

Friday, March 21. 2008

Justice Alito surprises by strengthening Batson.

Bill of Rights (Image from the public domain.) Once a person becomes a Supreme Court justice, no concern should exist about being pleasing enough to senators and the president to get onto a higher court (and getting elevated to a higher court or retained on the existing court, when it comes to some state courts, should not be a concern with any judge on any court); this is the highest court the United States ever has had. With that backdrop, I applaud the two newest justices -- Justice Alito and Chief Justice Roberts -- who scared me to little end when the Senate approved their nominations, and who still scare me, but who also give hope for doing some real justice from time to time. If only they would do as much justice as Justice Souter, about whom I went into a near-emotional tailspin when I first learned he had replaced my hero Justice William Brennan. Justice Alito penned yesterday's magnificent *Snyder v. Louisiana*, ___ U.S. ___, which requires a judge to take a fully active, observant, and independent role in assessing the demeanor of a prosecutor who contends a race-neutral reason for striking a potential juror, and for observing the demeanor of the stricken juror. The two Supreme Court justices who scare me the most are Justices Thomas and Scalia, who are *Snyder v. Louisiana*'s sole dissenters, by the pen of Justice Thomas. Fortunately, they are in a minority of one in *Snyder*. Here are some of the best passages from Justice Alito's majority opinion in *Snyder v. Louisiana*: Batson provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race: "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; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Miller-El v. Dretke*, supra, at 277 (THOMAS, J., dissenting) (quoting *Miller-El v. Cockrell*, 537 U. S. 322, 328-329 (2003)). The trial court has a pivotal role in evaluating Batson claims. Step three of the Batson inquiry involves an evaluation of the prosecutor's credibility, see 476 U. S., at 98, n. 21, and "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge," *Hernandez*, 500 U. S., at 365 (plurality opinion). In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "peculiarly within a trial judge's province," *ibid.* (quoting *Wainwright v. Witt*, 469 U. S. 412, 428 (1985)), and we have stated that "in the absence of exceptional circumstances, we would defer to [the trial court]." 500 U. S., at 366. In *Miller-El v. Dretke*, the Court made it clear that in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted. 545 U. S., at 239. Here, as just one example, if there were persisting doubts as to the outcome, a court would be required to consider the strike of Ms. Scott for the bearing it might have upon the strike of Mr. Brooks. In this case, however, the explanation given for the strike of Mr. Brooks is by itself unconvincing and suffices for the determination that there was Batson error. When defense counsel made a Batson objection concerning the strike of Mr. Brooks, a college senior who was attempting to fulfill his student-teaching obligation, the prosecution offered two race-neutral reasons for the strike. The prosecutor explained: "I thought about it last night. Number 1, the main reason is that he looked very nervous to me throughout the questioning. Number 2, he's one of the fellows that came up at the beginning [of voir dire] and said he was going to miss class. He's a student teacher. My main concern is for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase." Those are my two reasons. App. 444. Defense counsel disputed both explanations, *id.*, at 444-445, and the trial judge ruled as follows: "All right. I'm going to allow the challenge. I'm going to allow the challenge." *Id.*, at 445. We discuss the prosecution's two proffered grounds for striking Mr. Brooks in turn. -- The trial judge was given two explanations for the strike. Rather than making a specific finding on the record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation. It is possible that the judge did not have any impression one way or the other concerning Mr. Brooks' demeanor. Mr. Brooks was not challenged until the day after he was questioned, and by that time dozens of other jurors had been questioned. Thus, the trial judge may not have recalled Mr. Brooks' demeanor. Or, the trial judge may have found it unnecessary to consider Mr. Brooks' demeanor, instead basing his ruling completely on the second proffered justification for the strike. For these reasons, we cannot presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous. -- With many weeks remaining in the term, Mr. Brooks would have needed to make up no more than an hour or two per week in order to compensate for the time that he would have lost due to jury service. When all of these considerations are taken into account, the prosecutor's second proffered justification for striking Mr. Brooks is suspicious. The implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that

appear to have been at least as serious as Mr. Brooks's[™]. We recognize that a retrospective comparison of jurors based on a cold appellate record maybe very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable. In this case, however, the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause. Â Congratulations to Appellant Allen Snyder for winning this appeal, after having been convicted of capital murder and sentenced to death. The sweetness of his victory is limited, though, because Mr. Snyder likely will be retried, once again facing the risk of a conviction and death sentence. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00