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Use of Race in Peremptory Challenges Before Justices

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The statistic was startling and dramatic: In the 102 cases during the past 20 years in which the California Supreme Court reviewed a claim that prosecutors struck prospective jurors on the basis of their race, that court found error only once—and that was 12 years ago.

That "improbable record," California Supreme Court Justice Goodwin Liu has observed, was attributable, at least in part, to his court's "erroneous legal framework" for evaluating so-called Batson claims, named after the U.S. Supreme Court's landmark 1986 decision in *Batson v. Kentucky*. In *Batson*, the high court held that striking prospective jurors on the basis of race violated the equal protection clause.

Liu's comments came in his court's decision in the direct appeal of George Williams. During Williams' 1991 capital murder trial, the prosecutor used peremptory challenges to strike five of six African American female prospective jurors. Despite the women's statements to the contrary, the prosecutor said he felt, based on their demeanor, they would not impose the death penalty.

Now, nearly 30 years after the U.S. Supreme Court's landmark decision barring racially biased juror challenges by prosecutors and 22 years after his conviction, Williams is asking the justices to put teeth into appellate review of those challenges.

The trial judge acknowledged she had stopped taking notes about two of the five women challenged. But after calling for and reviewing the prosecutor's notes, she accepted the prosecutor's reason over the defense's objections. And, the judge added:

"I have to say in my other death penalty cases I have found that the black women are very reluctant to impose the death penalty; they find it very difficult no matter what it is. I have found it to be true."

Williams' case is the first to reach the Supreme Court involving peremptory strikes against African American women.

The California Supreme Court this year upheld Williams' conviction and found nothing wrong with the trial judge's review of the peremptory challenges. But one justice dissented, finding the trial judge's comments about black women egregious. Liu concurred in the result but wrote separately about the Batson issue.

In *Williams v. California*, Williams argues that the California Supreme Court, four other state supreme courts and four federal appellate courts wrongly give "great deference" to a trial court's unexplained denials of so-called Batson objections.

Four other federal appellate courts and five state supreme courts, he contends, do not defer to Batson denials when the record fails to show that the trial court independently evaluated the prosecutor’s explanations.

The type of review "matters deeply," Williams' counsel, Daniel Abrahamson of Berkeley, Calif., writes. The justices, he explains, have repeatedly emphasized in *Batson* and the decisions that it spawned that a prosecutor's discrimination jeopardizes the "very integrity" of the courts.

While Williams' counsel focuses on the need to resolve the differences in approaches, the trial judge's actions and, in particular, her comments about African American women caught the attention of Elisabeth Semel of the Death Penalty Clinic of the University of California, Berkeley School of Law.

"I'm kind of a Batson wonk," said Semel, who has filed amicus briefs not only in Williams' case but in other Batson-related Supreme Court cases. "I knew about the [Williams] case before it was argued. When the opinion came down, I said to his lawyer, 'If you're interested, I'm interested in doing an amicus brief.' He said yes."

In her amicus brief on behalf of the National Congress of Black Women and the Black Women Lawyers Association of Los Angeles, Semel tells the justices, "In this case, the trial court was not merely lax in restraining a prosecutor's unlawful strikes. It embraced the same stereotype that has been applied to African-American women for decades."

JUROR CHALLENGES

The Supreme Court first considered discrimination in a prosecutor's use of peremptory challenges in *Swain v. Alabama* (1965). Although the justices held that race-based peremptories violated equal protection, they imposed such a high standard of proof on defendants making that challenge that none won a Swain claim for 20 years.

In *Batson*, the court overruled the Swain standard of proof. It held that a defendant could make a prima facie case of discrimination solely on evidence of the prosecutor's use of peremptories at the trial. The burden then shifts to the prosecutor to give a legitimate, non-racial reason for the strike.

"But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race," Justice Lewis Powell Jr. wrote.

The third step in the Batson process requires the trial judge to determine, based on the totality of circumstances, whether the defendant has established purposeful discrimination.

Justice Thurgood Marshall joined the court's opinion but was skeptical of its impact. "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely," he wrote.

In *J.E.B. v. Alabama* (1994), the Supreme Court held that the equal protection clause also prohibits the use of peremptory challenges to remove prospective jurors based on gender.

Berkeley's Semel is a native of California familiar with the city of Compton, where Williams was tried for the murder of two men. In her amicus brief, she describes Compton's evolution from a predominantly white community to majority African American due to white flight following the 1965 riots in nearby Watts.

In 1973, she writes, Compton became the first metropolitan city in the United States to elect a black woman mayor, and the sitting mayor is also an African American woman.

"African-American women were crucial in combating the gang violence and drug scourge of the 1970s, 1980s, and early 1990s," Semel writes. "For example, they mobilized groups of outraged residents to clean up the streets of Compton in the face of intimidation by gang members." All of which counter the stereotype that these women would be soft on criminals of their own race.

African American women today hold a majority of the city's leadership positions, according to the brief.

Williams' trial took place less than six months after the televised beating of Rodney King by the Los Angeles Police Department. During voir dire, the trial judge asked prospective jurors if the King case would affect their impartiality if police testified, so race was front and center in the trial from the beginning.

"Even if the trial court's voir dire question about the Rodney King beating was warranted, it immediately framed Mr. Williams's trial in racial terms that were later magnified by the prosecutor’s strikes of five Black women, his polling of prospective jurors as to whether the strikes offended anyone, the trial court's comments about Black women, and its Batson rulings," Semel wrote.

Race is as difficult for lawyers and judges as it is for regular folks, she said. "It means there are apprehensions about making the [Batson] motion. There are apprehensions on the part of the judge about making the call. People don't want to squarely address the fact that discrimination happens and stereotypes are being used."

And the issue is particularly complicated, she added, because of the great respect for the role of peremptory challenges in trials. "When you mix the kind of respect for the right of lawyers to make these fairly instinctual

decisions with the fact you often make them based on assumptions, it becomes problematic."

PROPER DEFERENCE

In opposition to Williams' petition, the state of California argues that even if there is a division among state and federal appellate courts over the how to review Batson denials, "This case does not clearly present the issue because it is evident from the record that the trial court understood the requirement that it assess whether the prosecutor's reasons for exercising his peremptory challenges were pretextual."

The trial court noted at several points that many of the prospective jurors at issue matched its notes about those who were likely to be struck during jury selection due to their voir dire responses, the state writes. And, by examining the prosecutor's notes after the trial judge failed to take her own, rather than merely accepting the prosecutor's statements at face value, the judge "clearly conveyed it was attempting to assess whether the prosecutor's reasons were credible."

The California Supreme Court's decisions fall well within the parameters set by the U.S. Supreme Court, the state argues. "As noted by the California Supreme Court in this case, deference is accorded to a trial court's Batson ruling when the trial court has made 'a sincere and reasoned attempt to evaluate each stated reason,' " the state writes, quoting that court.

Semel counters that *Batson* has never been vigorously enforced, an opinion documented in a 2010 report by the Equal Justice Initiative of Alabama. The report found:

"In some communities, the exclusion of African Americans from juries is extreme. For example, in Houston County, Alabama, eight out of 10 African Americans qualified for jury service have been struck by prosecutors from death penalty cases. In Jefferson Parish, Louisiana, there is no effective African American representation on the jury in 80 percent of criminal trials."

The report blames the continuing discrimination, in part, on the failure of some state and federal appellate courts to enforce Batson review.

The Williams case gives the Supreme Court an opportunity to reinforce those courts' responsibility, Semel said. "The circuit split is very real and it is very much a problem."

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