JURY SELECTION AND THE LAW: WHERE STRATEGY MEETS LIMITS (11/18)

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I. MECHANICS

- Governed in New York by Article 270 of the Criminal Procedure Law.
- A challenge can be made to the panel *by defendant only*. CPL §270.10
  - Must be timely as in "made before the selection of the jury commences" or else it is waived.
  - Must be in writing.
  - Must claim that "there has been such a departure from the requirements of the judiciary law in the drawing **or return** of the panel as to result in substantial prejudice to the defendant."
- If no challenge then the prospective juror must be sworn to answer questions truthfully as to their qualifications. CPL §270.15
- Prosecution questions first CPL §270.15(1)(c).
- A trial jury consists of 12 jurors. Alternates are not mandatory, they *may* be selected, though not more than 6 unless Murder One. CPL §270.05; CPL §270.30(1).
  - Misdemeanor juries governed by CPL §360.10 unless it's an indictment.
- Foreperson is automatically juror number one. (CPL §270.15(3).
- Number of peremptory challenges depends on the level of the offense. CPL §270.25(2).
  - Since statute links number of challenges to seriousness of the case and the language "must be allowed" seems to traffic in minimums and not maximums, defense counsel may be able to argue that under their particular circumstances they should get more peremptory challenges (e.g. an E felony where client is facing a mandatory "to life" sentence).
- Co-defendants must share and majority rules. CPL §270.25(3)
- Trial court may order that the jury be "conducted" to a relevant premises to help them decide. CPL §270.50

II. QUESTIONING

- It is proper to search a prospective juror's social media presence but best to limit yourself to that which is public.
  - No deceit
  - No contact with juror
  - Rule of Professional Conduct 3.5; ABA Formal opinion 466; NYCBA Formal Opinion 2012-2.
- Judicial Interference
  - ***Time Limits***: Judge Pickholz enforced a five-minute time limit for attorney questioning. Defense counsel made a "timely objection explaining why the limit was insufficient."
    - Court of Appeals in *People v. Steward*, 17 NY3d 104 (2011) reversed the conviction.
      - Court referred to the judge's "particularly conscientious" examination and how it's a "commendable approach that is certainly to be encouraged."
      - But case had issues and exposure.
      - Broad discretion afforded trial courts.
      - Error standing alone does not warrant reversal but their ability to gauge prejudice hampered by a weak record so reversed
  - ***Subject Area Limitations***: Defense counsel wanted to probe prospective jurors regarding their feelings on involuntary confessions. The court prohibited counsel from doing this because *inter alia* the prosecution was still uncertain whether or not they were going to introduce the statement. Statement was then introduced without prior voir dire discussion.
    - Court of Appeals in *People v. Miller*, 28 NY3d 355 (2016) reversed.
      - First Department had affirmed.
      - Court noted that the trial court "refused to make its own inquiry of the potential jurors."
      - Defense counsel "premised his defense at trial" on involuntariness.

- Nice updating of *People v. Porter*, 226 AD2d 275, 277 (1st Dep't, 1996) wherein the best language was that the trial court had "deprived defense counsel of the standard trial tactic of giving the panel a preview of the weaknesses in her case and gauging the reaction."
    - Hypotheticals can be problematic under the guise of inviting premature deliberations. 1st Dep't in *Salley*, *Woolridge,* and *Davis*.
    - DA lines such as "CSI" or "if I don't present x" should give rise to a constitutional objection regarding the standard of proof in part because in *People v. Williams,* 5 NY3d 732 (2005) the COA held that juries are certainly allowed to consider a lack of evidence.

- ***Questioning Many Prospective Jurors Simultaneously:*** Some judges put a great many potential jurors in the box and instruct counsel to question them all at once in a way that makes it impossible to have a meaningful interaction with a significant number of them.
    - Bad News. Court of Appeals in *People v. Serrano*, 7 NY3d 730 (2006) upheld the simultaneous questioning of 44 jurors! Seemingly critical was the fact that defense counsel "expressed no inability to observe, hear, or assess the demeanor and qualificatrions of, or exercise challenges against, any prospective jurors."
    - But see the same court four years later in *People v. Hecker*, 15 NY3d 625 (2010) wherein they say that "There can be no doubt that the trial judge severely curtailed the parties from questioning the panelists, precluding them from conducting a more meaningful voir dire. Supreme Court specifically informed the parties that they only had 10 minutes to voir dire the panelists in each round. In the second round of jury selection, defense counsel asked questions of only five of the seated 18 panelists. This fact, without more,

cannot mean that defense counsel exhibited a bias against Chan or the other 12 unquestioned panelists. Rather, what it more realistically reveals is the impossibility of directing her attention to all of the panelists in the brief time she had to address them." Meaning the minutes allowed interacts with the number of jurors being examined at once.

- So be specific in your objection!

III. CHALLENGES

A. PEREMPTORY VERSUS FOR CAUSE

- Peremptory means that, with one exception (see below), no reason for the challenge must be given. Also, improper denial of a peremptory challenge mandates automatic reversal. Court of Appeals in *People v. Hecker,* 15 NY3d 625 (2010).

B. PEREMPTORY CHALLENGES AND BATSON

A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service. C.P.L. § 270.25(1).

THE BASICS

But, New York state and federal equal protection clauses prohibit both parties from challenging prospective jurors based upon membership in a constitutionally protected class. People v. Kern, 75 N.Y.2d 638 (1990) (holding that Batson applies to the defense).

A defendant need not share the protected characteristic of the challenged juror to raise a Batson objection. See Powers v. Ohio, 499 U.S. 400, 402 (1991).

Historically, raced-based objections were the most common. Batson v. Kentucky, 476 U.S. 79 (1986).

But Batson also has been held to encompass challenges based upon:

Gender (J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994);

Ethnicity (Hernandez v. New York, 500 U.S. 352 (1991);

Religion? Most likely. Although the United States Supreme Court has not addressed religious discrimination in the context of jury selection, in holding that the

Equal Protection Clause bars peremptory challenges based on gender, it "strongly suggested a similar prohibition on strikes based on any other classification receiving heightened or strict scrutiny under the Clause." United States v. Brown, 352 F.3d 654, 668 (2d Cir. 2003). And it has long been implicit in Supreme Court decisions that religious classifications require heightened scrutiny. See, e.g., United States v. Armstrong, 517 U.S. 456 (1996) (race and religion are "unjustifiable standard[s]" for "decision to prosecute").

Batson under New York Law

The Equal Protection clause of the New York State Constitution is broader than the federal one and includes that, "No person shall, because of race, color, creed or religion be subjected to any discrimination in his or her civil rights by any other person, . . or by the state or any agency or subdivision of the state. N.Y. Const. Art. 1 § 11. The state constitution also guarantees that jury service is a "privilege [] of citizenship," and the Judiciary Law provides that "all eligible citizens shall have the opportunity to serve on grand and petit juries in the courts of this state." N.Y. Const., Art. I, §1; Judiciary Law §500.

Religious-based exclusion of a potential juror from jury service violates the equal protection rights of the challenged juror under the New York Constitution by depriving the potential juror of his or her civil right to serve as a juror. See People v. Langston, 167 Misc.2d 400, 403 (Sup. Ct., Queens County 1996).

Constitutionally protected class is not a static concept, but rather means "any other status that implicates equal protection concerns." People v. Luciano, 10 N.Y.3d 499 (2008).

What constitutes a "constitutionally protected class" should not be narrowly construed. "Supreme Court took a narrow and unrealistic view, for Batson purposes, of who was black, when it questioned whether prospective jurors of biracial origin or Caribbean origin were of the same cognizable group as prospective jurors of African descent who were born in the United States." People v. Chance, 125 A.D.3d 993, 994 (2d Dep't 2015).

Skin color is a cognizable group. The New York Court of Appeals, relying upon New York's constitution and civil rights law, has held that skin color is a cognizable class, separate from race for Batson purposes. (People v. Bridgeforth, 28 N.Y.3d 567 (2016) (defense made Batson motion, stating prosecution was challenging "black or dark-colored [women]").

The Bridgeforth court distinguished its holding in People v. Smith, 81 N.Y.2d 875 (1993), in which the Court rejected the defendant's contention that a Batson challenge may be based upon the exclusion of "minorities," regardless of race.

Sexual Orientation: no New York decisions, but California has held that sexual orientation is a protected class. People v. Douglas, 22 Cal. App. 5th 1162, 1169 (Ct. App. 2018) (although US Supreme Court has yet to address whether Batson extends to sexual orientation, excluding prospective jurors solely on the basis of sexual orientation runs afoul of the principles espoused); People v. Garcia, 77 Cal. App. 4th 1269, 1279 (2000) (outside of racial and religious minorities, we can think of no group which has suffered such "pernicious and sustained hostility" as the homosexual community), as modified on denial of reh'g (Feb. 22, 2000)

Disability?: depends upon whether reasons for strike are rationally related to the legitimate purpose of selecting an impartial jury. People v. Page, 105 A.D.3d 1380 (4th Dept. 2013) (peremptory strike of juror who was blind in one eye and hard of hearing upheld); People v. Falkenstein, 288 A.D.2d 922, 922 (4th Dept. 2001) ("Unlike race or gender, disability may legitimately affect a person's ability to serve as a juror"; upholding prosecutor's challenge of hearing impaired prospective juror because it would affect her ability to assess audiotape evidence). United States v. Watson, 483 F.3d 828, 832 (D.C. Cir. 2007) (peremptory challenges of blind jurors are not subject to heightened scrutiny). United States v. Harris, 197 F.3d 870, 874 (7th Cir. 1999) (no prohibition against striking juror based on disability).

But not Hunters!!: "Unlike racial or ethnic minorities and women, there has been no showing that hunters have faced a history of prejudice, exclusion, invidious discrimination or stereotypes. . . . The fact that hunters may exercise their Second Amendment right—a right certainly not limited to hunters or conferred upon them because they are hunters—does not morph them into a cognizable group for equal protection purpose." Robar v. Labuda, 84 A.D.3d 129, 136–37 (3rd Dept. 2011)

Litigating a Batson motion

A Batson motion can be made at any point during jury selection where there is an inference of discriminatory intent – even after first challenge. And, a Batson application with respect to a particular juror need not be raised in the round that the juror is questioned, but may be made in a subsequent round. People v. Perez, 37 A.D.3d 152, 154 (1st Dept. 2007).

But, it's best to make it sooner, rather than later, because when raised contemporaneously with the prosecutor's alleged discriminatory challenge, the appropriate remedy is to strike the challenge and seat the juror. When the defense delays in raising a Batson challenge until after the relevant jurors have been excused, the defendant limits the available remedies. People v. Butler, 15 A.D.3d 415 (2d Dept. 2005) (court erred in ruling that defense Batson motion untimely where during round three of selection, defense challenged removal of two black prospective jurors during round two who could no longer be seated; but, defendant's contention that trial court should have declared a mistrial or granted him additional peremptory challenges unpreserved for appellate review because he never requested this or any relief from the trial court.).

There is a three-part test to determine if a party is using peremptory challenges for unlawful discriminatory purposes.

STEP ONE

The moving party must make a *prima facie* showing that the opposing party exercised peremptory challenges on the basis of race, gender, or other protected class. People v. Payne, 88 N.Y.2d 172, 181 (1996).

To establish a *prima facie* case, the moving party must set forth "facts and other relevant circumstances" that permit the judge to draw an inference of discrimination.

Step one "is not intended to be onerous," and there is no single method by which a party must establish an inference of discrimination. People v. Childress, 81 N.Y.2d 263, 266 (1993) ("demonstrating that members of a cognizable . . . group have been excluded . . . is seldom problematic").

There is no requirement that there must be a pattern of discrimination. The striking of one juror may be enough. People v. Gray, 68 A.D.3d 1131 (2d Dept. 2009) (defendant met his burden by establishing objective facts indicating that the prosecutor had challenged a member of a particular racial group who might be expected to favor the prosecution because of his background); People v. Hurdle, 99 A.D.3d 943, 944 (2d Dept. 2012) (during the third round of voir dire, the prosecutor exercised one of her peremptory challenges to strike a prospective juror, a black woman who was a retired New York City police officer, while the prosecutor did not challenge a white male retired police officer. These facts were sufficient to establish prima facie case of discrimination).

But, "[i]t is incumbent upon a party making a Batson challenge to articulate and develop all of the grounds supporting the claim, both factual and legal, during the colloquy in which the objection is raised and discussed" People v. Childress, 81 N.Y.2d 263, 268.

For example, courts have found no *prima facie* case where:

• Defendant relies solely on numbers: People v. Cutting, 150 A.D.3d 873, 874 (2d Dept. 2017) (defendant's reliance on the number of peremptory challenges exercised by the People against prospective male jurors, without more, was insufficient to make a prima facie showing of discrimination); People v. Hecker (Guardino), 15 N.Y.3d 625, 652-654 (2010) (noting "where we have sustained a *prima facie* showing of discrimination absent a 100% exclusion rate of a cognizable group, the moving party has placed other factors on the record).

• Where moving party's assertion to support a *prima facie* case is incorrect. People v. Smouse, 160 A.D.3d 1353, 1356(4th Dept. 2018) (The only ground asserted by the People in support of their *prima facia* case was that every peremptory challenge exercised by defendant was used to strike a woman, but defendant had previously exercised peremptory challenges to excuse two men).

But, the total exclusion of a cognizable group gives rise to an inference of discrimination. See, e.g., Batson, 476 U.S. at 100 (*prima facie* case where prosecutor excluded all four prospective black jurors from venire); People v. Scott, 70 N.Y.2d 420, 425 (1987) (*prima facie* case where prosecutor excluded all five prospective black jurors from venire); People v. Hernandez, 75 N.Y.2d 350 (1990) (removal of only 4 Latin American jurors out of 63-person panel *prima facie* case). But there's always an exception to that. People v. Cuesta, 103 A.D.3d 913, 914–15 (2d Dept. 2013) (defense objected to challenge of a prospective juror of Latin American origin, but contended only that no jurors of Latin American origin had been chosen and that the prosecutor had challenged all prospective jurors of Latin American origin. "In the absence of a record demonstrating other circumstances supporting a *prima facie* showing, the trial correctly found that the defendant failed to establish a pattern of purposeful exclusion sufficient to raise an inference of racial discrimination").

No matter what, try to give other "facts and circumstances." People v. Bolling, 79 N.Y.2d 317, 324-325 (1992) (prosecution exercised five peremptory challenges, four to exclude African-American members of the venire. African-Americans comprised 42% of the 12 prospective jurors, and 80% of them were excluded by the prosecution. "This disproportionate number of challenges to African-American

prospective jurors **coupled with defendant's uncontested assertion that two of the four jurors excused by the Assistant District Attorney had prosecution backgrounds** was sufficient to raise an inference that the Assistant District Attorney had used his peremptories to discriminate."); People v. Herrod, 163 A.D.3d 1462, 1463 (4th Dept. 2008) (*prima facie* case where challenged black prospective juror who had family in law enforcement, a college degree, and was a crime victim, had characteristics expected to be favorable to prosecution).

STEP TWO

If a *prima facie* case is shown, at step two, the nonmoving party must articulate non-discriminatory explanations for the peremptory challenges in question. This will seldom be problematic for the nonmoving party, but "[a] prosecutor's explanation may not be sustained where discriminatory intent is inherent in the explanation" People v. Mallory, 121 A.D.3d 1566, 1567 (4th Dept. 2014) (prosecutor excluded the two prospective jurors at issue solely based upon their answers to a race-based question, i.e., whether they believed that police officers "unfairly target members of the minority community.").

STEP THREE

If the reasons given are non-discriminatory, at step three, the burden shifts back to the moving party to persuade the court that the given reasons are a pretext for discrimination. People v. Hecker, 15 N.Y.3d 625, 634-635 (2010); People v. Allen, 86 N.Y.2d 101, 109-110 (1995). The trial court must then determine whether the facially neutral explanations are pretextual, including whether the reasons apply to the facts of the case, and whether the reasons were applied to only a particular class of jurors and not to others. People v. Payne, 88 N.Y.2d 172, 185-186 (1996); People v. Marcus, 101 A.D.3d 1046, 1047 (2d Dept. 2012).

This is a "pure issue of fact" and credibility determination by the trial court, which must make factual findings. People v. Claudio, 10 A.D.3d 531, 534 (1st Dept. 2004) (prosecutor's assertion that challenged juror was not "particularly verbal," although race-neutral, was made as an "afterthought"; case reversed based upon court's failure to make required factual findings)

In Hecker, the Court of Appeals held that whether a proffered reason relates to the facts of a case or a prospective juror's qualifications is a factor relevant to a court's determination of pretext, but not "automatically" dispositive.

Second, Third, and Fourth Department decisions are much better than those of the First Department and generally require that reasons such as employment, unemployment and residence be related to the factual circumstances of case and qualifications of juror to serve. . See, e.g., People v. Bell, 126 A.D.3d 718 (2d Dept. 2015) (challenged juror stated during *voir dire* that being a church deacon would not affect his decision making. Nevertheless, the prosecutor challenged the juror based on his "feeling" that the church deacon would have difficulty sitting in judgment of another. In holding that the challenge was pretextual, court stated that the prosecutor failed to explain how the juror's position as a church deacon related to the facts of the case or qualifications to serve as a juror); People v. Hall, 64 A.D.3d 665, 665 (2d Dept. 2009) (employment); People v. Ellis, 8 A.D.3d 826, 828 (3d Dept. 2004) (employment); People v. Parson, 282 A.D.2d 477, 478 (2d Dept. 2001) (residence); People v. Duncan, 177 A.D.2d 187, 193-95 (4th Dept. 1992) (employment and unemployment); People v. Wilmot, 34 A.D.3d 1225, 1225-26 (4th Dept. 2006) (explanation based on age is pretextual if not related to facts of the case).

1st Department does not. People v. Brown, 283 A.D.2d 312, 312-13 (1st Dept. 2001) ("the prosecutor was not required to show that the peremptory challenge [based on work experience] was specifically related to the facts of the case"); People v. Sanchez, 302 A.D.2d 282, 282-83 (1st Dept. 2003) (residence).

Examples of pretext include:

Where a stricken juror has the experience and background that would be expected to favor the side who struck juror. See People v. Brown, 129 A.D.3d 854, 856 (2d Dept. 2015) (nothing in record supported defense counsel's purported conclusion that prospective juror – 68-year-old sales associate who had previously sat on a jury, did not know anyone in law enforcement, and, unlike many other prospective jurors, had not been crime victim – would be a weak juror for the defense).

How a prosecutor questions, or fails to question, jurors. Miller-El v. Dretke, 545 U.S. 231, 255 (2005) ("The next body of evidence that the State was trying to avoid black jurors is the contrasting voir dire questions posed respectively to black and nonblack panel members, on two different subjects."); People v. Bell, 126 A.D.3d 718, 719 (2d Dept. 2015) (proffered reason for challenging black prospective juror pretextual where the prosecutor failed to pursue questioning of the prospective juror to ascertain whether this intuitive feeling that juror would not be able to sit in udgment of another because he was a church deacon was founded in fact); see People v. Richie,. 217 A.D.2d 84, 89 (2d Dept. 1995) (court should consider "extent to which the party exercising the peremptory challenge actually questioned the proposed juror").

Where reasons for challenges are not applied equally. People v. Brown, 153 A.D.3d 850, 851 (2d Dept.. 2017) (proffered reasons for challenging black prospective jurors pretextual where they were not applied equally to exclude other prospective jurors who were not black); People v. Hewitt, 258 A.D.2d 597, 598 (2d Dept 1999) (defendant's challenge of a juror based on his status as a crime victim pretextual where he did not apply it to two other prospective jurors similarly situated); Miller-El v. Dretke, 545 U.S. 231, 232 (2005) (If a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve, that is evidence tending to prove purposeful discrimination).

Where the record does not support the proffered reasons. People v. Fabregas, 130 A.D.3d 939, 941–942 (2d Dept. 2015) (facially race-neutral reason proffered by prosecutor for exercising peremptory challenge of Hispanic male prospective juror was pretextual where, although prosecutor argued juror had a difficult time understanding trial court's questions during *voir dire*, claim was not borne out by the record).

Once a party has placed its race-neutral reasons on the record the sufficiency of the prima facie showing becomes "moot." People v. Smocum, 99 N.Y.2d 418, 422 (2003).*

Preserving the Record

Making a Batson motion is not enough!! A claim of improper discrimination in the selection of jurors must be specific and timely.

People v. James, 99 N.Y.2d 264 (2002) (Batson claim unpreserved where, although defense attorney named four women in alleging a prima facie case, he asked for prosecutor's reason for challenge as to only one).

Where court accepts prosecutor's race neutral reasons, defense must make a specific objection and record as to the exclusion of any juror still claimed to have been the object of discrimination. People v. Allen, 86 N.Y2d 110-111.

Articulate all bases showing why proffered reasons are pretextual. For example: reasons not applied equally; have no relation to facts of case; unsupported by juror's answers during *voir dire*; juror had characteristics expected to favor prosecution.

C. FOR CAUSE CHALLENGES AND EQUIVOCATION

Prospective jurors must provide "unequivocal assurances" that they can be fair. Otherwise a challenge for cause must be granted. The Court of Appeals in *People v. Johnson,* 94 NY2d 600 (2000) put it this way: "When potential jurors themselves say they question or doubt they can be fair in the case, Trial Judges should either elicit some unequivocal assurance of their ability to be impartial when that is appropriate or excuse the juror when that is appropriate. **The worst the court will have done in most cases is to have replaced one impartial juror with another impartial juror**."

Doesn't the bolded language support a presumption in favor of granting the challenge?

The Court seems to feel that bias is acceptable as long as the juror states unequivocally that it can still be fair. This is them in *Johnson* in 2000!

> In *People v. Williams*, 63 NY2d 882 (1984), a burglary prosecution, two prospective jurors stated that *although they did not associate with blacks they could render a fair and impartial verdict* and although *they did not approve of interracial marriages … they did not feel that the circumstances that defendant had had a white girlfriend would interfere with their verdict* or affect their ability to sit on the jury. Unlike in *Blyden*, the prospective jurors in Williams themselves never expressed doubt that they could serve impartially. Both because the Trial Judge concluded that their statements did not constitute "actual bias" and because the prospective jurors asserted unequivocally that they could listen *fairly and impartially and that their feelings would not affect their ability to sit on the jury* we concluded that it was not an abuse of discretion to deny defendant's challenge for cause

They cited this approvingly, and it was eighteen years ago, but does that mean that today a prospective juror who says they hate Hispanics but can be fair will not be successfully challenged for cause? Seems illogical.

Lastly, preservation requires that defense counsel whose for-cause challenge is denied then excuse that juror peremptorily but also that counsel must ultimately use all of its peremptories. Otherwise harmless error at best. CPL §270.20(2).