FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
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BATSON V. KENTUCKY - UPDATED OUTLINE CASE LIST

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Batson v. Kentucky **- Updated Outline Case List**

I. Cognizable Groups under *Batson*

A. Religion

In re Freeman (2006) 38 Cal.4th 630, 133 P.3d 1013 [assuming without deciding that *Batson*, like *Wheeler*, applies to religious groups]

U.S. v. Brown, 352 F.3d 654 (2d Cir. 2003) [holding that strikes based on religion violate *Batson*, and collecting cases]:

B. Affiliation With Ethnic Groups

People v. Cruz, 44 Cal.4th 636, 187 P.3d 970 (2008) [Hispanic surname acquired by marriage does not qualify juror as member of protected class; court noted that in *People v. Trevino* (1985) 39 Cal.3d 667, 684[217 Cal.Rptr. 652, 704 P.2d 719] (disapproved on other grounds in [People v.] Johnson [(1989)] 47 Cal.3d [1194,] 1219-1221[255 Cal.Rptr. 569, 767 P.2d 1047]) we held that 'Spanish surnamed' sufficiently describes the cognizable class Hispanic under Wheeler-but only where no one knows at the time of the challenge whether the Spanish-surnamed prospective juror is Hispanic.]

C. Sexual Orientation

People v. Bell (2007) 40 Cal.4th 582 [Lesbians cognizable group]

United States v. Blaylock, 421 F.3d 758 (8th Cir. 2005), cert. denied, *Blaylock v. U.S.*, 126 S.Ct. 1108 (2006) and *United States v. Ehrmann*, 421 F.3d. 774 (8th Cir. 2005), cert. denied, *Ehrmann v. United States*, 126 S.Ct. 1099 (2006) [doubting that Batson extended to protect jurors from strikes based upon sexual orientation.]

II. Step One: Prima Facie Case

A. Burden:

Johnson v. California, 545 U.S. 162, 168 (2005) [burden at step one is to to "show[ ] that the totality of the relevant facts gives rise to an inference of discriminatory purpose."]

Miller-El v. Dretke, 545 U.S. 231 (2005) (defendant can make out a prima facie case of discriminatory jury selection by "the totality of the relevant facts" about a prosecutor's conduct during the defendant's own trial")

B. Std of Review:

People v. Bonilla (2007) 41 Cal.4th 313, 341-342 [ordinarily, review denial of Batson motion deferentially, considering only whether substantial evidence supports its conclusions; but where it is unclear whether t/ct applied correct standard for deciding p/f case, reviw is de novo]

C. Mode of Proof at Step One:

1. Statistical Evidence

One is enough: *U.S. v. Collins*, --- F.3d ----, 2009 WL 32561 (9th Cir. 2009) ["A pattern of striking panel members from a cognizable racial group is probative of discriminatory intent, but a prima facie case does not require a pattern because "the Constitution forbids striking even a single prospective juror for a discriminatory purpose."] *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir.1994); accord *United States v. Esparza-Gonzalez*, 422 F.3d 897, 904 (9th Cir.2005) (holding that prima facie case was shown where prosecutor struck the only Latino prospective juror as well as the only Latino potential alternate juror).

Brown v. Alexander, 543 F.3d 94 (2d Cir. 2008)

The Supreme Court recently reiterated that it "did not intend the first step [in the Batson inquiry] to be ... onerous." Johnson v. California, 545 U.S. 162, 170, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005). "[A] prima facie case of

discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives 'rise to an inference of discriminatory purpose.' " Id. at 169, 125 S.Ct. 2410 (quoting Batson, 476 U.S. at 94, 106 S.Ct. 1712) (footnote omitted). The Court also restated the principle that a defendant is not "require[d]" to "prove[ ] discrimination" at the prima facie stage. Id. at 169-70, 125 S.Ct. 2410.

This court has put a further gloss on what constitutes a prima facie case under Batson, and what constitutes an unreasonable application of Batson and its progeny. We have noted that "under Batson and its progeny, striking even a single juror for a discriminatory purpose is unconstitutional." Walker v. Girdich, 410 F.3d 120, 123 (2d Cir.2005). And we have said that we have "no doubt that statistics, alone and without more, can, in appropriate circumstances, be sufficient to establish the requisite prima facie showing." Overton, 295 F.3d at 278-79 (2d Cir.2002); see also Tankleff v. Senkowski, 135 F.3d 235, 249 (2d Cir.1998) ("[T]he fact that the government tried to strike the only three blacks who were on the panel constitutes a sufficiently dramatic pattern of actions to make out a prima facie case."). We have made clear, however, that "[o]nly a rate of minority challenges significantly higher than the minority percentage of the venire would support a statistical inference of discrimination." United States v. Alvarado, 923 F.2d 253, 255-56 (2d Cir.1991) (finding that "a challenge rate nearly twice the likely minority percentage of the venire strongly supports a prima facie case under Batson "). We have also required that statistical arguments be based on a well-developed factual record. Such a record

Abu-Jamal v. Horn, 520 F.3d 272 (3d Cir. 2008)

For the statistical evidence to be relevant, data concerning the entire jury pool is necessary. The number of strikes used to excuse minority and male jury pool members is irrelevant on its own. Indeed, depending on the make-up of the jury pool, such numbers could indicate that the state discriminated against Anglos and females.

People v. Bonilla, 41 Cal.4th 313, 160 P.3d 84 (2007)

Re: striking Blacks:

"Bonilla relies principally on the fact that all African-Americans-two of two-were struck from the juror pool. It is true the prosecution used

peremptories to challenge both African-Americans in the pool, but "the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible. '[E]ven the exclusion of a single prospective juror may be the product of an improper group bias. As a practical matter, however, the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion.' " (People v. Bell, supra, 40 Cal.4th at p. 598, 54 Cal.Rptr.3d 453, 151 P.3d 292)

Re: Striking Hispanics

"Preliminarily, the statistical frequency with which the prosecution struck Hispanics from the juror pool provides no basis at all to infer discrimination. Hispanics comprised approximately 10 percent of the pool (eight of 78), the prosecution used 10 percent of its challenges on Hispanics (three of 30), and the final jury was roughly 10 percent Hispanic (one of 12). Bonilla of course is a Hispanic male, but the prosecution used not a single strike against any Hispanic male, and a Hispanic man sat on the jury.

Perhaps because of this, Bonilla at various points frames his objection as one against the exclusion of Hispanic women. Whether or not Hispanic women constitute a separate cognizable group for Wheeler/Batson purposes, distinct from both women generally and Hispanics generally,FN14 on these facts this shifting approach smacks of data dredging."

Williams v. Runnels, 432 F.3d 1102 (9th Cir. 2006)

Here, Williams established that he is African-American and that the prosecutor used three of his first four peremptory challenges to remove African-Americans from the jury. In addition, it appears that only four of the first forty-nine potential jurors were African-American.

These bare facts present a statistical disparity. We have held that a defendant can make a prima facie showing based on a statistical disparity alone. In Paulino, we concluded there was an inference of bias where the prosecutor had used five out of six peremptory challenges to strike African-Americans. 371 F.3d at 1091. In Fernandez v. Roe, 286 F.3d 1073, 1077-80 (9th Cir.2002), we found an inference of bias where four of seven Hispanics and two African-Americans were excused by the prosecutor. In Turner v. Marshall, 63 F.3d 807, 812 (9th Cir.1995), overruled on other grounds by Tolbert v. Page, 182 F.3d 677, 681 (9th Cir.1999) (en banc), we determined there was a prima facie showing of discrimination where the

prosecutor exercised peremptory challenges to exclude five out of a possible nine African-Americans. In addition, we have noted that the "Constitution forbids striking even a single prospective juror for a discriminatory purpose." United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir.1994).

U.S. v. Ochoa-Vasquez, 428 F.3d 1015 (11th Cir. 2005)

In order to determine whether a Batson objector like Ochoa has established a prima facie case of discrimination, courts must consider all relevant circumstances. Batson, 476 U.S. at 96-97, 106 S.Ct. at 1723; Novaton, 271 F.3d at 1002; Lowder, 236 F.3d at 636. This Court has cautioned that "the mere fact of striking a juror or a set of jurors of a particular race does not necessarily create an inference of racial discrimination." Lowder, 236 F.3d at 636; Novaton, 271 F.3d at 1002. While statistical evidence may support an inference of discrimination, it can do so "only" when placed "in context." Lowder, 236 F.3d at 638; Allen-Brown, 243 F.3d at 1298. For example, "the number of persons struck takes on meaning only when coupled with other information such as the racial composition of the venire, the race of others struck, or the voir dire answers of those who were struck compared to the answers of those who were not struck." Lowder, 236 F.3d at 636-37 (emphasis in original); see also Novaton, 271 F.3d at 1002 (same); Allen-Brown, 243 F.3d at 1298 (evaluating the strike pattern in light of the racial composition of remaining potential jurors); Stewart, 65 F.3d at 925 (stating that "no particular number of strikes against blacks automatically indicates the existence of a prima facie case," and considering, inter alia, the number of struck black jurors as a percentage of the black venire members).

In determining whether the totality of the circumstances shows a "pattern" that creates an inference of discrimination, this Court has considered a number of factors. First, whether members of the relevant racial or ethnic group served unchallenged on the jury. See Lowder, 236 F.3d at 638 ("[T]he unchallenged presence of jurors of a particular race on a jury substantially weakens the basis for a prima facie case of discrimination in the peremptory striking of jurors of that race."); Novaton, 271 F.3d at 1002, 1004 (same); King, 196 F.3d at 1335 (finding that "not only was there no pattern of discriminatory strikes, there was a sort of 'antipattern' " where the State accepted one black juror and then *1045 struck the second of three black venire members); United States v. Puentes, 50 F.3d 1567, 1578 (11th

Cir.1995) ("Although the presence of African-American jurors does not dispose of an allegation of race-based peremptory challenges, it is a significant factor tending to prove the paucity of the claim."); Cochran v. Herring, 43 F.3d 1404, 1412 (11th Cir.1995) (same); Stewart, 65 F.3d at 926 (same).

Similarly, we have considered whether the striker struck all of the relevant racial or ethnic group from the venire, or at least as many as the striker had strikes. See Lowder, 236 F.3d at 637 ("[T]he number of jurors of one race struck by the challenged party may be sufficient by itself to establish a prima facie case where a party strikes all or nearly all of the members of one race on a venire" (citing United States v. Williams, 936 F.2d 1243, 1246 (11th Cir.1991))); cf. Dennis, 804 F.2d at 1210-11 (affirming finding of no prima facie case where the government did not use all of its strikes and thus "did not attempt to exclude all blacks, or as many blacks as it could, from the jury"); Allison, 908 F.2d at 1537 (same, where "the prosecutor preserved three black jurors, even though he had enough peremptory challenges to strike all the black jurors").

Second, we have considered whether there is a substantial disparity between the percentage of jurors of a particular race or ethnicity struck and the percentage of their representation on the venire. Lowder, 236 F.3d at 637. For example, in Lowder, we concluded that there was no prima facie case of discrimination where the plaintiffs used both of their peremptory strikes against white jurors. In so holding, we stated that there was no significant disparity between the plaintiffs' 100% rate of challenging white jurors and the 80% representation of white jurors on the venire. Id. On the other hand, in Stewart, we upheld a finding of a prima facie case based in part on the fact that, in exercising three peremptory challenges against black jurors, the defense struck 75% of black venire members. 65 F.3d at 925.

Third, this Court has considered "whether there is a substantial disparity between the percentage of jurors of one race [or ethnicity] struck and the percentage of their representation on the jury."FN39 Lowder, 236 F.3d at 637; Novaton, 271 F.3d at 1002.

2. No CJA at Step One (Cal. only?)

People v. Bell, 40 Cal.4th 582 (2007)

"In the circumstances of this first-stage Wheeler-Batson case, comparative juror analysis would make little sense. In determining whether defendant has made a prima facie case, the trial court did not ask the prosecutor to give reasons for his challenges, the prosecutor did not volunteer any, and the court did not hypothesize any. Nor, obviously, did the trial court compare the challenged and accepted jurors to determine the plausibility of any asserted or hypothesized reasons. Where, as here, no reasons for the prosecutor's challenges were accepted or posited by either the trial court or this court, there is no fit subject for comparison. Comparative juror analysis would be formless and unbounded."

P. v. Carasi, 44 Cal.4th 1263, 190 P.3d 616 (2008)

"Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his strikes are pretextual, it has little or no use where the analysis does not hinge on the *1296 prosecution's actual proffered rationales, and we [may properly] decline to engage in a comparative analysis" in a first-stage case. (Bonilla, supra, 41 Cal.4th 313, 350, 60 Cal.Rptr.3d 209, 160 P.3d 84.)"

Contra: *U.S. v. Collins*, --- F.3d ----, 2009 WL 32561 (9th Cir. 2009)

U.S. v. Stephens, 421 F.3d 503 (7th Cir. 2005)

("For example, the court may consider "the voir dire answers of those who were struck compared to the answers of those who were not struck." Lowder, 236 F.3d at 637.")

III. Step Two: Neutral Explanation

1. Prosecution must come forth with actual reason.

Paulino v. Harrison, 542 F.3d 692 (9th Cir. 2008)

"Batson's step two requires evidence of the prosecutor's actual reasons for exercising her peremptory challenges....Johnson v. California, 545 U.S. 162, 172, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005) (citing Paulino I, 371 F.3d at 1090("It does not matter that the prosecutor might have had good reasons ... what matters is the real reason [the jurors] were stricken.") (emphasis deleted) and Holloway v. Horn, 355 F.3d 707, 725 (3d Cir.2004) ("[S]peculation ... 'does not aid our inquiry into the reasons the prosecutor actually harbored' for a peremptory strike")); see also Turner v. Marshall (" Turner II "), 121 F.3d 1248, 1253 (9th Cir.1997) ("The arguments that the State has made since the evidentiary hearing do not form part of the prosecutor's explanation."); Riley v. Taylor, 277 F.3d 261, 282 (3d Cir.2001) (en banc) ("Apparent or potential reasons do not shed any light on the prosecutor's intent...."); Mahaffey v. Page 162 F.3d 481, 483-84 (7th Cir.1998) (explaining that the court must examine "actual" reasons as opposed to "apparent" reasons).

IV. Step Three: Has Def Showed purposeful discrimination?

A. Standard of Review

Reviewed for substantial evidence. (*People v. McDermott* (2002) 28 Cal.4th 946, 971, 123 Cal.Rptr.2d 654, 51 P.3d 874.); *P. v. Fiu*, 165 Cal.App.4th 360, 81 Cal.Rptr.3d 32 (2008) ["We review the trial court's ruling on the question of purposeful racial discrimination for substantial evidence. *(People v. McDermott* (2002) 28 Cal.4th 946, 971, 123 Cal.Rptr.2d 654, 51 P.3d 874.) We give deference to the trial court's ability to distinguish "bona fide reasons from sham excuses." (*People v. Burgener* (2003) 29 Cal.4th 833, 864, 129 Cal.Rptr.2d 747, 62 P.3d 1.) The trial court's conclusions are entitled to deference as long as the court makes "a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered." (*Ibid*.)"]

1. **Beware**: The "Sincere and Reasoned Effort" Gambit

B. Mode of Proof

Miller-El v. Dretke (2005) 545 U.S. 231
Snyder v. Louisiana (2007) 128 S.Ct. 1203
People v. Lenix (2008) 44 Cal.4th, 602
*Reed v. Quaterman (*5th Cir. 2009) --- F.3d ----, 2009 WL 58903
Kesser v Cambra, 465 F.3d 351 (9th Cir. 2006)