Reverse Batson Challenge Sustained

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In the recent case of State v. Hurd, the N.C. Court of Appeals upheld a claim by a prosecutor that a defendant's peremptory strike of a prospective White juror was racially discriminatory, which is the second time that our appellate courts have upheld such a claim. This post briefly reviews the legal requirements for challenges under *Batson*, analyzes the court's reasons for sustaining the prosecutor's challenge in *Hurd*, and considers the lack of appellate decisions in North Carolina upholding defense challenges to prosecutors' peremptory strikes of jurors of color.

What is a *Batson* challenge? Racial discrimination in the selection of trial jurors has been recognized as unconstitutional for more than a century and violates the Equal Protection Clause of the U.S. Constitution and article I, section 26 of the N.C. Constitution. This protection developed in response to laws and policies restricting jury service to White people and excluding African Americans. *See Raising Issues of Race in North Carolina Criminal Cases*, Section 7.2B (Development of Law) (UNC School of Government, 2014). In *Batson v. Kentucky*, 476 U.S. 79 (1986), the U.S. Supreme Court established a three-step test for assessing whether a prosecutor used a peremptory challenge for a discriminatory reason: 1) the defendant must make a prima facie showing that the State's strike was discriminatory; 2) the burden then shifts to the State to offer a race-neutral explanation for the strike; 3) the trial court decides whether the defendant proved purposeful discrimination. In *Georgia v. McCollum*, 505 U.S. 42 (1992), the court held that *Batson* also prohibits criminal defendants from making race-based peremptory challenges, a practice that may give rise to a "reverse *Batson* challenge."

Facts of *Hurd*: The defendant was indicted on three counts of first degree murder, among other charges. Defense counsel filed a pretrial motion "to prohibit the District Attorney from exercising peremptory challenges as to potential Black jurors, or in the alternative to order that the District Attorney state reasons on the record for peremptory challenges of such jurors," which the trial judge denied. During voir dire, when defense counsel attempted to strike four White prospective jurors, the State raised a challenge. The trial judge analyzed the defendant's pattern of strikes and found that the State had made a prima facie case. With regard to three of the prospective jurors, the trial judge found that defense counsel provided race-neutral reasons for the strikes and excused them. However, the trial judge found that defense counsel's explanation for attempting to strike Juror 10, (namely, that defense counsel believed Juror 10 was in favor of capital punishment) was pretextual and ordered that he be seated on the jury. The defendant was convicted and appealed, arguing in part that the trial judge erred in sustaining the State's *Batson* challenge.

Holding: The court held that the trial court did not commit clear error by sustaining the State's reverse *Batson* challenge, noting that great deference should be given to the findings of the trial judge as *Batson* challenges require evaluations of credibility. The court found that the State had shown purposeful discrimination for the third prong of the *Batson* test based on circumstances such as the following:

- The defendant and the three murder victims were Black.
- The defendant attempted to strike Juror 10, a White male but did not strike Juror 8, a Black female, although both rated themselves a "four" on a scale of one to seven when asked to rate their predisposition toward the death penalty.
- The trial court found that the defendant made a pretrial motion to prevent the State from exercising peremptory strikes against prospective Black jurors, and the motion was not made in response to any discriminatory action

of record.
- Of the 11 peremptory challenges used by the defense, 10 were used against White and Hispanic prospective jurors.
- The defendant's acceptance rate of Black jurors was 83%; his acceptance rate for White and Hispanic jurors was 23%.
- Defense counsel stated that they challenged Juror 10 because he was in favor of capital punishment, but Juror 10 also said that being in the jury box made him "stop and think" about the death penalty, and he considered the need for facts to support a sentence.

In his appellate briefs, the defendant's arguments included that 73% of the jurors who were seated for voir dire were White while the county was roughly 49% White; in other words, the defendant's strike rates were misleading because underrepresentation in the pool resulted in a situation where more White jurors were available to be excused. The defendant also pointed out reasons that Juror 8 was more attractive to the defense than Juror 10 that had nothing to do with race, such as that she had recently helped her son write a report on abolishing the death penalty, while Juror 10's statements such as "the punishment should fit the crime" provided a race-neutral explanation for the strike.

North Carolina courts' record on *Batson* challenges. Two decisions, *State v. Cofield*, 129 N.C. App. 268 (1998) and now *Hurd*, have upheld prosecutors' *Batson* challenges on the ground that the defendant engaged in purposeful discrimination against White people. In contrast, North Carolina appellate courts have never reversed a case on the ground of purposeful discrimination by the State in the exercise of a peremptory challenge. Our courts have decided over 100 cases in which defendants alleged racial discrimination against minorities in jury selection since *Batson* was decided in 1986. While our courts have found that further review was needed in about five cases involving *Batson* claims by the defense, none resulted in a finding of a violation. Only one decision in North Carolina has reversed a trial court's rejection of a defendant's *Batson* claim, but in that case the prosecutor did not offer any race-neutral justifications for striking at least one, and possibly two, Black venire members. *State v. Wright*, 189 N.C. App. 346 (2008).

Why do defendants have so little success on appeal? In Chapter 7 of our manual addressing issues of race, we analyze the requirements for *Batson* claims at length and discuss possible explanations for the lack of appellate relief for defendants. They include:

- North Carolina appellate courts have been deferential to trial judges' rejections of defendants' *Batson See* Section 7.2D of the manual (Studies of Peremptory Challenges in North Carolina)
- North Carolina prosecutors have consistently exercised peremptory challenges in a race-neutral way. There are studies and data that contradict this theory, however. *See id.*
- North Carolina trial judges have been upholding *Batson* claims at trial, making appellate review unnecessary. We don't have data on this question; however, the many North Carolina appellate opinions holding that the trial court did not err in rejecting defendants' *Batson* challenges following prosecutors' strikes of prospective Black jurors run counter to this theory.
- Defense lawyers are not raising *Batson* Again, no data, but *Batson* holdings against the defense show this is not entirely the case. It seems reasonable to assume that defense lawyers raise such claims at least as often as prosecutors do. (Jeff suggests in this post from 2009 that prosecutors may have been reluctant to raise reverse *Batson* claims because if they prevail and the defendant is convicted, an appellate court might find that the trial court erred and reverse the conviction.) A related question is whether defense lawyers are effectively litigating *Batson* claims that they raise. Our manual aims to assist defenders in litigating these claims.
- The *Batson* framework is not effective because it is too easy to give race-neutral reasons for challenges and too difficult to show that the reasons are pretextual. *See Miller El v. Dretke,* 545 U.S. 231, 239-40 (2005). Also, the requirement to show purposeful discrimination does not account for the impact of implicit bias in peremptory strikes of jurors. *See* Section 7.5 of the manual (Beyond Litigation).

What do you think? Is *Batson* an effective framework for challenging prosecutors' strikes of jurors of color?