

FIRST DISTRICT APPELLATE PROJECT

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Post-Conviction Litigation of Stage 1 (Prima Facie Case) *Batson* Claims in California Courts Following the U.S. Supreme Court's Decision in *Johnson v. California*

July 2005

This memorandum is for attorneys who are raising, or who have raised and lost, Stage 1 *Batson* issues. The memorandum sets forth some possible options you might consider, in response to the United States Supreme Court's decision in *Johnson v. California*.

On June 13, 2005, in [Johnson v. California](#), ___ U.S. ___, 125 S.Ct. 2410, the Supreme Court of the United States held that the California Supreme Court had placed too high a burden on movants to make a prima facie showing of discriminatory use of peremptory challenges. The state high court had held that a prima facie case of discriminatory use of peremptory challenges is established only when the movant shows that it is **more likely than not** that the juror was challenged for an improper reason. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1307.) The U.S. Supreme Court held, instead, that "a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw **an inference that discrimination has occurred.**" (*Johnson v. California*, 125 S.Ct. at 2417 (emphasis added).) The Court made clear that "California's 'more likely than not' standard is at odds with the prima facie inquiry mandated by *Batson*." (*Id.* at 2419.) (Unless otherwise indicated, subsequent references to "*Johnson*" are to the United States Supreme Court decision in that case.)

Johnson should be fully retroactive to pending cases and cases already final on direct review. The Court did not appear to create a new rule. The Court was merely stating what the law was under *Batson* all along. Because *Johnson* did not announce a new rule, its holding applies to all cases: whether or not final on direct review. Of course, there may be procedural barriers – such as the federal habeas statute of limitations – to using *Johnson* in some closed cases and many

petitioners will not obtain a new hearing on their *Batson* Stage 1 claim, even though the *Batson* claim was decided under an incorrect standard. And, for other petitioners, the state or federal court may conclude the petitioner is not entitled to relief because, even under the proper standard, a prima facie case was not established.

This memorandum will describe possible courses of action in making use of *Johnson*. Factors to consider in deciding what action, if any, to take are also provided. Given the many factors at play, that decision will be highly case specific and it is not possible, with the possible exception of the cases still pending in the court of appeal, to generalize as to what action is best in each category of cases.

Available Procedures

- A. Direct Appeal Still Pending In State Court/ Issue Was Raised (or Will Be Raised) on Appeal:** In any pending direct appeal in which appellant raised, or intends to raise, error in failing to find a prima facie case, *Johnson* is fully applicable and counsel can argue that the trial court – previously bound by the California Supreme Court’s decisions – necessarily applied the wrong standard. Remember, this does not involve raising a new issue, it’s a matter of presenting new controlling authority. Here are some options, depending on the status of the case:

Status	Option(s)
Pre-AOB	In the AOB, rely on <i>Johnson</i> to establish that the trial court applied the wrong standard in finding no prima facie case.
Post-AOB/Pre-Reply Brief	File a supplemental opening brief, accompanied by an application to file the same. Or simply rely on <i>Johnson</i> in the reply brief. As long as the issue was already raised in the opening brief, it is proper to simply add the new authority in the reply brief.

Post-AOB/Pre-Argument	Pre-argument new-authority letter. Although the Rules of Court don't specifically authorize such filings in the Court of Appeal, some divisions expressly authorize them in oral argument notices and others will routinely accept them. If you're not sure on whether such a letter will be accepted or whether it requires leave of the court, check with your project buddy.
Post-Argument/Pre-Opinion:	Letter to the court giving notice of new authority. Note: such a letter may technically require a motion to vacate submission.
Post-Opinion/Court of Appeal Opinion Not-Yet-Final	Petition for rehearing. If it is past the normal 15 days for a petition for rehearing (rules 25(b)(1), 33.1), a late petition may be filed with the permission of the court. "Before the decision is final and for good cause, the presiding justice may relieve a party from a failure to file a timely petition or answer" (rule 25(b)(4)).
Final in Court of Appeal; Petition for Review Not Yet Filed	Simply add the new authority to the petition for review.
Petition for Review Pending	File a supplemental letter in the California Supreme Court advising the Court of the new authority and its applicability to your case.

B. Petition for Review Denied; 90-Day Certiorari Window Still Open; Issue Raised in Court of Appeal

Option 1: Petition for certiorari asking the U.S. Supreme Court to vacate the decision below, and remand for reconsideration in light of *Johnson*. The U.S. Supreme Court has already issued one such GVR (grant, vacate & remand) order in light of *Johnson*. (*People v. Allen*, U.S.S.Ct. No. 04-6176, Order filed June 20, 2005.) Upon return of the case to the state Court of Appeal, the case would again be in the posture of a pending direct appeal, with the original appointment of counsel still open.

Note: if the supreme court denies certiorari, you would then have available the options described below in Category C.

Option 2: Move in the court of appeal for recall of the remittitur. If the remittitur is recalled, the case would again be in the posture of a pending direct appeal, with the original appointment of counsel still open. If the court declines to recall the remittitur, filing a federal habeas corpus petition would be a logical next step.

Option 3: Have your client go straight to federal court with a habeas corpus petition. A state court of appeal appointment does not cover federal habeas corpus proceedings. Under this option, counsel might consider sending the client the appropriate federal habeas corpus petition and in forma pauperis forms.¹

C. Petition for Review Denied; 90-Days to File Cert. Petition Closed; AEDPA SOL Has Not Run:

Option 1: state habeas corpus petition

Option 2: motion for recall of the remittitur

Note: as to options 1 and 2 in this category, since the direct appeal is already final, preparation of the habeas petition or motion to recall may not be compensable. Counsel could ask to be appointed upon filing of the habeas petition, but only if an order to show cause issues, is appointment of counsel mandatory. If a motion to recall the remittitur is granted, the direct appeal would be reopened and the appointment of appellate counsel revived.

Note: As an alternative to counsel preparing a habeas corpus petition, another option would be for counsel to send the client a habeas corpus form and provide some simple advice for completing and filing it. In particular, counsel might recommend that on line 6 of the form petition (Grounds for Relief) that the client state something to the effect that, in light of *Johnson*, the trial court applied the wrong standard in determining whether a prima facie showing of discrimination

¹ Links to federal habeas forms can be found at <http://www.fdap.org/t-forms.html#habeas> and http://www.adi-sandiego.com/practice_forms_motion.html.

was made under *Batson*.² Counsel might also provide the client with another copy of the state court of appeal opinion to attach to the habeas corpus petition.

Option 3: federal habeas

Note: Whether to go straight to federal court in this situation will depend on a number of considerations noted in the “factors” section below and is highly case dependent.

D. AEDPA Statute of Limitations Has Run:

Only Option: state habeas proceedings. (See note in section C above.)

E. Federal Habeas Petition (or Appeal to Ninth Circuit) is Pending:

While, theoretically, an option would be to file a state habeas petition and request a stay of federal proceedings, it would seem that the most logical option would be to simply continue with the federal proceedings.

Factors to Consider in Deciding Which Procedure to Use

- Is there a realistic chance the state court of appeal would reach a different conclusion about whether a prima facie showing was made upon applying the correct standard? If, upon recall of the remittitur, following a GVR, or in a state habeas, the state courts are unlikely to reach a different result, proceeding to federal court without revisiting the issue in state court may be appropriate. This may depend upon the court or division and the reasoning of the original opinion.
- The clarity of the trial court’s decision or the court of appeal’s opinion may inform which procedure to use, or whether relief in state court is at all realistic. On one hand, the decision or opinion may show that the court clearly relied on the wrong standard. On the other hand, if the decision shows the court would have denied relief under any standard, pursuing further relief in that court could be futile.

² Links to state habeas forms can be found at <http://www.fdap.org/t-forms.html#habeas>.

- In determining the strength of the post-*Johnson Batson* claim, consider the timing of the trial judge's ruling or the court of appeal's opinion. Was it before the *People v. Box* (2000) 23 Cal.4th 1153, 1188 fn.7 decision equating the two standards ("a 'strong likelihood' means a 'reasonable inference'")? Was it between *Box* and the California Supreme Court's *Johnson* decision? Rulings made after the California Supreme Court's *Johnson* decision, but before the United States Supreme Court decision, might present the strongest claims that the state court necessarily applied the wrong standard.
- State Habeas v. Recall of Remittitur? These options are to some extent fungible, and the better approach may depend on the preferences of the particular district court of appeal, as well as how much time has passed since the appeal became final. The longer the period since the conclusion of the direct appeal, the less suitable recall of the remittitur would be.
- Availability of counsel? Upon returning to the state court of appeal by way of a U.S. Supreme Court GVR order or by recall of the remittitur, the direct appeal is revived and the client will proceed with counsel. In state habeas corpus proceedings, however, there is no guarantee of counsel unless the court issues an order to show cause. Similarly, there is no right to counsel in non-capital federal habeas proceedings. Unless an evidentiary hearing is ordered, appointment of counsel is at the discretion of the district court judge (or the Ninth Circuit, if on appeal).
- Is time of the essence? In short-sentence cases, the decision on how to proceed may be driven by the speed with which each court moves. Federal district court habeas proceedings are notoriously slow.
- Normal concerns about the onerous federal habeas standard of review (28 U.S.C. 2254(d)) may *not* be a weighty consideration in this unusual situation. The Ninth Circuit has repeatedly held that application of the wrong standard for the prima facie standard renders the state court decision contrary to U.S. Supreme Court authority and, thus, the claim is reviewed de novo in federal court, even under AEDPA. *Fernandez v. Roe*, 286 F.3d 1073, 1077 (9th Cir. 2002); *Cooperwood v. Cambra*, 245 F.3d 1042, 1046-47 (9th Cir. 2001); *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000).

Though it arose on direct appeal, *Johnson* appears to vindicate the Ninth Circuit's position that *Batson* dictates the inference standard.

Other Developments to Watch For in *Batson* Cases

Because those reading this memorandum are litigating *Batson* claims, a couple of other cases, decided and undecided, are worth mentioning.

- *Miller-El v. Dretke* (2005) 125 S.Ct. 2317 (decided the same day as *Johnson*). This is *Miller-El II*, the decision following the Fifth Circuit's decision on the merits affirming the denial of habeas corpus relief. (In *Miller-El I*, the Court had reversed the Fifth Circuit's denial of a certificate of appealability.) *Miller-El* validates juror comparison is a legitimate means of assessing whether the peremptory challenge was based on an impermissible factors: "More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." It also provides insight into a wide-range of other evidence (some of it from outside the courtroom) that can be considered in evaluating a *Batson* claim.
- *People v. Ibarra*, Cal. Supreme Court no. S124067, rev. gr. June 9, 2004. Presents this question regarding remedy: "In light of the Court of Appeal's finding of Wheeler/Batson error (*People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79), what is the appropriate remedy in this case - outright reversal of defendant's conviction or a limited remand to permit the trial court to inquire into the prosecutor's reasons for removing minority jurors?" *Ibarra* is fully briefed, but has not been argued yet.