RESPONDING TO *BATSON/WHEELER* MOTIONS

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I. BASIC PRINCIPLES

- "The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." (*Batson v. Kentucky* (1986) 476 U.S. 79, 89.)

- Based entirely on prosecutor's actions in the case being tried; def. doesn't have to show pattern of discrimination over number of cases (as required pre-*Batson*.)

- Also applies to discrimination based on ethnicity (*Holland v. Illinois* (1990) 493 U.S. 474, 488-89) and gender (*J.E.B. v. Alabama* (1994) 511 U.S. 127, 129.)

- Different rationale in *People v. Wheeler* (1978) 22 Cal.3d 258: Use of peremptory challenges to remove prospective jurors on sole ground of race violates right to a trial by jury drawn from representative cross section of community under Cal. Const., Art. I, § 16.

- Strike of single minority juror may constitute *Batson/Wheeler* violation if based on purposeful discrimination. (See, e.g., *Snyder v. La.* (2008) 552 U.S. 472, 478.)

- No harmless error analysis on appellate/habeas review. (Structural error.)

II. THREE STEPS OF *BATSON*

A. Prima Facie (PF) Case (Step 1)

- Def. must present sufficient evidence to permit trial judge to *draw an inference* of discrimination during jury selection based on "totality of the relevant facts." (*Johnson v. California* (2005) 545 U.S. 162, 170; *Batson*, 476 U.S. at 94.)

- Although def. has *burden of production*, this is a **very low threshold**.
  - For many years, California used a standard of "strong likelihood" of racial discrimination (from *Wheeler*). Sometimes described as "strong evidence" of racial discrimination, or facts showing it was "more likely than not" that pros. was discriminating on basis of race. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1315.)
  - In *P. v. Box* (2000) 23 Cal.4th 1153, 1188, CSC said trial court's finding of no PF case will be affirmed "when the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question."
  - But U.S. Supreme Court said in *Johnson* that the "strong likelihood" std. is too demanding, and inconsistent w/*Batson*. Trial courts should not

"engage[] in needless and imperfect speculation when a direct answer can be obtained." (*Johnson*, 545 U.S. at 172.)
    - Ninth Circuit has said that std. in *Rex* is inconsistent with *Batson* and *Johnson*. (See, e.g, *Johnson v. Finn* (9th Cir. 2011) 665 F.3d 1063, 1069; *Shirley v. Yates* (E.D. Cal. 2013).)

- In making the PF determination, trial court considers *all relevant circumstances*, including:
    - Pattern of strikes by prosecutor.
    - Minority jurors still in box who have been passed on.
    - Differences in questioning minority vs. non-minority venire members during voir dire.
    - Information in written questionnaires.
    - Responses to questions during voir dire.
    - Defendant's and/or victim's race.

- Single strike should rarely be enough to state a PF case, unless no other (or very few other) minorities in venire, and struck juror has no obvious red flags for the prosecution.

- Mere fact that prosecutor "passed" or accepted jury containing other minorities does not end the inquiry on whether def. has made out a PF case. May be a factor, but not a conclusive factor. (*P. v. Snow* (1987) 44 Cal.3d 216, 225.)
    - In *Snow*, using 6 of 16 peremptories to excuse black prospective jurors clearly established a PF case, regardless of number of blacks still in box.

B. Prosecutor's Statement of Reasons (Step 2)

- Should be given only after trial court finds a PF case because burden has now shifted to prosecution.
    - Once a prosecutor offers reasons and the trial court makes an ultimate determination on whether there has been intentional discrimination, the PF inquiry is moot. (*Hernandez v. New York* (1991) 500 U.S. 352, 359.)
    - CSC has encouraged trial courts to elicit prosecutor's reasons before making a PF determination. [This may expedite process in trial court and be upheld regularly on direct review, but it can pose big problems in federal habeas review if the trial court is not careful in its ruling.]

- The prosecutor's reasons need not be persuasive or even rational, as long as they are racially neutral.
    - "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." (*Hernandez v. New York*, 500 U.S. at 360.)

- "The second step of this process does not demand an explanation that is persuasive, or even plausible." (*Purkett v. Elam* (1995) 514 U.S. 765, 768.)
- But in practice, a reason that seems far-fetched could later be deemed pretextual, so **be as specific and clear as possible.**

- **Safe reasons (generally upheld on appeal & in fed. habeas):**
  - Bad experience with law enforcement or felt criminal justice system treated self or family member unfairly.
  - Prospective juror or family member was convicted of felony (more similar to case being tried, the better). [But can be problematic if others are allowed to serve who also had relatives or friends in prison.]
  - Misrepresentations in juror questionnaire.
  - Acquitted a defendant in prior case.
  - Demonstrably poor attitude in response to *voir dire* questions, or hostility in responding to prosecutor's questions.
  - Social worker or other occupation that would indicate sympathy toward a defendant in a criminal case.
  - No employment experience, particularly if prospective juror is young.
  - Specific demeanor (e.g. didn't make eye contact).

- **Problematic reasons (sometimes found to be pretextual)**
  - Vague reference to demeanor (e.g. prospect. juror seemed "inattentive" or "disinterested"), especially if unaccompanied by any other specific reason.
  - Occupation and/or education, especially if based on concern that juror not sophisticated enough and case doesn't involve technical evidence. (*See Reynoso* (9th Cir. 2010); *P. v. Muhammad* (2005) 108 Cal.App.4th 318.)
  - Youth and/or life experience (particularly if no other reason and nothing in record, such as questionnaires, to confirm).
  - Length of residency in local community.
  - Concern that bilingual juror might disregard official translation of court interpreter. (But difficulty understanding English is solid reason.)
  - **Any reason that mischaracterizes prospective juror's comments or responses during voir dire.**

C. Trial Court Determination of Purposeful Discrimination (Step 3)

- **Burden Back to Def.**: After prosecutor states his/her race-neutral reasons, the *burden of persuasion* is on the defendant to show that reasons were pretextual and that pros. actually struck juror(s) based on their race. (*Purkett,* 514 U.S. at 768.)

- **Prosecutor's Credibility**: In step 3 of *Batson*, the trial judge must assess prosecutor's credibility and "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge." (*Snyder*, 552 U.S. at 477 (quoting *Hernandez*, 500 U.S. at 365).)

- **Need for Specific Findings**: If prosecutor's reasons are supported by the record and are inherently plausible, trial judge need not question the prosecutor or make detailed findings. But if no support for reason appears in record or reasons seem implausible, judge must make specific findings. (*People v. Silva* (2001) 25 Cal.4th 345.)

- **Comparative Juror Analysis (CJA)**: Defense at trial or on appeal may point to non-minority jurors with similar traits of those who were struck. Pros. should then point to other traits of non-minority jurors that made them more acceptable (e.g., law enforcement connections/experience). Trial court must then determine if prosecutor's stated reasons are pretextual.
    - "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to service, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241.)
    - Reviewing courts may examine not only stated reasons but also differences in prosecutor's questioning of prospective jurors (disparity in questioning). (*Miller-El*, 545 U.S. at 255-261.)
    - CJA can apply to both voir dire and the jury questionnaires of all venire members. (*Green v. LaMarque* (9th Cir. 2008) 532 F.3d 1028, 1030.)
    - Can be raised for first time on appeal or on federal habeas.
    - The Ninth Circuit requires federal courts to perform CJA even if it hasn't been raised by the petitioner. [In fact, Ninth Circuit says CJA applies to step 1 of *Batson* as well as step 3. *Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139. CSC says it only applies to step 3.].
    - Both USSC and CSC have recognized that CJA based on a "cold appellate record may be very misleading" and that exploration of claim at trial might have revealed that jurors "were not really comparable." (*Snyder*, 552 U.S. at 483; *see also People v. Lenix* (2008) 44 Cal.4th 602, 622-24 [discussing "inherent limitations" of CJA].)
    - But Ninth Circuit Court of Appeals and federal district courts more than occasionally grant habeas relief on *Batson* claims based, at least in part, on comparative juror analysis done for first time on habeas.
    - CJA is most effectively used as a tool when it is combined with a dubious explanation for a challenge, or an apparent pattern of excluding minority prospective jurors.
    - **"The inherent limitations of comparative juror analysis can be tempered by creating an inclusive record." *Lenix*, 44 Cal.4th at 624.**

- **Demeanor-based reasons**: Trial court may accept a demeanor-based reason even if the court did not personally observe the relevant aspect of the prospective juror's demeanor. (*Thaler v. Haynes* (2010) 559 U.S. 43, 130 S.Ct. 1171, 1174.)
    - In *Thaler* the judge who denied *Batson* motion did not preside during voir dire of juror in question. (But the record showed that the juror's responses during voir dire were light-hearted, supporting the prosecutor's reason.)

- But U.S. Supreme Court also has stated that a trial judge's first-hand observations of a prospective juror's demeanor are of "great[] importance." (*Snyder*, 552 U.S. at 477.)
- If demeanor of prospective juror is primary reason for strike, this may blunt any later attempts by appellate counsel to rely on CJA. (*See Lenix*, 44 Cal.4th at 634 (concurring opn. of Chin & Moreno).)

- **Stand or fall on Stated Reasons:** On appeal, neither AG nor reviewing court can rely on possible [or even obvious] reasons why a prosecutor struck a minority juror, if they were not articulated at trial by the prosecutor.
  - "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis." (*Miller-El*, 545 U.S. at 252.)

III. FEDERAL HABEAS REVIEW (Achilles Heel for *Batson* claims)

A. AEDPA Standards (Theory vs. Reality)

- Under 28 U.S.C. § 2254(d)(1), federal habeas relief is barred unless state court decision was contrary to, or involved an unreasonable application of, clearly established Federal Law (i.e. *Batson* and its U.S. Supreme Court progeny).
  - In theory, this should be an extraordinarily high standard, but fed. courts often find state court decision "contrary to" or "unreasonable application" of *Batson* in various situations, including:
    - Trial court uses wrong standard in Step 1.
    - Federal court finds, contrary to state court, that defendant did make out a PF case, and trial court has not made an alternate ruling on the ultimate question of intentional discrimination.
    - State appellate court speculates on reasons why a prosecutor might have excused a minority juror.

- Under 28 U.S.C. § 2254(d)(2), federal habeas relief is barred unless the state court's factual determination was based on an unreasonable determination of facts in light of evidence presented in state court.
  - This evidence usually is the record of the *Batson/Wheeler* hearing and any juror questionnaires included in the direct appeal record.

- One race-based reason can overshadow several other racially-neutral reasons. (*See Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351; *Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174.)
  - In *Kesser*, the prosecutor made reference to "dark skin" of Native American prospective jurors. Reasons included that tribe workers associate more with the tribe's culture than with "the mainstream system" and that Native Americans "are sometimes resistive of the criminal justice system generally and somewhat suspicious of the system."

- "[T]he prosecution's proffer of one pretextual explanation naturally gives rise to an inference of discriminatory intent, even where other, potentially valid explanations are offered." (*Ali*, 584 F.3d at 1192.)

- Federal courts will find *Batson* violation if it concludes that the prosecutor was motivated in "substantial part by discriminatory intent." (*Snyder*, 552 U.S. at 485; *Cook v. LaMarque* (9th Cir. 2010) 593 F.3d 810, 815.)
  - Thus, even if prosecutor had other reasons that would have prompted him/her to excuse prospective juror apart from race (i.e. no "but for" causation), fed. Court still could find racial discrimination.

- Failure to inquire into subject matter cited as reason for strike may be interpreted as evidence of pretext. (*Miller-El*, 545 U.S. at 244; *Ali*, 584 F.3d at 1192-93.)

B. Evidentiary Hearings in Federal Court

- Appropriate when fed. Court finds that trial court erred in finding no PF case and prosecutor did not offer any reasons for the strikes.

- Also may be appropriate where fed. Court is first court to use CJA in assessing whether prosecutor's reasons are pretextual and thus prosecutor had no opportunity to explain why he/she preferred the non-struck jurors.

- Because these hearings often are ordered years after the trial, it is important to keep and maintain notes of reasons for excusing minority jurors.
  - Because fed. judge is sitting in shoes of trial court judge, a prosecutor will then "stand and fall" on the reasons given in federal court.
  - No credit given to reasons when prosecutor can only speculate on why he/she exercised a strike at trial years earlier. (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692, 700-02.)

IV. HOW TO IMPROVE CHANCES OF PREVAILING ON APPEAL & HABEAS

- **Avoid Questions with Racial Implications:** Asking potential jurors if they think the criminal justice system treats African-Americans differently or more harshly than others could raise a red flag that you are setting up blacks for strikes.
  - Better to ask more general questions like, Do you think the criminal justice system is fair? Or do you think police treat people fairly?

- **Assist the Trial Court:** Although trial courts often ask for reasons during step 1 inquiry, encourage the court to make a finding of PF case before doing so.
  - At step 1, it is appropriate to point to objective factors that would undermine any finding of a PF case, such as number of minorities in box that were passed on, number of challenges to non-minorities.
  - If court asks for reasons before making PF determination, provide them, but make clear that you only want them considered if court first finds that there is a prima facie case.

- Might want to ask court to make an alternative step 3 ruling based on the reasons.
- If court makes PF ruling without asking for reasons, consider stating your reasons anyway just for the record, in the event that an appellate court disagrees with the step 1 ruling.

- **Take Notes:** Take and keep notes on all prospective jurors struck during voir dire.
  - That way, if federal court orders evidentiary hearing years later, you will be able to refresh your memory of why you did what you did.

- **Prioritize Your Reasons**: If you have one or two very strong reasons (e.g., past run-in with law enforcement or relatives in prison or social worker-type occupation), stress that those are your primary reasons.
  - Might want to omit mention of other lesser reasons, particularly if they are for characteristics shared by non-challenged members of jury panel.

- **Be Specific**: If primary reason is based on demeanor of struck juror, be as specific as possible (e.g., refusal to make eye contact, eyes closed during voir dire, crossing arms across chest when prosecutor asked questions).
  - Though not required, helpful to have trial court confirm observations.

- **Defuse CJA**: If stated reasons could apply to other prospective jurors who have been accepted or passed on (e.g., youth, minimal work experience, short time in community), volunteer for record other more favorable traits of the non-challenged jurors.

- **Flesh Out the Record**: If *Batson/Wheeler* motion is raised and rejected during jury selection, after jury is selected, put on record how many minority jurors have been seated.

- Also, if you gave reasons for striking a minority juror which were found race-neutral by the trial court, and you subsequently struck non-minority juror(s) for the same reason, note that for the record after jury selection is completed.