WAPA BEST PRACTICES - June 2016
Batson v. Kentucky: Guidelines for Jury Selection

Prosecuting Attorneys are committed to furthering racial, ethnic, and gender inclusiveness in jury service. Peremptory challenges against members of historically underrepresented racial and ethnic groups, or based upon gender, should be exercised only for legitimate and articulable reasons.

In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court recognized that the historic exclusion of minority citizens from jury service is "a primary example of the evil the Fourteenth Amendment was designed to cure." This history of racial discrimination has harmed not only defendants and prospective jurors of color, but has undermined public confidence in the fairness of the justice system. When exercising peremptory challenges in jury selection, prosecuting attorneys must be mindful of this history and mindful of the importance of inclusion in maintaining public confidence in the justice system.

In J.E.B. v Alabama, 511 U.S. 127 (1994), the United States Supreme Court stated that "[discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process."

Recent appellate decisions regarding peremptory challenges exercised against members of historically underrepresented groups illustrate that prosecuting attorneys should be careful not to exercise peremptory challenges in a way that supports an inference of racial discrimination. To that end, understanding the Batson analysis as currently applied by Washington courts is crucial.

While Batson and its progeny are aimed at purposeful discrimination, the Washington Supreme Court recently observed in State v. Saintcalle, that discrimination in jury selection may be the result of unconscious bias. Prosecuting Attorneys should carefully examine their reasons and motives for exercising a peremptory challenge against a member of a historically underrepresented racial or ethnic group, or based upon gender.

The Batson analysis has three parts:

First part: The defendant must make a "prima facie" showing of purposeful discrimination. A prima facie showing of purposeful discrimination is based on a totality of the circumstances.

In one case, the appellate court held that a prima facie case was established with the exercise of a peremptory challenge against a single juror when there are only two members of that racial group on the panel.

Prosecuting Attorneys should be cautious about agreeing that a prima facie showing has been made, or volunteering an explanation when the court has not required one. When an explanation has been provided, the existence of a prima facie showing is no longer a relevant issue. Instead, a reviewing court will examine the adequacy of the explanation. State v. Luvene, 127 Wn.2d 690, 699 (1995). This review has sometimes been more intensive than the review of the adequacy of a "prima facie showing." See, e.g., State v. Cook, 175 Wn. App. 36 (2013).

You must be fully prepared to articulate a race-neutral reason or reasons whenever striking a juror from a historically underrepresented racial group.

The race of the defendant is irrelevant: any party can bring a Batson challenge if the opposing party appears to be striking jurors on an impermissible basis.

Note about confusion as to "cognizable groups": If you have a doubt as to whether the juror in question actually belongs to a cognizable racial or ethnic group, you should raise the issue with the court. The burden is on the party making a Batson challenge to establish that the juror is a member of a cognizable group. If you genuinely did not realize the juror was a member of a cognizable group at the time you exercised the peremptory challenge, you should state this on the record.

Second part: The burden shifts to the State to offer a race-neutral or gender-neutral reason or reasons for the peremptory challenge.

The reason:

Must be supported by the record. Reasons should be based on the juror's answers, or characteristics that are established on the record. "She was scowling at me throughout jury selection," or "he appeared confused" will not be supported by the record and will be viewed with suspicion by the appellate court unless the trial court expressly agrees with your observations. A sidebar or hearing outside the presence of the jury alerting the court to your concerns during voir dire should be considered to ensure the court is in a position to agree with your observations.

Must be applied evenly to all panel members. If your race-neutral reason is based on a particular answer, consider whether there are other jurors who gave the same or a very similar answer. If so, is the reason you are striking the minority juror — and not the other similar jurors — truly race-neutral, and can you articulate your reasons for striking one but not the others? You should assume the appellate court will conduct a "comparative analysis" of all your challenges. If you strike a minority juror for being a teacher, but keep other teachers on the panel, your reason will be considered a pretext for racial discrimination.

While it is appropriate to offer more than one valid reason supported by the record, do not offer weak reasons in an attempt to bolster your challenge. Weak reasons will simply cause the exercise of the peremptory challenge to be viewed with suspicion.

Third part: The trial court decides whether the race-neutral or gender-neutral reason is legitimate or a pretext for racial or gender discrimination.

This determination should be given deference by the appellate court. However, the appellate court may not defer to the trial court, particularly if the trial court seems confused about the proper standard to be applied.

The remedy for a successful Batson challenge is traditionally discharge of the entire panel, but the trial court may reseat the challenged juror instead, or grant the other party additional peremptory challenges. See Batson v. Kentucky, 476 U.S. 79, 99 n.24 (1986); McCrory v. Henderson, 82 F.3d 1243, 1247 (2nd Cir. 1996); State v. Willis, 43 P.3d 130, 137 (Cal. 2002).

Finally, the State can and should bring Batson challenges when there is a clear indication that the defense is exercising its peremptory challenges in a manner that reflects discrimination on a basis of race or ethnicity. See Georgia v. McCollum, 505 U.S. 42 (1992); See State v. Bennett, 180 Wn. App. 484 (2014). "[A]ll jurors have the right to be free from race or gender discrimination in jury selection." Id. At 488. The State can and should bring Batson challenges when there is a clear indication that the defense is exercising its peremptory challenges using gender as a proxy for bias. See United States v. Grant, 563 F.3d 385 (8th Cir. 2009), cert. denied, 559 U.S. 941 (2010).

Additional points to consider:

1) Request that Batson challenges be made outside the presence of the jury.
2) Consider asking for additional time for voir dire if you foresee a Batson challenge. As was noted by the California Supreme Court in People v. Lenix, 187 P.3d 946, 962 (Cal. 2008), "trial courts must give advocates the opportunity to inquire of panelists and make their record. If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask sufficient questions. Undue limitations on jury selection also can deprive advocates of the information they need to make informed decisions rather than rely on less demonstrable intuition."
3) After a Batson challenge has been made, regardless of the outcome, ask the trial court to note the final racial composition of the jury on the record.

In summary, when responding to a defense Batson challenge:

1) Listen carefully to the basis for the challenge, and request clarification if you do not understand the basis.
2) If the court finds that the defendant has made a prima facie showing, offer your legitimate race-neutral reason(s).
3) Once jury selection is completed, ask the trial court to note the final racial/ethnic composition of the jury on the record.