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**COOL IDEAS FOR CERT. PETITIONS AND
PETITIONS FOR REVIEW**

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This article will address a handful of subjects on which appellate counsel should consider making an all-out effort to obtain plenary review by the California Supreme Court or the U.S. Supreme Court. This is not, by any means, intended as a comprehensive guide to splits of authority or important unresolved issues. Instead, this discussion will simply address a small number of issues (or issue areas) which appear ripe for full review – either because the law appears muddled or because recent developments call for re-examination of past precedents.

The developments supporting review or certiorari could, of course, be legal ones, such as recent legislation or out-of-jurisdiction authorities. But they could also represent scientific or social developments, which provide cause for reconsideration of previous assumptions in the area. For example, contemporary “developments in psychology and brain science,” providing greater insight into the “fundamental differences between juvenile and adult minds,” provided a crucial impetus for the Supreme Court’s recent decisions barring the death penalty and limiting LWOP for juvenile offenders. (See *Miller v. Alabama* (2012) 132 S.Ct. 2455, 2465.) Similarly, technological advances – whether in law enforcement tactics or in the everyday lives of Americans – may provide cause for reconsideration of how to apply “pre-digital” standards to situations which could not have been conceived at the time those standards were formulated. (See the U.S. Supreme Court’s recent opinion on cell phone searches, *Riley v. California* (2014) 134 S.Ct. 2473.)

GENERAL CONSIDERATIONS ON PETITIONS FOR REVIEW AND PETITIONS FOR CERTIORARI.

- **It’s a new day in California.** This is a new California Supreme Court, and we should not assume that it will chart the same course as the Lucas Court or the George Court. Already Justice Liu has made important contributions by casting light on ways in which the California Supreme Court’s standards appear to have diverged from the

principles of U.S. Supreme Court precedents (as reflected in the dissents and concurrences cited in these materials). Justices Cuellar and Kruger have just taken the bench, and their mark on the Court has yet to be felt. We should not have any preconceptions about what approach the Court will take in the coming years.

- **It's good to have friends.** Sometimes it will become apparent while a case is still in the Court of Appeal that it may present an especially good candidate for resolution of an important state or federal issue. In that situation, appellate counsel should consider soliciting amicus support *during the Court of Appeal briefing*. Because amicus briefs are much less common in appellate courts than in the California or U.S. Supreme Courts, an amicus organization's interest in an appeal may help communicate to the appellate court that the case is an important one.

It is especially useful where the amicus *has particular expertise as to the specific issue at stake*. Consequently, while amicus briefs by general criminal defense groups (e.g., CPDA or CACJ) can be helpful, a submission by an organization with a more specific connection to the issue may carry greater weight – e.g., innocence projects, advocacy organizations involved in drafting of the recent legislation, medical, psychological or other professional organizations.

- **Exhaustion petitions frequently aren't enough.** It's common to view federal habeas corpus as the defendant's best or only shot at future relief, following an affirmance by the California Court of Appeal. But it's essential for state appellate practitioners to realize how dramatically the U.S. Supreme Court has curtailed the availability of federal habeas relief through its very demanding application of the AEDPA standard of review. 28 U.S.C. § 2254(d)(1) allows a federal court to grant relief only where the state decision was “contrary to” or an “unreasonable application” of “clearly established” precedents of the U.S. Supreme Court. Almost every term over the past decade, the Supreme Court has reversed one or more Ninth Circuit grants of relief on the grounds that the Circuit showed insufficient deference to the state appellate court's legal analysis. Many of these have been per curiam summary reversals, which have received relatively little attention, even in the legal press. (E.g., *Glebe v. Frost* (2014) 135 S.Ct. 429; *Lopez v. Smith* (2014) 135 S.Ct. 1; *Nevada v. Jackson* (2013) 133 S.Ct. 1990; *Marshall v. Rodgers* (2013) 133 S.Ct. 1446; *Cavazos v. Smith* (2011) 132 S.Ct. 2.)

The lesson for state practitioners is that, regardless of whether the state decision was right or wrong, they should not count on the availability of federal habeas relief unless there is a “clearly established” U.S. Supreme Court precedent closely on point. The Court has repeatedly chastised the Ninth Circuit for extrapolating from a very general

Supreme Court precedent on a subject or for relying on circuit precedents “to refine or sharpen a general principle ... into a specific legal rule that this Court has not announced.” (*Marshall*, 133 S.Ct. at 1450.) If there is arguably anything unsettled about the precise standard applicable to the case at hand – especially if there is any split on the subject among state and federal courts – the prospects for federal habeas relief will be daunting. In those situations, counsel should consider a certiorari petition. § 2254(d) applies only to federal habeas. There is no such constraint – and no such deference to the state court’s legal analysis – on U.S. Supreme Court certiorari review of a state court decision.

- **Court of Appeal decisions are sometimes better candidates for certiorari than the California Supreme Court precedents they implicate.** It would be natural to assume that the U.S. Supreme Court will be more inclined to grant review of a case decided by a state supreme court, rather than an intermediate state appellate decision. But recent experience indicates otherwise. The majority of certiorari grants in California criminal cases over the past decade have concerned Court of Appeal opinions. Frequently, the cert. grants have required examination of the validity of a California Supreme Court opinion, but the U.S. Supreme Court has chosen a different case as the vehicle for its own review of the issue.¹

There could be any number of factors at work here. The U.S. Supreme Court may view the case arising from the Court of Appeal as better suited to its resolution of the issue for factual or procedural reasons.² Often, the Court may initially pass on an issue (declining cert. in the California Supreme Court case) and allow it to “percolate” for a few years, in order to see whether a split develops among other state and federal courts.

- **What’s an ideal case?** Obviously, it’s preferable to take an issue to the California

¹ E.g., *Riley v. California* (2014) 134 S.Ct. 2473 (cell phone searches) (implicating *People v. Diaz* (2011) 51 Cal.4th 84); *Navarette v. California* (2014) 134 S.Ct. 1683 (anonymous tip re reckless or drunk driving) (implicating *People v. Wells* (2006) 38 Cal.4th 1078); *Cunningham v. California* (2007) 549 U.S. 270 (*Blakely*’s application to Determinate Sentence Law) (implicating *People v. Black* (2005) 35 Cal.4th 1238); *Samson v. California* (2006) 547 U.S. 843 (parole searches) (implicating *People v. Reyes* (1998) 19 Cal.4th 743).

² For example, the Court likely chose *Cunningham*, rather than the California Supreme Court’s case, *Black*, to evaluate the constitutionality of the DSL, because *Cunningham* involved only aggravating factors concerning the current crime, rather than prior convictions or other recidivist factors.

or the U.S. Supreme Court on a “clean” case, where the issue has been clearly preserved and framed throughout the proceedings and there are no procedural impediments to resolution on the merits. Take, for example, the issue of the applicability of *Flannel* imperfect self-defense principles to imperfect defense of another person. In a 2002 capital opinion, the California Supreme Court recognized that concept of imperfect defense of another “flows logically from the interplay between statutory and decisional law.” But the Court found that, because the principle “was not a well-established doctrine” at the time of that capital trial, it did not come within the trial court’s sua sponte instructional duties. (*People v. Michaels* (2002) 28 Cal.4th 486, 530.) Three years later, however, the Court did endorse that principle and reversed a murder conviction, where the defense had specifically requested instructions on imperfect defense of another as a basis for voluntary manslaughter. (*People v. Randle* (2005) 35 Cal.4th 987.)

While *Randle* illustrates the value of a “clean,” well-preserved issue, the Supreme Court’s recent decision in *People v. Centeno* (2014) 60 Cal.4th 659 [180 Cal.Rptr.3d 649], provides a powerful counter-example. The Supreme Court found that the prosecutor prejudicially misstated and diluted the reasonable doubt through a “diagram showing the geographical outline of California.” (*Id.*, 180 Cal.Rptr.3d at 655.) The prosecutor’s use of a “simplistic hypothetical,” equating identification of the state depicted with the issues of the trial, reduced “the exacting process of evaluating the case to answering a simple trivia question.” (*Id.* at 660.) Yet, by some measures, *Centeno* was far from an ideal candidate for Supreme Court review of the recurring issues presented by prosecutors’ uses of similar diagrams or puzzles. The actual diagram had not been preserved in the record, so “we must infer from the prosecutor’s argument what the graphic looked like.” (*Id.* at 659 fn. 6.) Of still greater potential concern, defense counsel had failed to object to the diagram or the prosecutor’s argument. Consequently, the Supreme Court did not review the misconduct issue directly, but only through the framework of ineffective assistance of defense counsel. Yet still the Court found prejudicial error and reversed.

The lesson of these disparate examples is that it’s far preferable to take an issue to the state or federal high court on a clean record, unencumbered by waiver or other potential procedural obstacles. Yet, a compelling argument as to the importance of the error to the overall trial may sometimes be enough to overcome those hurdles. The Court may have chosen *Centeno* to address the hazards posed by prosecutors’ uses of diagrams and the like, because “this was a very close case” – marked by recantations and inconsistencies in the molestation complainant’s account. Hence, regardless of the legal issue for review, it is always essential to interest the Court in the underlying case and to demonstrate a likely miscarriage of justice.

I. SOME COOL TOPICS FOR PETITIONS FOR REVIEW.

- **Eyewitness Identification**³

The U.S. Supreme Court's due process standards for suggestive police identification practices date to the 1960's. Despite some preliminary hopes that the Court might revisit those standards, the Supreme Court punted on the subject in *Perry v. New Hampshire* (2012) 132 S.Ct. 716. While those older cases place some limits (albeit weak ones) on admissibility of identifications tainted by highly suggestive police practices, the Court declined to expand those rules to other circumstances, beyond police misconduct, that may grievously undermine the reliability of an identification.

As reflected in Justice Sotomayor's dissent in *Perry* and in amicus briefs filed by the American Psychological Association and other organizations, there has been abundant scientific literature in recent decades documenting the unreliability of eyewitness identifications and highlighting a number of circumstances (some of them counter-intuitive) that may or may not affect reliability:

The empirical evidence demonstrates that eyewitness misidentification is “the single greatest cause of wrongful convictions in this country.” Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures. (*Perry*, 132 S.Ct. at 739 (Sotomayor, J., dissenting) (multiple footnotes omitted).)

As a practical matter, by refusing to expand federal constitutional scrutiny of identifications in view of these new developments, the U.S. Supreme Court has effectively left it to states to fashion safeguards against convictions resting on highly unreliable identifications. A number of state courts have risen to that challenge in recent years and have developed new rules in this area, in the form of prescribed police practices for conducting identifications, refined limitations on admissibility, and/or expanded jury instructions reflecting the

³ Some of the out-of-state authorities cited here are taken from briefs filed by FDAP panel attorneys Thea Greenhalgh and Barry Karl. Those briefs also include journal articles and other secondary sources reflecting the contemporary literature on the infirmities of eyewitness identifications.

contemporary understanding of factors undermining reliability. (E.g., *State v. Henderson* (2011) 208 N.J. 208 [27 A.3d 872]; *State v. Lawson* (2012) 352 Or. 724 [291 P.3d 673]; *State v. Ledbetter* (2005) 275 Conn. 534 [881 A.2d 290]; *Commonwealth v. Santolia* (1997) 424 Mass. 837 [680 N.E.2d 1116].)

It has been decades since the California Supreme Court granted plenary review on the subject of eyewitness identifications. (Cf. *People v. McDonald* (1984) 37 Cal.3d 351 (admissibility of expert testimony); *People v. Wright* (1988) 45 Cal.3d 1126 (no sua sponte duty to instruct on identification factors)) It is past time for the Court to revisit its standards in this area, just as its counterparts in other states have done.

In view of the Prop. 8 limitation on independent state constitutional exclusionary remedies (*In re Lance W.* (1985) 37 Cal.3d 873), it may be unrealistic to expect to impose new limits on *admission* of eyewitness identifications. But California's form instructions on eyewitness identification factors are certainly in need of overhaul. In particular, CALCRIM 315 continues to list the witness's certainty about an identification as a material factor in evaluating its reliability. CALCRIM's inclusion of the witness certainty factor is especially pernicious because it effectively ratifies the common misperception that there is a strong correlation between certainty and accuracy. The modern scientific literature has debunked that assumption. As the Oregon Supreme Court recently observed, "Despite widespread reliance by judges and juries on the certainty of an eyewitness's identification, studies show that, under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy." (*State v. Lawson*, 291 P.3d at 704.)

The Georgia Supreme Court found the inclusion of witness certainty in that state's eyewitness instruction rose to the level of "harmful error" by distorting the jurors' evaluation of reliability. (*Brodes v. State* (2005) 279 Ga. 435 [614 S.E.2d 766].) Other state courts have also disapproved inclusion of the certainty factor or have required a cautionary instruction. (E.g., *Commonwealth v. Santoli* (1997) 424 Mass. 837 [680 N.E.2d 1116]; *State v. Guzman* (Utah 2006) 133 P.3d 363.)

The California Supreme Court previously held that there was no sua sponte duty to modify or delete the witness certainty factor from CALJIC 2.92 (the precursor to CALCRIM 315). (*People v. Ward* (2005) 37 Cal.4th 186, 213.) However, that was only one of dozens of issues in *Ward*, a capital appeal, and the Court devoted barely two paragraphs to the subject. Moreover, the additional scientific literature and out-of-state cases over the past decade disapproving that factor may provide cause for reconsideration. Of course, this would present a still stronger issue if defense counsel *did* request a modification or pinpoint instruction eliminating the certainty factor.

In addition to challenging the witness certainty factor, counsel should consider other ways in which the current form instruction fails to provide adequate guidance to jurors. For example, counsel may want to compare CALCRIM 315 with the very detailed eyewitness identification instructions which the New Jersey Supreme Court adopted a year after its *Henderson* opinion. {http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf}

- **Admission of Rap Lyrics.**⁴

Unfortunately, many of our clients have given police and prosecutors a gift by writing their own rap lyrics and often posting videos, as well. Often the lyrics boast of the characters' violent exploits, declare loyalty to a particular gang, and vow retribution against anyone who shows disrespect. It has become common for prosecutors to seek admission of the rap songs and videos, usually citing a putative purpose such as intent, motive, or proof of gang affiliation.

Obviously, the admission of these disturbing lyrics (and accompanying videos) poses serious issues under traditional evidentiary principles, including the general limits on "other offenses" and propensity evidence (Evid. Code §§ 1101, 1103) and on the ground that their inflammatory and prejudicial effect outweighs any legitimate probative value (*id.*, § 352). Moreover, because these are, after all, songs – i.e., artistic expression – they also pose significant free speech concerns under the First Amendment and its California counterpart (Cal. Const., art. I, § 2(a)).

Only two published California appellate opinions have explicitly addressed the admissibility of rap lyrics in criminal trials. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1372-1374; *People v. Zepeda* (2008) 167 Cal.App.4th 25.) Both were murder cases arising out of alleged gang altercations, and the charges in both cases included gang enhancements under Pen. Code § 186.22. As with the lyrics at issue in many cases, the songs' respective narrators presented themselves as tough, violent gun-wielding gangsters, who would not hesitate to shoot anyone who showed disrespect. Both opinions found that the lyrics had strong probative value, especially as to each defendant's affiliation to the specific gang at issue, which outweighed the lyrics' prejudicial impact. For example, the lyrics admitted in *Olguin* referred to a specific neighborhood gang, "Southside," and also included apparent references to one defendant's "gang moniker" and some of his activities. "As such, they demonstrated

⁴ The discussion of this issue is based on a research memo by Kevin King, a UC Hastings third-year law student working with FDAP as a "Lawyers for America" fellow. That memo also addresses a number of unpublished California opinions on the subject. We will be posting that memo on FDAP's web site, when it is finalized.

his membership in Southside, his loyalty to it, his familiarity with gang culture, and inferentially his motive and intent on the day of the killing.” “The mere fact that the lyrics might be interpreted as reflective of a generally violent attitude could not be said ‘substantially’ to outweigh their considerable probative value. It looks to us like the trial court got it right....” (*Olguin* at 1373.) Similarly, the lyrics in *Zepeda* were found to demonstrate the Norteños defendants’ violent hostility toward Sureños and also included localized references, such as an area code and a particular apartment complex. (*Zepeda* at 32-34.)⁵

The California Supreme Court recently sidestepped deciding the admissibility, during the penalty phase of a capital trial, of violent rap lyrics, which “sp[oke] in the first person about shooting police officers.” (*People v. Nelson* (2011) 51 Cal.4th 198, 222.) In addition to the special circumstance murder (of a carjacking victim), the convictions in *Nelson* included the attempted murders of two officers. While it commented that the lyrics “certainly express a remorseless attitude toward murder,” the Court declared “we need not resolve the admissibility question,” because there was no “reasonable possibility” of any prejudicial error in view of the strength of the aggravating evidence. In any event, due to the much greater materiality of matters of character and criminal propensity in a capital penalty phase, *Nelson* casts little light on the more common problem of presentation of such evidence during a guilt phase trial.

The relatively few published cases on rap lyrics mask the frequency with which such issues are arising in California trials, especially those including gang enhancements. A number of unpublished appellate opinions have either upheld the admission of such lyrics against section 352 challenges or have found any error harmless. Moreover, in some of those unpublished cases, the lyrics arguably did not have as strong a “nexus” to the charged crimes as the localized references and other details provided in the published cases, *Olguin* and *Zepeda*.

The New Jersey Supreme Court has recently undertaken an exhaustive analysis of the problems posed by admission of “violent and profane” rap lyrics. (*State v. Skinner* (2014) 218 N.J. 496 [95 A.3d 236].) The prosecution had argued that the lyrics were probative of motive, intent and the defendant’s “street culture of violence and retribution,” but “there was no argument ... that the rap lyrics constituted direct evidence” of the charged attempted murder and related charges. (*Skinner*, 95 A.3d at 238, 250.) The New Jersey Supreme Court

⁵ E.g., “This line informs the Chico community (area code 530) that they are a serious gang.” (*Zepeda*, 167 Cal.App.4th at 33 fn. 7.)

found that, in the absence of any “strong nexus” to the specific charged crimes, the admission of such evidence flouted the traditional prohibition on criminal propensity and also had the effect of penalizing artistic expression and free speech.

[T]he violent, profane, and disturbing rap lyrics authored by defendant constituted highly prejudicial evidence against him that bore little or no probative value as to any motive or intent behind the attempted murder offense with which he was charged. The admission of defendant's inflammatory rap verses, a genre that certain members of society view as art and others view as distasteful and descriptive of a mean-spirited culture, risked poisoning the jury against defendant. *Fictional forms of inflammatory self-expression, such as poems, musical compositions, and other like writings about bad acts, wrongful acts, or crimes, are not properly evidential unless the writing reveals a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense* for which a person is charged, and the probative value of that evidence outweighs its apparent prejudicial impact. (*Skinner*, 95 A.3d at 238-239.)

The Court highlighted the danger of treating the violent themes of “artistic self-expressive endeavors” as proof that the author “has acted in accordance with those views. One would not presume that Bob Marley ... actually shot a sheriff or that Edgar Allen Poe buried a man beneath his floorboards.” (*Skinner* at 251.)⁶

Although it does not pose an admissibility question, a case currently before the U.S. Supreme Court also touches on similar dangers posed by treatment of fictional or artistic works as proof of criminality. *Elonis v. United States*, No. 13-983 {argued Dec. 1, 2014}, challenges a criminal threats conviction based on the defendant’s Facebook posting of a series of song lyrics (which the posts explicitly characterized as “fictional”) describing various ways of killing his estranged wife. An amicus brief filed in *Elonis* by “rap music scholars” and other groups traces the “origins of hip hop and rap,” their common use of “hyperbole,” and their role as “an explicit, even confrontational, vehicle for political commentary and resistance.”⁷

⁶ Two professors who have testified as experts in response to presentation of such lyrics have offered two additional examples in an Op-Ed article. “Nobody believes that Johnny Cash shot a man in Reno or that Bret Easton Ellis carried out the gory murders described in ‘American Psycho’....” (Neilson & Kubrin, “Rap Lyrics on Trial,” *New York Times* (Jan. 13, 2014).)

⁷ Amicus Curiae Brief of the Marion B. Brechner First Amendment Project and Rap Music Scholars, etc., *Elonis v. United States*, No. 13-983, at pp. 6, 8, 11 (Aug. 18, 2014).

Regardless of how the U.S. Supreme Court decides the criminal threats issue in *Elonis*, the grave concerns raised in both *Elonis* and the New Jersey Supreme Court’s opinion, *Skinner*, on treatment of rap lyrics as proof of criminality should provide a good “hook” to petition the California Supreme Court to clarify the limits on admission of rap lyrics in California trials. The *Skinner* opinion provides a sensible blueprint for evaluating the admission of such evidence, with particular emphasis on the necessity of a “strong nexus” between the lyrics and the specific circumstances of the charged crime. Additionally, the risks of criminalizing works of self-expression – and treating them as proof of the author’s propensity to carry out the kinds of violent acts described in the fictional work – echo the concerns the California Supreme Court itself highlighted in *In re George T.* (2004) 33 Cal.4th 620. (In *George T.*, the Court, recognizing the First Amendment interests at stake, reversed a juvenile adjudication based on a high school student’s “ambiguous” poem, including the line “I can be the next kid to bring guns to kill students at school.”)

II. SOME COOL TOPICS FOR PETITIONS FOR CERTIORARI.

The purpose of this section is to highlight several federal constitutional issues on which California cases (including California Supreme Court opinions) appear at odds with U.S. Supreme Court precedents. Obviously, all the topics below will also require petitions for review.

- ***Batson* – Lots of Potential Cert. Questions**

Although the California Supreme Court barred racially-motivated peremptory challenges (under the Cal. Constitution) 6 years before the Supreme Court adopted a similar rule under the equal protection clause, the California Supreme Court has accorded such extraordinary deference to prosecutors’ reasons (stated or unstated) and to trial courts’ discretion in recent decades that it has become almost impossible to prevail on a *Wheeler-Batson* claim in state court. Indeed, as Justice Liu has documented, “In the 102 cases where this Court has addressed a *Batson* claim over the past 20 years, we have found *Batson* error only once – and that was 12 years ago. [Citation.]” (*People v. Mai* (2013) 57 Cal.4th 986, 1060 (Liu, J., concur. opn.); see *People v. Harris* (2013) 57 Cal.4th 804, 892-898 (Liu, J., concur. opn.) (appendix, listing the 102 cases).)⁸

(Not surprisingly, the rap scholars’ amicus brief features a more eclectic table of authorities than the average appellate filing, including works by Jay Z., Notorious B.I.G., Eminem, and many others.)

⁸ Since Justice Liu compiled that list in *Harris* in Aug. 2013, the California Supreme Court has rejected *Batson* claims in at least 9 more cases, all of them capital appeals.

In a series of recent dissents and concurrences in capital cases, Justice Liu has identified a number of systemic defects in the California Supreme Court's *Batson* jurisprudence. (See *People v. Mai*, 57 Cal.4th at 1058-1078 (Liu, J., concur. opn.) ; *People v. Williams* (2013) 56 Cal.4th 630, 699-728 (Liu, J., dis. opn.); *People v. Harris*, 57 Cal.4th at 863-891 (Liu, J., concur. opn.); *People v. Chism* (2014) 58 Cal.4th 1266, 1338-1352 (Liu, J., dis. opn.).) Here's a quick run-down:

Batson Stage 1 (prima facie case): “[O]ur *Batson* jurisprudence on what is required to show a prima facie case of discrimination appears noticeably out of step with principles set forth by the United States Supreme Court in two crucial respects.” (*Harris*, 57 Cal.4th at 864.)

- “First, by **scouring the record for nonobvious reasons that might explain the peremptory strike of a minority juror**, and by relying on such reasons to negate the inference of discrimination otherwise arising from the circumstances, this court has improperly elevated the standard for establishing a prima facie case beyond the showing that the high court has deemed sufficient to trigger a prosecutor's obligation to state the actual reasons for the strike.” (*Ibid.* (emphasis added).)
- “Second, while regularly invoking nonobvious reasons that a prosecutor might have given for striking a minority prospective juror, this court has **erroneously prohibited the use of comparative juror analysis** to test whether a hypothesized reason was likely the actual reason for a particular strike.” (*Ibid.* (emphasis added).) As *Wheeler-Batson* aficionados will recall, for years the California Supreme Court had refused to conduct juror comparisons, even at Stage 3. It has only recently (and reluctantly) begun to do so at Stage 3, under compulsion of *Miller-El v. Dretke* (2005) 545 U.S. 231.)

Batson Stage 3 (evaluation of DA's reasons):

- **Deference improper where trial court summarily denies motion without explicit, on-the-record analysis.** “Today's decision deepens a split of authority among federal and state appellate courts on the adequacy of a *Batson* ruling where the trial court has engaged in no explicit analysis of the validity of the prosecutor's facially neutral explanation.” (*Williams*, 56 Cal.4th at 700.) “[D]eference is unwarranted ‘when a trial court fails to make explicit findings or to provide any on-the-record analysis of the prosecutor’s stated reasons...’” (*Mai*, 57 Cal.4th at 1059.)
- **Deference improper where trial court did not conduct juror comparisons.** “[N]othing in the record indicates that the trial court ... compared [the stricken juror] to white jurors whom the prosecutor did not strike.” (*Chism*, 58 Cal.4th

at 1349.)

- **California’s continuing limits on comparative juror analysis.** California Supreme Court “improperly limits comparative juror analysis” by refusing to apply it “also to nonblack jurors seated *after* the trial court’s rulings,” unless defense specifically renewed *Batson* motion. (*Chism*, 58 Cal.4th at 1350 (emphasis in original.)

Any one of these would present an appropriate candidate for a cert petition. Justice Liu has already done most of the work, by laying out the incompatibility of the California opinions with the U.S. Supreme Court’s *Batson* jurisprudence. (Also, don’t be disheartened by the cert. denials in those immediate cases. For any number of reasons, those cases might have been viewed as uninviting cert. candidates. As capital trials, they likely had much more voluminous voir dire records than other cases in which similar *Batson* issues frequently arise. Also, as reflected in Justice Liu’s *concurrences* in the dispositions in *Mai* and *Harris*, the *Batson* denials in those cases may well have been legitimate, even under a correct framing of the standards.)

Although not highlighted in Justice Liu’s dissents and concurrences, another common *Batson* denial ground also appears ripe for re-examination, especially in light of recent events.

- **Disparate impact – implications of reliance on negative experiences with police or criminal justice system.** One of the most commonly accepted assertedly-“neutral” reasons for a peremptory challenge is that the minority juror or someone he or she knows has had some negative experience with police or the criminal justice system – even if the matter was remote and even if the juror gives assurances he or she can sit fairly. As reflected in the public debate over recent police killings of young African-American men, experiences with police and the criminal justice system represent one of the areas of American life with the most pronounced racial divides.⁹ The pervasive prosecutorial reliance on any negative experience with police – for example, of a distant relative or an incident decades earlier – and the judicial acceptance of this as a “race-neutral” reason may substantially curtail minority representation on juries. This common practice raises the question of what role, if any, “disparate impact” analysis should play in the *Batson* assessment

⁹ See, e.g., “On Racial Issues, America Is Divided Both Black and White and Red and Blue,” *Washington Post* (Dec. 27, 2014) (describing polling showing that, “[f]or more than two decades, African Americans have been far more negative in their assessments of whether there is equal treatment of minorities and whites in the criminal justice system”).

of the legitimacy of asserted reasons for a challenge.

- ***Apprendi* and Priors.**

Apprendi lives! The U.S. Supreme Court has continued to enforce and even expand *Apprendi*'s mandate of jury determination and proof beyond a reasonable doubt of sentence enhancing facts. For example, the Court recently overruled its prior precedents and extended *Apprendi* to "mandatory minimums." "[A]ny fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." (*Allelyne v. United States* (2013) 133 S.Ct. 2151, 2155.)

To date, the Court has not abrogated the *Almendarez-Torres* exception allowing judicial, rather than jury, determination of the "fact of a prior conviction"¹⁰ (despite continuing calls by Justice Thomas for re-examination of *Almendarez-Torres*). However, in a recent decision construing the federal Armed Career Criminal Act, the Court has invoked Sixth Amendment *Apprendi* principles in proscribing "judicial factfinding beyond the recognition of a prior conviction." (*Descamps v. United States* (2013) 133 S.Ct. 2276, 2288.) In *Descamps*, the Court overruled a line of Ninth Circuit precedents which had allowed a federal sentencing court to look beyond the elements of the prior conviction offense to plea colloquies or trial evidence to find additional facts necessary to support the sentencing enhancement in the current offense. (*Descamps* at 2289.)

[T]here's the constitutional rub. The Sixth Amendment contemplates that a jury – not a sentencing court – will find such facts, unanimously and beyond a reasonable doubt. And **the only facts the court can be sure the jury so found are those constituting elements of the offense** – as distinct from amplifying but legally extraneous circumstances. [Citation.] Similarly ... when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; **whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment.** [Citation.] (*Descamps*, 133 S.Ct. at 2288 (emphasis added).)

One Sixth District case has already held that *Descamps* prohibits a sentencing court from making any findings as to "disputed facts" in the prior case, beyond the offense elements. (*People v. Wilson* (2013) 219 Cal.App.4th 500.) The Sixth District reversed a "strike"

¹⁰ *Apprendi v. New Jersey* (2000) 530 U.S. 466, 487-490; see *Almendarez-Torres v. United States* (1998) 523 U.S. 224.

finding where the sentencing court had looked to the prior preliminary hearing to resolve a disputed question whether the prior vehicular manslaughter involved Wilson's personal infliction of great bodily injury (as opposed to proximate causation). The *Wilson* sentencing court's resolution of a disputed factual issue went beyond even the California Supreme Court's precedents, since that Court had stated that a sentencing court does *not* make any "independent determination regarding a disputed issue of fact relating to the defendant's prior conduct." (*People v. McGee* (2006) 38 Cal.4th 682, 706.) Consequently, the immediate issue in *Wilson* did not require the Sixth District to consider "whether the broader application of *Apprendi* and *Descamps* to California's sentence enhancement scheme would leave intact the kind of findings ... heretofore endorsed under California law" (*Wilson*, 219 Cal.App.4th at 516).

Even aside from the broader question of the continued survival of the *Almendarez-Torres* prior conviction exception, two aspects of California's current regimen for determination of "strikes" and other enhancements appear contrary to *Apprendi* and *Descamps*:

- **Guerrero-type findings.** *Wilson* was a relatively easy case, because the preliminary hearing reflected a genuine factual dispute regarding the nature of Wilson's prior conduct. "To resolve the issue, the sentencing court was required to weigh the credibility of various witnesses and statements." (*Wilson*, 219 Cal.App.4th at 515.) But, under a literal reading of *Descamps*, any judicial factfinding regarding "extraneous" or "superfluous" facts beyond the *elements* of the prior crime offends the Sixth Amendment, even if those "extraneous" facts were seemingly not in dispute. In particular, the Supreme Court condemned any factfinding based on plea colloquies, including any putative admissions in the defendant's own statements. (*Descamps*, 133 S.Ct. at 2288-2289.) ***Descamps* appears to call into question the entire *Guerrero* line of cases¹¹ allowing sentencing courts to go "behind the judgment" and to consider the "record of conviction" to find additional facts (e.g., personal infliction of great bodily injury, personal use of a deadly weapon, etc.) beyond the elements of the prior offense.** Per *Descamps*, a sentencing court cannot "rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence." (*Descamps* at 2289.)
- **"Strikes" based on juvenile adjudications.** The Supreme Court's renewed emphasis on the impropriety of "judicial factfinding" to enhance a defendant's current sentence provides further cause for review of the California Supreme

¹¹ *People v. Guerrero* (1988) 44 Cal.3d 343.

Court's prior holding allowing a juvenile adjudication to serve as a "strike." (*People v. Nguyen* (2006) 46 Cal.4th 1007.) In her final year on the bench, Justice Kennard reiterated her dissent from the *Nguyen* holding: "the Sixth Amendment's right to a jury trial does not permit a trial court to impose additional punishment ... based on prior juvenile conduct for which there was no right to a jury trial." (*People v. Chism* (2014) 58 Cal.4th 1206, 1338 (Kennard, J., dis. opn.)) Because there was never an opportunity for jury factfinding on any aspect of the juvenile offense, enhancing a current sentence for a juvenile conviction represents an especially flagrant form of the "judicial factfinding" that *Descamps* found intolerable under the Sixth Amendment.

- **California Courts' Pervasive Misapplication of *Chapman* Standard.**

In his dissent from a recent death penalty affirmance, Justice Liu addressed one of the recurring frustrations encountered by criminal appellate counsel – the California courts' apparent dilution of the rigorous harmless error analysis required by *Chapman v. California* (1967) 386 U.S. 18. (*People v. Jackson* (2014) 58 Cal.4th 724, 774-808 (Liu, J. dis. opn.)) The immediate occasion for Justice Liu's *Jackson* dissent was the majority's declaration that any error in the defendant "being forced, without legal justification, to wear a ... stun belt throughout his trial," was harmless under *Chapman*. Although much of the dissent's discussion is specific to distortions of the trial process likely caused by the stun belt (including its effect on the defendant's demeanor), Justice Liu also places the issue in the context of a more pervasive pattern, covering a range of constitutional errors.

Regrettably, today's decision is only the most recent instance in which this Court has deviated from *Chapman*'s mandate. The deviations have occurred in capital cases [citations], as well as non-capital cases [citation]. Given the precedential force of these decisions, it is reasonable to worry that *Chapman* will continue to mean something different in the courts of California than what the high court has repeatedly said it means. (*Jackson*, 58 Cal.4th at 808.)

- **Requiring defendant to prove prejudice.** Justice Liu's *Jackson* dissent highlights one recurring problem. Although the California Supreme Court recites the *Chapman* formulation, in practice, the Court's harmless error analysis frequently demands that a defendant demonstrate prejudice, contrary to *Chapman*'s mandate that the "beneficiary of a constitutional error," i.e., the state, bears the burden to "prove beyond a reasonable doubt that the error ... did not contribute to the verdict." (*Chapman*, 386 U.S. at 24.) Thus, in *Jackson*, the majority held that "reversal ... is unwarranted where the record ... is devoid of evidence" that the stun belt "had any adverse effect." (*Jackson*,

58 Cal.4th at 740 (maj. opn.) But, as Justice Liu observed, that analysis “inverts *Chapman*’s burden allocation.” (*Id.* at 778 (Liu, J. dis. opn.)) “Today’s opinion effectively puts the burden on defendant to demonstrate that the erroneous use of the stun belt was prejudicial.” (*Ibid.*)

California Appellate Defense Counsel (CADC) filed an amicus brief supporting the petition for writ of certiorari in *Jackson*.¹² The CADC amicus brief (authored by panel attorney Richard Neuhoff) includes a survey of numerous California opinions, both published and unpublished, declaring various constitutional errors harmless under *Chapman*. In addition to the burden-shifting problem highlighted in Justice Liu’s *Jackson* dissent, the brief identifies several other recurring errors in California courts’ applications of *Chapman*:

- **Viewing Evidence in Favor of the Prosecution Even When Evaluating Prejudice.** The amicus brief catalogs California appellate cases finding various errors harmless based on the putative strength of prosecution evidence, without apparent consideration of defense testimony contesting that evidence.
- **“California Appellate Courts Failing to Consider Factors Beyond the Evidence Itself.”** The brief lists examples of appellate courts according no significance to recognized indicia of prejudice, such as lengthy deliberations, readback requests, and prosecutorial exploitations of trial errors during closing arguments.
- **“California Appellate Courts Invading the Province of the Jury by Engaging in Appellate Fact-Finding.”** The amicus brief cites examples of harmless error discussions describing victim testimony as “credible, consistent, and plausible” and defendants’ accounts as “implausible.”

The U.S. Supreme Court denied cert. in *Jackson*. However, as always, it is dangerous to read too much into a cert. denial. The Court may have been reluctant to take up *Jackson*, because doing so would effectively have required it to address the merits of the underlying error of requiring the defendant to wear a stun belt. Conceivably, the Court would be more willing to scrutinize California courts’ conception of *Chapman* in a case posing a more common constitutional error, involving erroneous jury instructions or admission or exclusion of evidence. Justice Liu’s dissent and the CADC amicus brief provide valuable tools for illustrating that the problem goes beyond one intermediate court’s misapplication of the standard and reflects a more pervasive error in the California courts’ framing of *Chapman*, such as shifting the burden to the defendant, failure to consider prejudice indicia, etc.

¹² Brief of Amicus Curiae California Appellate Defense Counsel, etc., *Jackson v. California*, No. 14-5760 (Sept. 12, 2014).