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INVESTIGATING BATSONⁱ

by Kitty Hailey, CLI

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“Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant biased or eccentric judge.”ⁱⁱ

“12 Archie Bunkers will convict on little evidence.”ⁱⁱⁱ

Our judicial and legal branches continually make and change laws to benefit “*We the people*.”^{iv} Yet members of those same noble professions blatantly disregard the rights of citizens because of the competitive need to succeed. Racism and gender bias have long plagued our country. In spite of valiant attempts by our forefathers to correct these inequities, personal prejudice has always been a part of our criminal justice system. The 1986 ruling in *Batson v Kentucky* became the standard for selecting impartial juries to insure that citizens could be judged fairly.

One of the greatest pleasures, and most daunting challenges, of being an investigator is the ability to uncover and expose the wrongs of society. Today there is a national epidemic: winning at any cost trumps doing what is right and fair. Abuse of the jury selection process still plagues our judicial system long after *Batson* became the seminal case against racial bias. To investigate a *Batson* claim, the investigator must first understand it. The following summarizes the issue and discusses the investigator's role in this essential part of criminal defense.

UNDERSTANDING BATSON

Voir dire is the process of selecting a jury. The words are French and mean simply, “to see or understand” and “to say or to tell.”^v The voir dire process is a method of systematically observing potential jurors from a pool of individuals residing in the community. In a criminal case the prosecutor and the defense attorney, along with the judge, question these individuals as to their appropriateness for a jury panel. The jury panel is referred to as the Venire. Individuals within the Venire are referred to as Venire Person(s).^{vi} The Q & A of these individuals becomes vital in understanding the Venire Person, his or her background and social preferences. The pool from which they are selected may be small (30-50) individuals or larger, depending on the case needs. Highly publicized cases often go into the hundreds of potential jurors. Twelve men and women are ultimately selected to sit in judgment of the defendant accused of a crime.

All attorneys wish to have sympathetic jurors on their side. There are, however, limits to which they should and can go to achieve these goals. Certainly prosecutors wish to have stable members of society who are most likely to side with them. A prosecutor represents the state or community and is “law enforcement” at its ultimate. Defense attorneys represent the accused and wish to have open minded people who are capable of actually listening and not being swayed by accusations that may not be founded in evidence. Peremptory challenges^{vii} are the vehicle for eliminating persons who do not appear to conform to the

desired profile. One steps over the line when using racial profiling and stereotyping in a blatant disregard for the rights of the accused. Prior to Batson prosecutors were known to systematically remove Blacks from a jury when a defendant was African American. Unfortunately, post Batson, this still occurs.

In a 1997 training program for Assistant District Attorneys in Philadelphia, DA Jack McMahon stated “Case law says that the object of selecting a jury... is to get one that’s competent, fair and impartial. Well that’s ridiculous. You’re not trying to get that. If you go in there thinking you’re some noble civil libertarian, you’ll lose. You’re there to win, and the only way to do that is to get jurors that are unfair and likely to convict.”^{viii} More than ten years after Batson, prosecutors in Pennsylvania were being instructed on ways to win. The ultimate goal! Not truth. Not fact. Not evidence. Merely chicanery and deceit!

McMahon goes on to instruct these neophyte prosecutors on why citizens of color are not good jurors. He further compounds his prejudicial remarks by maligning women as “a downtrodden minority” and instructing on ways to surreptitiously count the racial makeup of the prospective jurors. Then McMahon suggests: “the best way to avoid any problems with it [Batson] is to protect yourself.” He suggests making notations on the jury selection sheet about anything other than race to obfuscate the real reason for eliminating a juror.

It is in post conviction when defense attorneys are reviewing a case to further defend their client that the question of jury selection becomes important. When it is decided that a Batson claim would be an intelligent tactical challenge there is a three pronged standard that must be met.

1. The Defense must prove a prima facie showing to the trial court of prejudice in the selection of a jury.
2. The Prosecutor must provide a comprehensible race or gender neutral explanation.
3. The Court must determined if the Defense has carried this burden of proof and that the Prosecutor was unable to provide such an explanation for his/her use of peremptory challenges to eliminate the minority class.

THE ROLE OF THE INVESTIGATOR PART ONE: LOCATING THE VENIRE

This is a missing person’s case on steroids. The Batson claim may be preserved at the time of trial but is generally not investigated until post conviction. The time frame between the actual seating of a jury and the investigation into Batson can be as many as five (5) to twenty-five (25) years. Compound the difficulty in this issue because the investigator is not only locating the members who served on the jury panel but the pool from which these jurors were selected. It is the eliminated persons who are important in this matter as well as those selected who served and convicted the client.

Organization, as always, is the clue to success. It is suggested that the investigator set up a chart. It can be as simple as an MS Word chart or more complex as with an Xcel type of program. In fact, a yellow legal pad with lines works amazingly well. The chart should include space for each person who participated in the voir dire. Included should be room to note anything and everything stated about this individual which will give a clue to locating them today.

Order and read carefully the entire voir dire. Generally, when an attorney provides an investigator with a trial transcript the voir dire is not included. In this case the voir dire is the working document from which all other data will flow. Begin reading and note **EVERYTHING** about the individual potential juror that is noted. This includes the following:

1. The entire name, middle initial and spelling if it is requested by the court.
2. There are normally questions asked of all persons to establish their standing in the community. In Philadelphia, Pennsylvania it is common practice to ask the section of the city in which one lives because each community has its own distinct racial and ethnic component. An address is generally not provided, but as sections are no more than 20 square blocks in any neighborhood, the area is at least delimited for future research. Write this down.
3. The school which one attended, year graduated, marital status, employment, number of children and other statements which will later help to insure that the investigator has found the correct individual should all be written.
4. Often questions are asked as to the venire person's exposure to crime. Note if they have been a victim, have a relative who is incarcerated or are related to a police officer. Again, these are all indicators to be used for locating this individual.
5. If the race of a particular individual is noted, this becomes paramount in importance.

Prior to searching for any one individual it is reasonable to do some simple mathematics and bring current the age of anyone mentioned. For example: if a woman states that she has a nine (9) year old son and this is ten years post conviction, it is reasonable that you are now searching for a woman with a nineteen (19) year old son. If a venire person claims to be retired after working forty (40) years for Campbell Soup Company and this is now fifteen (15) years post conviction that person is most likely more than seventy-five (75) years old.

On line data bases are a great help. In proving the first prong of a Batson claim they are not the end, they are the beginning of an investigation. In the ensuing years since the trial these individuals have most likely moved, married, divorced or died. It is normal to get a few positive hits immediately. It is not normal to get all forty or fifty of the entire jury pool in this manner.

Initial suggested searches include:

1. On line subscription data bases.
2. Public records data bases.
3. Social Security Death data bases.
4. Google searches (or other similar search engines).

Common names can be cross referenced with information about an area of the city or other general information about the section in which an individual claimed to have resided. Pull a map and search to see if any of the numerous "John Jones" live or work within that grid.

Cole's directories and the now antiquated telephone books on disk are beautiful tools for searching old addresses. Older city directories actually tell of other family members and residents of an address. In smaller towns they frequently mention the location of employment of an individual.

Like investigators, each particular profession and trade has its own professional association. If your notes reveal that a man was working as an ironworker it is possible that he is still a

member of Local 352. Actors belong to SAG and attorneys are members of the bar. As with NALI, there is a “find member” category on most web sites.

A venire person’s comment about attending University of Florida might send the investigator to the school library to search through old yearbooks. Additional clues are often found in the subscript for each photographed graduate. “Pursing a degree in nursing” is a pretty good indicator that this eliminated juror might now be a practicing LPN or RN.

An off handed comment by a venire person that they “don’t have children but instead have a Schnauzer” might lead the astute investigator to the city animal licensing bureau. Once a dog lover, always a dog lover.

This is an investigative process that requires a vivid imagination and a diligent attention to detail. Each individual is a different research project that must be analyzed, evaluated and pursued. This is not a cross section of similar peoples, but a random mixture of individuals chosen from the voting records of a community. And it is there that the investigator may actually find his/her answer. Persons who voted ten years ago are most likely to still vote. Use any and all available resources to pull this obscure individual out of the pages of the voir dire transcript and into the daylight of today.

THE ROLE OF THE INVESTIGATOR PART TWO: PROVING RACE

To prove a prima facie showing of prejudice in the elimination of a minority group the investigator must now determine the race of the newly located individual. That information is not visible in the black and white pages of the voir dire. Interestingly enough, the investigator’s own observations of black or white are not sufficient to this end either. An affidavit or declaration of the investigator testifying that “I saw him and he appeared to be a person of African American origin” does not wash in the courts.

In older voter registration records race is often included. This is sufficient unto itself as a verifiable document. Occasionally marriage licenses and birth certificates will hold a designation of race which is acceptable as proof. A signed declaration of the individual himself or of his heirs (son, daughter, other relative) is one of the most acceptable sources of race verification.

The investigator should then prepare appropriate affidavits with sufficient information to properly identify an individual as an excluded member of a particular jury panel. This is proving a negative and it is fair to say that many people will not remember that they were eliminated from a particular trial. As they have no knowledge of what occurred after they left the courthouse that day twenty years ago, they may have no independent recollection of that occasion. Therefore, the affidavit must be worded in such a way as to include their own answers to the questions asked of them during voir dire.

After the appropriate headings for an affidavit or declaration in your state, try to include something like the following:

1. I was a registered voter in 19XX.
2. I am currently employed as a nurse and was a student at the University of Florida in 19XX, in their school of nursing.
3. I am divorced but was married at that time.

4. I am the mother of a nineteen year old son, who was nine years old in 19XX.
5. I lived in the Mayfair section of the city with my first husband.
6. I am of (African American/Hispanic/Caucasian/other) heritage. (Have the affiant circle one).

In this way, there can be no doubt in the minds of anyone that this is the same person who was questioned in voir dire at the time of the jury selection.

At this point, experts can be called to analyze the data obtained by the investigator. In some cases, the investigator is called upon to do the charts and graphs depicting the size of the Venire, the racial makeup and the percentages of individuals eliminated. It is astounding to see the actual numbers. Even in cases where there are African Americans retained on the jury the number of eliminated African Americans compared to the number of eliminated Caucasians becomes quite telling.

SUMMARY AND CONCLUSION

Of course Batson is not limited to prosecutorial abuse. “Batson is generally considered a pro-defense doctrine...”^{ix} As it has been found more regularly to be a tool of prosecutors the investigator is most often called in to investigate for this reason. If, however, the case is to question defense counsel the procedure is the same.

Edmondson v Leesville Concrete Co, 500 U.S. 614 (1991) extended the Batson doctrine to include civil cases as well. Thus this is a tool for both criminal and civil investigators.

Interestingly, if one only applied the constitution fairly these issues were covered years ago by our founding fathers. The Fifth Amendment^x states that “no person shall be deprived of life, liberty or property, without due process of law.” The Sixth Amendment^{xi} provides “the right to a trial by an impartial jury...a fair cross section of the community.” And the Fourteenth Amendment^{xii} provides for “equal protection of the law.”

The goal of this author in preparing an explanation and application of Batson was to provide the investigator with tools to participate in a specific and important part of the legal process. A secondary purpose was to research a topic of general interest which was not based on ethics, as this is generally the topic on which I have written voluminously. The research is complete and yet, in retrospect, I just can't seem to avoid another ethical dilemma!

Kitty Hailey, CLI is an investigator and writer who has promoted professionalism and ethics in the industry. Her concentration is in the areas of civil rights and criminal investigation. She is the recipient of editor/publisher awards from national and local organizations. Feel free to contact her with any questions: kitty@kittyhailey.com. Visit: www.kittyhailey.com.

ⁱ Batson v Kentucky 476 U.S. 79 (1986) Landmark decision making it improper for an attorney to use racial or gender bias in the selection of a jury.

ⁱⁱ USSC Justice Byron White, Duncan v Louisiana, 391 U.S. 145 (1968)

ⁱⁱⁱ Bond v. Beard, 2006 WL 1117862, Civ.A. No. 02-CV-08592-J (E.D.Pa., 2006) Quoted from notes taken during a 1990 lecture regarding jury selection that was given to Philadelphia prosecutors by Bruce Sagel, who was then an Assistant District Attorney in the Philadelphia District Attorney's Office. The notes were taken by Gavin Lentz, a former Philadelphia Assistant District Attorney, who had attended Mr. Sagel's lecture.

^{iv} Thomas Jefferson. Opening words of the Constitution of the United States of America. "We the people of the United States, in order to form a more perfect union....." (Philadelphia, 1776)

^v Wikipedia. Internet dictionary/encyclopedia.

^{vi} Venire and Venire Persons are terms utilized by the United States Courts to refer to individuals being questioned as potential jurors. (Definition of the writer.)

^{vii} Wikipedia, Internet dictionary/encyclopedia. Peremptory Challenge: The right for a prosecutor or defense attorney to eliminate a juror without stating his or her rationale. Civil and criminal cases vary in the number of peremptory challenges. In Pennsylvania, homicide cases with potential death penalty allow each side a total of 20 peremptory challenges, or "unstated reasons to eliminate a prospective juror."

^{viii} DATV Productions. Ron D. Castille, District Attorney. Jury Selection with Jack McMahon. Foster Court Reporting Services, Inc., Philadelphia, PA.

^{ix} The reverse – Batson: wrestling with the habeas remedy. Yale Law Journal 01-May 10.

^x U.S. Constitution Amendment V

^{xi} U.S. Constitution Amendment VI

^{xii} U.S. Constitution Amendment XIV