CENTER FOR APPELLATE LITIGATION

120 WALL STREET – 28TH FLOOR, NEW YORK, NY 10005 TEL. (212) 577-2523 FAX 577-2535
http://appellate-litigation.org/

ISSUES TO DEVELOP AT TRIAL

January 2017 - Vol. 2, Issue 1

Happy New Year! This month we address a recent Batson decision out of the Court of Appeals, People v. Bridgeforth, that recognized "color" as a category distinct from race for purposes of mounting a Batson challenge. To prepare for a potential Batson challenge, trial practitioners should take note of the prospective jurors' race, gender, ethnicity, skin color, etc., as voir dire progresses. Your identification of the cognizable group being excluded must be clear and specific. It is further worth noting that Bridgeforth also implicitly endorsed "hybrid" groups, as the successful challenge there was to "dark-colored women." e.g., the cognizable class included both color and gender.

Background: In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court held that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race. Id. at 89. Batson has been extended by the Supreme Court to apply to gender, J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994), and ethnicity, Hernandez v. New York, 500 U.S. 352, 359 (1991). New York adopted Batson under the State Constitution and prohibits discrimination against prospective jurors by either the People or the defense "on the basis of race, gender, or any other status that implicates equal protection concerns." People v. Luciano, 10 N.Y.3d 499, 502-03 (2008).

Batson sets forth the three-step procedure to assess claims of discrimination during the jury selection process. Assuming, for our purposes, that it is the defense who is alleging discrimination by the prosecutor: at step one, the defendant bears the burden of establishing a prima facie case that the prosecutor has intentionally used its peremptory challenges to discriminate against a cognizable group. The prima facie case has two components: the cognizable class and facts and circumstances giving rise to an inference of discrimination. At step two, the burden shifts to the prosecutor to articulate a facially non-discriminatory ("race-neutral") reason for striking the juror. At step 3, the trial court must determine, based on the arguments presented by the parties, whether the proffered reason for the peremptory strike was pretextual and whether the movant has shown purposeful discrimination.

The parties as well as the court often conflate and confuse (ie., generally mess up), these steps! We provide handy practice tips below to assist you going forward.

Bridgeforth: In Bridgeforth, the defense brought a Batson challenge, specifying that the prosecutor was striking "'[t]he black or dark-colored [women].'" Although the prosecutor objected that "'we are either going to do Guyanese or African-American, can't do black or skin color,'" the prosecutor plowed ahead and gave reasons for all the strikes, with the exception of one of the challenged jurors, where the prosecutor could not "remember" the reason for getting

"rid of her." That juror was ultimately not seated. The lower court never actually made a step one finding, nor a step 3 finding, essentially granting the challenge because the prosecutor had met its step two burden.

Revisiting the issue of the prima facie case[1], the Court of Appeals held that **"under this State's Constitution and Civil Rights Law, color is a classification upon which a Batson challenge may be lodged."** As the Court explained, race and color are separate classifications, under the specific terms of the Equal Protection Clause of the State Constitution and section 13 of the Civil Rights Law, and pursuant to scholarly research in the field. **Thus, under Bridgeforth, skin color is now a cognizable classification upon which a challenge to a prosecutor's use of peremptory strikes under Batson may be based.**

The Court then went on to find that the prosecutor failed to provide any reason, let alone a race-neutral one, for the excluded juror. Since the prosecutor did not meet its burden at step 2, the trial court's failure to seat the juror was reversible error.

"Step-by-Step" Practice Tips:

- **STEP ONE**: As noted above, a Batson challenge begins with making a step one showing of a prima facie case of intentional discrimination. This showing has two components: identifying the cognizable class and setting forth "facts and other relevant circumstances" to support an inference of discrimination. See Batson; People v. Hecker, 15 N.Y.3d 625, 651 (2010).

    - Cognizable class: Race, gender, ethnicity, color (or a hybrid group: dark-skinned women, Hispanic men). As our high court has shown an interest in an expansive view of Batson, don't hesitate to make the challenge if you see it and can support it! However, note that the Court has already rejected "minorities" as a cognizable group. Skin color, the Court distinguishes, is generally "an immutable characteristic."

    - "Facts and other inferences": The Court of Appeals has said there are "no fixed rules," but some relevant facts (though no single one is required) include: "group identity" between the defendant and the excused prospective jurors; a pattern of strikes or questions or statements made during the voir dire; a showing that

---

[1] **For appeal geeks (mostly)**: Under principles of mootness that apply in this area, the defense had argued that the Court could not revisit whether the defense met its burden at step one because the prosecutor had gone on to give step two race-neutral reasons, thus mooting the step one issue. However, the majority found that the step one question would only be moot if the lower court had made a step 3 ruling. Judge Garcia, in concurrence, criticized the majority for "reformulat[ing] the court's mootness doctrine." While of particular importance on appeal, trial practitioners, on receiving a favorable step one ruling, should insist that the court make a step 3 ruling in order to "moot out" the step one "prima facie" issue on appeal.

members of the cognizable group were excluded while others with the same relevant characteristics were not stricken (similarly situated jurors treated differently); where the stricken jurors might be expect to be favorably disposed to the prosecution (e.g., ties to law enforcement, crime victim).

- in the midst of voir dire, defense attorneys naturally turn first to the numbers of strikes the prosecutor has exercised against the protected class in making a Batson challenge. When doing this, it is vital that you clearly identify not only the class of jurors who were struck, but their makeup on the venire and the prosecutor's allocation of its strikes. E.g., "Of the five peremptory challenges used by the People, they struck four of the five potential African-American women on the 18-member venire." Otherwise, short of a wholesale exclusion, there is an insufficient record for assessing whether the prosecutor has disproportionately struck members of the protected class. Of course, always augment your numbers argument with other facts and circumstances, as noted above. Short of wholesale exclusion, numbers alone will rarely be enough to make out a prima facie case.

- Remember your future audience. You are making a record for the appellate lawyer in the unfortunate event of a conviction. Name the jurors who were struck, or clearly identify them by number.

- **STEP TWO**: At step two, again assuming you are the movant and have made out a prima facie case, the prosecutor has the burden of proffering race/gender/ethnicity/color-neutral reasons for the strike or strikes. The burden here is slight: the reasons need only be "facially permissible." That means they must not implicate race, gender, etc. Their believability is not the issue at step two. That is a matter for step three.

- **STEP THREE**: If the explanations proffered by the prosecutor are facially race neutral, the burden shifts back, at step three, to the moving party to "persuade the court that reasons are merely a pretext for intentional discrimination." Hecker, 15 N.Y.3d at 656. The trial court must make its ultimate determination on the issue of discriminatory intent based on all of the facts and circumstances presented. Id.

  - The trial court has discretion in this area to believe or disbelieve the reason. It is a question of fact, not law. "Credibility can be measured by among other factors, the demeanor of the opposing party, by how reasonable or how improbable, the explanations are, and by whether the proffered rationale has some basis in accepted strategy." Miller-El v. Cockrell, 537 U.S. 332, 339 (2003).

  - Also, the strength of the step one showing is a factor you can cite to support the step 3 showing. A strong showing of "facts and other circumstances" can inform whether the prosecutor has engaged in intentional discrimination despite his or her purportedly race-neutral explanations.

  - **Do not forget step 3! Unless the court rules on the issue of intentional**

discrimination, the prima facie case you worked hard to establish can be revisited on appeal under Bridgeforth. Nor can an appellate lawyer argue that the race-neutral reasons were silly and not believable if you do not make arguments below saying so, and do not insist on a ruling by the court.

See past issues at http://appellate-litigation.org/issues-to-develop-at-trial/

Contact us with ideas for future issues at: info@cfal.org

* * *