

Black Strikes

A Study of the Racially Disparate Use of Peremptory Challenges
By the Jefferson Parish District Attorney's office

A Report of the Louisiana Crisis Assistance Center
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(Statistical Analysis)
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Black Strikes*: A Study of the Racially Disparate Use of Peremptory Challenges by the Jefferson Parish District Attorney's office

While empanelling juries in serious felony trials the prosecutor may, at his or her discretion, use a limited number of "peremptory challenges" to strike prospective jurors from the panel. Data was collected from 390 felony jury trials prosecuted by the District Attorney's office of Jefferson Parish, Louisiana between 1994 and 2002. The rate at which prosecutors used their challenges to strike jurors was examined against the race of the jurors struck or accepted. Prosecutors chose to strike black prospective jurors at more than three times the rate of whites. Chi square testing demonstrated a highly significant racial disparity in the use of peremptory strikes by the Jefferson Parish District Attorney's office ($p < .001$).

Background

In June 2002 the Louisiana Supreme Court reversed the capital conviction of Edward Harris, a black teenager sentenced to death in Jefferson Parish. The conviction was reversed after the Supreme Court found that ADA Morgan had explicitly relied upon race in using peremptory jury strikes.¹ That is, she had deliberately struck blacks from the jury because they were black. The Supreme Court held, "*We conclude that the manner in which the state sought to dismiss jurors in this case, based solely on race, amounts to a violation of defendant's constitutional rights. . . . this error raises serious federal constitutional equal protection issues affecting the rights of both the defendant and the excused venirepersons.*"²

This was not the first time that ADA Morgan or the Jefferson Parish District Attorney's office had been criticized on the basis of clear violations of the ban on race based jury challenges.³ In addition, anecdotal evidence suggested that

* The term "Black Strikes" describes the use by prosecutors of peremptory challenges to strike blacks from juries at a greater rate than they strike whites. It is a play on the phrase "back strikes", a legitimate use of peremptory challenges during jury selection used to control the overall make up of the jury panel.

there was an established pattern of race based jury selection by the District Attorney's office in Jefferson Parish.

Against this backdrop, this study was designed to determine the extent and scope of race based jury selection by the Jefferson Parish District Attorney's office.

The Mechanics of Jury Selection

Jury selection in Jefferson Parish begins with the establishment of a jury pool list containing the names of all eligible voters in the parish. From this list random selections of 800-1,000 names are made to form daily venire lists. The jurors on these lists are required to attend court to serve as jurors in any cases listed on that particular day.

When a presiding judge requires a jury for a trial, a request for a jury panel is made and a selection of jurors required to attend court from the daily venire list is physically sent to the courtroom for the jury selection process. While individual practices differ somewhat between judges and some steps in the process are often merged, the following is an adequate account of the jury selection process.

A process known as *voir dire* is conducted in which jurors are asked series of questions by the court and by prosecution and defense counsel. This process may be conducted across the whole of the group of jurors sent to the courtroom or in smaller groups or even individually.

The court may then consider challenges for cause from prosecution and defense counsel by which counsel seek to have jurors excluded for "good cause" as defined in the statute, most commonly because the juror could not be impartial or is not willing to consider the evidence or render a verdict in the manner the law prescribes.⁴ The court may also exclude jurors for cause of its own motion.

A change in the court rules in 2002 has introduced the simultaneous use of peremptory challenges but the jury selection that applied for the great bulk of the study period proceeded under the following step by step process⁵.

The first twelve jurors are tendered to the prosecutor who may accept or challenge each juror's presence on the jury panel. The prosecutor may at this

time make a challenge for cause or may choose to exercise a peremptory challenge to remove the prospective juror from the panel.⁶

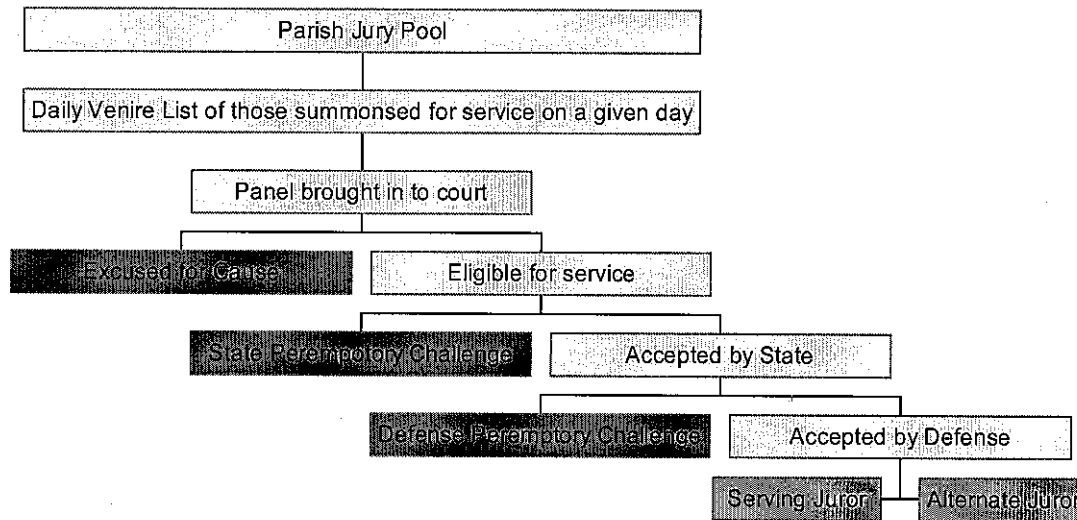
“Peremptory challenges”, also known as “peremptory strikes” are available to both the prosecution and the defense and are made in the discretion of the attorney. No reason need be given; the juror is simply dismissed from the panel. This process occurs out of the hearing of the prospective jurors and they will usually be unaware whose decision it was to remove them from the panel. In Louisiana law, the primary restriction on the discretion of the attorney to strike a prospective juror is that no peremptory challenge may be based solely upon the race of the juror.⁷ In trials of offenses punishable by death or necessarily by imprisonment at hard labor, each defendant has twelve peremptory challenges and the state has twelve challenges for each defendant. In all other cases only six peremptory challenges are made available.⁸

After the jury panel is tendered to the prosecutor, those jurors accepted by the prosecutor are then tendered to the defense to be accepted or challenged. This process is repeated until both the prosecution and the defense have accepted twelve jurors.

At that time most courts in Louisiana will allow the prosecution and the defense to engage in a further round of peremptory challenges. This process is known as “back striking” and allows counsel to make the decision to peremptorily challenge an individual juror in the light of the balance of the whole jury. Once again, the prosecution goes first in choosing whether to accept or challenge the jurors selected on the panel. The process of tendering more jurors is then repeated to fill empty places in the panel, and this selection process continues until a jury of twelve has been selected.

The court will then usually undertake a similar process to select alternate jurors, in case one of the principal jurors becomes unavailable during the trial. The court will often grant the state and the defense further peremptory challenges to assist in the selection of the alternate jurors.

The stages of selection of the jury are depicted below.



Gathering the Data

Our survey examined 390 jury trials in Jefferson Parish resulting in conviction where the defendant was indigent and had appealed through the Louisiana Appellate Project and where the court's records on the case were complete. The data involved the selection process for 13,662 prospective jurors.

represent conviction on black strikes

These cases were identified through the records of the Louisiana Appellate Project and represent the entire population of jury trials, resulting in conviction with which LAP became involved and for which records were complete.⁹

Minute entries from jury selection, held in the Clerk of Court's office, identified the selection outcome for each of the jurors and this information was cross-matched to the Parish jury pool database, also provided by the Clerk of Court, to determine the race of each juror.

Jurors were divided according to the coding for race in the Parish jury pool list. The divisions were B (Black) and W (White).¹⁰

do both ways

The jury selection outcome for each juror was coded according to the entry on the court's minute entry. Those excused by the court, successfully challenged for cause or simply unused during the selection were coded and set

aside. Those the subject of a state peremptory challenge form the group coded as State Peremptory in this study. Those who the state chose not to peremptorily strike were coded as Accepted by State.¹¹ This group was made up of those later challenged peremptorily by the defense as well as those ultimately accepted as jury members or alternate jurors.

In this way, the coding reflected the decision making stage for the state's representatives: when faced with the possibility of having a particular juror on the jury did they accept that juror or use a peremptory challenge to remove him or her from the panel?

The Raw Data

The raw data was broken in to two data sets and collated into data tables, shown below. The first data set contained those trials involving twelve person juries and the second data set contained those trials involving six member juries.

Jefferson Parish Trials Survey – 12 Juror Cases

| | B | W | Total |
|--------------------------|----------|----------|--------------|
| State Peremptory | 673 | 1,135 | 1,808 |
| Accepted by State | 540 | 5,812 | 6,352 |
| Total | 1,213 | 6,947 | 8,160 |

Jefferson Parish Trials Survey – 6 Juror cases

| | B | W | Total |
|--------------------------|----------|----------|--------------|
| State Peremptory | 166 | 274 | 440 |
| Accepted by State | 114 | 1,336 | 1,450 |
| Total | 280 | 1,610 | 1,890 |

As can be seen from the above, in the twelve-juror trials a total of 8,160 prospective jurors reached the stage of jury selection at which the state was forced to exercise a choice to accept or peremptorily challenge the juror. In the

six-juror trials a total of 1,890 prospective jurors were subjected to the state's decision making during jury selection.

The rate at which the decision was made to remove black jurors as opposed to white jurors is clearly reflected by expressing the above figures as percentages.

| | <i>12 Juror Trials</i> | | <i>6 Juror Trials</i> | |
|--------------------------|------------------------|----------|-----------------------|----------|
| | B | W | B | W |
| State Peremptory | 55.5% | 16.3% | 59.3% | 17% |
| Accepted by State | 44.5% | 83.7% | 40.7% | 83% |

The above tables demonstrate that in twelve-juror trials prosecutors from the Jefferson Parish District Attorney's office choose to use their peremptory strikes to remove 55% of black prospective jurors who are otherwise eligible to serve but only challenge 16.3% of white prospective jurors who are in the same position. This pattern is repeated in six-juror trials, where prosecutors challenge 59.3% of black venire persons and only 17% of whites.

Combining the data sets creates an aggregate figure for 390 trials and 10,050 prosecutorial decisions. The data shows that the Jefferson Parish District Attorney's office uses peremptory strikes to remove African-Americans from juries at more than three times the rate that it challenges whites.

Statistical Analysis

The above data was submitted to Professor Joel Devine, Center for Applied Social Research, Tulane University. Professor Devine subjected the data to Chi Square testing with the following results for the twelve-juror data set:

The proportion of black venire persons who were peremptorily challenged by the State was 0.55 whereas the proportion of white venire persons who were peremptorily challenged by the State was

only .16. The difference in proportions is highly significant: (1, N = 8,160) = 917.4, p < .001 (p= 1.62E-201).

Professor's results for the six-juror data set were:

The proportion of black venire persons who were peremptorily challenged by the State was 0.59 whereas the proportion of white venire persons who were peremptorily challenged by the State was only .17. Again, the difference in proportions is significant at the highly stringent .001 level: (1, N = 1,890) = 238.5, p < .001 (p= 8.35E-54).

Professor Devine concluded that:

The above analysis demonstrates that there is a racial disparity in the state's use of peremptory challenges and that this disparity is highly significant.

Conclusions

Following a number of judicial findings and anecdotal accounts of racially disparate jury selection practices amongst prosecutors in Jefferson Parish Louisiana a study was conducted of prosecutorial jury selection behavior in 390 trials. These trials involved the state's decision to accept or reject 10,050 jurors.

The results of this study demonstrate that prosecutors from the Jefferson Parish District Attorney's office choose to strike black prospective jurors at more than three times the rate at which they strike white prospective jurors. Statistical analysis has shown this difference to be highly significant.

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Endnotes

¹ During jury selection prosecution and defense attorneys may “peremptorily challenge” or “strike” a limited number of jurors at their discretion. However, it is unconstitutional for this discretionary power to be exercised solely on the basis of race

² *State v Harris*, 820 So. 2d 471 (La. 2002)

³ See for example the criticism of ADA Morgan in *State v. Jacobs*, 99 KA 1659, (Tr. 1492-1493). See also *State v Meyers*, 761 So. 2d 498, *State v. Jacobs*, 789 So. 2d 1280 (La. 2001).

⁴ La. C. Crim. P. Art. 797, 798

⁵ See Rules for Louisiana District Courts, Rule 19.10. The introduction of simultaneous strikes will in no way redress the disparity in the use of peremptory challenges by Jefferson Parish prosecutors.

⁶ La. C. Crim. P. Art. 788

⁷ La. C. Crim. P. Art. 795(C). the US Supreme Court made it clear in *Batson v Kentucky*, 476 US 79 (1986) that the use of peremptory challenges based solely upon the race of a juror are unconstitutional, violating the Fourteenth Amendment guarantee of equal protection before the law.

⁸ La. C. Crim. P. Art. 799

⁹ Requests for access to the computerized information describing jury trials in the Clerk of Courts office were refused. The best available list of jury trials beyond this source was the list of cases handled by the Louisiana Appellate Project. This list contained 504 cases, of which 33 did not result in jury trials (judge only trials, pleas of guilty etc.) and a further 14 did not have complete records of jury selection in the Clerk of Court's office. A further 67 cases did not have complete information as to each juror's race contained in the Jefferson Parish jury pool database, leaving 390 jury trials for analysis.

¹⁰ There is also a coding for O (Other), I (Native American) and H (Hispanic). These entries were coded as a W for the purposes of this study as the hypothesis to be tested was the disparate treatment of black prospective jurors. For the purposes of this report, the non-black prospective jurors will be referred to as white, in recognition of the fact that these smaller populations made up only 344 of the 13,662 prospective jurors in the study.

¹¹ The coding was based on the final outcome for each juror. Where the state challenged a juror and that challenge was disallowed on the basis that it was based on race the coding would reflect that the state had accepted that juror. As a result, the data in the study describes the disparity in striking black venire persons even after the protection afforded by *Batson v Kentucky*, 476 US 79 (1986)