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ISSUES TO DEVELOP AT TRIAL

RACIAL JUSTICE SERIES

April 2021

Our second edition in our Racial Justice series addresses *Batson* challenges. Every defense practitioner knows that *Batson* has failed to eradicate discrimination in jury selection and the pressing need for reform. A major overhaul of *Batson* through court rule or legislation is possible – Washington State and California have done it. But there are concrete steps you can take now to challenge *Batson*'s shortcomings. Even if you don't prevail before the trial court, you will preserve an important issue that, if your client is not acquitted, appellate practitioners can develop for Court of Appeals review.

Although all three steps of the *Batson* framework have shortcomings, we focus in this ITD on step two — the prosecutor's obligation to provide a race-neutral reason once a prima facie case is established. We believe there is a legal basis to limit the prosecutor's ability to sustain strikes on reasons that disparately impact people of color.

As discussed further below, we propose that, when a prosecutor tries to justify the strike of a juror of color on grounds related to their views of law enforcement, e.g., distrust of the police/negative interactions with the police/racial profiling, you should argue that, under our more protective state constitution, such reasons are not race-neutral because of their disproportionate impact on jurors of color. Although 21 years ago, our Court of Appeals, in *People v. Hernandez*, 75 N.Y.2d 350 (1990), *aff'd sub nom. Hernandez v. New York*, 500 U.S. 352 (1991), rejected that the state constitution prohibits facially neutral reasons having a disparate impact, we believe that the time has come to revisit this issue and press it in the trial courts. Your argument is assisted by a 2019 decision from the First Department.

Legal Background

Batson v. Kentucky, 476 U.S. 79 (1986), established a three-step protocol for establishing discrimination in the exercise of peremptory challenges. At step one, the moving party must establish a prima facie case of discrimination. If a prima facie case is established, the burden shifts, at step two, to the nonmoving party to offer a facially neutral explanation for each suspect challenge. At the third step, the burden shifts back to the moving party to prove purposeful discrimination, and the trial court must determine whether the proffered reasons are pretextual. 476 U.S. at 96-98. *Batson* declined to "formulate particular procedures" for the States to follow, *id*. 99, or to instruct State courts how best to implement its holding, *id*. at 99, fn 24. This allows States the freedom to be laboratories in creating its own procedures that exceed what the federal constitution requires.

In *Hernandez v. New York*, 500 U.S. 352 (1991), the Supreme Court considered whether a race-neutral reason that disparately impacts a protected group violates the Federal Constitution, and concluded that it did not. There, the prosecutor held that prosecutor had not violated *Batson* by using peremptory challenges to exclude Latino jurors by reason of their ethnicity when he offered as a race neutral explanation his concern that bilingual jurors might have difficulty accepting the court interpreter's official translation of testimony given in Spanish. The Court stated that a "neutral explanation in the context of [its] analysis . . . means an explanation based on something other than race . . . Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 360.

Hernandez arose from a New York case in which the majority had held that the prosecution's "interpreter" reason did not violate either federal or state constitutional guarantees of equal protection. *People v. Hernandez*, 75 N.Y.2d 350 (1990). The majority found "no justification for breaking new ground" as to the State equal protection right. *Id.* at 358.

In dissent, Chief Judge Kaye, joined by Judge Hancock, urged that the case should be decided as a matter of State law, applying our State constitution's guarantee of equal protection. They stated that an explanation by a prosecutor "that may appear facially neutral that nonetheless has a disparate impact on members of defendant's racial or ethnic group is 'inherently suspect.'" *Id.* at 362. Such a reason must be subjected to enhanced scrutiny, by way of additional voir dire from the court, or some investigation or inquiry beyond the minimum mandated in the ordinary case. *Id.* at 363-64.

As a result of *Hernandez* and other caselaw addressing the prosecutor's step-two burden, virtually any reason the prosecutor proffers, short of an admission of discriminatory intent or no reason at all, will suffice as facially race-neutral. In practical terms, this means that prosecutors can and do use proxies for race — reasons that disparately impact jurors of color — with impunity. Such reasons have long included distrust of the police, concerns about racial profiling, criminal justice involvement of those close to the juror, and personal and cultural choices related to dress (such as head scarves and durags) and hair styles ("long braids").

However, in *People v. Watson*, 169 A.D.3d 81 (1st Dep't 2019), the First Department (in a 3-2 split), directly questioned the legitimacy of a prosecutor's strike based on a prospective juror's negative encounters with the police. Stating as " a lamentable fact" that "a disproportionately high number of black males in this City have had occasion to be stopped and frisked by the police in a manner that does not comport with the Constitution," the Court further stated that "[t]o allow exclusion solely on this basis would bring us close to a reality where African American males are effectively barred from serving on juries in criminal trials, a proposition we cannot endorse." *Id.* at 84-85.

Although the dissent accused the majority of creating a "per se" prohibition on the People's exercise of peremptory challenges that disproportionately impact a protected group, the majority noted that upholding such strikes "threatens to establish a per se rule excluding all African American males as venirepersons." *Id.* at 85.

The *Watson* majority did not discuss or distinguish *Hernandez*, but we suggest that the majority was implicitly endorsing a New York State specific rule, based on our state constitution, rejecting "police distrust" and related reasons, as race-neutral due to their disparate impact.

Framing your challenge (with some tips on preservation as well).

- Make your *Batson* challenge, and clearly state it as a *Batson* challenge. Although you can raise a challenge after the prosecutor strikes just one juror of color, you will need to show more than just the fact of the strike or strikes. You will need to point to facts and circumstances beyond the strike to support that the strike wasn't based on the juror's answers, such as that the prosecutor did not strike white jurors who gave similar answers, or that there were things about the juror of color that would make them a prosecution-friendly juror, such as a relative in law enforcement or being a crime victim. If denied, continue to monitor the prosecution's strikes and renew your challenge upon future strikes.

- If the court finds a prima facie case, the burden will shift to the prosecutor to provide race-neutral reasons. Make sure to insist on reasons for any prospective jurors whose exclusion you previously and unsuccessfully challenged, including jurors from previous rounds, even if they've left the courtroom.

- In addition to other objections you have, and consistent with our proposal, focus on any reasons directed to the juror's experiences with or opinion of law enforcement. Remember, this is a prospective juror who has withstood a challenge for cause, and so has said they could judge the case fairly and impartially notwithstanding any experiences or opinions about the police! They have a right to serve!

    - ♦ Argue that a reason grounded in a Black or brown New Yorker's experiences with the police is inherently race-based because of its disparate impact on jurors of color. Jurors of color are disproportionately stopped, unlawfully, by the police. Cite *Watson* for support. Distrust of the police by communities of color is both widespread and reasonable in light of what we all know to be true historically and based on the most recent events involving the murders of Black men and women.

    - ♦ Argue that the reason is not race-neutral simply because white jurors might share that viewpoint as a political matter. Jurors of color have a different lived experience with police due to their race or ethnicity – fear or apprehension of police officers based on that lived experience does not and cannot disparately impact white jurors.

    - ♦ It is unacceptable that peremptory challenges should be used to exclude prospective jurors for honestly voicing reasonable and widely held views. Argue that even if the Federal Constitution does not require this, our State Constitution does. For support:

- New York has emphasized the right of the individual juror to serve as a basic right of citizenship, secured and protected by our state constitution and by statute (N.Y. Const, art. I, §§ 1, 11; Judiciary Law § 500; Civil Rights Law § 13). The Court of Appeals has repeatedly affirmed that jury service is a means of participation in government and must be a body "truly representative of the community."[1] Excluding a significant percentage of people belonging to a suspect class from serving because they express a reasonable, fact-based, and widely held view is inconsistent with that policy, as well as degrading and insulting to the juror who voices this concern.

- 21 years ago, in 1990, two judges of the Court of Appeals, including the Chief Judge, would have found state constitutional protections against facially-neutral reasons proffered by the prosecution that disparately impact protected groups. Although rejected by the majority then, the issue is in a different posture now, where, as the First Department found in 2019 in *Watson*, accepting such reasons as "race-neutral" could ultimately and unacceptably lead to the wholesale exclusion of Black individuals from serving. The *Watson* decision shows that courts have already started to recognize the need to apply New York State law to provide greater protections where law-enforcement-related reasons are involved.

- Although the majority opinion in *Hernandez* found no justification for distinguishing between the state and federal constitutional provisions, New York has since applied the State Constitution's equal protection clause more expansively, specifically in the area of *Batson*. In 2016, the Court of Appeals extended the application of *Batson* to challenges based on skin color finding that such challenges violate the State Constitution. *People v. Bridgeforth*, 28 N.Y.3d 567 (2016). The Court of Appeals also applied the State Constitution's equal protection clause to protect immigrants, finding that strict scrutiny was required, independently of any Federal Constitutional guarantees, to laws depriving non-citizens of state benefits. *Aliessa v. Novello*, 96 N.Y.2d 418 (2001).

Marshal these arguments to force the court to rule whether a reason that disparately impacts prospective jurors of color violates our State Constitution's guarantee of equal protection. If, as is probable, your challenge is denied, the burden will shift back to you to prove, as a factual matter, that the reason was a pretext for discrimination - a heavy burden. Here, you need to marshal all the circumstances: you can point again to the number of jurors whom the prosecutor struck, that the reason was not applied evenhandedly or was used to strike a juror who could be expected to be favorable that the reason disproportionately impacts jurors of color.

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[1] *People v. Kern*, 75 N.Y.2d 638,651-52 (1990); *People v. Bridgeforth*, 28 N.Y.3d 567, 573 (2016).

*** UPDATE ***

In our March 2019 ITD, we suggested a challenge to the rule allowing courts to deny applications to present expert testimony on identification or confessions if the identification or confession in "corroborated" by other evidence.

There is now further ammunition to support this challenge, thanks to a fabulous law review article authored by CAL's Matthew Bova, linked here.

* * * PRACTICE REQUEST * * *

Your appellate brethren have a request: please don't be *too* nice when dealing with your adversary or even the court. Of course, we know you must be respectful to the court, and we know there are good reasons for courtesy and collegiality in the courtroom, but clients can easily mistake niceties as an all-hands conspiracy against them. That makes our job doubly difficult because we must fight embedded distrust just when we're trying to work with our clients on issue selection and briefing strategies.

Scenarios we've seen that cause trouble down the road are: thanking the DA for turning over documents they are either obligated to or are disclosing voluntarily; thanking the court after it issues a bad ruling or denies your request; conceding an issue unnecessarily (e.g., that a search was lawful where no hearing had been held), or complimenting the court's plea colloquy as lengthy, thorough, appropriate, etc.

Thank you!