

*CONTINUING LEGAL EDUCATION*

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**JURY SELECTION ISSUES:  
FOR-CAUSE CHALLENGES, BATSON, AND BEYOND**

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## MAKING SUCCESSFUL FOR-CAUSE CHALLENGES (OR PRESERVING THEM FOR APPEAL)

### A. Background

- Every defendant charged by an indictment has the legal right, both by statute (CPL § 270.05(1), and the New York Constitution to a 12-person jury. And every defendant has the constitutional right to be tried by an impartial jury. Indeed, nothing

“is more basic to the criminal process than the right of an accused to trial by an impartial jury. The presumption of innocence, the prosecutor’s heavy burden of proving guilty beyond a reasonable doubt, and the other protections afforded the accused at trial, are of little value unless those who are called to decide the defendant’s guilt or innocence are free of bias.” People v. Branch, 46 N.Y.2d 645, 653 (1979).

- Challenges for cause (CPL § 220.20) are a vital tool for safeguarding the right to an impartial jury by allowing the excusal of jurors who are not fit to serve, usually for reasons involving their partiality. Statutory grounds for challenges:
  - Most common- “actual bias.” CPL § 220.20(1)(b) authorizes parties to seek dismissal of a prospective juror based on “actual bias” whenever the juror “has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence.”
    - When a prospective juror has expressed a state of mind likely to preclude impartial service, he or she “must in some form give “unequivocal assurance that they can set aside any bias and render an impartial verdict based on the evidence.” See People v. Johnson, 94 N.Y.2d 600 (2000); People v. Arnold, 96 N.Y.2d 358 (2001)(jurors who have revealed doubt about their ability to serve impartially “must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent them reaching an impartial verdict”).
    - It is the duty of the trial judge either to elicit an unequivocal assurance of the juror’s ability to be impartial or else excuse the juror. See People v. Harris, 19 N.Y.3d 679 (2012); People v. Johnson, 17 N.Y.3d 752 (2011).
    - There are no magic words or talismanic statements that render a response equivocal or unequivocal: a prospective juror’s statements during voir dire must be taken in context and as a whole. However, once

a prospective juror expresses doubts about his or her ability to serve, “nothing less than a personal, unequivocal assurance of impartiality can cure a juror’s prior indication that she is predisposed against a particular defendant or particular type of case.” See Johnson, supra; Arnold, supra.

- “Implied” bias. CPL § 220.20(1)(c) sets forth a series of self-evident relationships (except for the alternative catchall provision), which would establish an “implied bias.” A juror with an “implied bias” must be discharged, irrespective of whether the juror claims that he or she can nonetheless be impartial. People v. Branch, 46 N.Y.2d at 651. The paragraph (c) catchall provision would disqualify a prospective juror based on “some other relationship” to one of the persons referenced in that paragraph “of such nature that it is likely to preclude him [or her] from rendering an impartial verdict.” Compare People v. Furey, 18 N.Y.3d 284, 938 N.Y.S.2d 277, 961 N.E.2d 668 (2011) (juror disqualified for implied bias where she knew eight of the People’s witnesses and had “frequent professional and social relationships” with at least two) with People v. Colon, 71 N.Y.2d 410, 418-419 (1988) (juror who had four close relatives on the police force was not thereby impliedly biased because that relationship “in and of itself, cannot be said to likely preclude an average juror from rendering an impartial verdict within the meaning of that provision”). and People v. Provenzano, 50 N.Y.2d 420, 425 (1980) (where prospective juror had a nodding acquaintance with the trial prosecutor and supported him for position of District Attorney, no implied bias found; “Merely generalized support for the candidates of one party or attendance at political rallies does not signal a relationship which would preclude fairness on the part of a prospective juror”).
- Other subdivisions: (1)(a), relating to a juror who does not have the qualifications required by law; subdivision; (1)(d), relating to a juror who testified or will testify as a witness; and subdivision (1)(e), relating to a juror who served on a grand jury or trial jury involving the same incident.
- Challenge for cause issues are **outstanding** issues on appeal because “harmless error” (the strength of the prosecution’s case) has no bearing. If the cause challenge was wrongly denied, AND THE ISSUE IS PROPERLY PRESERVED ---- reversal!
- **Preservation:** If the court denies your challenge for cause, the issue can **only** be raised on appeal if (1) you exercise a peremptory challenge against the juror **and** (2) thereafter exhaust all of your peremptories before the end of jury selection.

**PRACTICE TIP:** If your client is being tried with a co-defendant, DO NOT rely on co-defendant's challenge to preserve the issue, unless you have previously made clear, on the record, that you are acting together during jury selection. Otherwise, you must expressly join in the challenge or make your own.

**§ 270.20 Trial jury; challenge for cause of an individual juror**

1. A challenge for cause is an objection to a prospective juror and may be made only on the ground that:

- (a) He does not have the qualifications required by the judiciary law; or
- (b) He has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial; or
- (c) He is related within the sixth degree by consanguinity or affinity to the defendant, or to the person allegedly injured by the crime charged, or to a prospective witness at the trial, or to counsel for the people or for the defendant; or that he is or was a party adverse to any such person in a civil action; or that he has complained against or been accused by any such person in a criminal action; or that he bears some other relationship to any such person of such nature that it is likely to preclude him from rendering an impartial verdict; or
- (d) He was a witness at the preliminary examination or before the grand jury or is to be a witness at the trial; or
- (e) He served on the grand jury which found the indictment in issue or served on a trial jury in a prior civil or criminal action involving the same incident charged in such indictment; or
- (f) The crime charged may be punishable by death and the prospective juror entertains such conscientious opinions either against or in favor of such punishment as to preclude such juror from rendering an impartial verdict or from properly exercising the discretion conferred upon such juror by law in the determination of a sentence pursuant to section 400.27.

2. All issues of fact or law arising on the challenge must be tried and determined by the court. If the challenge is allowed, the court must exclude the person challenged from service. An erroneous ruling by the court allowing a challenge for cause by the people does not constitute reversible error unless the people have exhausted their peremptory challenges at the time or exhaust them before the selection of the jury is complete. An erroneous ruling by the court denying a challenge for cause by the defendant does not constitute reversible error unless the defendant has exhausted his peremptory challenges at the time or, if he has not, he peremptorily challenges such prospective juror and his peremptory challenges are exhausted before the selection of the jury is complete.

**B. Making a Cause Challenge Under CPL §220.20(1)(b)**

- Setting up the challenge: This requires getting information from the jurors themselves to enable you to “deselect” the ones who will be bad for your case (or, more accurately, get the judge to deselect them). While voir dire can accomplish several things (educating the jury, developing some rapport) your main task is to try to identify the folks whose belief system predisposes them against you and your client.

Some jurors are very open in expressing their feelings and opinions, others need to be drawn out. How to conduct as successful and fruitful a Voir Dire as possible is a topic in itself and beyond the scope of this CLE, but here are some tips:

- don’t lecture - the ratio should be no more than 25/75 you to them.
- try to ask open-ended questions, not yes/no questions (elicits more information; e.g., “How do you feel about (so and so)?” will elicit more information than asking, “Do you feel (so and so)?” The prospective juror who is asked, “What's your reaction to (so and so)?” will divulge more information than s/he would if asked, “Will you (so and so)?”
- ask jurors about their feelings not what they “think” — jurors often decide cases on feelings and then use facts to justify their decisions. Fact questions are most useful when they are introductions to the feeling questions.
- Frame questions in a way that is more likely to get the response you are looking for: e.g. “How many of you [whatever]” versus “Do any of you [whatever]. The first question presumes that there are some people who [whatever]. The second question doesn’t contain that presumption.
- So if you want to draw out unfavorable opinions that might be shared, ask the question the second way “How many of you agree with Mr. Smith that my client is probably guilty?” If you want people to keep their mouths shut because the opinion might favor you in the jury room, ask it the second way “Does anyone agree with Mr. Smith that the government should be held to a higher

standard that beyond a reasonable doubt.”

- When you are probing for juror attitudes, don't frame the question with broad conclusory words such as “impartial,” “prejudice,” or “bias” that telegraphs the “right” answer.
- Keep in mind that the judge’s questions as to whether the prospective juror will be able to follow the court’s instructions encourages a “yes” answer. You want to unfreeze the potential bias and draw out the “no” answer.

- Making the challenge:

You must identify a specific bias/predisposition/opinion that “is likely to preclude” the juror from rendering an impartial verdict. If the juror has revealed more than one bias, specify all the grounds. Common biases:

- favoring police testimony/giving it more weight
- equating arrest/indictment with guilt
- needing to hear from both sides/needing to hear the defendant’s side
- having an opinion about the crime or the defense
- having some experience or expertise in a relevant area
- equating a criminal record with guilt
- having a pre-existing opinion about the defendant’s guilt (perhaps from the media)
- having an opinion about the defendant’s character (perhaps from the media)
- lumping together separate incidents (if he’s guilty of one then he must be guilty of all)
- prior experience as a crime victim
- concern for safety/fear (lives in the neighborhood)

- gory photos (sympathy for the victim, emotional reaction to the case).

**PRACTICE TIP:** Be very clear on the record as to which jurors you are addressing. Use their name. If you are looping in another juror, use both jurors' names. Be very clear again when you go on to make the cause challenge, and if you then proceed to challenge the jury by peremptory (name or seat number, but names are best), and clear again when you have exhausted your peremptories (state that you have used your final perempt). An unclear record on appeal might not just complicate raising the issue, but doom it, as it is the appellant's burden to present a sufficient record for appeal.

It is not your job or obligation to try to rehabilitate the juror or ask the court to do so before making your challenge! Don't end up "fixing things" by going further than you need to. **It is up to the court to rehabilitate the juror and obtain the necessary unequivocal assurances that the juror can be fair and impartial.**

If the court succeeds in rehabilitating the jury, then engage the juror further to try to re-establish the bias and undo the rehabilitation. See, e.g., People v. Barber, 269 A.D.2d 758 (4th Dep't 2000)(where the prospective juror advised the court that he assumed a person who was arrested and brought to court was guilty, but then unequivocally stated that he would follow the court's instructions on presumption of innocence and burden of proof, defense counsel established the bias on renewed questioning, leading to reversal on appeal: "However, upon subsequent questioning by defense counsel, the prospective juror acknowledged that his presumption of guilt was a strong belief that would "probably" not be dispelled).

If you adjudge the rehabilitation to be inadequate, just make your challenge at the appropriate time.

If the court denies your challenge, that, **plus using a peremptory against the juror plus exhaustion of peremptories will preserve the issue.** In certain instances, you may want to request further inquiry after the denial (see Practice tip), but, for the most part, live with the court's denial and then take the necessary steps to preserve the issue for appeal.

**PRACTICE TIP:** If the court denies your challenge and you are down to your last few perempts, you may face a tough tactical decision: do you want to exercise a peremptory and assure preservation of the appellate issue? Or keep the perempt in your back pocket for later use because you fear worse jurors coming down the pike?

Some considerations: (1) the strength of the challenge; (2) the strength (or weakness of your case); (3) how bad the juror is for you; and (4) how likely you will need to use your remaining perempts on the jurors to come.

If the for-cause issue is strong and the prosecution's case also seems strong, we advise nailing down the appellate issue and using the perempt. If you think your client will be going down at trial, then you can at least embed a good appellate issue.

You can try first to force the court to excuse the juror for you. Even if questioning is done and the court has denied your challenge, ask the court to call the juror in for further inquiry, citing whatever record evidence you can marshal in support of the juror's unfitness (conflicting answers, inadequate rehab, not credible in her statements of fairness). If you succeed, further inquiry could expose the juror's unshakable bias and lead to a successful challenge after all (it could also risk pristine rehabilitation and the consequent elimination of any appellate issue if you do go ahead and perempt the juror)..

In sum, you'll have to weigh how important preservation of the issue is (using the perempt now) against what your jury pool is looking like and your feelings about the case.

### C. Red Flags for Inadequate Rehabilitation: What Makes a Good Appellate Issue

- If, in the course of your questioning, the prospective juror reveals a bias, followed by some version of the following, you have a decent appellate issue if the court denies the challenge. Do not harp on the juror's statements, as that may invite further rehabilitative efforts by the court (unless there's a strategic reason to, see practice tip above).
  - juror will "try" to follow the court's instructions/set aside feelings
  - juror "thinks" he or she can do so
  - juror will try his or her "best" or use "best efforts"
  - juror "would hope" he or she would be fair
  - juror promises to be "open-minded"
  - panel collectively agrees that they can follow the court's instructions, but juror is not asked specifically about his/her attitudes. See People v. Arnold, 96 N.Y.2d 358, 363-64 (2001)(collective questioning of panel did



not rehabilitate juror who stated, in domestic violence case, that her prior academic study of domestic violence might impede her ability to be impartial)

- “rehabilitative” questioning that does not require the juror to confront the stated bias. See People v. Small, 145 A.D.3d 478 (1st Dep’t 2016)(after initial rehabilitation, juror repeated that her siblings’ experiences with crime might affect her ability to be fair; defense counsel’s general inquiry into whether juror would have difficulty returning a not guilty verdict if she had a reasonable doubt was insufficient to elicit an unequivocal assurance of impartiality as the questioning “failed to confront the very issue she had raised”).
- Note that the juror’s responses will be taken as a whole. Although “I think” or “I’ll try” are definite red flags and disfavored by courts reviewing for-cause challenge claims on appeal, such words are not talismanic that automatically make a statement equivocal. The juror’s statements will be taken in context and as a whole. See People v. Chambers, 97 N.Y.2d 417 (2002). At the same time, “A hollow incantation, made without assurance or certitude is not enough. Where there remains any doubt in the wake of such statements, when considered in the context of the juror’s over-all responses, the prospective juror should be discharged for cause.” People v. Blyden, 55 N.Y.2d 73 (1982).

**PRACTICE TIP:** So what’s a practitioner to do when a juror says “I’ll try” or “I think I can” in response to the prosecutor’s or court’s attempted rehabilitation? Leave it there or follow-up to nail down the bias and lack of rehabilitation? Our advice: Generally leave it alone. Even with Chambers, courts on appeal still don’t like equivocal language, especially if the bias was strongly stated, or involves something extraneous to the case (which the evidence wouldn’t address, such as opinions about the defendant). Further questioning might muck things up. The exception might be if it’s clear that the “I think” was just a figure of speech and the juror’s answers as a whole showed that he or she was willing and able to set aside the bias. With an iffy appellate issue, it might be worth revisiting the issue with the juror to try to re-establish the bias as unpurged. In any event, exercise a peremptory if you have an “I think” or “I’ll try” situation, and EXHAUST.

**D. When the Defense Should “Rehabilitate”**

- What about the jurors who seem amenable to your case? Make your opponent find out, on her own, those that are leaning your way from the start. If you expose, by your questions, the people who are most likely to see things your way, your opponent will strike them. Since your primary task is to try to identify the ones who honestly are not in your corner, always ask the questions that will identify those you want to banish or purge from the panel first.
- If a juror gives answers to the prosecutor that suggest he or she is slanted to your side (e.g., doesn't trust/ bad experience with police, needs physical evidence/DNA, skeptical of single witness identifications), it will become your job to fend off a prosecution for-cause challenge and force the prosecution to exercise a peremptory.
- Ask the juror “neutralizing” questions to rehabilitate him/her so that the judge decides that he/she can remain on the panel over the other side's challenge. Here is where you want to ask the kind of questions that will elicit a simple “yes” — that the juror can follow the court's instructions, only consider the evidence in the case, abide by the reasonable doubt standard. Also ask questions that focus on the negative aspects of the juror, to lead the other side into believing you may not want them.

**E. Prospective Jurors Who Conceal Information During Voir Dire**

- Occasionally, prospective jurors, either deliberately or inadvertently conceal information during voir dire that later comes to light. Your remedies, if the information casts doubt on the juror's impartiality, depend on when the information is revealed. Dismissal of the juror becomes correspondingly more difficult as the case moves forward.
  - If the information comes out after the juror is selected and sworn but before the first trial witness is sworn, then you will be permitted to make a belated challenge for cause against that juror under CPL § 270.15(4).
  - If the information comes out after trial begins, then your remedy falls under CPL § 270.35(1) — you must show that the juror is “grossly disqualified to serve in the case or has engaged in misconduct of a substantial nature.” At a minimum, you should request an inquiry of the juror.
  - If the information comes out after sentence, then you must bring a

440.10 motion alleging that the juror's concealment of information violated the defendant's constitutional right to a fair and impartial jury and due process of law. You will be entitled under Supreme Court law to an evidentiary hearing, see Smith v. Phillips, 455 U.S. 209 (1981), but to win, you must establish "actual bias," that is, that the juror's verdict was influenced by the information she concealed. Alternatively, you must show that the juror's answer was deliberately false (not a mistake), and that the correct response would have provided a valid basis for a challenge for cause. See Samuels v. American Cyanamid Co., 130 Misc. 2d 175, 188 (N.Y. County Sup. Ct. 1985); United States v. Stewart, 433 F.3d 273, 303 (2d Cir. 2006).

**F. "Pre-Voir Dire" "Hardship" Excusals**

Before anyone is put in the box and questioned, it is common for the court to screen all 50 or 60 jurors called from Central Jury for "hardship." Hardship does not, or should not concern the juror's ability to be fair, but should concern such matters as family obligations, business commitments, medical issues, travel plans, etc. Such screening is not a material stage of the trial. The defendant has no right to be present, and the clerk can even handle the screening. **If you have any objection to the procedures the court follows in its hardship screenings, you must object to preserve the issue for appeal.**

## HYPOS

### Hypo 1

During voir dire in an attempted murder case where defense counsel indicated that the defense would be insanity, prospective juror K.G. stated that she had written a college thesis on the insanity defense.

She first told the court, unequivocally, that she would be able to set aside her personal views on that topic and apply the law as instructed by the court. On follow-up questioning by counsel, about whether her experience with the defense would prevent her from reaching a verdict based on the evidence, she stated,

"I think you should say that I would like to think that I could follow the judge's instructions, but I have very strong opinions, and I think my experience with research of the insanity defense and their successes over the years, I don't know . . . I don't know if I can ignore my prior experiences"

She later explained,

"I have very strong opinions of what constitutes a mental defect or mental illness that would make someone be found not guilty for their actions . . . As a lawyer, I would like to think I can listen to the judge. But, to be fair, I feel like I come in here with a strong bias."

I can apply the law, but I find that listening to the evidence -- you have to interpret the law and apply the law to the way you interpret the evidence, and I feel that I might be biased in the way that I interpret the evidence.

Asked by the prosecutor "So, you can't give both sides a fair trial," K.G. answered, "I'd like to try, but I don't know if I would be the best person to do that."

\* \* \*

1) would you want to ask K.G. any further questions?

2) would you challenge K.G. for cause? On what basis?

3) what do you think would be the outcome based on this record? Is there evidence of rehabilitation?

People v. Johnson, 74 A.D.3d 427 (1st Dep't 2010), People v. Johnson, 17 N.Y.3d 752 (2011)

## Hypo 2

Defense Counsel (to prospective juror C.H.): Would you be inclined to give a policeman's testimony a little bit more weight simply because they are a policeman?

C.H.: More weight than who?

Defense Counsel: Than a regular witness.

C.H.: Yes.

Defense Counsel: Because of their title as a policeman, right?

C.H.: Yes.

THE COURT: The law is you are not to give any greater weight to a police officer's testimony than you would to another person. Not only is it a concept of law, but it is also not unreasonable simply by virtue of a title or officer that they are more believable. So, in the law and everyday life, that doesn't apply.

C.H.: So it holds no weight, did you say?

THE COURT: It holds no weight that they are a police officer. They should be treated like anybody else. Otherwise, it gives weight to a person because of a title or job.

C.H.: Wouldn't they necessarily have more experience in certain areas?

THE COURT: They may be qualified as an expert in certain areas and in that case you would give them more consideration to their experience.

C.H.: I guess that would be just my tendencies. I was being honest. I know that is not what I am supposed to do.

\* \* \*

1) would you make a challenge for cause?

2) do you think the juror was sufficiently rehabilitated?

### Hypo 3

Prosecutor: Does anyone have any experiences from police officers that you feel will impact your ability to be fair in this case? Yes?

PROSPECTIVE JUROR: Several of my cousins are on the police force in New Rochelle and New York.

Prosecutor: The judge will tell you that you've got to treat police officers like every other witness. Can you follow his instructions?

A PROSPECTIVE JUROR: Um, yes. I mean, I come from a large family of relatives and police officers and, you know. I respect what they do.

Prosecutor: But you'll follow the court's instructions?

A PROSPECTIVE JUROR: Yes, I'll try.

\* \* \*

1) do you think you could make a successful challenge for cause on this record? Why or why not?

2) If you think more is needed for the challenge, what would you want to establish?

#### **Hypo 4**

During voir dire, a prospective juror stated that she had previously sat on a grand jury and had found it difficult and upsetting to view the gory pictures. She thought she might be influenced by "emotion or shocking photos."

On questioning from the court, she stated she would be fair despite seeing things she didn't like, agreed that a particular newspaper was not "always 100 percent accurate," and that the opinions she forms after reading newspaper articles were "not always right." The court then asked: "Would you look at the evidence, pictures, documents, reports, whatever kinds of things the evidence is and make your decision on that, not anything you learned outside of the courtroom or before the cases started?" The juror responded "Yes."

\* \* \*

1) would you make a challenge for cause on this record or want more from the juror?

2) what do you think of the rehabilitation by the court?

## Hypo 5

During the first round of jury selection in a robbery case, prospective juror M.G. stated that she had a nephew who was a police officer, but that it would not “make it difficult for her to serve as a fair and impartial juror.” She also stated that she had once been the victim of a chain-snatching, but neither would that “make it difficult for her to serve as a fair and impartial juror.”

During defense counsel’s voir dire, the following occurred:

Defense Counsel: Ms. G, do you think that the fact that my client has obviously been arrested and you heard that he was indicted and if you were selected to you feel that he is on trial here with these serious charges, does that indicate that he has to be guilty?

M.G.: I imagine they have something on him, they have evidence that he did —

Defense Counsel: I am not asking you what they have, I am asking you what you think. As you sit here do you think because he was arrested and indicted and because he is on trial now and we are here selecting this jury, a whole day selecting it and you heard two and a half to three weeks do you think that means, all of that means there is something here that’s an indication of guilt just be honest, do you believe that?

M.G.: Yes.

The Court: Can you follow my instruction that the defendant is presumed to be innocent?

M.G.: Yes.

The Court: So as he sits here today you must presume him to be innocent?

M.G.: Yes.

\* \* \*

The Court: Excuse me, let me stop you for a second, one of my instructions to you at the close of the case is going to be that the fact that somebody is arrested is not evidence of guilt. Can you all follow that instruction? Ms. G., can you follow that instruction?



M.G. Yes.

\* \* \*

1) Did Ms. G. state a bias? IF so, what? If not, why not?

2) Was she rehabilitated? Why or why not?

3) Would you make a challenge for cause on this record?

People v. Knight, 29 A.D.3d 306 (1st Dep't 2006)

### **Hypo 6**

During voir dire in a drug case, prospective D.R. asked to speak privately and informed the judge and the attorneys that "the only thing that concerns me, he [the defendant] looks familiar." He said he was "a little concerned about that." The following colloquy ensued:

DEFENSE COUNSEL: Well, does this recollection have a negative connotation, positive or neutral?

D.R.: More concern than anything else. That's all. More concern I might run into him later on; maybe some of his friends. . . .

THE COURT: If he does look familiar, how can you start talking about running into any of his friends –

D.R.: Maybe, he knows me. . . . maybe he can recall my face.

THE COURT: I can't rely on that. . . . That would be something that the Legislature never envisioned . . . .

D.R.: I'm only telling you what I feel. I'm not asking to be disqualified . . . .

DEFENSE COUNSEL: If I told you my client's address, would that put your mind at ease? Longwood Avenue near Prospect?

D.R.: I live around the corner from Longwood. All right?

DEFENSE COUNSEL: Does that change your concern in any way?

D.R.: It only increases it, obviously. Do you understand now? . . . I probably seen him around. I'm pretty sure of it as a matter of fact.

The court became irritated Rivera had not mentioned this concern when it had previously asked the venire if any actors in the case appeared familiar, stating “living in the same neighborhood is not a disqualifying factor.” Counsel then followed up:

DEFENSE COUNSEL: . . . The Judge has instructed you that my client is presumed innocent. Yet you have concern you may be acquainted, he may be in your neighborhood. Why should you be concerned if he's presumed innocent?

D.R.: Good question.

DEFENSE COUNSEL: Can you follow the Judge's instructions or do you have now a feeling about the defendant's guilt even though you haven't heard any evidence?

D.R.: Yes. There is a feeling of the defendant's guilt.

THE COURT: Based on what, sir?

D.R.: Based upon the fact he lives on Longwood Avenue. Longwood Avenue is infected with drugs and drug dealers . . . .

THE COURT: And you live on Longwood Avenue?

D.R.: I live around the corner from Longwood Avenue. . . .

THE COURT: . . . [I]f one can draw the same conclusion that you drew with respect to him, then there's nothing to stop me from drawing the same conclusion . . . with respect to you.

D.R.: You have a right to your conclusions. I have a right to mine. . . .

THE COURT: I told you when I brought you and your fellow jurors in here, this gentleman is presumed to be innocent.

D.R.: That's true.

THE COURT: And can you follow that instruction on the law?

D.R.: I'll try.... I can't promise you anything.

PROSECUTOR: You feel, given the information you've told us regarding the neighborhood

situation, you feel you could be a fair and impartial juror for the People as well as the defendant?

D.R.: I will try.

\* \* \*

1) Would you make a challenge on this record?

2) What facts would you point to?

3) How would you respond if the judge stated that he did not believe the juror actually recognized the defendant? That the juror had been rehabilitated?

People v. Tavaréz, 110 A.D.3d 473 (1st Dep't 2013)

### **Hypo 7**

In a murder case where the defense would be justification, defense counsel asked the prospective jurors whether they could fairly and impartially judge the self-defense claim and not be swayed by the fact that defendant's possession of the gun was unlawful. Thereupon, the following exchanges with juror number 4 took place:

DEFENSE COUNSEL: What about illegally? You heard the judge say the law on justification. You are shaking your head. What if someone has the gun illegally and uses it in a way that the law in New York allows that person to use it, would you say like, you are shaking your head.

PROSPECTIVE JUROR: Yes, I am troubled by someone carrying a gun illegally and what that implies about their intent. I am just using myself as the only person. I know if I am going to put a gun in my pocket and go out on the street I plan to use it. It is sort of a fantasy. Guns pervade us.

DEFENSE COUNSEL: Do you agree a gun could have a defensive purpose as opposed to I am going to go out and use it?

PROSPECTIVE JUROR: Yes.

DEFENSE COUNSEL: Can a legal gun have a defense purpose?

JUROR: I hate guns.

DEFENSE COUNSEL: Can I stop and ask you this question. Hate is a strong word.

JUROR: I believe the whole society has gone crazy.

DEFENSE COUNSEL: Based upon those emotions of hatred, is it fair to say that would interfere with your ability to be fair?

JUROR: Someone putting a gun in his pocket especially knowing that it is not legally warranted predisposes him or her to using it.

COURT: Excuse me, nonetheless legal or illegal, there are certain circumstances under which you can under the law use deadly force. We are not dealing with morality whether you would do it, whether you would want anybody you care about to do it. We are talking about whether somebody is guilty of a crime. Notwithstanding your feelings about guns, can you follow that instruction?

JUROR: I believe I could.

COURT: And, would your hatred of guns prevent you from following my instruction that under certain circumstances you can use deadly physical force without being criminally accountable?

JUROR: Not having heard the evidence, I could only say I would trust your instruction.

.....

DEFENSE COUNSEL (to Juror 4): Do you still have reservations about self-defense as a defense to the crime being charged?

JUROR: I am still troubled by carrying an illegal gun and the implications has in my mind to committing a crime.

\* \* \*

1) Would you make a challenge for cause on this record?

2) What is the juror's bias or predisposition?

3) Do you think the rehabilitation here is a close call or a no-brainer?

People v. Hausman, 285 A.D.2d 352 (1st Dep't 2001)

## **BATSON CHALLENGES**

### **A. Background**

The “Constitution forbids striking even a single prospective juror for discriminatory purpose.” Snyder v. Louisiana, 552 U.S. 472, 478 (2008). In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court held that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race. Id. at 89. Batson has been extended by the Supreme Court to apply to gender, J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994), and ethnicity, Hernandez v. New York, 500 U.S. 352, 359 (1991). New York adopted Batson under the State Constitution and prohibits discrimination against prospective jurors by either the People or the defense “on the basis of race, gender, or any other status that implicates equal protection concerns.” People v. Luciano, 10 N.Y.3d 499, 502-03 (2008); see People v. Kern, 75 N.Y.2d 638 (1990).

### **B. Making a Batson Challenge**

Batson sets forth the three-step burden-shifting procedure to assess claims of discrimination during the jury selection process. Courts are supposed to strictly abide by the three-step procedure discussed in more detail below; however, they often confuse and conflate the steps.

Step One – the moving party bears the initial burden of establishing a prima facie case that the opposing party has intentionally used its peremptory challenges to discriminate against a cognizable group. The prima facie case has two components: the cognizable class and facts and circumstances giving rise to an inference of discrimination.

Step Two – the burden shifts to the opposing party to articulate a facially non-discriminatory (“neutral”) reason for striking the juror(s).

Step Three – the trial court must determine, based on the arguments presented by the parties, whether the proffered reason for the peremptory strike was pretextual and whether the movant has shown purposeful discrimination.

#### **1. Step One: A Prima Facie Case**

##### **a. Legal Standard**

As noted above, a Batson challenge begins with making a step one showing of a prima facie case of intentional discrimination. This showing has two components: 1) identifying the cognizable

class and 2) setting forth “facts and other relevant circumstances” to support an inference or “pattern” of discrimination. See Batson; People v. Hecker, 15 N.Y.3d 625, 651 (2010).

The Supreme Court has noted that the step one burden is not intended to be onerous. See Johnson v. California, 545 U.S. 162 (2005); see also Truesdale v. Sabourin, 427 F. Supp. 2d 451, 460 (S.D.N.Y. 2006) (noting that Batson “does not support the differential treatment of claims based on a pattern of strikes and claims based on other forms of evidence. . . . Nor does Batson support a requirement that any argument made at the first step of the Batson inquiry be ‘compelling’ or ‘conclusive.’”). In fact, the moving party need only demonstrate an “inference” of discrimination. People v. Smocum, 99 N.Y.2d 418, 421 (2003); People v. Childress, 81 N.Y.2d 263, 268 (1993). While identifying a cognizable class is relatively straightforward, demonstrating a “pattern” of discrimination has not proven easy for litigants.

### **i. Cognizable Class**

A cognizable class has been defined as “a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied.” Castaneda v. Partida, 430 U.S. 482 (1977) (discussing equal protection violations in grand jury context). Cognizable groups, include (but are not limited to):

-**Race** - Batson v. Kentucky, 476 U.S.79 (1986) (black jurors); People v. Payton, 204 A.D.2d 661 (2d Dep’t 1994) (white jurors).

-**Gender** - People v. Irizarry, 165 A.D.2d 715 (1st Dep’t 1990) (female jurors); People v. Wilson, 65 A.D.3d 956 (1st Dep’t 2009) (male jurors); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) (same).

-**Skin Color/People of color/Skin tones** - People v. Bridgeforth, \_\_\_ N.Y.3d \_\_\_, 2016 WL 7389277 (Dec. 22, 2016) (“dark-colored” skin tone was a protected class to challenge exclusion of black and Indian women).

-**National origin** - People v. Hernandez, 75 N.Y.2d 350 (1990) (Latino jurors); United States v. Rudas, 905 F.2d 38 (2d Cir. 1990) (same); People v. Rambersed, 170 Misc. 2d 923 (Sup. Ct., Bx. Cty. 1996) (Italian-Americans).

-**Hybrid of any of these protected classes** – People v. Bridgeforth, \_\_\_ N.Y.3d \_\_\_, 2016 WL 7389277 (Dec. 22, 2016) (“dark-colored” women).

-**Sexual orientation** – People v. Baker, 211 A.D.2d 602 (1st Dep’t 1995) (finding Batson challenge unpreserved on appeal, but denied existence of a pattern of discrimination as to “homosexual” prospective jurors); Smithkline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014).

-**Religious Affiliation** – United States v. Somerstein, 959 F. Supp. 592 (E.D.N.Y. 1997) (Jewish jurors); People v. Langston, 167 Misc. 2d 400 (Sup. Ct., Queens Cty. 1996) (Muslim jurors). But see United States v. Brown, 352 F.3d 654 (2d Cir. 2003) (distinguishing religious affiliation – a protected class – from those engaged in religious activities – not a cognizable group).

Groups that courts have held **not** to be cognizable include:

-**“Minorities”** - People v. Smith, 81 N.Y.2d 875 (1993).

-**Political Affiliation** - United States v. Prince, 647 F.3d 1257 (10th Cir. 2011); Jaquith v. South Orangetown Cent. School Dist., 349 F. App’x 653 (2d Cir. 2009).

-**Age** - People v. Assi, 63 A.D.3d 19 (1st Dep’t 2009); United States v. Helmstetter, 479 F.3d 750 (10th Cir. 2007).

-**Practice Tip:** While age independently is not a cognizable group, there is an open question in NY as to whether or not age, in combination with other cognizable groups, is a protected class. See, e.g., Robinson v. United States, 890 A.2d 674 (D.C. 2006) (recognizing “young black males” as a cognizable category for step-one Batson purposes). Thus, this should be an objection that you are making if you see, for example, that young black jurors are being stricken, yet the prosecution is selecting older black jurors.

## **ii. “Facts and other relevant circumstances”**

In addition to identifying a cognizable class, the movant must also show “that the facts and circumstances of the voir dire raise an inference that the other party excused one or more jurors for an impermissible reason.” People v. Smocum, 99 N.Y.2d 418, 421 (2003). There are no fixed rules for determining what will establish an “inference” of discrimination, however, the following is a non-exhaustive list of things you want to consider when making out a prima facie case:

- The pattern of strikes (numerical arguments are discussed in the next section).
- Whether the prosecutor questioned the challenged jurors during voir dire.
- Whether the prosecutor struck “members of this group who, because of their background and experience, might otherwise be expected to be favorably disposed to the prosecution.” Childress, 81 N.Y.2d at 267. Examples include, education levels, stable employment, ties to law enforcement, lack of criminal history, etc.
- Whether members of the cognizable group were excluded while others with the same relevant characteristics were not. See Foster v. Chapman, \_\_ U.S. \_\_, 136 S. Ct. 1737 (2016); Childress, 81 N.Y.2d at 267; People v. Bolling, 79 N.Y.2d 317, 324-25 (1992); People v. Rodriguez, 211 A.D.2d 275, 277-78 (1st Dep’t 1995).

## **iii. Numerical Arguments**

While litigants should use numerical arguments in support of meeting its prima facie burden, the Court of Appeals has cautioned that “numerical or statistical arguments are ‘rarely’ conclusive in the absence of other facts or circumstances’ to give rise to an inference of discrimination.” Hecker, 15 N.Y.3d at 651 (quoting People v. Brown, 97 NY2d 500, 507 (2002) (emphasis added)).

Nonetheless, this should not discourage litigants from raising numerical arguments. See, e.g., People v. Rosado, 45 A.D.3d 508 (1st Dep’t 2007) (numerical argument sufficient to raise inference of discrimination although not accompanied by other evidence); People v. Brown, 97 N.Y.2d 500, 507 (2002) (noting that a disproportionate number of strikes against a particular group may be sufficient to create an inference that establishes a prima facie claim). Numerical arguments help paint a picture (especially on appeal!) as to who comprises the venire and whether peremptory strikes are being disproportionately utilized against a specific group.

## **b. Practical Matters**

### **i. Notetaking**

Before an attorney can even know if a Batson challenge is warranted, careful attention to the personal details of each prospective juror is necessary. In order to make an effective Batson challenge, the defense must note the name and race and gender of each prospective juror (as well as any notes pertaining to national or religious affiliation if it is evident). Additionally, the defense must take notes as to the background of each prospective juror (important facts include, whether there are ties to law enforcement, education level, profession, crime victim, family member of crime victim, etc.).

**Practice Tip:** There can be a lot of important information that is revealed in a short time span, so it helps to have your client, if possible, take down notes as well. This assists you as a practical matter, allows your client to contribute to the jury selection process, and gives the prospective jurors (who will eventually be sworn jurors) the opportunity to see your client taking an active and interested role in the litigation of his/her case. More, jurors will believe that you trust your client enough to play an important role in this process – a sentiment that could impact deliberations.

### **ii. Making a Record**

Two things to keep in mind: 1) clearly state what protected group(s) are being unlawfully stricken and 2) identify (by name and number) which prospective jurors you are challenging as part of the protected class. Many records are left unintelligible on appeal because defense counsel has neglected to state which prospective jurors are being challenged. This is particularly important if you are challenging the use of peremptory strikes from a prior round.



-**Note:** If you have previously made a Batson challenge as to the same protected class that the court denied, make sure to join your prior Batson challenge with your current challenge. This will help further establish your pattern.

Other things to state when making a record for a Batson claim:

- How many prospective jurors are on the venire?
- How many of those prospective jurors were part of the protected class?
- How many jurors of that protected class remain on the panel after the prosecutor's use of peremptory strikes?
- What are the name and numbers of similarly situated jurors that the prosecutor did not strike?
- How many similarly situated jurors were not stricken by the prosecution?

To develop a clear record for appeal, it is also important to identify the juror by name during voir dire. Oftentimes, attorneys will seamlessly go from juror to juror during voir dire without identifying the juror, making it impossible to know whether those were the responses of jurors later named in a Batson challenge. Therefore, at least when you are zeroing in on a particular prospective juror as one who might be challenged for cause or involved in a Batson issue, try to address that juror by name during the voir dire. If the key questions were asked by the court or the prosecutor, restate, as best you can, during your argument of the resulting issue exactly what the juror said, so the appeals attorney can identify the relevant parts of the transcript.

## **2. Step Two: Neutral Reasons**

Assuming the court finds a prima facie case of discrimination, step two places the burden on the opponent of the Batson challenge to provide non-discriminatory reasons for its patterned use of peremptory challenges against a cognizable class. However, if the complaining party does not question a particular strike, the party defending the strike is not required to provide a neutral reason for it. People v. James, 99 N.Y.2d 264 (2002); People v. Manigo, 165 A.D.2d 660 (1st Dep't 1990). Any "facially-neutral reason" for the challenge is enough to rebut the prima facie case, even if the reason is ill-founded, unpersuasive, or implausible. Purkett v. Elam, 514 U.S. at 768; People v. Allen, 86 N.Y.2d 101, 109-10 (1995).

"Determination whether the People's proffered reasons meet their burden is a question of law: assuming the proffered reasons for the peremptory challenges are true, do the challenges violate the Equal Protection Clause?" Allen, 86 N.Y.2d at 109. Thus, unless a discriminatory intent is "inherent in the . . . explanation," the reason proffered will be deemed neutral. Id. at 110; Smocum, 99 N.Y.2d 418.

Nonetheless, there are limitations. One cannot meet the step two burden by claiming "good faith." Purkett v. Elam, 514 U.S. at 769; People v. Jenkins, 75 N.Y.2d 550 (1990); People v.

Reid, 212 A.D.2d 642 (2d Dep’t 1995) (prosecutor’s statement that as a black individual she was very sensitive to racial discrimination was insufficient because it was little more than a denial of discriminatory purpose and an assertion of good faith). Nor is the failure to recall the reason for the peremptory strike sufficient to meet the burden. People v. Dove, 172 A.D.2d 768, 769 (2d Dep’t 1991). Moreover, the trial court, rather than the prosecutor, cannot be the person to supply the neutral reason even if it is evident on the face of the record. Williams v. Louisiana, \_\_\_ U.S. \_\_\_, 136 S. Ct. 2156 (2016).

**Note:** In a reverse Batson challenge, the defense will be the party that will have to offer neutral reasons for its peremptory strikes. As a result, notetaking is critical to providing neutral reasons for the peremptory challenges. Additionally, during step two of a reverse Batson, the defense should be challenging the prosecution’s prima facie case, arguing that either a cognizable group has not been identified and/or that the facts and circumstances did not establish a pattern of discrimination.

### **3. Step Three: Pretext**

Assuming the court finds that the striking party’s explanations are neutral, the burden shifts back to the moving party to “persuade the court that reasons are merely a pretext for intentional discrimination.” People v. Hecker, 15 N.Y.3d 625, 656 (2010). This a factual, not legal, determination that the court must make based on all of the facts and circumstances presented. Id.

**Practice Tip:** Since the court must consider all of the facts and circumstances presented, you should cite to the facts listed in your step one showing to support your Batson claim. These facts that were elicited during step one are still relevant in the step three analysis as they explain why the prosecutor’s purportedly neutral reason is pretextual.

The court can consider a variety of factors when assessing pretext. “Credibility can be measured by among other factors, the demeanor of the opposing party, by how reasonable or how improbable, the explanations are, and by whether the proffered rationale has some basis in accepted strategy.” Miller-El v. Cockrell, 537 U.S. 332, 339 (2003). In People v. Richie, 217 A.D.2d 84, 89 (2d Dep’t 1995), the Second Department suggested five factors in assessing pretext:

1. Whether the reason proffered by the party exercising the peremptory challenge relates at all to the facts of the case,
2. The extent to which the party exercising the peremptory challenge actually questioned the proposed juror,
3. Whether particular questions were asked of only one group of jurors, and not of others,

4. Whether a particular reason was applied to only one group of jurors, and not to others,
5. Whether the reason proffered was based upon “hard data” or was purely intuitive.

**Practice Tip:** If you are the party making a Batson challenge, make sure the court explicitly decides step three. The reason for this is that once the court makes a step 3 finding, any questions as to whether there is a prima facie case (step one) is mooted out. See Bridgeforth, \_\_ N.Y.3d \_\_, 2016 WL 7389277 (Dec. 22, 2016). On the other hand, if you are responding to a Batson challenge, there is no need to encourage the court to make a step three finding as it would moot out any step one litigation on appeal. Nor can an appellate lawyer argue that the race-neutral reasons were silly and not believable if you do not make arguments below saying so, and do not insist on a ruling by the court. Foster v. Chapman, \_\_ U.S. \_\_, 136 S. Ct. 1737 (2016).

**a. Mixed Motive:**

The Supreme Court has yet to announce specific guidance on this mixed-motive or dual-motive situation, but it has phrased the requisite showing for the third prong as proof that a strike was “motivated in substantial part by discriminatory intent.” Snyder v. Louisiana, 552 U.S. 472 (2008). If during a step three analysis you believe the court is not going to find pretext, it may be worth reminding the court that it need not find that the strikes were used solely for discriminatory purposes and only in “substantial part.”

**C. Scenarios**

1. Prosecution makes a reverse Batson challenge in the second round of voir dire claiming that the defense is discriminating against minority prospective jurors. What is your response?
2. You make a Batson challenge due to what you claim is a pattern of discriminatory strikes against young, Asian, male jurors. The prosecution responds that you have not identified a cognizable class under Batson. How do you reply?
3. You make a Batson challenge due to the prosecutor striking four out of the five female, Latina prospective jurors on the panel. Without making a step one finding, the court immediately asks the prosecutor for race and gender neutral reasons. The prosecutor provides neutral reasons for three out of the four women. For the fourth woman, the prosecutor simply states that he did not believe she was part of the protected class (Latina) and never provides any other explanation. The court then finds that the defense did not meet its step 1 burden and, in any event, accepts the prosecutor’s neutral reasons. How do you respond?

4. You are in the second round of voir dire and the prosecution has used all three peremptory challenges against black jurors. In the first round, the prosecution struck the only black juror on the venire. How do you craft your Batson challenge?
5. The prosecution makes a reverse Batson challenge and argues that the defense is striking a disproportionate number of people of color. At this point, the defense has struck an African male, a Korean woman, and an Indian male. How do you respond?

## MISCELLANEOUS ISSUES

### Limitations on Voir Dire

#### A. Time Limitations

- There are no statutory guidelines relating to the duration of voir dire: The scope of counsel's examination of prospective jurors "shall be within the discretion of the court." CPL 270.15. Trial courts have "broad discretion" but any restrictions imposed on voir dire "must nevertheless afford . . . counsel a fair opportunity to question prospective jurors about relevant matters." People v. Steward, 17 N.Y.3d 104 (2011); People v. Jean, 75 N.Y.2d 544 (1989).
- If the court choose at the outset to allocate a fixed period of time for such questioning, "the allotment should be appropriate to the circumstances of the case." Steward, supra. The court must also be willing to reconsider the propriety of that restriction if a party raises a legitimate concern woce jury selection is underway.
- Five minutes per round held unreasonable in Steward — Court of Appeals notes that five minutes is "significantly shorter than the norm in this multiple felony prosecution;" that defendant was facing serious charges; that the victim was a local radio celebrity known to many prospective jurors; the case involved a novel issue of victim "self-help."
- Court in Steward lists relevant factors for a court to consider in determining time limits: number of jurors and alternate jurors to be selected and number of peremptorys available to the parties, number, nature and seriousness of the charges, any media attention, special considerations arising from the legal issues in the case, including anticipated defenses or a plea of not responsible, any unique concerns emanating from the identify or characteristics of the defendant, the victim, the witnesses or counsel, the extent to which the court will examine the prospective jurors on relevant topics.
- Preservation: Counsel must alert the court that the limit is unduly restrictive and why. For a successful appeal, the defendant must also establish prejudice from the limitation — that a potentially biased juror actually sat on the jury. Therefore, the record must clearly show which jurors were discharged and retained — that some of the jurors who gave problematic answers on initial questioning but with whom counsel could not follow up with because of the time restrictions, ultimately sat on the jury.

B. Content Limitation

- Parties must be afforded “a fair opportunity to question the prospective jurors as to any unexplored matter affecting their qualification, but the court is required to preclude repetitive or irrelevant questioning, or questions as to a juror’s knowledge of rules of law. CPL 270.15(1)(c).
- Error to prevent defense counsel from asking whether prospective jurors would draw an adverse inference if defendant did not testify and whether they would automatically discredit the sole defense witness because he had a criminal record. People v. Porter, 226 A.D.2d 275 (1st Dep’t 1996). “Questions regarding how jurors would react to certain witnesses and whether they will accord the defendant a fair trial should be permitted during voir dire.” *Id.*
- use of hypotheticals: While not categorically improper, New York courts have expressed disapproval of hypotheticals containing detailed statements of fact which counsel expects to establish, and presupposed rules of law to be charged by the court. See People v. Garrett, 285 A.D. 1088 (2d Dep’t 1955). If prosecutor uses a hypothetical that uses facts similar to your case, object that the hypo is aimed at getting jurors to commit to convicting before even hearing any evidence in violation of the defendant’s constitutional right to an impartial jury.

### **Antommarchi (the Defendant's Right to Be Present at Sidebars)**

- Defendant has the right to be present at sidebar discussions with prospective jurors exploring their backgrounds and their ability to weigh the evidence objectively. People v. Antommarchi, 80 N.Y.2d 247 (1992).
- Defendant has no right to be present at sidebars concerning physical impairments, family obligations and work commitments. People v. Velasco, 77 N.Y.2d 469 (1991).
- Preservation: The defendant's absence can be raised on appeal even absent objection and even if the juror is discharged through a peremptory challenge by the defense. However, if the juror was excused for cause or peremptorily by the prosecution, then defendant's presence could not have made a difference because the juror was disqualified as a matter of law. Antommarchi, supra; People v. Roman, 88 N.Y.2d 18 (1996).
- A defendant can waive his or her Antommarchi rights, both implicitly (by not exercising them after being advised of them by the court) and explicitly (through counsel, even outside the defendant's hearing).

**PRACTICE TIP:** While once common, Antommarchi error is a rare occurrence today. However, if the court should fail to advise the defendant about his Antommarchi rights or secure a waiver, don't be the one to remind the court. If a sidebar occurs and you exercise a peremptory as a result, Antomamarchi would call for automatic reversal.

