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May 5, 2008

Frederick K. Ohlrich,
Court Administrator and Clerk
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: People v. Lenix, No. S148029

Dear Mr. Ohlrich:

The Court has granted review in the above-captioned case. The Office of the State Public Defender represents approximately 130 men and women in their automatic appeals before this Court. Many of our cases may be affected by this Court's ruling in Lenix.

On April 28, 2008, the California State Conference of the National Association for the Advancement of Colored People, et al., filed an amicus brief in support of defendant/petitioner Lenix. We submit this letter to formally join Argument II of the brief of amici curiae and to bring additional points to the Court's attention that are relevant to its consideration of the issues in Lenix.

In our view, the central issue before this Court in Lenix is whether an appellant raising a Batson claim on appeal may rely on arguments comparing the evidence in the record regarding the excluded prospective jurors with those who were permitted to serve – so-called “comparative juror analysis” – only if, as the court of appeal held, such an analysis was presented to the trial court below. (People v. Lenix, 2006 WL 2925354, at *8.)

We maintain that in order to determine whether the equal protection clause has been violated by a prosecutor's use of peremptory challenges under Batson, a reviewing court must necessarily consider all the relevant record evidence regarding the excluded prospective jurors with those who were permitted to serve, in order to determine whether the reason why some were excluded and others not was attributable to discriminatory intent. (See Coulter v. Gilmore (7th Cir. 1998) 155 F.3d 912, 921 [“the crucial and determinative inquiry in a Batson claim is whether the state has treated similarly situated venirepersons differently based on race”].) Because “comparative juror analysis” is simply a mode of evaluating the relevant evidence that is in the record, and that was before the trial court at the time of its ruling (see Miller-El v. Dretke (2005) 545 U.S. 231, 241, n.2 [rejecting the dissenting opinion's objection to the Court's consideration of comparative juror analysis arguments that the petitioner did not present to the state court, because it “conflates the difference between evidence that must be presented . . . and

theories about that evidence”]), such an analysis of the record may be advanced for the first time on appeal, as long as it provides a meaningful basis for comparing the prospective jurors who were struck with those who were not. For this reason, we cannot join Argument I of the brief of amici curiae, which maintains that where the prosecutor’s proffered reason is based on a stricken juror’s demeanor, as opposed to a juror’s substantive answers to voir dire questions, the “defense must proffer a comparison in the trial court *to preserve the analysis* [of the record] *for appeal*. . . .” (Brief of Amici Curiae, People v. Lenix, No. S148029, at p. 4, emphasis and bracketed information supplied.)

However, we fully join Argument II of the brief of amicus curiae, which maintains that if this Court announces in Lenix a rule that trial counsel must present comparative analysis argument in the trial court in order to raise such arguments on appeal, such a rule may not be applied retroactively to cases tried before the rule is announced.

We also respectfully submit this letter to bring an additional perspective to the issue presented in Lenix, but not mentioned in the briefs submitted by the parties or by amicus curiae.

This Court has previously expressed its disapproval of arguments raising comparative juror analysis for the first time on appeal. For example, in People v. Johnson (2003) 30 Cal.4th 1302, this Court stated that “[w]hile we decline to prohibit the practice outright, we are hard pressed to envision a scenario where comparative juror analysis for the first time on appeal would be fruitful or appropriate.” (Id. at p. 1325.) We maintain, however, that the very manner in which this Court has reviewed Batson claims, particularly in cases tried prior to Johnson v. California (2005) 545 U.S. 162, makes comparative juror analysis for the first time on appeal not only fruitful and appropriate but, indeed, constitutionally required.

In Johnson, the High Court held that California courts were applying an unduly onerous prima facie standard to Batson objections. (545 U.S. at pp. 169-170.) Thus, in many California cases tried prior to Johnson, trial courts erroneously denied Batson claims at the prima facie stage when application of the correct constitutional standard would have required that the Batson inquiry proceed to the second and third stages of the test. As a result, in such cases the prosecutor was never required to proffer explanations for the challenged strikes at the second stage, and defense counsel was denied the opportunity to demonstrate, through comparative analyses of the excluded and nonexcluded jurors, that any reasons proffered by the prosecutor for the challenged strikes were in fact pretextual. In short, the consequence of the trial court’s initial error at the prima facie stage is that the Batson fact-finding inquiry was terminated prematurely, and the appellate record is bereft of proffered reasons for the strikes by the prosecutor or comparative juror analysis by defense counsel.

Since Johnson was decided, the Attorney General has frequently defended a trial court’s ruling by asserting that – notwithstanding the fact that the prosecutor never proffered reasons for the peremptory challenges below – there are reasons apparent from the record to support the trial court’s ruling sustaining the prosecutor’s peremptory challenge. Thus, those cases, the Attorney General has asserted – and this Court has entertained – *reasons for a peremptory challenge that are articulated for the first time on appeal*. (See, e.g., People v. Bonilla (2007) 41 Cal.4th 313, 349 [although the Court found it “virtually impossible to glean . . . any clues” about prospective juror’s opinions from her voir dire or questionnaire, it accepted respondent’s argument that

“prosecutor could reasonably have” struck her because she wrote that fact that a murder was for financial gain was not important to her]; People v. Hoyos (2007) 41 Cal.4th 872, 902 [Hispanic juror might have been struck because she had limited language skills]; People v. Avila (2006) 38 Cal.4th 491, 554-555 [African-American juror might have been struck because she had “mixed feelings” about prior jury service and/or because her brother was convicted of manslaughter]; People v. Guerra (2006) 37 Cal.4th 1067, 1102-1103 [African-American juror might have been struck because she believed her cousin was treated unfairly by the police and/or because she had “strong opinions”]; People v. Gray (2005) 37 Cal.4th 168, 192 [prosecutor “may well have” struck prospective juror “because she reported that someone close to her had been arrested and sent to jail for stealing a car ”].)

We have maintained that it is improper for an appellate court to review a trial court’s Batson ruling by speculating about reasons that “may,” “might” or “could have” motivated a challenged peremptory strike, where neither the prosecutor nor the trial court made any reference to such reasons at trial. (See Johnson, *supra*, 545 U.S. at pp. 172-173 [because the “Batson framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process,” it is improper to “rely[] on judicial speculation” or “engag[e] in needless and imperfect speculation when a direct answer can be obtained by asking a simple question”].) Indeed, as the High Court stated in Johnson, “it does not matter that the prosecutor might have had good reasons [for the challenged strikes] . . . [w]hat matters is [whether they are] the real reason[s]. . . .” (*Id.* at p. 172, quoting Paulino v. Castro (9th Cir. 2004) 371 F.3d 1083, 1090.)¹ Thus, where the fact-finding inquiry under Batson has been prematurely terminated due to an erroneous ruling at the prima facie stage at trial, the appropriate appellate remedy is to either reverse the case in its entirety or, in some instances, remand the case to the trial court for further evidentiary proceedings on the question of the prosecutor’s actual intent; it is inappropriate for the appellate court and the parties to speculate as to possible reasons that might have motivated the strike.

However, where the reviewing court reviews a Batson claim by entertaining possible or apparent reasons for the challenged strikes that are articulated for the first time on appeal, the appellant’s constitutional rights to due process and meaningful appellate review require that he be permitted to advance comparative juror analysis of the record for the first time on appeal in order to demonstrate that any such possible or apparent reasons entertained by the court also applied to jurors who were allowed to serve. The opportunity to respond to allegations of an adverse party is “fundamental to due process.” (Nelson v. Adams USA, Inc. (2000) 529 U.S. 460, 466.) Consequently, where the court entertains possible reasons articulated for the first time on appeal by the Attorney General, due process requires that appellant be allowed to respond by demonstrating that any such reasons are insufficient to sustain the challenged strikes.

¹ Applying these principles to its review of a third-stage Batson case, the High Court made clear in Miller-El v. Dretke (2005) 545 U.S. 231, 251-252, that an appellate court may not sustain a prosecutor’s peremptory challenge by “thinking up any rational basis” for the strike or “imagin[ing] a reason that might not have been shown up as false” where the prosecutor’s proffered reason “does not hold up.”

Thank you for considering these points.

Sincerely,

Michael J. Hersek
State Public Defender

cc:

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