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RECENT DEVELOPMENT

ILLINOIS COURTS STRUGGLE TO EVALUATE RACE-NEUTRAL EXPLANATIONS FOR PEREMPTORY CHALLENGES UNDER *BATSON v. KENTUCKY*

The peremptory challenge is used to exclude prospective jurors from the venire. Traditionally, because there was no need to state a reason for the exclusion of a prospective juror, peremptory challenges were the most effective means for prosecutors to compose a favorable jury.[1] In the landmark case of *Batson v. Kentucky*,[2] the United States Supreme Court examined the constitutionality of the broad scope of the prosecutor's use of these challenges. The Court held that the equal protection clause of the fourteenth amendment prohibits the prosecution's use of peremptory challenges to exclude members of a cognizable racial group, if exclusion is based solely on membership in that group.[3] Unfortunately, the Court provided inadequate guidance as to the implementation of *Batson's* mandate. As a result, lower courts have applied the case in a confused and inconsistent manner.

This confusion is particularly apparent when deciding whether the prosecution has proffered neutral reasons that justify the exclu-

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1. Note, *The Defendant's Right to Object to Prosecutorial Misuse of Peremptory Challenge*, 92 HARV. L. REV. 1770, 1774 (1979).

2. 476 U.S. 79 (1986).

3. *Id.* at 97. The Court stated:

> Just as the Equal Protection Clause forbids the states to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors . . . so it forbids the states to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black.

Id. In *Batson*, the State used four peremptory challenges on black veniremen, with the result that an all-white jury served. *Id.*

For a discussion of the *Batson* case, see Robinson, *The Peremptory Challenge After Batson: Limits on the Prosecutor or License to Discriminate?*, 76 ILL. B.J. 620 (1988); Note, Batson v. Kentucky: *A Significant Step Toward Eliminating Discrimination in the Jury Selection Process*, 29 ARIZ L. REV. 697 (1986); Note, Batson v. Kentucky: *The New and Improved Peremptory Challenge*, 38 HAST. L. REV. 1195 (1987).

sion of venirepersons. Illinois courts, presently at the early stage of development in this area, warrant close attention. This is because only consistent and rational judicial interpretation of race-neutrality will guide Illinois practitioners in determining when perceived racial discrimination during voir dire is, in fact, remediable.[4]

General Requirements of Race-Neutrality

In order to succeed under *Batson*, the defendant must show a prima facie case of racial discrimination. To establish a prima facie case, the defendant must show both that he or she is a member of a cognizable racial group[5] and that members of that group have been excluded from the venire.[6] The trial judge is to consider all relevant circumstances of the venire in deciding whether a prima facie case is established.[7]

Once the defendant has established a prima facie case, the burden shifts to the state to present neutral explanations for challenging the prospective jurors.[8] For two reasons, there are few Illinois cases discussing race-neutrality. First, *Batson* is a relatively recent case, and the appellate machinery yields results only over time. Second, there are many Illinois cases that were remanded to the trial court when a prima facie case was shown, on the theory that the

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4. In People v. Andrews, No. 86-635, slip. op. (Ill. App. Ct., 1st Dist., 3d Div., July 6th 1988), the court discussed the importance of prohibiting racial discrimination during voir dire:

> A Criminal trial is more than merely a means of meeting justice. The trial is also an avenue for fulfilling the notion deeply rooted in the common law that justice must satisfy the appearance of justice. For a civilization founded upon principles of ordered liberty to continue to survive with its principles intact, its members must share the conviction that they are governed equitably. That necessity underlies the Equal Protection Clause upon which *Batson v. Kentucky* is based . . . plainly, the appearance of justice is not fulfilled if the trial court acquiesces in, condones or fails to preclude attempts by the prosecuting attorney to exclude blacks from the jury solely because they are black . . . those citizens who are selected as jurors in a criminal case are expected to judge the defendant solely on the basis of his acts and not on the basis of his race. The selected jurors can hardly be expected to accomplish this task if they see that they, themselves, were selected by the state not on the basis of their individual qualities, but as members of a particular race.

Id. at 13.

5. *Batson*, 476 U.S. at 96.

6. *Id.* Subsequent to *Batson*, courts have held that the exclusion of even one prospective juror may give rise to a prima facie case. *See* United States v. Battle, 836 F.2d 1084 (8th Cir. 1987) (striking single black juror for racial reasons violates equal protection clause); People v. Parker, 166 Ill. App. 3d 123, 519 N.E.2d 703 (1988) (use of peremptory challenge to exclude black juror in prosecution of black defendant was prima facie evidence of racial discrimination).

7. *Batson*, 476 U.S. at 96-97. Further, the defendant is entitled to rely on the presumption that the peremptory challenge permits "those to discriminate who are of a mind to discriminate." *Id.*

8. *Id.* at 96.

trial court is in the best position to judge race-neutrality.[9] Fortunately for Illinois, other jurisdictions provide guidance in this area.[10]

Batson itself requires the prosecutor's reason for the peremptory challenge be neutral and related to the case to be tried.[11] Further, the reason must be clear and reasonably specific, and legitimate.[12] A Missouri court provides other factors the trial judge should consider, including 1) the case's susceptibility to racial discrimination, 2) the race of the victim and expected witnesses, 3) the prosecutor's demeanor, 4) whether the prosecutor's office engaged in a past pattern of discriminatory practices and 5) whether white jurors sharing the excluded jurors' characteristics were not challenged.[13] It is insufficient for the prosecutor to merely assert good faith or deny a discriminatory motive.[14] Further, the prosecutor may not assume challenged jurors' partiality to the defendant because of their shared race.[15]

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9. The Illinois Supreme Court remanded, by *sue sponte* order on May 1, 1987, the following cases:

People v. Hooper, 118 Ill. 2d 244, 506 N.E.2d 1305 (1987); People v. Hope, 118 Ill. 2d 244, 506 N.E.2d 1313 (1987); People v. Young, 118 Ill. 2d 244, 506 N.E.2d 1314 (1987); People v. Evans, 118 Ill. 2d 244, 506 N.E.2d 1314 (1987); People v. Harris, 118 Ill. 2d 244, 506 N.E.2d 1315 (1987); People v. McDonald, 118 Ill. 2d 244, 506 N.E.2d 1315 (1987); People v. Mack, People v. Taylor, 118 Ill. 2d 244, 506 N.E.2d 1316 (1987); People v. Amos, 118 Ill. 2d 244, 506 N.E.2d 1317 (1987); People v. Cannon, 118 Ill. 2d 244, 506 N.E.2d 1317 (1987).

These cases, if re-appealed, will provide a wealth of Illinois case law on race-neutrality. Further, Illinois appellate courts, following the Illinois Supreme Court's lead, have remanded the following additional cases for similar trial court determinations:

People v. Andrews, No. 86-635, slip op. (Ill. App. Ct., 1st Dist., 3d Div., July 6, 1988); People v. Johnson, 162 Ill. App. 3d 12, 515 N.E.2d 825 (1987); People v. Rivera, 160 Ill. App. 3d 214, 513 N.E.2d 214 (1987); People v. Johnson, 159 Ill. App. 3d 991, 513 N.E.2d 852 (1987); People v. McEwen, 157 Ill. App. 3d 222, 510 N.E.2d 74 (5th Div. 1987); People v. Williams, 156 Ill. App. 3d 560, 509 N.E.2d 782 (1987); People v. Adams, 156 Ill. App. 3d 444, 509 N.E.2d 482 (1987); People v. Rooseveltause, 156 Ill. App. 3d 288, 509 N.E.2d 521 (1987); People v. Jones, 155 Ill. App. 3d 641, 508 N.E.2d 357 (1987); People v. Sims, 154 Ill. App. 3d 528, 507 N.E.2d 178 (1987); People v. Seals, 153 Ill. App. 3d 417, 505 N.E.2d 1107 (1987); People v. Bolden, 152 Ill. App. 3d 631, 504 N.E.2d 835 (1987); People v. Kindelan, 150 Ill. App. 3d 818, 502 N.E.2d 422 (1986); People v. Johnson, 148 Ill. App. 3d 163, 498 N.E.2d 816 (1986).

10. Two federal courts of appeals and the state courts of California, Delaware, Florida, Massachusetts and New Mexico used the sixth amendment of the Constitution and state constitutions to prohibit racial discrimination during selection of the petit jury. *See Batson*, 476 U.S. at 82 n.1. For a discussion of the use of peremptory challenges to exclude venire persons of a race or class, see Annotation, *Use of Peremptory Challenges to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R. 3D 14 (Supp. 1988).

11. *Batson*, 476 U.S. at 98.

12. *Id.* at 98 n.1.

13. State v. Butler, 731 S.W.2d 265, 268 (Mo. App. Ct. 1987).

14. *Batson*, 476 U.S. at 98.

15. *Id.* at 97-98. Indeed, the prosecutor should leave race-reasoning completely out of the explanation for the challenge. The courts tend to treat any explanation involving race as discriminatory. *See* United States v. Brown, 817 F.2d 674 (10th Cir. 1987) (invalid explanation that blacks were challenged because, in previous cases with

SPECIFIC REQUIREMENTS OF RACE-NEUTRALITY

There are two requirements that present considerable difficulty when determining race-neutrality; namely, whether the proffered reason relates to the case to be tried, and whether the dissimilar treatment of white jurors suggests discriminatory use of the peremptory challenges. "Case-specific" reasoning, the requirement that the reason relate to the case at hand, may result in the same proffered reason being valid in one case, and invalid in another. For example, in a tax evasion case, a prospective juror may be validly excluded on the ground that he or she had problems with the Internal Revenue Service in the past.[16] Yet, in a murder trial, the required nexus between this reason for exclusion and the case at hand may not exist. More common within the ambit of case-specificity is where the prospective juror knows a party or a witness to the case.[17] Where the defendant shows that the peremptory challenge does not relate to the case, the claim of racial discrimination will be bolstered.

A claim of racial discrimination during voir dire will also be bolstered if the defendant can establish that white jurors who were chosen for the petit jury shared the characteristics of the excluded jurors. For example, where the excluded jurors lacked the "background, education and knowledge" to understand the evidence, the case was remanded because two white jurors who served on the jury had not completed high school.[18] Similarly, where the prosecutor stated he preferred jurors who did not live in a certain geographical area, yet allowed a white juror who lived in that area to serve on the jury, the court afforded "little weight" to the explanation.[19]

Perhaps the most difficult type of neutral explanation to evaluate is where the prospective juror's attitude or demeanor is the rea-

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some black defense counsel, blacks tended to acquit); Booker v. Jabe, 775 F.2d 762 (7th Cir. 1985) (invalid reason where prosecutor struck blacks because defense counsel struck whites); People v. Johnson, 22 Cal. 3d 296, 583 P.2d 774 (1978) (fact that witness would call someone a "nigger" at trial held invalid as a matter of law); People v. Allen, 168 Ill. App. 3d 397, 521 N.E.2d 1172 (1988) (invalid for prosecutor to explain he expected defendant to assert that defendant's arrest was racially inspired); Commonwealth v. Brown, 11 Mass. App. 238, 416 N.E.2d 218 (1981) (invalid reason where prosecutor struck blacks because defense counsel struck whites).

16. *See* United States v. Lewis, 651 F.2d 1163 (6th Cir. 1981).

17. *See* United States v. Cartlidge, 808 F.2d 1064, 1070 (5th Cir. 1987) (valid use of peremptory challenge where juror knew defense counsel); Weathersby v. Morris, 708 F.2d 1493, 1496 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984) (three jurors validly excluded where they knew co-defendant's counsel or spouse); United States v. Jackson, 696 F.2d 578, 593 (8th Cir. 1982) (valid exclusion where juror knew defendant and character witnesses); United States v. Andrade, 605 F. Supp. 1497, 1498 (D. Minn. 1985) (valid use of peremptory challenge where defense counsel had previously represented juror).

18. Garrett v. Morris, 815 F.2d 509, 514 (8th Cir. 1987).

19. Clark v. City of Bridgeport, 645 F. Supp. 890 (D. Conn. 1986).

son for the prosecution's use of the peremptory challenge. These explanations are difficult to evaluate because they are based on the subjective ground of prosecutorial intuition. As such, they are highly susceptible to stereotype.[20] Given the difficulty of evaluating these reasons, it is not surprising that the jurisdictions are split on their validity.

Courts have upheld challenges where the venireperson had a "wishy-washy" demeanor,[21] where the venireperson examined the prosecutor in a "hostile" manner,[22] and where the venire person "avoided eye-contact."[23] Texas courts have held "body english" may be used to rebut discriminatory motive.[24] A California court, however, stated that body language as a proffered reason "reduces the constitutional guarantee to meaningless superficialities."[25] Other courts have rejected hostility[26] and lack of sense of humor[27] as valid reasons. Such conflicting case law bespeaks the difficulty of evaluating attitude and demeanor explanations.

ILLINOIS COURTS ON RACE-NEUTRALITY

Illinois courts, still at the early stage in developing case law on race-neutral reasoning, seem to be struggling to implement *Batson*'s mandate. The difficulty Illinois courts are facing stems from the dilemma of enforcing the constitutional guarantee, while at the same time not unduly curtailing prosecutors' use of the peremptory challenge.[28] Over time, members of the criminal law bar may expect Illinois courts to provide more guidance. For the present, however, the case law on race-neutrality in Illinois is sparse and lacks thorough analysis.[29]

Illinois courts have appropriately applied the concept of case-

20. Polelle & Hourihane, *In Batson's Wake*, A.B.A. BARRISTER 53, 55 (Summer 1988).

21. Thomas v. State, 502 So. 2d 994 (Fla. 1987).

22. United States v. Mathews, 803 F.2d 325 (7th Cir. 1986), *rev'd on other grounds*, 108 S. Ct. 883 (1988).

23. United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987).

24. Grady v. State, 730 S.W.2d 191, 195-96 (Tex. Ct. App. 1987) (juror smiling at defendant); *see also* Chambers v. State, 724 S.W.2d 440, 442 (Tex. Ct. App. 1987) (juror inattentiveness).

25. People v. Trevino, 39 Cal. 3d 667, 693 n.25, 704 P.2d 719, 733 n.25, 217 Cal. Rptr. 652, 666 n.25 (1985).

26. People v. Motton, 39 Cal. 2d 596, 602, 704 P.2d 176, 178, 217 Cal. Rptr. 416, 418 (1985).

27. People v. Hall, 35 Cal. 3d 161, 166, 672 P.2d 854, 856, 197 Cal. Rptr. 71, 73 (1983).

28. For a thorough discussion supporting unfettered use of peremptory challenges, see Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975).

29. See *infra* notes 35-42 and accompanying text for a discussion of Illinois cases involving race-neutrality.

specificity, and upheld exclusion of prospective jurors where the proffered reason for exclusion related to the instant case. For example, use of the peremptory challenge was upheld where the venireperson had seen the defendant in local taverns.[30] Peremptory challenges also have been upheld where the venireperson or a relative was convicted of a crime similar to the crime with which the defendant was charged.[31] Courts in Illinois, however, have also upheld challenges where case-specificity did not exist. In one case, the court held that a venireperson in a murder trial was validly excluded because, as a controller, the juror might have "a propensity for detail and meticulousness,"[32] despite a prior court warning that similar reasoning appears pretextual.[33] Other Illinois cases have summarily upheld the proffered reasons of age, unemployment and marital status, with little or no discussion of the reason's relation to the case.[34]

Illinois courts have also inconsistently applied the concept of disparate treatment of accepted white jurors and rejected minority jurors. Though disparate treatment of jurors is the most objective way to discern racial discrimination, Illinois courts have shown little respect for the importance of this factor. In more than one case, Illinois courts have upheld exclusion on the basis of the characteristics of age, unemployment and marital status, even though jurors who served on the jury shared one or more of these characteristics.[35]

Because characteristics such as age, employment and marital status are so common among venirepersons, they are readily available as reasons for exclusion. Indeed, these characteristics have been cited often in Illinois as well as in other jurisdictions.[36] For these

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30. People v. Brown, 152 Ill. App. 3d 996, 1002, 505 N.E.2d 397, 401 (1987).

31. People v. Parker, 166 Ill. App. 3d 123, 128, 519 N.E.2d 703, 706 (1988) (relative convicted of crime similar to that charged); People v. Talley, 152 Ill. App. 3d 971, 987, 504 N.E.2d 1318, 1327 (1987) (theft conviction of prospective juror in trial for residential burglary).

32. People v. Peters, 144 Ill. App. 3d 310, 321, 494 N.E.2d 853, 861 (1986).

33. Roman v. Abrams, 608 F. Supp. 629, 635 (S.D.N.Y. 1985), *rev'd on other grounds*, 822 F.2d 214 (1986) (explanation that juror with electronics background was "a too technical background . . . has a hollow ring").

34. *See, e.g.*, People v. Daniels, 164 Ill. App. 3d 138, 517 N.E.2d 626 (1987) *appeal denied* 522 N.E.2d 1249 (1988); People v. Chevalier, 159 Ill. App. 3d 341, 512 N.E.2d 1001 (1987) *appeal denied* 517 N.E.2d 1089 (1987). *But see* People v. Taylor, No. 86-1768, slip. op. at 13, 14. (Ill. App. Ct., 1st Dist., 5th Div., June 3, 1988) (court states "the prosecutor reasonably may have believed that young, single unemployed persons lack maturity and may have a tendency to identify with a young defendant charged with drug offense. That belief is racially neutral and 'case specific' ").

35. *See Daniels* 164 Ill. App. 3d at 141, 517 N.E.2d at 628; *Chevalier*, 159 Ill. App. 3d at 349, 512 N.E.2d at 1006-07.

36. Currently, the Illinois Supreme Court is considering three cases involving the proffered reasons of age, employment status and marital status. These cases are: People v. Harris, No. 60857 (Ill. Sup. Ct. filed Oct. 1, 1984) (age and unemployment); People v. Hope, No. 58037 (Ill. Sup. Ct. filed March 3, 1983) (age, job stability, marital status). *See* People v. Mack, No. 55370 (Ill. Sup. Ct. filed Aug. 14, 1981) (age and job stability); Appellant's Petition for Leave to Appeal, People v. Taylor No. 86-1768,

reasons to be valid, the courts must closely scrutinize the treatment of all members of the venire. Illinois courts should also heed the warning of other jurisdictions that these reasons may actually be cited on the prosecutor's assumption the racial group would be less likely to convict.[37]

In a recent case, the Illinois Supreme Court applied the factor of disparate treatment in a case where the prosecutor used sixteen of his peremptory challenges to exclude black venirepersons.[38] The prosecutor excluded two potential jurors whose spouses were teachers on the grounds that teachers and their spouses used their own reasoning. An accepted juror, however, was a teacher. The prosecutor excluded a nurse from the petit jury because the nurse might rely on her own knowledge in deciding the case, yet a nurse's aid was accepted. A 34 year old male was excluded because of his young age, yet an 18 year old white male served on the jury. The Illinois Supreme Court found that "in light of the characteristics of the white jurors whom the prosecutor accepted, the prosecutor's reasons were inadequate."[39]

As previously noted, reasons based on the prospective juror's attitude or demeanor are the most difficult to evaluate. The few Illinois cases in this area reveal an inexcusable lack of analysis. In one case, the court upheld as a valid reason that the prosecutor stated he "was not too happy with [the juror's] demeanor and how he answered the questions."[40] While this statement leaves one bereft of knowledge as to what the prosecutor objected to, the court concluded that the explanation, based on the record, was specific enough to permit the exclusion.[41] In another Illinois case, the prosecutor explained that the juror did not respond quickly to a question during voir dire. The court upheld the exclusion, despite the trial judge's previous finding that the juror's responses were not objectionable.[42]

Undeniably, the attitude of a prospective juror may serve as a legitimate and race-neutral reason for peremptorily challenging the

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(Ill. App. Ct., 1st Dist., 5th Div., June 3, 1988).

37. Simpson v. Commonwealth of Massachusetts, 622 F. Supp. 304, 311 (D.C. Mass. 1984), *rev'd on other grounds*, 795 F.2d 216 (1986), *cert. denied*, 107 S. Ct. 676 (1986); State v. Hood, 745 S.W.2d 785 (Mo. Ct. App. 1988).

38. People v. McDonald, People v. Hicks, Nos. 63204, 63240, slip op. (Ill. Sup. Ct., Sept. 22, 1988).

39. *Id.* at 10.

40. People v. Talley, 152 Ill. App. 3d 971, 504 N.E.2d 1318 (1987).

41. *Id.* at 987, 504 N.E.2d at 1328. In *Talley*, while the voir dire examination was reported, there was no transcript as part of the appellate record. *Id.*

42. People v. Peters, 144 Ill. App. 3d 310, 494 N.E.2d 653 (1986). The standard of review for overturning a trial court's determination of racial discrimination during voir dire is the "clearly erroneous" standard. United States v. Matthews, 803 F.2d 325 330 (7th Cir. 1986), *rev'd on other grounds*, 108 S. Ct. 883 (1988).

juror. Illinois, however, has thus far mishandled these types of cases. For attitude or demeanor exclusions to be valid, the trial judge, as well as the prosecuting attorney, should observe the behavior of the prospective jurors.[43] Further, the specific behavior should be clearly noted in the record to assist the appellate court upon review. Only in this way will reliable case law in this difficult area be established.

CONCLUSION

The peremptory challenge has been a central facet of America's jury selection system for almost two hundred years.[44] *Batson*'s mandate may foreshadow the demise of this procedure.[45] For the present, the courts must seek to implement *Batson's* mandate in cases where peremptory challenges are racially motivated. Evaluating race-neutral reasons for exclusion of prospective jurors is the most difficult aspect of a *Batson* claim.[46] The courts in Illinois have thus far proved unequal to the task. The case law, understandably sparse, is also generally superficial. Only through close analysis and full discussion will Illinois courts guide Illinois trial attorneys in the area of race-neutrality.

Kevin E. Bry

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43. *See, e.g.*, United States v. Forbes, 816 F.2d 1006 (5th Cir. 1987).

44. Batson v. Kentucky, 476 U.S. 79, 112 (1986) (Burger, C.J., dissenting).

45. In a concurring opinion in *Batson*, Justice Marshall advocates that "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds" should lead to the abolition of the procedure. *Id.* at 107 (Marshall, J., concurring).

46. If one accepts the proposition that even the most enlightened of individuals harbors some racial stereotypes, faith in trial judges in evaluating race-neutrality must remain uncertain. Indeed, most of the trial judges themselves are former prosecutors or defense attorneys, and therefore may have preconceptions of what is impermissible discrimination during voir dire.

Robert Isaacson, Chief of the Appellate Division of the Cook County Public Defender's Office, agrees that some judges are biased. Yet, he maintains that evaluating explanations for peremptory challenges *shouldn't* be more difficult than judging the credibility of witnesses at trial. Interview with Robert Isaacson, Chief of the Appellate Division of the Cook County Public Defender's office in Chicago, Illinois (October 9, 1988). Isaacson does not feel peremptory challenges should be abolished, but rather "peremptory challenges should be used in a constitutional manner." *Id.*