dri The Voice of the Defense Bar™

The Voice

July 10, 2019 Volume 18, Issue 27

This Week's Feature

Flowers v. Mississippi: A *Batson* Guideline for Civil and Criminal Trial Lawyers

By Brett A. Tarver

On June 21, 2019, the United States Supreme Court continued its history of fighting discrimination against potential jurors based on race during the jury selection process, reminding trial lawyers everywhere that *Batson* challenges are alive and well. In *Flowers v. Mississippi*, Justice Kavanaugh repeated twice that the Court broke "no new legal ground," but instead, "simply enforce[d] and reinforce[d] *Batson*." *Flowers v. Mississippi*, No. 17-9572, 2019 WL 2552489, at *4, *17 (U.S. June 21, 2019) (*Flowers*). In *Batson*, the Supreme Court ruled for the first time that "a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial." *Id.* at *3. However, the *Flowers* decision creates instructive guidelines for trial lawyers in arguing for or against *Batson* challenges during jury selection. The following takes a look at the uniqueness of the *Flowers* case and breaks down the *Batson* guidelines for trial lawyers that are inherent in the decision.

Article continues on page 4.

This Week's Feature

Flowers v. Mississippi: A *Batson* Guideline for Civil and Criminal Trial Lawyers

By Brett A. Tarver

On June 21, 2019, the United States Supreme Court continued its history of fighting discrimination against potential jurors based on race during the jury selection process, reminding trial lawyers everywhere that *Batson* challenges are alive and well. In *Flowers v. Mississippi*, Justice Kavanaugh repeated twice that the Court broke "no new legal ground," but instead, "simply enforce[d] and reinforce[d] *Batson*." *Flowers v. Mississippi*, No. 17-9572, 2019 WL 2552489, at *4, *17 (U.S. June 21, 2019) (*Flowers*). In *Batson*, the Supreme Court ruled for the first time that "a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial." *Id.* at *3. However, the *Flowers* decision creates instructive guidelines for trial lawyers in arguing for or against *Batson* challenges during jury selection. The following takes a look at the uniqueness of the *Flowers* case and breaks down the *Batson* guidelines for trial lawyers that are inherent in the decision.

Flowers' History

There is no denying that *Flowers* is a unique case. This most recent Supreme Court decision flows from the *sixth* trial of defendant Curtis Flowers for the murder of four people in Winona, Mississippi, in 1996. 2019 WL 2552489, at *3. Defendant Flowers was convicted in his first three trials, but each of these convictions were overturned by the Mississippi Supreme Court for either prosecutorial misconduct or discrimination against jurors based on race by the prosecution. *Id.* Defendant Flowers' fourth and fifth trials resulted in hung juries and mistrials. *Id.* After a conviction in his sixth trial, defendant Flowers appealed again, for the prosecution's discrimination based on race against jurors during the jury selection process. *Id.*

After outlining the history leading up to the *Batson* decision and the way that *Batson* has been molded since its delivery in 1986—including *Batson*'s application to civil cases, *id.* at *10—the Court closely reviewed the actions of the prosecution during voir dire, the prosecution's use of peremptory strikes, and counsel's arguments against *Batson* challenges at the trial-court level. Upon reviewing the totality of actions taken by counsel over a series of trials, the Court determined that discrimination against jurors on the basis of race by the prosecution required that the conviction of the defendant be reversed and remanded for yet another new trial. *Id.* at *17.

Trial Techniques to Watch

During jury selection, both plaintiffs and defendants can be faced with a *Batson* challenge to their use of peremptory strikes. Although the Court broke "no new legal ground" in the *Flowers* decision, its review of the actions taken by the prosecution provide a helpful set of guidelines for trial lawyers dealing with *Batson*-based issues in their civil trials. Whether drafting a voir dire outline, reviewing carefully how peremptory strikes will be used, or making a *Batson* challenge against the other side, the takeaways from the *Flowers* case are educational and informative for all trial lawyers. Justice Kavanaugh highlighted the critical facts in the Court's decision to overturn the verdict, and each of those critical facts provides a wealth of instructive guidance to trial lawyers.

History Matters. As is clear from the posture of the case and the fact that defendant Flowers had just undergone his sixth trial on the same criminal charges, the *Flowers* case was rife with history for the Court to rely on in identifying the intent of counsel to strike jurors on the basis of race. Notably, the same prosecutor conducted all six of defendant Flowers' trials. 2019 WL 2552489, at *3. Identified as the first critical fact in the decision, Justice Kavanaugh writes that "in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck." *Id.* Explaining that the Court "cannot ignore that history," the Court found that the trial court judge "did not sufficiently account for the history when considering Flowers' *Batson* claim." *Id.* at *13. The lesson to learn here is simple: trial lawyers should be armed with the knowledge and history of opposing counsel's use of peremptory strikes in previous trials. When there may be a history of counsel routinely and consistently employing strikes against a certain race or gender, that knowledge will aid in arguing that counsel's current use of

peremptory strikes contains discriminatory intent. Lawyers should likewise keep track of their own peremptory strike records, both as a way to uncover a lawyer's own potential implicit bias and to guard against that history being used by opposing counsel.

Beware of Disparate Questioning. *Batson* set forth that "once a prima facie case of discrimination has been shown by a [party], the [opposing party] must provide race-neutral reasons for its peremptory strikes." 2019 WL 2552489, at *9. Race- and gender-neutral reasons for using peremptory strikes are discovered during the voir dire process when prospective jurors answer questions about their biases, opinions, and relationships to the parties or witnesses in the case. It is often the strategy of counsel to focus his or her voir dire questions on the prospective jurors that raised counsel's concern by the prospective jurors' responses to a questionnaire or during general questioning. Yet the *Flowers* decision reminds counsel to be wary of focusing too much on those jurors if an argument can be made that the concerning jurors are all of one race or gender. The Court found it a critical fact that "at the sixth trial, in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors." *Id*. at *3. Looking only at the prosecution's actions during voir dire in defendant Flowers' sixth trial, the Court highlighted the following:

> The State asked the five black prospective jurors who were struck a total of 145 questions. By contrast, the State asked the 11 seated white jurors a total of 12 questions. On average, therefore, the State asked 29 questions to each struck black prospective juror. The State asked an average of one question to each seated white juror.

Id. at *13. Thus the Court found that "the dramatically disparate questioning and investigation of black prospective jurors and white prospective jurors at the sixth trial strongly suggests that the State was motivated in substantial part by a discriminatory intent." *Id*. at *15. During voir dire, counsel must strike a balance between questioning concerning jurors while also not solely focusing on questioning individuals of a certain gender or race. Under *Flowers*, such behavior could be used by opposing counsel to argue a *Batson* challenge to a peremptory strike.

Be Precise in Arguing Batson Challenges. Once a *Batson* challenge has been made, counsel arguing the race- or gender-neutral reasons for the use of the peremptory strike must be accurate and careful in outlining those reasons. In *Flowers*, the Court identified that the prosecution made incorrect statements about four black jurors when arguing against *Batson* challenges to the State's use of peremptory strikes on the potential jurors. *See* 2019 WL 2552489, at *16. Explaining that "incorrect statements of that sort may show the State's intent," the Court found that the "State's pattern of factually inaccurate statements about black prospective jurors suggests that the State intended to keep black prospective jurors off the jury." *Id*. Trial counsel should be prepared with materials and tools to ensure that statements made during a *Batson* challenge are accurate. The most helpful tool to have on hand is the actual transcripts recorded during voir dire. When used, especially in an electronic format, counsel can quickly guide the trial judge to the prospective juror's own statements on the record to help support counsel's non-discriminatory basis for use of a peremptory strike.

Pay Attention to Similarly Situated Jurors. The final critical fact pointed to by Justice Kavanaugh was the state's decision to strike a black juror, Carolyn Wright, "who was similarly situated to white prospective jurors who were not struck by the State." *Id*. at *3. The Court's comparison of "prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred." 2019 WL 2552489, at *2. The state's race-neutral reason for striking Ms. Wright centered on the facts that she had worked at the local Wal-Mart with the defendant's father and had connections to witnesses for both the prosecution and the defense. *Id*. at *15–*16. But prospective white jurors on the panel also disclosed similar connections to the Flowers family and potential witnesses in the case and were not struck by the state. *Id*. at *16. Even more telling, the state chose not even to question these potential white jurors about their connections with the Flowers family or witnesses in the case, while focusing a large amount of time questioning Ms. Wright on these issues. *Id*. at *16. When preparing to fight for or defend against a *Batson* challenge, trial lawyers must pay attention to similarly situated jurors when outlining the race- or gender-neutral reasons for the use of a peremptory strike.

Conclusion

Trial lawyers must be prepared to fight for or against *Batson* challenges during jury selection. While the *Flowers* decision "break[s] no new legal ground" in the *Batson* arena, the focus of the Court on the actions taken by the prosecution before, during, and after jury selection stand as useful guidelines for trial counsel to rely upon in handing *Batson* challenges. Considering these guidelines when developing voir dire strategy, executing peremptory strikes, and arguing against or for *Batson* challenges will

aid counsel in strategically developing a fair jury to hear the trial and lead to a positive outcome for their clients.

Brett A. Tarver is an associate with **Jones Day** in the Atlanta office. She has participated in 11 trial teams since joining the firm in May of 2016. Her practice focuses on complex civil litigation in state and federal courts, including the defense of individual and class action product liability lawsuits. She is an active member of the DRI Drug and Medical Device and Product Liability Committees and serves on the DRI Young Lawyers Committee Steering Committee. The views expressed in this article do not necessarily reflect those of Jones Day.