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CHALLENGING PROSECUTORIAL PEREMPTORY CHALLENGES: *LITTLE v. UNITED STATES*

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I. INTRODUCTION

In *Little v. United States*,[1] the District of Columbia Court of Appeals was called upon to decide an issue of discriminatory use of peremptory challenges. The court held that the defense counsel failed to present a prima facie case of discriminatory use of peremptory challenges under *Batson v. Kentucky*.[2] The defense counsel focused primarily on the number of black venire persons that the prosecutor struck and the racial composition of the jury.[3] In addition, the court held that the trial judge's stated reasons for denying the defense counsel's claim under *Batson* was incorrect as a matter of law.[4] However, the court of appeals, by relying on the record, did not find reversible error because the trial judge based his decision on his own observations of the prosecutor's actions.[5]

The court, in closing, "cautioned trial judges to make a clear record of their reasons for finding or not finding a prima facie case"[6] of discriminatory use of peremptory challenges. The court suggested that trial judges make a clear record of their reasons, pointing to facts which they relied on, to reach their decision.[7] When the prosecutor's actions are questionable, the judge should always inquire about the prosecutor's reasons for making such strikes "since the burden on the prosecutor in rebutting a prima facie case is not overly onerous nor time-consuming."[8]

II. THE CASE

In January 1990, a jury convicted Marvin C. Little of assault with intent to kill while armed,[9] carrying a pistol without a license,[10] and one count of possession of a

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1. 613 A.2d 880 (D.C. 1992)
2. 476 U.S. 79 (1986).
3. Little v. United States, 613 A.2d 880, 886.
4. *Id.* at 887.
5. *Id.*
6. *Id.*
7. *Id.* at 888.
8. *Id.* at 887-888.
9. D.C. CODE ANN. §§ 22-501, 3202 (1989 & 1991 Supp.).
10. D.C. CODE ANN. § 22-3204(a) (1989 & 1991 Supp.).

firearm during a crime of violence[11].

The defense counsel made a timely move for a mistrial citing *Batson v. Kentucky*.[12] Defense counsel pointed out that his client, Mr. Little, is black, and the prosecutor exercised six of his seven peremptory strikes against black individuals, a number of whom answered no questions. The defense counsel asked the court to require the prosecutor to give the court neutral explanations for his strikes. The trial judge pointed out that the vast majority of people in the city are black, therefore, the odds are heavy that when a prosecutor exercises peremptory challenges it will be against a black person. The judge stated that he did not notice anything that resembled racial motivation by the prosecutor in his exercise of peremptory challenges. The judge then went on to say, "I believe one of his strikes was someone who was white. I think that probably satisfies any constitutional claim that could even be made in the wildest stretch of the imagination."[13] Then the judge gave the prosecutor the opportunity to respond if he desired.

The prosecutor responded by stating, "I don't think I need to respond . . . if I am put on the spot . . . I would have to give it some thought." The prosecutor then proceeded to give general reasons such as he looked at the prospective juror's "demeanor," "gait" and looked for jurors who would give the case a "fair shake." The prosecutor noted he "wasn't keeping track" of his strikes.[14]

The judge responded, "I think that explanation is certainly satisfactory to me . . . I don't want to do anything inadvertently that will leave a cloud over this record. But, from my perspective, that is about as far-fetched a claim as could possibly be made."[15]

The prosecutor "passed" four times by opting not to strike anyone. Out of the six venire persons he struck, only two answered questions on voir dire. The questions they answered related to whether their close friends or relatives were in law enforcement. The final jury composition was eight black members, four white members and two black alternates.

The trial judge dismissed the defense counsel's motion and the court of appeals affirmed this decision.

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11. DC CODE ANN § 22-3204(b) (1989 or 1990 Supp.) The jury acquitted the appellant of assault with a dangerous weapon and one of the possession of a firearm during a crime of violence.

12. *Batson*, at 79.

13. *Little*, at 883.

14. *Id.* at 883.

15. *Id.*

III. LEGAL BACKGROUND

Peremptory challenge is defined by Black's Law Dictionary as "The right to challenge a juror without assigning, or being required to assign, a reason for the challenge."[16] Peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia.*[17] It first came into use in the 1600's under English common law which allowed criminal defendants to make these challenges.[18] The right to use peremptory challenges is not guaranteed under the United States Constitution, but rather is a tool used in an attempt to obtain an impartial jury, which is a guaranteed right under the Sixth Amendment of the U.S. Constitution.

Challenges to limit the power to exclude jurors have historically evolved in the criminal context to combat the evils of racial discrimination. The first case to raise the issue of improper exclusion of potential jurors was the 1880 case of *Strauder v. West Virginia.*[19] In *Strauder* the Supreme Court reversed a state murder conviction because it was shown that black venire persons were purposely excluded from serving on the defendant's grand and petit jury. A defendant has no guaranteed right to have a jury composed of persons of his own race.[20] However, the Court held that the Equal Protection Clause of the Fourteenth Amendment guarantees that members of his race will not be purposely excluded on account of race or on the false assumption that, as a group, they are not qualified to serve on the jury.[21] In *Norris v. Alabama,*[22] the Supreme Court held that merely denying use of peremptory challenges for racial discriminatory reasons is insufficient to rebut a prima facie case. Thus, "limitations on jury selection began in response to the problem of racial discrimination."[23]

The first test the Supreme Court used to detect illicit use of peremptory challenges was the equal protection standard in *Swain v. Alabama.*[24] Under the *Swain* equal protection standard, the defendant must prove that the prosecutor

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16. BLACK'S LAW DICTIONARY 1136 (6th ed. 1990).
17. Avery v. Georgia, 345 U.S. 559, 562 (1953).
18. Mark Curriden, *The Death of the Peremptory Challenge*, A.B.A J., Jan 1994, at 62.
19. Strauder v. West Virginia, 100 U.S. 303 (1880).
20. *Id.* at 305.
21. *Id.* at 306-307. The Supreme Court limited its holding to race or color. Groups such as women were allowed to be excluded from the jury. *Id.* at 310.
22. Norris v. Alabama, 294 U.S. 587 (1935).
23. Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV L REV 1013, 1014 (1989).
24. Swain v. Alabama, 380 U.S. 202 (1965).

developed a systematic pattern of striking jurors for what appears to be for improper reasons.[25] This test proved to be virtually impossible to satisfy because it implied researching a prosecutor's history of using peremptory strikes in other cases.[26] This led the California Supreme Court in *People v. Wheeler*[27] to adopt a more liberal Sixth Amendment test, and ultimately the United States Supreme Court in *Batson v. Kentucky* [28] to adopt a more liberal equal protection test.

In *People v. Wheeler* two black defendants were convicted by an all white jury of murdering a white man. The prosecutor used his peremptory challenges to strike every black venire person from the jury. The trial judge refused to require the prosecutor to explain his challenges and denied the defense counsel's repeated motions for a mistrial. The California Supreme Court reversed the conviction based on the cross-section (impartial jury) requirements of the Sixth Amendment of the U.S. Constitution and Article I, Section 16, of the California Constitution.[29] Both Constitutions have been interpreted to imply that the defendant has a constitutional entitlement "to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits."[30]

The court recognized the importance of peremptory challenges and did not want its holding to jeopardize the challenge, and thereby imposed limitations on opportunities to raise objections.[31] The most important limitation is the requirement that the defense must establish a prima facie case of improper exclusion before the court will scrutinize over the peremptory challenges. The defense must prove that the excused jurors are members of a cognizable group and that they are being excused solely because they belong to this group.[32]

In *Batson* the U.S. Supreme Court reevaluated discriminatory use of peremptory challenges, adopted a Fourteenth Amendment equal protection standard and purposely avoided the Sixth Amendment cross-section analysis applied by *Wheeler*.[33] The *Batson* analysis consists of a three step process: 1) the challenging party must prove a prima facie case of discriminatory use of

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25. *Id.* at 223-224.
26. Batson v. Kentucky, 476 U.S. 79, 92 (1986).
27. People v. Wheeler, 583 P.2d 748 (1978).
28. Batson v. Kentucky, at ____.
29. *Wheeler*, at 769.
30. *Id.*
31. *Id.* at 764.
32. *Id.*
33. *Batson*, at 137.

peremptory challenge,[34] 2) after a prima facie case has been proven the burden shifts to the accused party who must give a "neutral explanation" for each challenge,[35] and 3) the trial judge must then "decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors."[36]

To establish a prima facie case of purposeful racial discrimination in jury selection, the challenging party may rely solely on the circumstances in his particular case. This is a departure from the *Swain* standard which was only applicable to the most blatant abuses, and is in accordance with the proposition articulated in *Arlington Heights v. Metropolitan Housing Dev. Corp.* that "a single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions."[37]

In order to establish a prima facie case, the defendant must first show that "he is a member of a cognizable racial group".[38] Next he must show "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race,"[39] and that "these facts and any other relevant circumstances raise an inference that the prosecutor used [a peremptory challenge] to exclude the venire persons from the petit jury on account of their race."[40] The Court noted that, "The trial court should consider all relevant circumstances" when deciding whether the defendant has met his burden.[41]

Once a challenging party establishes a prima facie case, the burden shifts to the prosecutor to come forward with a "neutral explanation" for striking each juror. The explanation "need not rise to the level justifying exercise of a challenge for cause" but should not merely be an "assumption or intuition judgment."[42] The explanation must give "clear and reasonably specific legitimate reasons"[43] which are related to the particular case being tried.

The Court noted its confidence "that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of

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34. *Id.* at 96-97.
35. *Id.* at 97-98.
36. *Id.* at 97.
37. *Batson* at 95, (*quoting* Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977)).
38. *Batson*, at 96.
39. *Id.*
40. *Id.*
41. *Id.* at 96-97.
42. *Id.* at 98.
43. *Id.* (*quoting* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

peremptory challenges creates a prima facie case of discrimination against black jurors," and declined "to formulate particular procedures to be followed."[44] Therefore, it is within the trial court's discretion to determine the procedure to evaluate the explanation as long is it conducts some proceeding. The court "has a duty to satisfy itself that a prosecutor's challenges were based on constitutionally permissible trial-related considerations, and that the proffered reasons are genuine ones, and not merely a pretext for discrimination."[45]

IV. LEGAL REASONING

Little required the District of Columbia Court of Appeals to address the issue of racial discriminatory use of prosecutorial peremptory challenges which the court referred to as a *Batson* issue. The court had only one other instance to address this issue, *Nelson v. United States*,[46] and the defendant in the case failed to create an adequate record for a prima facie case.

The question on appeal was limited to the third factor of the *Batson* prima facie burden, which is whether the defendant showed facts and any other relevant circumstances that raise an inference that the prosecutor purposely excluded jurors solely because of their race.

To establish a prima facie case the defendant relied on the fact that the prosecutor exercised six of his seven peremptory challenges on black venire persons and only two of them had answered a question during voir dire. The questions they were asked regarded family or friends in law enforcement and nothing in their responses indicated a bias against the prosecution. The defense argued that it may in fact indicate a bias toward the prosecution. The only white person struck had answered a question. The resulting jury was comprised of eight black members, four white members and two black alternates.

The defendant also pointed to other relevant circumstances to prove an inference of racial discrimination. These circumstances included the prosecutor's voluntary statement explaining his strikes as a whole in a general way by stating that he looked at "demeanor," "gait" and for people who would give the government a "fair shake" although, he was not "keeping track." The prosecutor did not give an explanation for each specific juror. The defense argued that his explanation does

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44. *Id.* at 97-99.
45. Garrett v. Morris, 815 F.2d 509, 511 (8th Cir. 1987).
46. Nelson v. United States, 601 A.2d 582, 590 (D.C. 1990).

not satisfy *Batson's* requirement that the prosecutor "articulate a neutral explanation related to the particular case to be tried"[47] and the reasons given were not "clear and reasonably specific."[48]

The government argued that nearly all the prosecutor's peremptory challenges were against black venire persons because nearly all the persons in the venire were black. The government pointed out that the prosecutor "passed" on four rounds and if he had been intent on striking as many black jurors as he could he would not have "passed." The government also stressed that the trial judge is given broad discretion in evaluating the circumstances of the voir dire process since he has "unique awareness of the totality of the circumstances surrounding the voir dire."[49] There are circumstances that are not part of the record, including, the race of the members of the venire (unless discussed in a motion), their facial expressions and body language, etc. The trial judge has the opportunity to observe many of these facts which do not appear on the record. Therefore, the trial judge's conclusion should be given great deference upon review.

The trial court concluded that the defendant failed to make a prima facie showing of purposeful discrimination in the prosecutor's use of peremptory challenges. The trial court relied on the facts that one of the seven peremptory challenges was against a white venire person, that the prosecutor "passed" in four rounds, and from the judge's own observation he could not infer purposeful discrimination.

The Court of Appeals affirmed, but expressed concern regarding the trial judge's statements and reasoning. The court held that the defendant failed to present a prima facie case because he focused primarily on mere numbers of black venire persons struck by the prosecutor. Although the court stated that the trial judge's statements concerning the one white venire person struck and the prosecutor's general disclaimer being "probably satisfactory" were incorrect as a matter of law, the court held that this was not reversible error because the judge also relied on his observations, and the record as a whole did not constitute reversible error.

The court noted that the defendant brought up additional arguments in his briefs and in oral argument that if presented to the trial court may have constituted a prima facie case. These arguments included comparing the black venire persons struck with the white venire person struck, comparing answers to questions asked, comparing blacks who did not answer to whites who did not

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47. *Batson*, 476 U.S. at 98.
48. *Texas Dept. of Community Affairs*, at 258.
49. United States v. Moore, 895 F.2d 484, 486 (8th Cir 1990)

answer, or emphasizing the group being struck as a heterogeneous group of both sexes and a variety of occupations and social backgrounds.

In closing, the Court of Appeals warned trial judges to make a clear record of their findings which emphasizes facts or absence of facts they used in making their decisions. The court noted that it was a close case, but ultimately the defendant, not the judge, had the burden of showing a prima facie case, which he failed to do in this case. The court also noted that when close, the trial judge should require the prosecutor to state his reasons for his challenges, especially since this is not a heavy burden. Rigorous scrutiny is essential because "the exclusion of even one black member of the venire for racial reasons violates the equal protection clause regardless of how many white jurors are struck."[50]

V. ANALYSIS

In *Little* the court warned trial judges to adopt a more precise procedure that creates a clear record of their reasons for finding or not finding a prima facie *Batson* claim. The court emphasized relying on underlying facts or the absence of facts which support or negate the claim.[51] The court could only warn trial judges and could not provide additional procedural guidelines because the defendant failed to satisfy his prima facie burden.

The peremptory challenge is a very powerful tool for trial lawyers. It gives trial lawyers the right to challenge venire persons merely on a hunch without having to furnish an explanation.[52] This enables trial lawyers to exclude venire persons from the jury for reasons which do not rise to the level of exclusion for cause and which historically were not questioned. *Batson*, its progeny such as *Little*, and especially cases looking to extend the principle even further to include gender,[53] could mean a drastic change and possible demise of the peremptory challenge. A trial lawyer's discretion in exercising peremptory challenges will no longer be absolute and unquestioned. The limitations could possibly alleviate some racial and perhaps gender discrimination from the jury system, however, it could be at the expense of the trial lawyers powerful tool used to obtain an impartial jury.

As the case law indicates, limitations imposed on the use of peremptory

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50. *Little*, at 885.
51. *Id.* at 887.
52. *Curriden*, at 62.
53. *J.E.B. v. T.B.*, ___ U.S. _____ (1994). Case was argued November 2, 1993.

challenges are based on the jurors' rights under the Equal Protection Clause of the Fourteenth Amendment and the defendants' rights under the Due Process Clause, specifically his right to an impartial jury. The purpose of the challenge is to facilitate the objective of obtaining an impartial jury.

However, a peremptory challenge by its very nature is "arbitrary and capricious." Improper use is likely to go undetected and immune from scrutiny, which would infringe upon a juror's equal protection right not to be discriminated against.[54] To establish a prima facie case the questionable challenges must be substantially obvious. Even if challenged, a lawyer may be encouraged against giving the real reasons for the challenges, because it may be for improper reasons, or the real reasons may give up the lawyer's trial strategy.[55]

The *Batson* standard is a way to limit the unquestioned discretion of the trial lawyer in using peremptory challenges and attempts to alleviate racial exclusion of jurors. A trial lawyer should have a legitimate reason for excluding a potential juror, and the lawyer should be able to articulate this reason if the circumstances indicate an inference of racial discrimination. This does not mean that every challenge must be scrutinized, and in reality only those challenges which are the most obvious will get scrutinized.

The Court of Appeals in *Little* was justified in issuing its warning to trial judges to specifically state on the record the facts and circumstances for their decision on a *Batson* issue. It is unconstitutional to exclude someone from serving on a jury because of their race or gender, therefore, strict procedures for enforcing *Batson* need to be followed to attempt to diminish this injustice, but must also be balanced against the need to obtain an impartial jury. Claims deriving from an insubstantial inference of improper discrimination should not be scrutinized.

VI. CONCLUSION

The Supreme Court in *Batson* limited the use of peremptory challenges to prohibit the exclusion of a juror on the basis of race. The Supreme Court has recently extended *Batson* to protect a white defendant, *Powers v. Ohio*,[56] to apply in civil cases as well as criminal cases, *Edmonson v. Leesville*,[57] and to be binding

54. Note *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV L REV. 1014 (1989).

55. *Curriden, supra* note 15, at 62.

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

57. Edmonson v. Leesville, 500 U.S. 614 (1991).

on the criminal defense counsel as it is on the prosecutor, *Georgia v. McCollum*.[58] The Court is currently considering extending *Batson* to include gender, *J.E.B. v. T.B.*.[59] The District of Columbia Court of Appeals, in December 1993, extended *Batson* to prohibit striking white jurors based on their race. The courts continue to define what constitutes a *Batson* violation and need to also focus on devising procedures to detect and eliminate these growing violations.[60]

As the court in *Little* cautioned trial judges, a clear record stating the relied upon facts and the reasons for a *Batson* claim must be enforced. The voir dire process needs to be carefully monitored to ensure a fair trial. Rigorous scrutiny is essential for any potential *Batson* claim. Strict procedures on detecting potential *Batson* claims and the growing categories of violations may lead to inquiry into every peremptory challenge, and thus bring the challenge closer to a challenge for cause. If every peremptory challenge is questioned it is no longer a tool which the lawyer can use to choose one juror over another for no articulated reason. This could be the death of the peremptory challenge, or at least an end to the challenge as we know it.

Trial lawyers have an opportunity to observe a potential juror's demeanor, facial expressions, body language and other such characteristics which may lead them to conclude that certain jurors may be unable to be impartial. These reasons may be insufficient to sustain a challenge for cause but, a trial lawyer may be able to exclude these jurors by way of the peremptory challenge. Limitations on the challenge need to be imposed to combat the evils of improper discrimination, but we must be careful not to eliminate the essential tool, the peremptory challenge, which is necessary to obtain an impartial jury. Only those challenges based on a substantial inference of improper discrimination should be scrutinized.

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58. Georgia v. McCollum, 112 S. Ct. 2348 (1992).

59. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

60. In September 1990, the Joint Committee on Judicial Administration in the District of Columbia Courts established a Task Force on Racial and Ethnic Bias and a Task Force on Gender Bias in the Courts. The purpose of the Task Forces was to determine the extent to which racial, ethnic, and gender biases were perceived or found in the District of Columbia courts. The purpose was also to make recommendations to reduce or eliminate biases. The Task Forces issued their final report in May 1992.

The Task Forces examined court employment practices, treatment of participants during litigation, attorney disciplinary proceedings, the composite of the judiciary, etc. However, they did not specifically examine perceived bias or actual discrimination in jury selection.

Addendum

On April 19, 1994, the Supreme Court in *J.E.B. v. Alabama ex rel. T.B.*[61] held that under the Equal Protection Clause of the Fourteenth Amendment, "gender, like race, is an unconstitutional proxy for juror competence and impartiality" and thus "gender-based" peremptory strikes are prohibited.[62]

This creates a further obstacle to the use of the peremptory challenge. Justice O'Connor points out in her concurring opinion that this decision is costly by making "the peremptory challenge less discretionary and more like a challenge for cause" it will "force lawyers to articulate what we know is often inarticulable," and will increase "the number of cases in which jury selection-once a sideshow-will become part of the main event."[63]

Justice Scalia states in his dissent that "the Court imperils a practice that has been considered an essential part of fair jury trial since the dawn of the common law. The Constitution of the United States neither requires nor permits this vandalizing of our people's traditions."[64] As mentioned, this could be the death of the peremptory challenge as we know it.

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61. J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994).

62. Split decision: Justice Blackmun wrote the majority opinion, in which Justices Stevens, O'Connor, Souter, and Ginsburg joined. Justices O'Connor and Kennedy filed concurring opinions. Justice Rehnquist filed a dissenting opinion and Justice Scalia filed a dissenting opinion, in which Judges Rehnquist and Thomas joined.

63. *Id.* at 15-16.

64. *Id.* at 24.