7.2 Overview

A. Consequences of Discrimination in Jury Selection

Recent publications have raised concerns about the potential influence of race on peremptory challenges, both nationally and in North Carolina. *See, e.g.*, Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012) (concluding that in the cases of inmates on North Carolina's death row as of July 1, 2010, the strike rate of eligible Black jurors was about 2.5 times that of eligible non-Black jurors); EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14 (2010) (reporting that "[f]rom 2005 to 2009, in cases where the death penalty has been imposed, prosecutors in Houston County, Alabama, have used peremptory strikes to remove 80% of the African Americans qualified for jury service").

The consequences of discrimination in jury selection extend beyond the violation of an individual defendant's constitutional rights. Courts have recognized that racial minorities suffer harm from discrimination in jury selection, "for prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *Miller-El v. Dretke*, 545 U.S. 231, 237–38 (1995) (internal quotations omitted); *see also State v. Saintcalle*, 309 P.3d 326, 337 (Wash. 2013) (observing that when the judicial system "allow[s] the systematic removal of minority jurors, we create a badge of inferiority, cheapening the value of the jury verdict"). The U.S. Supreme Court has observed: "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U.S. 79, 87. When the jury selection procedure is "tainted with racial bias, that overt wrong casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial. That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality, and undermines public confidence in adjudication." *Miller-El*, 545 U.S. 231, 238 (internal citations and quotations omitted).

B. Development of Law

Racial discrimination in the selection of trial jurors has long been recognized as unconstitutional. *See Strauder v. West Virginia*, 100 U.S. 303 (1880). "For more than a century, [the U.S. Supreme] Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause." *Georgia v. McCollum*, 505 U.S. 42, 44 (1992); *see also Batson*, 476 U.S. 79, 85 (describing the Court's "unceasing efforts to eradicate racial discrimination" in jury selection).

In the era before Reconstruction, jury service was generally restricted to White men. EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 9 (2010). The Civil Rights Act of 1875 outlawed racial

discrimination in jury service and, in 1880, the U.S. Supreme Court overturned a West Virginia statute restricting jury service to Whites. *Strauder*, 100 U.S. 303, 308 (holding that racial discrimination in jury selection compromises the right of trial by jury and violates the Equal Protection Clause); *see also Batson*, 476 U.S. 79, 89 ("The principles announced in *Strauder* never have been questioned in any subsequent decision of this Court."). In practice, however, the Civil Rights Act of 1875 was rarely enforced, and the *Strauder* holding was circumvented by the replacement of statutes restricting jury service to Whites with statutes that, while race-neutral on their face, had the effect of excluding African Americans from jury service. For example, laws restricting jury service to eligible voters resulted in all-white juries when voting was restricted to those who could pass a literacy test and pay a poll tax. *See Williams v. Mississippi*, 170 U.S. 213 (1898). In addition, local officials excluded African Americans from jury service based on vague jury service requirements such as intelligence or good character. *See, e.g.*, *State v. Speller*, 229 N.C. 67, 69 (1948) ("The Chairman of the Board of [Bertie] County Commissioners testified that there had been 'no discrimination at all' in the selection of persons to serve on juries; that he had never 'known a Negro's name to be on the list of persons chosen for [service] on a grand or petit jury', but that all rejections were for want of good moral character and sufficient intelligence."); *see also* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 10–11 (2010).

In the 1960's, there was an increase in the number of minorities on jury venires as a result of the civil rights movement and the U.S. Supreme Court's fair cross-section jurisprudence. However, some scholars have concluded that these gains were undercut by the advent of racial discrimination in the exercise of peremptory challenges. *See, e.g.*, EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 12 (2010); Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2072–76, 2106–2110 (2010).

In *Swain v. Alabama*, 380 U.S. 202 (1965), the U.S. Supreme Court held that the use of race in the exercise of peremptory strikes violates the Equal Protection Clause, but required defendants raising challenges to show a pattern or practice of discrimination over a number of cases; evidence of discrimination from the defendant's individual case was not sufficient to establish an equal protection violation. The Court later recognized that the *Swain* standard was difficult to meet: it imposed a "crippling burden of proof [leaving] prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny." *Batson*, 476 U.S. 79, 92–93; JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 134 (1994) (noting that the *Swain* standard was not satisfied in federal court over a twenty year period).

In 1986, the U.S. Supreme Court altered the evidentiary burden for proving discrimination in the exercise of peremptory challenges by holding that Equal Protection Clause violations could be demonstrated with evidence from a defendant's case alone; historical evidence of discriminatory patterns was no longer required. *Batson*, 476 U.S. 79, 95–96; *see also infra* § 7.3, Legal Restrictions on Peremptory Challenges. The *Batson*

framework continues to govern challenges to discrimination in jury selection, but subsequent U.S. Supreme Court cases, including *Miller El v. Dretke* and *Snyder v. Louisiana*, have refined the standards necessary to sustain a *Batson* challenge.

Despite the Court's condemnation of racial discrimination in jury selection, "[t]he rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature." *Miller El v. Dretke*, 545 U.S. 231, 238 (2005). Just as the *Batson* Court concluded that *Swain* had not succeeded in ending the practice of race-based peremptory challenges, in recent years the Supreme Court has recognized that *Batson's* three-step test for detecting racial motivations behind peremptory strikes has also had a "weakness of its own owing to its very emphasis on the particular [race-neutral] reasons [for a strike that] a prosecutor might give." *Miller-El*, 545 U.S. 231, 239–40; *see also Miller-El*, 545 U.S. 231, 270 (Breyer, J., concurring) ("the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before").

In 1970, North Carolina amended its state constitution to explicitly prohibit discrimination in jury selection. Article I, section 26 of the North Carolina Constitution provides that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin." Additionally, North Carolina courts have held that the *Batson* framework is applicable under North Carolina constitutional law. *See State v. Maness*, 363 N.C. 261, 271–72 (2009). Nonetheless, a number of researchers, attorneys, and other observers have noted that legal prohibitions have not succeeded in eliminating race discrimination from jury selection in our state. *See infra* § 7.2D, Studies of Peremptory Challenges in North Carolina.

In recent years, legislators, judges, and researchers have examined the role that race may play in peremptory challenges in North Carolina capital cases. In 2009, the North Carolina General Assembly enacted the Racial Justice Act (RJA), which prohibited the sentencing or execution of any person "pursuant to any judgment that was sought or obtained on the basis of race." S.L. 2009-464. The law provided relief for defendants who could demonstrate that race "was a significant factor in decisions to exercise peremptory challenges during jury selection" in "the county, the prosecutorial district, the judicial division, or the State" at the time the defendant's death sentence was sought or imposed. *Id*. The law was amended in 2012 and repealed in 2013. Before its repeal, statistical information concerning racial disparities in jury selection in North Carolina capital cases was compiled in connection with RJA claims. *See infra* § 7.2D, Studies of Peremptory Challenges in North Carolina.

Four defendants' RJA claims advanced to trial court hearings. *See* *State v. Marcus Reymond Robinson*, Order Granting Motion for Appropriate Relief, ACLU.ORG (last visited Aug. 12, 2014) [Robinson Order]; *State v. Tilmon Golphin, Christina Walters, and Quintel Augustine*, Order Granting Motions for Appropriate Relief, ACLU.ORG (last visited Aug. 12, 2014) [Golphin Order]. In all four cases, the trial court found violations of the RJA relating to patterns of discrimination in peremptory strikes, among other things. These cases are now under review by the North Carolina Supreme Court. Regardless of the ultimate outcome in those cases, the evidence collected by the trial

court, and the lengthy, detailed analysis of jury selection issues in North Carolina contained within the Golphin and Robinson Orders may serve as useful information for attorneys raising challenges to peremptory strikes. *See* Cassandra Stubbs, *Strengthening* Batson *Challenges with the MSU Study* in the Race Materials Bank at www.ncids.org (select "Training and Resources").

C. How Race May Influence the Exercise of Peremptory Challenges

Discretion. Because of the broad discretion afforded their exercise, the U.S. Supreme Court has recognized that "peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (internal quotations omitted); *see also Rice v. Collins*, 546 U.S. 333, 344 (2006) (Breyer, J., concurring) (it has been difficult to harmonize, "on the one hand, what Blackstone called an inherently 'arbitrary and capricious' peremptory challenge system, and, on the other hand, the Constitution's nondiscrimination command" (internal quotations and citations omitted)). In his concurring opinion in *State v. Saintcalle*, 309 P.3d 326, 347–71 (2013) (Gonzalez, J., concurring), Washington State Supreme Court Justice Gonzalez identified several ways in which race may unlawfully influence the exercise of peremptory challenges:

- A peremptory challenge may be based on an overt racial stereotype. *Id.* at 355–56; *see also Howard v. Senkowski*, 986 F.2d 24, 25 (2d Cir. 1993) (prosecutor believed Black jurors were more likely to sympathize with the defendant).
- A peremptory challenge may be based on a juror profile that treats race as an indicator of how a juror may view a given type of case. *Saintcalle*, 309 P.3d 326, 356 (Gonzalez, J., concurring) (discussing TED A. DONNER & RICHARD K. GABRIEL, JURY SELECTION: STRATEGY AND SCIENCE 6–23 (3d ed. 2007)).
- A peremptory challenge may be part of an effort to achieve some particular racial balance on the jury as a whole. *Saintcalle*, 309 P.3d 326, 356 (Gonzalez, J., concurring); *see also Miesner v. State*, 665 So. 2d 978, 980–81 (Ala. Crim. App. 1995) (prosecutor stated that he was looking for White jurors in order to achieve a racially balanced jury).
- A peremptory challenge may be based on unconscious bias. *Saintcalle*, 309 P.3d 326, 356 (Gonzalez, J., concurring); *see also* Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 269 (2007) (studying influence of implicit bias in simulated peremptory challenges and finding "clear empirical evidence that a prospective juror's race can influence peremptory challenge use and that self-report justifications are unlikely to be useful for identifying this influence"); *infra* "Implicit bias" in this subsection C.

Time pressure. Researchers have concluded that time pressure may exacerbate the influence of biases on decision-making:

> [S]ituations that involve time pressure [or] that force a decision maker to form complex judgments relatively quickly . . . limit the ability to

> fully process case information. Decision makers who are rushed, stressed, distracted, or pressured are more likely to apply stereotypes—recalling facts in ways biased by stereotypes and making more stereotypic judgments—than decision makers whose cognitive abilities are not similarly constrained.

NATIONAL CENTER FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS 4. Evaluating this phenomenon in the *Golphin* case, the trial court observed: "When prosecutors evaluate potential jurors, they must quickly decide—often on the basis of the prosecutor's gut feel—whether a particular venire member will be a 'good' juror for the State. This is precisely the type of decision and environment likely to be most susceptible to implicit bias." Golphin Order at 92.

Implicit bias. Even before contemporary implicit bias studies improved our understanding of unconscious stereotypes, Justice Marshall recognized the difficulty of uncovering the role that both conscious and unconscious bias may play in the exercise of peremptory strikes:

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As Justice Rehnquist concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that
>
> mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.

Batson v. Kentucky, 476 U.S. 79, 106 (Marshall, J., concurring).

Researchers have concluded that race influences peremptory strikes and that, as a result of implicit biases, "good people often discriminate, and they often discriminate without being aware of it." Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 160–61 (2005). By requiring prosecutors to provide a race-neutral explanation for challenged peremptory strikes, the *Batson* framework presumes that individuals generally are aware of the factors motivating their own behavior. However, "[e]ven presuming that lawyers are always entirely honest and open about their motivations for striking jurors, there are powerful reasons to believe that much discrimination occurs at the subconscious level." Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. LAW. REV. 279, 326 (2012) (noting that a lawyer facing a *Batson* challenge may

"even lie to herself and identify some other nominally neutral trait or character on which to pin her unease"). In the *Golphin* case, the trial court found "unrebutted, credible expert testimony . . . indicating that individuals are not reliable reporters of the extent to which their decisions are influenced by race." Golphin Order at 28; *see also* Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010).

Ease of identifying race-neutral reasons for peremptory strikes. Many have observed that even if a prosecutor's peremptory strike has been consciously or unconsciously influenced by race, it is easy to justify the strike on race-neutral grounds. *See* Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 U. MICH. J. L. REFORM 229, 236 (1993) (concluding that "in almost any situation a prosecutor can readily craft an acceptable neutral explanation to justify striking black jurors because of their race"). The ease of identifying a race-neutral strike justification raises concerns, since "people will act on unconscious bias far more often if reasons exist giving plausible deniability (e.g. an opportunity to present a race-neutral reason)." *State v. Saintcalle*, 309 P.3d 326, 336 (Wash. 2013).

Researchers have found that individuals "are remarkably facile at recruiting race-neutral characteristics to justify jury selection judgments." Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007). Some prosecutors' trainings have included "cheat sheets" listing race-neutral strike justifications, such as crossed arms. *See Top Gun II Batson Training: Articulating Juror Negatives* in the Race Materials Bank at www.ncids.org (select "Training and Resources"); *see also* Robinson Order at 156–57 (reviewing the training materials from the *Top Gun II* CLE and finding that the "training [was not] intended to teach prosecutors how to avoid discrimination in jury selection, but that the training was focused on how to avoid a finding of a *Batson* violation in case of an objection by opposing counsel"). Unless defense counsel effectively raises concerns about the reasons offered for a peremptory strike, a judge may have difficulty discerning the prosecutor's motivations and therefore may accept the race-neutral reason for the strike at face value.

D. Studies of Peremptory Challenges in North Carolina

North Carolina appellate courts have been deferential to trial court rejections of *Batson* claims. Only one reported decision has reversed a trial court's rejection of a defendant's *Batson* claim, and 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). It is difficult to quantify the extent to which race may influence the exercise of peremptory strikes in North Carolina, however. The affirmance of trial court decisions overruling *Batson* objections does not necessarily resolve the question. Appellate decisions may not reflect whether defendants are prevailing on *Batson* claims at trial, which generally would not be the subject of appellate review. To the extent the appellate decisions show a pattern, some may argue that they show that prosecutors

generally exercise peremptory strikes in a race-neutral fashion, while others may view them as evidence of the need for closer scrutiny of peremptory challenges to effectuate the rights sought to be guaranteed. *See* Amanda S. Hitchcock, Recent Development, *"Deference Does Not By Definition Preclude Relief": The Impact of* Miller-El v. Dretke *on* Batson *Review in North Carolina Capital* Appeals, 84 N.C. L. REV. 1328 (2006) (reviewing North Carolina capital cases involving *Batson* claims between 1986 and 2005, arguing that the process has been unduly deferential to race-neutral justifications, and suggesting that, following the U.S. Supreme Court's opinion in *Miller-El v. Dretke*, 545 U.S. 231 (2005), North Carolina appellate courts reviewing *Batson* claims should grant greater weight to statistical evidence, complaints regarding disparate questioning, and comparative juror analysis); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695 (1999) (studying jury selection in Durham, North Carolina felony trials and concluding that race appeared to play a role in peremptory strikes by both prosecutors and defense attorneys); Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C. LAW REV. 1533, 1577 (1991) (reviewing North Carolina decisions in the five years following *Batson* and finding no decisions in the appellate courts finding a *Batson* error on merits).

Most recently, two Michigan State University (MSU) researchers found that, in the trials of the 173 prisoners on death row in North Carolina at the time of the study, prosecutors used peremptory challenges to strike 52.6% of Black strike-eligible jurors and 25.7% of all other strike-eligible venire members. *See* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1548 (2012). The strike rate of Black venire members was higher in cases involving Black defendants: in those cases, prosecutors struck 60% of Black venire members and 23.1% of other venire members. *Id.* at 1549; *see also* Golphin Order at 138 (finding MSU study "highly reliable"). Where relevant, this chapter describes how this study's findings may support challenges to discriminatory peremptory strikes in noncapital cases, and how defense attorneys may conduct their own studies of peremptory strike patterns. *See infra* § 7.4A, Pretrial Preparation for a *Batson* Challenge; *see also* Cassandra Stubbs, *Strengthening* Batson *Challenges with the MSU Study* in the Race Materials Bank at www.ncids.org (select "Training and Resources").

E. Potential Benefits of Raising *Batson* Challenges

There are a number of reasons why defenders should raise *Batson* challenges to peremptory strikes that appear motivated by race or ethnicity. These include:

- Raising meritorious *Batson* challenges may result in more racially diverse juries. Diverse juries are consistent with the guarantee of a jury of one's peers; and empirical studies have concluded that diverse juries may be more likely to deliberate longer and conduct a more rigorous analysis of the issues presented. *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition in Jury Deliberation*, 90 J. PERSONALITY AND SOC. PSYCHOL.

597, 608 (2006) ("By every deliberation measure . . . heterogeneous groups outperformed homogeneous groups.").

- You must raise a *Batson* challenge to a potentially discriminatory peremptory strike to preserve the issue for appellate review.
- Making the issue of race salient in this manner may reduce the influence of implicit bias on prosecutors, defenders, jurors, and judges. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *"Race Salience" in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009).
- The ABA Guidelines counsel that attorneys should raise "appropriate issues" regarding jury panel selection and the exercise of challenges for cause and peremptory challenges. ABA Defense Standard 4-7.2.
- Raising such a challenge may strengthen your relationship with your client by demonstrating that you are willing to tackle difficult issues.
- By raising meritorious *Batson* challenges to questionable strikes, you help develop a record of prosecutorial *Batson* justifications for use in future *Batson* challenges. *See supra* § 7.4A, Pretrial Preparation for a *Batson* Challenge.