

SNYDER v. LOUISIANA: DEMAND FOR JUDICIAL SCRUTINY OF THE USE OF PEREMPTORY CHALLENGES

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I. INTRODUCTION

In *Snyder v. Louisiana*,¹ the United States Supreme Court, in a 7-2 ruling, overturned a first-degree murder conviction and death sentence, holding that the trial court erred when it found that the prosecution's use of racially motivated peremptory challenges had not violated the precedent established in *Batson v. Kentucky*.² Although the Court has previously held that the "trial court has a pivotal role in evaluating *Batson* claims,"³ here, the Court found that the presence of "exceptional circumstances" prevented deference to the trial court.⁴ In contrast to Justice Alito's majority opinion in *Snyder*, Justice Thomas, in his dissent, asserted that he would not "second-guess the fact-based determinations of the Louisiana courts Given the trial court's expertise in making credibility determinations and its firsthand knowledge of the *voir dire* exchanges, it is entirely proper to defer to its judgment."⁵ *Snyder* demands a higher level of scrutiny from trial courts when they determine the presence of racially discriminatory intent and urges a more critical analysis of the race-neutral explanations proffered by lawyers using peremptory challenges. Regardless, one must wonder whether *Snyder* mitigates concerns that the use of peremptory challenges prevents impartiality

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1. *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008).

2. *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the use of racially discriminatory peremptory challenges violates the Equal Protection Clause).

3. *Snyder v. Louisiana*, 128 S. Ct. 1203, 1208 (2008).

4. *See id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (plurality opinion)).

5. *Id.* at 1212-13, 1215 (Thomas, J., dissenting).

and fairness—hallmarks of the jury system in the United States.⁶ The prevalence of jury consultants, who rely heavily on factors such as demographics in determining which potential jurors to strike,⁷ as well as stereotypes that individuals have as a result of societal influences,⁸ and of which they are not aware, raises doubts that *Snyder* will have a substantial impact on the jury selection process.

II. BACKGROUND OF THE CASE

Allen Snyder was convicted of the first-degree murder of his former wife's boyfriend, and sentenced to death by an all-white jury.⁹ Snyder alleged that the all-white jury was selected by the Louisiana State prosecutor in a racially discriminatory manner.¹⁰ This allegation stemmed from the fact that the prosecution used peremptory challenges to strike all potential black jurors.¹¹ Although the defense objected to the prosecution's peremptory challenges as racially discriminatory, and thus illegal under *Batson v. Kentucky*,¹² the trial court denied these objections.¹³

6. See *Miller-El v. Dretke*, 545 U.S. 231, 266–73 (2005) (Breyer, J., concurring).

7. See Barry P. Goode, *Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire*, 92 Ky. L.J. 601, 658–59 (2004) (“Fifty years ago, it was widely believed that gender, ethnicity, and race were, each by themselves, important factors in jury selection. More recent writings by jury consultants show that these factors are still often considered part of the ‘demographic’ mix, or the ‘profile’ that should be considered in jury selection. Jury consultants often urge that questions about such immutable characteristics be included in supplemental jury questionnaires.”) (internal citations omitted).

8. See Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 160 (2005) (noting that “race-and gender-based stereotypes almost inevitably affect people’s judgment and decision-making, even if people do not consciously allow these stereotypes to affect their judgment. This includes attorneys making peremptory challenges. . . . Once stereotypes have formed, they affect us even when we are aware of them and reject them. Stereotypes can greatly influence the way we perceive, store, use, and remember information. Discrimination, understood as biased decision-making, then flows from the resulting distorted or unobjective information. The attorney exercising the peremptory challenge will be unaware of this biased information processing and so will be unaware of her gender-or race-based discrimination. Because she is unaware of her actual thought processes, she may not be able to completely or correctly answer why she chose to exercise a peremptory challenge.”) (internal citations omitted).

9. *State v. Snyder*, 942 So. 2d 484, 486 (La. 2006).

10. *Id.*

11. *Snyder v. Louisiana*, 128 S. Ct. 1203, 1207 (2008).

12. *Batson v. Kentucky*, 476 U.S. 79 (1986).

13. *Snyder*, 942 So. 2d at 486.

A. *The Prosecution's References to the O.J. Simpson Case*

The defense first raised concerns about the prosecution's racial prejudice prior to *voir dire*.¹⁴ At an evidentiary hearing held on July 29, 1996, the prosecution referred to "another case that was on television everyday for the last couple of years . . . where this very thing happened."¹⁵ The defense responded to these statements by filing a "motion *in limine* specifically requesting the State be precluded at trial from referring to or making comparisons with O.J. Simpson or his trial, as such references would serve no purpose other than to confuse and prejudice the jury."¹⁶ Although the trial court denied the defendant's motion, the prosecutor promised that he would not "at any time during the course of the taking of evidence or before the jury in this case, mention the O.J. Simpson case."¹⁷

Despite the prosecutor's promise, during the penalty phase of the trial the prosecutor again pointed out the similarities between the case at hand and that of O.J. Simpson by stating that the crime Snyder had been convicted of made him recall "the most famous murder case in the last, in probably recorded history, that all of you all are aware of."¹⁸ The defense counsel's objections to these statements were overruled when the prosecutor claimed that this particular reference to the O.J. Simpson case should be allowed because it was based on similarities between defendant's actions and those of O.J. Simpson.¹⁹

At the conclusion of his trial, Snyder was convicted of first-degree murder and sentenced to death.²⁰

B. *Snyder's Initial Appeal and the United States Supreme Court Grant of Certiorari*

Following his conviction and the imposition of the death sentence by the trial court, Snyder appealed to the Louisiana Supreme Court pursuant to Article V, Section V(D) of Louisiana's Constitution. This provision enables a defendant convicted of a capital offense and sentenced to death to appeal to the Louisiana Supreme Court.²¹ The

14. *Id.* at 497.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 498.

19. *Id.* at 498–99.

20. *Id.* at 486.

21. *Id.*

Louisiana Supreme Court affirmed Snyder's conviction and sentence; however, the Court "remanded the case to the trial [court] for retrospective determination of defendant's competency at the time of trial, if one could be made."²² The trial court held that such a determination was possible and that Snyder was competent at the time of his trial.²³ Snyder then appealed the trial court's competency ruling to the Louisiana Supreme Court,²⁴ which again affirmed the lower court's finding, as well as his conviction and sentence, emphasizing that the trial court had acted in accordance with Snyder's procedural due process rights.²⁵

The United States Supreme Court granted Snyder's petition for writ of certiorari.²⁶ Then, on June 13, 2005, the Court remanded the case back to the Louisiana Supreme Court for additional consideration based on the outcome of *Miller-El v. Dretke*,²⁷ decided two weeks earlier.²⁸ In its brief to the Louisiana Supreme Court, the defense insisted that it "consider that the prosecutors selected an all-white jury as a means of playing their 'O.J. card.'"²⁹

The Louisiana Supreme Court, however, found that the defense counsel presented no evidence, aside from inferences from the prosecution's statements, that supported its claim that peremptory challenges were used in a discriminatory manner.³⁰ The court specifically noted that "[n]either remark [made by the prosecution] referred to Simpson's or Snyder's race."³¹ In light of the holding in *Miller-El*, the court examined all relevant evidence that suggested the existence of racial discrimination in establishing whether the trial court's discrimination determination was clearly erroneous.³² After also considering the prosecutor's reasons for striking two black jurors during *voir dire*, the court held that the prosecutor's reasons for using the peremptory challenges were not pretextual and that "race did not

22. *Id.*

23. *Id.*

24. *State v. Snyder*, 874 So. 2d 739 (La. 2004).

25. *Id.* at 745.

26. *Snyder v. Louisiana*, 545 U.S. 1137 (2005) (mem.).

27. *Miller-El v. Dretke*, 545 U.S. 231 (2005) (holding that when considering an alleged *Batson* violation, all evidence must be taken cumulatively to determine whether the prosecutor's peremptory strikes are racially discriminatory).

28. *Snyder*, 545 U.S. 1137 (mem.).

29. *State v. Snyder*, 942 So. 2d 484, 499 (La. 2006).

30. *Id.*

31. *Id.*

32. *Id.*

play an impermissible role in the exercise of these strikes.”³³ The court therefore concluded that there was no *Batson v. Kentucky* violation despite the fact that records from the *voir dire* proceedings illustrate that the prosecutor struck every prospective African American juror who had not previously been struck for cause.³⁴ Snyder appealed to the United States Supreme Court, which again granted his petition for certiorari.³⁵

III. THE SUPREME COURT’S FINDINGS

Writing for the majority, Justice Alito in *Snyder v. Louisiana*, concluded that the prosecution violated the requirement established in *Batson v. Kentucky* that peremptory challenges be race neutral based on its peremptory strike of Jeffrey Brooks,³⁶ a potential black juror. The Court reiterated the three-pronged *Batson* test to determine whether a peremptory challenge was impermissibly based on race, and noted that the third prong was at issue in this case:

First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties’ submissions, the trial court must determine whether the defendant has shown purposeful discrimination.³⁷

Typically, the Supreme Court defers to the trial court’s determination vis-à-vis the third prong of the *Batson* test, because only the trial judge can make “first-hand observations.”³⁸ These observations are considered valuable because “the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.”³⁹ Moreover, because the prosecutor’s race-neutral explanations often focus on a juror’s demeanor, the trial court

33. *Id.*

34. *State v. Snyder*, 750 So. 2d 832, 839, 841–42 (La. 1999).

35. *Snyder v. Louisiana*, 127 S. Ct. 3004 (2007).

36. Although the defense also raised as racially discriminatory the prosecution’s decision to strike Elaine Scott—another potential black juror—the Court felt that it would look solely at the prosecution’s challenge used against Brooks. If the Court found that challenge to be in violation of *Batson*, it would not need to also examine the challenge of Scott. *Snyder v. Louisiana*, 128 S. Ct. 1203, 1208 (2008).

37. *Id.* at 1207–08 (citing *Miller-El v. Dretke*, 545 U.S. 231, 277 (2005) (Thomas, J., dissenting) (quoting *Miller-El v. Cockrell*, 537 US 322, 328–29 (2003)).

38. *Id.* at 1213.

39. *Id.* (citing *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion)).

is seen as best able to gauge the behavior.⁴⁰ However, the Court made clear that *Snyder* is an “exceptional circumstance[]” in which the Supreme Court would not defer to the trial court’s determination.⁴¹

Upon reaching its conclusion that there was a *Batson* error, the Court examined the prosecution’s race-neutral explanations for its peremptory challenge to Brooks. The prosecutor claimed that he struck Brooks because not only did Brooks appear nervous when the prosecutor questioned him, but also because Brooks was a student teacher whose duty as a juror would cause him to miss class.⁴² The prosecutor concluded that Brooks’s position as a student teacher, in particular, may cause Brooks to come back with a verdict that would not impose a penalty phase in an effort to expedite his jury duty. Though the trial judge, without explanation, accepted the prosecution’s justifications as race-neutral, the Supreme Court rejected them.

A. *The Prospective Juror’s Nervousness*

The Supreme Court acknowledged that the trial court’s determination that an attorney who relies on a potential juror’s demeanor or disposition in exercising a peremptory strike should typically receive deference when considering whether there was a *Batson* violation.⁴³ Here, however, the trial judge permitted the prosecution’s challenge to remove Brooks without any requisite prosecutorial explanation.⁴⁴ Furthermore, the prosecution’s challenge did not occur until the day after Brooks’s *voir dire*, which suggests that “the trial judge may not have recalled Mr. Brooks’s demeanor,” possibly lessening his credibility as a “first hand observer.”⁴⁵ Thus, the Court found that without an explanation by the trial judge as to why he accepted the prosecution’s challenge to remove Brooks, the Court “cannot presume that the trial judge credited the prosecutor’s assertion that Mr. Brooks was nervous.”⁴⁶

40. *Id.* at 1208.

41. *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (plurality opinion)).

42. *Id.*

43. *Id.* at 1209.

44. *Id.*

45. *Id.*

46. *Id.*

B. The Prospective Juror's Position as a Student Teacher

The Court also denied the prosecutor's claim that he struck Brooks, not based on race, but due to his position as a student teacher.⁴⁷ Brooks had come forward during *voir dire* and "expressed concern that jury service . . . would interfere with work [and] school," because as a student teacher, he was required to teach five days a week from 8:30 a.m. to 3:00 p.m.⁴⁸ However, after speaking with the Dean of Southern University, the trial court learned that Brooks's service as a juror would not interfere with the three hundred hours of observation time required for his teaching, and the Dean assured the trial court that he would work with Brooks to ensure that he would meet the requirements.⁴⁹ According to the court's records, Brooks seemed satisfied with this information and no longer expressed concern about his potential jury service.⁵⁰

Thus, the Court found the prosecutor's second reason for striking Brooks—that in an effort to quickly resume his student teaching duties, Brooks might find the defendant guilty of a lesser verdict without a penalty phase—to be "highly speculative."⁵¹ Snyder's trial, the Court noted, was extremely short, a fact that "the prosecutor had anticipated on the record during *voir dire*," and, therefore, Brooks would have missed just "two additional days of student teaching."⁵² The Court, examining this evidence cumulatively, held that "[w]hen all of these considerations are taken into account, the prosecutor's second proffered justification for striking Mr. Brooks is suspicious."⁵³

The Court's suspicions deepened when it compared the circumstances surrounding Brooks's dismissal with the prosecutor's failure to strike other jurors who asked to be excused due to future conflicts. For instance, Roland Laws, a potential white juror and self-employed general contractor, claimed that serving on the jury would present great difficulties: he had pressing family issues and he would not be able to complete his work projects, including a home that the buyers had planned to occupy in just a few days.⁵⁴

47. *Id.* at 1209–10.

48. *Id.* at 1209.

49. *Id.* at 1210.

50. *Id.*

51. *Id.* at 1208, 1210.

52. *Id.* at 1210.

53. *Id.* at 1211.

54. *Id.*

The Court also noted another potential white juror, John Donnes, who the prosecutor did not use a peremptory challenge to strike, despite the fact that Donnes expressed great concern that as a juror, he would “‘have to cancel too many things,’ including an urgent appointment at which his presence was essential.”⁵⁵ The Court explained that the prosecutor’s decision not to strike Laws and Donnes suggested that he was not “sincerely concerned that Mr. Brooks would favor a lesser verdict than first-degree murder in order to shorten the trial.”⁵⁶

Thus, after examining the third prong of the *Batson* test, the Court found “[t]he prosecution’s proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent.”⁵⁷ The Court concluded that there was a *Batson* violation and overturned Snyder’s first-degree murder conviction and death sentence. In his dissent, however, Justice Thomas noted that the majority opinion paid only “lip-service to the pivotal role of the trial court” identified in *Batson*.⁵⁸ Thomas questioned the majority’s claimed deference to a trial court’s determination of a discriminatory peremptory strike except when the determination is “clearly erroneous.”⁵⁹ Thomas found no precedent for the standard that the majority adhered to in its analysis: the majority decision second-guessed the trial court’s determinations because the trial judge did not make specific findings with regard to each of the prosecution’s race-neutral explanations for the peremptory strike.⁶⁰ Instead, Thomas noted that if there was ambiguity in the reasons for the trial court’s determination, the Court’s application of deferential standard called for a presumption against a belief that the trial court’s decision was “clearly erroneous.”⁶¹

IV. CONCLUSION

The Court’s holding in *Snyder v. Louisiana* seems unlikely to answer concerns reminiscent of those previously raised by Justices Breyer and Thurgood Marshall.⁶² In *Miller-El v. Dretke*, Justice Breyer

55. *Id.* at 1212.

56. *Id.* at 1211.

57. *Id.* at 1212.

58. *Id.* at 1213.

59. *Id.* at 1208, 1213.

60. *Id.* at 1213.

61. *Id.*

62. See *Miller-El v. Dretke*, 545 U.S. 231, 266–73 (2005) (Breyer, J., concurring); *Batson v. Kentucky*, 476 U.S. 79, 102–08 (1986) (Marshall, J., concurring).

agreed with Justice Marshall's assessment that the Court's ruling in *Batson v. Kentucky* would not end the use of racially discriminatory peremptory challenges. Instead, Breyer, like Marshall, asserted that this goal could only be attained through the complete elimination of such challenges.⁶³ While *Snyder* seems to have been an attempt to address Justice Breyer's call to "reconsider *Batson*'s test,"⁶⁴ the majority opinion does not hint that the Court will consider the elimination of peremptory challenges at any time in the near future.

Snyder holds that when claims of *Batson* violations are made, trial judges must be more critical of the race-neutral reasons prosecutors give for the use of peremptory challenges. It is hard to ignore, however, Justice Breyer's poignant words in *Miller-El*, in which he noted that the third step in the *Batson* test is the most important step, because at this point judges must "engage in the awkward, sometimes hopeless, task of second-guessing a prosecutor's instinctive judgment—the underlying basis for which may be invisible even to the prosecutor exercising the challenge."⁶⁵ The Court's opinion seems to have overlooked the very real likelihood that at times it may be impossible for a trial judge to determine the reason for the prosecution's use of a peremptory challenge, even with the advantage of first-hand observation.⁶⁶ Critics have suggested that *Batson* is inherently flawed in this respect, as an attorney may unconsciously discriminate on the basis of gender or race in making peremptory challenges.⁶⁷ While a peremptory challenge is unconstitutional if made on the basis of the potential juror's race or gender, it is an attorney's unconscious discrimination, which results from "normal cognitive processes that form stereotypes," that influences the attorney's often instinctual decision that a potential juror would not be favorable to his or her client.⁶⁸ Thus, the attorney's stereotypes impact the way that he or she processes information about the potential juror.⁶⁹

63. *Miller-El*, 545 U.S. at 266–67 (citing *Batson*, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring)).

64. *Id.* at 273 (Breyer, J. concurring).

65. *Id.* at 267–68.

66. See Page, *supra* note 8, 156 (noting that psychological research has indicated that attorneys are often unaware that they have exercised a peremptory challenge as a result of a juror's race or gender, and thus that "the *Batson* peremptory challenge framework is woefully ill-suited to address the problem of race and gender discrimination in jury selection.").

67. *Id.* at 180, 207–08.

68. *Id.* at 180.

69. *Id.* at 207–08.

Time will tell whether *Snyder's* refinement of *Batson*, requiring trial judges to more critically analyze race-neutral reasons given for peremptory challenges, will decrease the racial discrimination that currently pervades the jury selection system.⁷⁰ With the prevalence of jury consultants, who often consider elements such as demographics in determining which potential jurors to strike,⁷¹ as well as stereotypes that individuals are bound to have,⁷² one must wonder whether peremptory challenges can ever be race-neutral.

If discrimination occurs subconsciously, lawyers and even jury consultants are as susceptible as anyone else to forming racially motivated biases, and in turn, allowing such biases to influence use of peremptory challenges.⁷³ There is a very real possibility that a lawyer who strikes a potential juror may “be unaware that her discomfort with a particular jury is race-based, [and] might sincerely deny the allegation.”⁷⁴ While it is clear that *Batson* issues will continue to be raised in courts, it does not seem that *Snyder* will lessen the frequency of litigation based on these issues.

70. See, e.g., *Miller-El*, 545 U.S. at 266–73 (Breyer, J., concurring); Note: *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 HARV. L. REV. 2121, 2142 (2006) (detailing a need to eliminate peremptory challenges completely to limit prosecutorial discretion, noting that “prosecutors’ knowledge that they can use peremptory challenges to impanel an all-white or nearly all-white jury inflates their estimated chances of success, as convicting a minority defendant is easier before a monoracial jury than it is before a cross-representative jury. In this way, peremptory challenges lead prosecutors to discount the cost of convicting minority defendants.”); see also *supra* note 8.

71. See *supra* note 7.

72. See *supra* note 8.

73. Camille A. Nelson, *Symposium: Procedural Justice: Perspectives on Summary Judgment, Peremptory Challenges, and the Exclusionary Rule: Batson, O.J., and Snyder: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1718 (2008).

74. *Id.* (citing Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 326 (2007)).