror's demeanor seemed "somewhat humorous" and "not serious." The judge, who was not present during the questioning and who had not seen the juror's demeanor, accepted the prosecutor's explanation and overruled the defendant's *Batson* objection. Haynes was convicted, but on appeal, a federal Appeals Court granted Haynes a new trial. However, the Supreme Court reversed that decision, ruling that a trial judge need not personally observe a juror's demeanor in order to rule on a demeanor-based explanation for a challenged peremptory strike.

While *Thaler* may seem to be a relatively minor technical decision, it may have important consequences for attorneys and trial consultants. First, *Thaler* reverses a recent trend toward restricting the scope of acceptable race-neutral explanations. Recall that *Snyder* rejected speculative juror hardship as an acceptable race-neutral explanation, and *Miller-El* rejected explanations for challenged strikes if the explanation also applied to jurors who were not struck. Second, *Thaler* could be seen as sanctioning the expanded use of demeanor-based explanations for challenged strikes. Juror demeanor includes a wide range of juror actions and statements, potentially giving attorneys greater flexibility in the use of their peremptory challenges.

Clarifying *Batson*?

Case in *Batson* Line	Result
1995: *Purkett v. Elem*	"Long hair" and "goatee beards" are acceptable explanations
2005: *Johnson v. California*	Lowered California's standard for prima facie case to "inference" or "suspicion"
2005: *Miller-El v. Dretke*	Race-neutral explanations are not acceptable if they apply to jurors not struck
2008: *Snyder v. Louisiana*	Speculative juror hardships are "unconvincing"
2010: *Thaler v. Haynes*	Judges need not observe a juror's demeanor in order to rule on demeanor-based explanations for challenged strikes.

Implications for Attorneys and Trial Consultants

So where does *Batson* currently stand? The most recent decisions, particularly *Snyder* and *Miller-El*, have tightened the standards for what constitutes a race-neutral explanation in the *Batson* process. However, there remain some pitfalls to avoid. Consider the following tips if you anticipate a *Batson* challenge while exercising your peremptory challenges.

- Whenever possible, use a written juror questionnaire during jury selection. Juror questionnaires not only give attorneys and trial consultants a great deal of information about jurors' attitudes and life experiences, but jurors' written answers are a valuable resource for clearly explaining challenged strikes in the event of a *Batson* hearing. Jurors are also more likely to answer questions truthfully and thoughtfully when writing their answers on a confidential questionnaire than when asked to talk about themselves in open court.

If facing a *Batson* challenge:

- Provide as many reasons as possible for the decision to strike the juror.
- Make sure that the reasons offered for the strike do not also apply to jurors who remained on the panel.
- Take careful notes on juror demeanor during questioning, as trial courts and the Supreme Court have accepted juror demeanor as an acceptable race-neutral reason for a strike.
- Remember that a juror's perceived hardship is not a persuasive race-neutral justification for a challenged strike.

Sean Overland, PhD is a trial strategy and jury consultant based in Seattle. His company, the Overland Consulting Group assists clients facing complex civil litigation.

All graphics and tables in this article created by **Jason Barnes** of Barnes and Roberts.

References

Allen v. Hardy 478 U.S. 255 (1986)

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

Edmonson v. Leesville Concrete Co. 500 U.S. 614 (1991)

Georgia v. McCollum 505 U.S. 42 (1992)

Hernandez v. New York 500 U.S. 352 (1991)

J.E.B. v. Alabama ex rel. T.B. 511 U.S. 127 (1994)

Johnson v. California 545 U.S. 162 (2005)

Mililli, Kenneth J. (1996). *Batson* in Practice: What We Have Learned About *Batson* and Peremptory Challenges. *Notre Dame Law Review, 71,* 447.

Miller-El v. Dretke 545 U.S. 231 (2005)

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

Purkett v. Elem 514 U.S. 765 (1995)

Raphael, M.J. & Ungvarsky, E.J. (1994). Excuses, Excuses: Neutral Explanations Under *Batson v. Kentucky*. *University of Michigan Journal of Legal Reform*, *27*, 229.

Snyder v. Louisiana 552 U.S. 472 (2008)

Thaler v. Haynes 559 U.S. ___ (2010)

Citation for this article: *The Jury Expert*, 2010, 22(3), 17-22.

Editor's Note

Welcome to the May 2010 issue of *The Jury Expert*! It's spring (although in Texas it definitely feels like summer)! This issue we have reptiles in the courtroom (and in a departure from tradition, we have four trial lawyers responding to the article rather than trial consultants); a *Batson* update; a piece on juror intimidation inside the jury deliberation room; an article from two journalists on pre-trial publicity and what defense advocates can learn from the Duke lacrosse case (with responses from three trial consultants); a piece using sense-making theory to discuss how Supreme Court Justices behave like jurors; that age-old question of whether size matters when it comes to juries; an essay on persuasive communication and attorney likability; and finally--a trip across the country (and, kind of, through time) as consultants tell stories about rural courthouses time forgot (and stories about a few other things too).

Of course, we also have a couple of Favorite Things and want to remind you about the upcoming ASTC conference in beautiful Minneapolis, Minnesota. The theme this year is 'Perfecting Your Game' and it's always a good time for that.

This is the first issue in which we have benefitted from visual graphics experts in pulling together the issue. Special thanks to Jason Barnes (Barnes & Roberts), Ted Brooks (Litigation-Tech) and Nate Hatch (Resonant Legal Media). Click anywhere in this issue of The Jury Expert for challenging, educative and fun reading for Spring 2010. You'll see us again in July and 24/7 on-line. Read us. Tell your friends and colleagues.

Rita R. Handrich, Ph.D., Editor

On Twitter: @thejuryexpert

The Jury EXPERT
The Art and Science of Litigation Advocacy

The Jury Expert [ISSN: 1943-2208] is published bimonthly by the:

American Society of Trial Consultants
1941 Greenspring Drive
Timonium, MD 21093
Phone: (410) 560-7949
Fax: (410) 560-2563
http://www.astcweb.org/

The Jury Expert logo was designed in 2008 by:
Vince Plunkett of *Persuasium Consulting*