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Voir Dire Racial Discrimination Under a "Comparative Juror Analysis" in Kesser v. Cambra

Andje Morovich

CASE SUMMARY

VOIR DIRE RACIAL DISCRIMINATION UNDER A "COMPARATIVE JUROR ANALYSIS" IN *KESSER v. CAMBRA*

INTRODUCTION

In *Kesser v. Cambra*, the en banc Ninth Circuit panel held that a California State Prosecutor's justifications for peremptory challenges during jury voir dire were pretexts for purposeful discrimination.[1] The Ninth Circuit concluded that the California Court of Appeal failed to apply the proper Supreme Court test under *Batson v. Kentucky*[2] to determine whether the prosecutor's nonracial motives were pretextual.[3] Applying a "comparative juror analysis" (comparing the characteristics of a stricken juror with an impaneled juror), the Ninth Circuit majority held that the California Court of Appeal improperly relied solely on the prosecutor's own self-serving testimony as to his race-neutral reasons.[4] By contrast, the concurring and dissenting opinions argued that a pure "comparative juror analysis" was not prescribed by Supreme Court precedent and offered alternative approaches.[5]

I. FACTS AND PROCEDURAL HISTORY

Following their convictions of first degree murder and sentences to life in prison without parole, defendants Richard Kesser and (wife) Jennifer Leahy sought a writ of habeas corpus to the Ninth Circuit "on

[1] Kesser v. Cambra 465 F.3d 351, 353 (9th Cir. 2006) (en banc).

[2] Batson v. Kentucky, 476 U.S. 79 (1986).

[3] *Kesser*, 465 F.3d at 358.

[4] *Id.*

[5] *See infra* notes 77-104 and accompanying text.

the grounds that the prosecutor struck potential jurors on the basis of their race, in violation of the Equal Protection Clause of the Fourteenth Amendment."[6] The prosecutor struck three Native American women and one Asian woman.[7]

At the defendant's request, the trial court conducted an evidentiary hearing and summoned the prosecutor to explain the reasoning behind his strikes.[8] The prosecutor explained that Debra Rindels, the first Native American woman to be challenged, was stricken because she worked for a tribe and he feared she was "inclined to favor Native American culture and institutions over 'the mainstream system'" and that "Native Americans were 'resistive' and 'suspicious' of the criminal justice system."[9] He rated Ms. Rindels a "C" overall, finding her to be "pretentious," "self-important," "somewhat unstable, fairly weak, and some[one] who . . . would be easily swayed by the defense."[10]

Regarding Theresa Lawton, a second Native American woman, the prosecutor explained that he rated Ms. Lawton a "C minus" overall because he perceived her to be "weak" and uneducated.[11] In addition, he was concerned with her commute to court, given the winter conditions, and did not want to disrupt the flow of the proceedings if roads were closed.[12] Ultimately, he made the determination that she was not a good juror for the *Kesser* case.[13]

Finally, the prosecutor explained that he excused the last Native

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[6] Kesser v. Cambra, 465 F.3d 351, 353, 356 (9th Cir. 2006). Richard Kesser, his wife, Jennifer Leahy, and a friend, Stephen Chiara, were convicted of first degree murder under the theory that Kesser and Leahy hired Chiara to kill Kesser's ex-wife so that the couple could collect the insurance proceeds. *Id.* at 356. The couple was sentenced to life in prison without the possibility of parole. *Id.*

[7] *Id.* at 353.

[8] *Id.* *People v. Wheeler* is California's equivalent of *Batson v. Kentucky*, holding that purposeful discrimination in the jury selection process violates the Equal Protection Clause of the Fourteenth Amendment. *See generally* People v. Wheeler, 583 P.2d 748 (Cal. 1978) (rejected by Johnson v. California, 545 U.S. 162 (2005), to the extent *Wheeler* conflicts with federal law); *see also* Batson v. Kentucky, 476 U.S. 79 (1986). *Wheeler* held that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates article I, section 16, of the California Constitution. *See Wheeler*, 583 P.2d at 761-62. To the extent the *Wheeler* standard differs from *Batson*, the federal rule controls. *See* Johnson v. California, 545 U.S. 162, 168 (2005).

[9] *Kesser*, 465 F.3d at 353.

[10] *Id.* at 353-54. "The prosecutor indicated that he made notes and gave grades from a high of A to a low of F based on his impression of the questionnaire filled out by the venire panel, responses during voir dire, and what transpired at the hardship proceeding." *See id.* at 378 (Rymer, J., dissenting).

[11] *Id.* at 354-55. The prosecutor elaborated that he viewed Ms. Lawton as "weak" given her admission during voir dire that she would have a hard time answering out loud if the Court questioned her on her verdict. *Id.*

[12] Kesser v. Cambra, 465 F.3d 351, 354 (9th Cir. 2006).

[13] *Id.* at 355.

American woman, Carla Smithfield, for hardship and had rated her a "C" overall.[14] Ms. Smithfield emphasized during voir dire that the trial would be a hardship to her given her position as a teacher of two year old children because the children were very attached to her and she could not think of anyone to take her place during the trial.[15]

Following the prosecutor's explanations, defense counsel expressed particular concern with the challenge against Debra Rindels, arguing that it was a "classic example of . . . a presumption of a group bias based on a stereotype membership in a racial group . . . ."[16] The trial court, however, found sufficient justification to support all of the peremptory challenges and held that Debra Rindels was dismissed because she worked for a tribe, not because she was a member of the tribe.[17] The Ninth Circuit noted, however, that the trial court "did not evaluate the sincerity of the prosecutor's nonracial responses because it did not find any racial animus that would prompt further inquiry."[18]

The California Court of Appeal reviewed the defense challenge, also known as a *Batson*[19] challenge, and found that the trial court was correct in holding a hearing to determine if jurors had been excluded based on their association with an identifiable group.[20] The California Court of Appeal revisited the trial court's findings and concluded that the challenges were "'based on individual predilections supported by the record.'"[21] The Court of Appeal recognized that the trial court made no findings on the sincerity of the prosecutor's motivations, but held that great deference was to be given to the trial court in "'distinguishing bona fide reasons from sham excuses.'"[22] The Court of Appeal concluded that the trial court could reasonably have found, given several race-neutral explanations, that the prosecutor's motives were not racial or ethnic.[23]

The California Supreme Court denied Kesser and Leahy's petitions without comment.[24] The couple then sought a writ of habeas corpus under 28 U.S.C. § 2254, on the ground the prosecutor's use of peremptory strikes violated the Equal Protection Clause of the

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[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 356.

[18] Kesser v. Cambra, 465 F.3d 351, 356 (9th Cir. 2006).

[19] Batson v. Kentucky, 476 U.S. 79 (1986).

[20] Kesser v. Cambra, 465 F.3d 351, 356 (9th Cir. 2006) (citing People v. Chiara, No. A060502, slip op. at 17 (Cal. Ct. App. Dec. 12, 1995)).

[21] *Kesser*, 465 F.3d at 356 (quoting *Chiara*, No. A060502, slip op. at 20).

[22] *Kesser*, 465 F.3d at 356 (quoting *Chiara*, No. A060502, slip op. at 19).

[23] *Kesser*, 465 F.3d at 356-57.

[24] People v. Chiara, No. S051306 (Cal. Mar. 14, 1996).

Fourteenth Amendment.[25] The district court that reviewed the claim also denied the petitions and found that "although the trial court 'commit[ed] serious error in failing to recognize the bias inherent in one of the prosecutor's purportedly neutral reasons,' the court of appeal acted appropriately in finding that 'race was not the primary reason given by the prosecutor.'"[26]

The Ninth Circuit originally affirmed the district court in a divided decision, then granted a rehearing en banc and reversed.[27]

II. EN BANC NINTH CIRCUIT ANALYSIS

A. THE COURT'S DUTY TO EVALUATE THE CREDIBILITY AND LEGITIMACY OF PEREMPTORY CHALLENGES

When there are questions surrounding the discriminatory motivations behind a peremptory challenge, a party can request a *Batson* hearing.[28] Under *Batson*, the party that exercised the peremptory challenge "'must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges'" and the court's findings "'largely will turn on evaluation of credibility.'"[29] The Ninth Circuit explained that even in a "mixed-motive analysis" (where a challenger articulates both race-based and race-neutral reasons), when there are blatant race-based strikes *Batson* is not "toothless."[30] "Once an inference of race-based challenges has been established, the court need not accept any nonracial excuse that comes along."[31]

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[25] Kesser v. Cambra, 465 F.3d 351, 357 (9th Cir. 2006).

[26] *Id.* (citing Leahy v. Farmon, 177 F. Supp. 2d 985, 992, 1001 (N.D. Cal. 2001) (internal quotations omitted); *see also* Kesser v. Cambra, No. C-96-3452-PJH 2001 WL 1352607, *8-13 (N.D. Cal. Oct. 26, 2001) (unpublished disposition)).

[27] Kesser v. Cambra, 392 F.3d 327 (9th Cir. 2004), *reh'g granted*, 425 F.3d 1230 (9th Cir. 2005), *rev'd en banc*, 465 F.3d 351 (9th Cir. 2006).

[28] Batson v. Kentucky, 476 U.S. 79 (1986). California's equivalent of a *Batson* hearing is a *Wheeler* hearing. *See* People v. Wheeler, 583 P.2d 748 (Cal. 1978) (rejected by Johnson v. California, 545 U.S. 162 (2005), to the extent *Wheeler* conflicts with federal law). *See also supra* note 8.

[29] *Kesser*, 465 F.3d at 358 (quoting Batson v. Kentucky, 476 U.S. 79, 98 n.20-21 (1986)).

[30] *Kesser*, 465 F.3d at 358. The "mixed-motive analysis" was advocated by Circuit Judge Wardlaw in her concurrence in this case. *See id.* at 371-76; *see also infra* notes 77-84 and accompanying text.

[31] Kesser v. Cambra, 465 F.3d 351, 358 (9th Cir. 2006) (citing Johnson v. Vasquez, 3 F.3d 1327, 1331 (9th Cir. 1993)).

1. Batson Test

"A *Batson* challenge involves a three-part test. First, the defendant must make a prima facie showing that a challenge was based on race. Second, the prosecution must offer a race-neutral basis for the challenge. Third, the court must determine whether the defendant has shown 'purposeful discrimination.'"[32]

If the prosecution has put forth race-neutral reasons under the second step in *Batson*, "the court is required to evaluate 'the persuasiveness of the justification.'"[33] "The question is not whether the stated reason represents a sound strategic judgment, but 'whether counsel's race-neutral explanation for a peremptory challenge should be believed.'"[34] "'While subjective factors may play a legitimate role in the exercise of challenges, reliance on such factors alone cannot overcome strong objective indicia of discrimination . . . .'"[35]

It is the duty of the prosecutor to give a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges."[36] The reasons must be related to the case being tried.[37] "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."[38] "'[W]hen there is reason to believe that there is racial motivation for the challenge, neither the trial courts nor [Circuit Courts of Appeal] are bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it.'"[39] There is no need for the court to find "all nonracial reasons pretextual in order to find racial discrimination."[40]

2. Comparative Juror Analysis

The court can also conduct a "comparative analysis" of a stricken

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[32] *Kesser*, 465 F.3d at 359 (citing *Batson*, 476 U.S. at 98; Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam) ("If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.")).

[33] *Kesser*, 465 F.3d at 359 (citing Purkett v. Elem, 514 U.S. 765, 768 (1995)).

[34] *Kesser*, 465 F.3d at 359 (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991) (plurality opinion)).

[35] *Kesser*, 465 F.3d at 359 (quoting Burks v. Borg, 27 F.3d 1424, 1429 (9th Cir. 1994)).

[36] *Kesser*, 465 F.3d at 359 (quoting Batson v. Kentucky, 476 U.S. 79, 98 n.20 (1986) (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981))).

[37] Kesser v. Cambra, 465 F.3d 351, 359 (9th Cir. 2006) (citing *Batson*, 476 U.S. at 98).

[38] *Kesser*, 465 F.3d at 359 (quoting Purkett v. Elem, 514 U.S. 765, 768 (1995)).

[39] *Kesser*, 465 F.3d at 359 (citing Johnson v. Vasquez, 3 F.3d 1327, 1331 (9th Cir.1993)).

[40] *Kesser*, 465 F.3d at 360.

juror with an impaneled juror.[41] In the present case, the majority found particularly apt the "comparative juror analysis," which it noted was a long-approved circuit approach that the United States Supreme Court recently applied in *Miller-El v. Dretke*.[42] Under a comparative analysis, a "'prosecutor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge.'"[43] The Ninth Circuit noted that the California appellate court may not have engaged in a comparative analysis because California case law provides "that neither the court of appeal nor the trial court need 'compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered.'"[44] However, the Ninth Circuit suggested that California courts might want to revisit this issue in light of the Supreme Court's holding in *Miller-El v. Dretke*.[45]

B. APPLICATION OF *BATSON* AND THE COMPARATIVE JUROR ANALYSIS

In *Kesser*, the Ninth Circuit majority held that the California court failed to consider the evidence before it and "unreasonably accepted [the prosecutor's] nonracial motives as genuine."[46]

The majority held that the prosecutor's racial animus behind his strikes was clear.[47] The prosecutor's "race-neutral" reasons were "only a veneer, a pleasing moss having no depth"; therefore the court went on to consider individually each of the prosecutor's stated reasons for exercising his challenges.[48] The majority concluded, given the prosecutor's testimony, that he had an obvious fixation with Native

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[41] *See id.*; *see also* Miller-El v. Dretke, 545 U.S. 231 (2005); Lewis v. Lewis, 321 F.3d 824 (9th Cir. 2003); McClain v. Prunty, 217 F.3d 1209, 1220 (9th Cir. 2000); Turner v. Marshall, 121 F.3d 1248, 1251-52 (9th Cir. 1997); United States v. Chinchilla, 874 F.2d 695, 698-99 (9th Cir. 1989).

[42] *See Kesser*, 465 F.3d at 360. *See also* Miller-El v. Dretke, 545 U.S. 231, 241 (2005); *supra* note 4.

[43] Kesser v. Cambra, 465 F.3d 351, 360 (9th Cir. 2006) (quoting McClain v. Prunty, 217 F.3d 1209, 1220 (9th Cir. 2000)). *See also* United States v. Chinchilla, 874 F.2d 695, 698-99 (9th Cir. 1989) (finding pretext where the prosecution claimed it struck a Hispanic juror on account of his residence, but did not strike a non-Hispanic juror with the same residence).

[44] *Kesser*, 465 F.3d at 360 (quoting People v. Arias, 913 P.2d 980 (Cal. 1996)); *see also* People v. Johnson, 767 P.2d 1047 (Cal. 1989).

[45] *Kesser*, 465 F.3d at 360 n.3 (citing Miller-El v. Dretke, 545 U.S. 231, 241 (2005) (holding that "[i]f a prosecutor's proffered reason for striking a [minority] panelist applies just as well to an otherwise-similar [nonminority] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step")).

[46] *Kesser*, 465 F.3d at 358.

[47] *Id.* at 357.

[48] *Id.* at 362-71.

Americans and went on to strike the remaining Native Americans in the panel.[49] He then struck the only other minority in the venire, Flordeliza Nakata, whom he also described in his notes as "brown skinned."[50] The jury that was ultimately selected was an all-white jury.[51]

1. Debra Rindels, a Native American Woman

When questioned about his peremptory challenge to eliminate Debra Rindels, the prosecutor "answered using blatant racial and cultural stereotypes."[52] He identified Rindels in his notes and to the court as a "darker skinned" "Native American female."[53] He then went on to express his fears that Native Americans were resistive and suspicious of the criminal justice system.[54] He stated that she was "pretentious" for thinking she was the only one at her job that could complete her tasks.[55] He also felt that Rindels was living in a dysfunctional family because her daughter had been molested by Rindels' father.[56]

The majority conducted a comparative analysis of questionnaire responses by other potential jurors in the *Kesser* case and found impaneled jurors with many of the same characteristics that Rindels was dismissed for having.[57] Ultimately, the majority found that Rindels "was not emotional about, resistive to, or suspicious of the system," unlike some other jurors.[58]

The majority's analysis uncovered other jurors who appeared "pretentious" from their answers but were not struck by the prosecutor.[59] It also found impaneled members of the jury in dysfunctional family situations who were accepted by the prosecutor.[60] The court concluded that

> In light of the record, the prosecutor's facially plausible explanations are "severely undercut by the prosecution's failure to object to other panel members who expressed

[49] Kesser v. Cambra, 465 F.3d 351, 357 (9th Cir. 2006).
[50] *Id.*
[51] *Id.* at 358.
[52] *Id.* at 357.
[53] *Id.*
[54] *Id.*
[55] Kesser v. Cambra, 465 F.3d 351, 362 (9th Cir. 2006).
[56] *Id.* at 365.
[57] *Id.* at 362-68.
[58] *Id.* at 365.
[59] *Id.* at 362-63.
[60] *Id.* at 366.

> views much like [Rindels's]. The fact that [a given] reason also applied to these other panel members, most of them white, none of them struck, is evidence of pretext."[61]

Given his clearly pretextual reasons, the prosecutor failed to meet his non-racial obligation under *Batson*.[62] Thus, the evidence in the *Kesser* case was "'too powerful to conclude anything but discrimination.'"[63]

2. *Theresa Lawton and Carla Smithfield, Native American Women*

Although the evidence of "racial animus [was] most obvious with respect to Rindels," the prosecutor's treatment of the other two Native Americans was consistent.[64] He identified Lawton and Smithfield, along with Rindels, as "the darkest skinned women that I saw on the panel."[65] Of the prosecutor's five stated reasons for striking Lawton, only one, the length of her commute, appeared legitimate given a comparative juror analysis.[66]

The prosecutor dismissed Smithfield because her husband was a recovered alcoholic and he feared she would sympathize with the defendant.[67] The majority found this case-specific reason logical, but after further inquiry non-genuine.[68] In light of the comparative juror analysis other jurors had personally experienced problems with alcoholism and might have just as easily sympathized with the defendant, but were not excused from the panel.[69] In addition to Smithfield's husband's condition, the prosecutor also claimed he struck her because she was concerned with leaving her job as a school teacher, a concern shared by other impaneled jurors.[70]

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[61] Kesser v. Cambra, 465 F.3d 351, 367 (9th Cir. 2006) (quoting Miller-El v. Dretke, 545 U.S. 231, 248 (2005)).

[62] *Kesser*, 465 F.3d at 364.

[63] *Id.*

[64] *Id.* at 368.

[65] *Id.* at 369.

[66] *Id.* at 370. The prosecutor's other reasons included: (1) being married to a man who had to pay child support; (2) receiving a speeding ticket and a drunk driving arrest; (3) following a murder trial in which Kesser's defense attorney secured an acquittal; and (4) being "weak" and not overly educated. *Id.* at 369. Each of Lawton's personal characteristics was held by some of the impaneled jurors, and, by contrast, one other impaneled juror "actually *knew* Kesser's counsel." *Id.* (emphasis in original).

[67] Kesser v. Cambra, 465 F.3d 351, 370 (9th Cir. 2006).

[68] *Id.*

[69] *Id.* at 370-71.

[70] *Id.* at 371.

3. *Flordeliza Nakata, Possibly a Filipina Woman*

Although a *Batson* challenge was not before the court in regards to Ms. Nakata, the court found her strike relevant to the overall determination of whether the prosecutor employed racial stereotypes.[71] The prosecutor's remarks about Nakata also indicated racial stereotyping; he stated that she was the type to "walk two steps to the left and one to the rear" which "smacks of racial and ethnic stereotypes of the subservient Asian woman."[72]

While the record indicated that the prosecutor offered several race-neutral reasons for striking Lawton, Smithfield, and Nakata, his pretextual explanations ultimately undercut his credibility.[73]

4. *Conclusion*

Aware that the California Court of Appeal must be given deference in its findings of fact, the majority held that, taken as a whole, the record showed that the prosecutor's non-racial reasons for challenging the jurors at issue were pretextual and amounted to "sham excuse[s]."[74] State courts have a duty under *Batson's* third step to "review the record to root out such deceptions."[75] Accordingly, the Ninth Circuit concluded that the state court's findings were unreasonable and granted the writ.[76]

C. DEPARTURE FROM A PURE COMPARATIVE JUROR ANALYSIS

1. *"Mixed-Motive Analysis": The Wardlaw, Paez, and Berzon Concurring Opinion*

Circuit Judge Kim M. Wardlaw wrote separately asserting that the majority should have applied a "mixed-motive analysis" in the second or third step of *Batson* according to applicable Supreme Court precedent.[77] Judge Wardlaw, with whom Circuit Judge Richard Paez and Circuit

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[71] *Id.* at 369 n.6.

[72] *Id.* (citing Peter Kwan, *Invention, Inversion, and Intervention: The Oriental Woman in The World of Suzie Wong, M. Butterfly, and The Adventures of Priscilla, Queen of the Desert*, 5 ASIAN L.J. 99, 100 (1998) ("The Oriental Woman is meek, shy, passive, childlike, innocent and naïve. She relies and is dependent on the white hero . . . .").

[73] Kesser v. Cambra, 465 F.3d 351, 369 (9th Cir. 2006).

[74] *Id.* at 371.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 371-72 (Wardlaw, J., concurring); *see also* Washington v. Davis, 426 U.S. 229, 239 (1976).

Judge Marsha S. Berzon joined, stated that in situations where both race-based and race-neutral reasons were provided for striking a juror, "Supreme Court precedent requires application of 'but for' mixed-motive analysis to determine whether the strike violates the Equal Protection Clause."[78]

To illustrate, Judge Wardlaw provided an example of the application of the "mixed-motive analysis":

> Imagine a prosecutor considering using a strike against either an African-American or a white venirewoman because each has a spouse who has served time in prison. Imagine that the prosecutor ultimately strikes the African-American woman instead of the white woman because of her race. Although the stricken venirewoman's experience with the criminal justice system is the predominant motive driving the strike, her race is the but-for cause. Thus a partially race-based strike may pass the Court of Appeal's "predominant motive" standard but fail mixed-motive analysis. Moreover, mixed-motive analysis shifts the burden to the prosecutor to demonstrate that veniremembers would have been challenged irrespective of their race . . . .[79]

According to Judge Wardlaw, a mixed-motive analysis properly shifts the burden to the prosecutor in cases where both race-based and race-neutral reasons for a challenge exist.[80] The purpose of "but for" analysis in mixed-motive cases is to prevent impermissible discriminatory motivation, but to permit prosecutors to show that the challenge would have been made even absent the impermissible motivation (i.e., "that the discriminatory motivation was not a 'but for' cause of the challenged decision").[81] By including the mixed-motive analysis at either step two or step three of the *Batson* test, the prosecutor would have to

> demonstrate that he would have exercised the strike absent [the] discriminatory motive. Either way, a court may not allow a mixed-motive rationale to survive equal protection scrutiny unless the prosecutor can establish by a preponderance of the evidence that he would have reached the same decision even in the absence of impermissible

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[78] *Id.* at 372 (Wardlaw, J., concurring).

[79] Kesser v. Cambra, 465 F.3d 351, 375 (9th Cir. 2006) (Wardlaw, J., concurring).

[80] *Id.* at 372 (Wardlaw, J., concurring).

[81] *Id.*

race-based motivation.[82]

Moreover, Judge Wardlaw noted that every circuit that has decided *Batson* cases involving mixed motives has come to the same conclusion.[83] Consequently, Judge Wardlaw would have granted habeas relief as a result of the California court's failure to apply mixed-motive analysis.[84]

2. *A Stricter Standard: The Berzon Concurring Opinion*

Judge Berzon joined in the majority opinion and Judge Wardlaw's persuasive concurrence but felt that the court was "restricted to deciding whether the state court decision [was] contrary to, or involved an unreasonable application of, 'clearly established' Supreme Court law" because this case arose as a petition for a writ of habeas corpus.[85]

Judge Berzon suggested that if this were a case arising on direct appeal rather than habeas, she would hold that "in *Batson* cases, the Equal Protection Clause forbids a prosecutor from exercising a peremptory challenge to dismiss a juror whenever a motivating factor for the dismissal is race-based, without permitting the prosecutor to establish that he would have challenged the juror absent the race-based motive."[86] Thus the standard advocated by Judge Berzon is even higher than the one advocated by Judge Wardlaw.[87]

3. *"Dual Motivation Analysis" Does Not Require Solely Race-Neutral Peremptory Challenges: The Dissent*

Of particular concern to the dissent in *Kesser* was that the majority employed a "comparative juror analysis" that was neither prescribed by

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[82] *Id.* at 373 (Wardlaw, J., concurring) (citing Batson v. Kentucky, 476 U.S. 79, 98 (1986); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

[83] *Kesser*, 465 F.3d at 373 (Wardlaw, J., concurring). *See* Howard v. Senkowski, 986 F.2d 24, 27-30 (2d Cir. 1993) (remanding for correct application of mixed-motive analysis on habeas review); Gattis v. Snyder, 278 F.3d 222, 232-35 (3d Cir. 2002) (approving correct application of mixed-motive analysis on habeas review); United States v. Darden, 70 F.3d 1507, 1530-32 (8th Cir. 1995) (approving correct application of mixed-motive analysis on direct review); Wallace v. Morrison, 87 F.3d 1271, 1274-75 (11th Cir. 1996) (per curiam) (approving correct application of mixed-motive analysis on habeas review).

[84] *Kesser*, 465 F.3d at 372 (Wardlaw, J., concurring).

[85] Kesser v. Cambra, 465 F.3d 351, 376 (9th Cir. 2006) (Berzon, J., concurring); 28 U.S.C.A. § 2254(d)(1) (West 2007).

[86] *Id.* at 376-77 (Berzon, J., concurring).

[87] *Id.* at 376 (Berzon, J., concurring).

the Supreme Court nor raised by the parties below.[88] Circuit Judge Pamela Ann Rymer, with whom Circuit Judge Diarmuid F. O'Scannlain, Chief Judge Andrew J. Kleinfeld, Chief Judge Consuelo Callahan, and Chief Judge Carlos T. Bea joined, disagreed with the majority's "comparative juror analysis," noting that "the Supreme Court has never held that the only permissible challenge is one that is based solely on race-neutral reasons. Neither has the Court ever prescribed what test must be applied when a peremptory challenge is based on mixed prosecutorial motives."[89] Thus, according to Judge Rymer, the decision of the California Court of Appeal should have been affirmed.[90]

Judge Rymer rejected Kesser's argument that the four race-neutral reasons put forth by the prosecutor for dismissing Rindels did not matter because "ethnicity can play *no* role in the jury selection process."[91] Rather, the rule does not require that *every* reason be race-neutral.[92] In fact, Judge Rymer noted that the Supreme Court "passed up the opportunity to address a mixed motive challenge when it denied certiorari in *Wilkerson v. Texas*, a case where the prosecutor admitted that race was a factor in his peremptory strike."[93] Therefore, since the Supreme Court had not decided a case on point, the California Court of Appeal decision in this case could not be "contrary to clearly established federal law" as the majority concluded.[94] Instead, the cases that have addressed mixed-motive peremptory challenges have allowed some race-based reasons as long as the race-neutral reasons would have justified the strike without the presence of the race-based factor.[95]

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[88] *See Kesser*, 465 F.3d at 377 (Rymer, J., dissenting).

[89] *Id.* (Rymer, J., dissenting).

[90] *Id.* (Rymer, J., dissenting).

[91] Kesser v. Cambra, 465 F.3d 351, 381 (9th Cir. 2006) (Rymer, J., dissenting) (emphasis in original).

[92] *Id.* (Rymer, J., dissenting) (stating that "the [Supreme] Court has not said that the burden at step two can only be met if *every* reason is race-neutral") (emphasis in original).

[93] *Id.* (Rymer, J., dissenting) (citing Wilkerson v. Texas, 493 U.S. 924 (1989)).

[94] *Id.* (Rymer, J., dissenting).

[95] *Id.* at 383 & n.6 (Rymer, J., dissenting). *See also* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284-87 (1977); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (holding that if the claimant proves discriminatory motivation, the accused party may show that the improper motivation was only part, and not the decisive part, of the motivation); Gattis v. Snyder, 278 F.3d 222, 231- 35 (3d Cir. 2002) (holding that the state court's application of dual motivation analysis to a Batson challenge did not result in a decision contrary to, or an unreasonable application of, federal law under § 2254(d)(1)); Jones v. Plaster, 57 F.3d 417, 418-22 (4th Cir. 1995) (holding that if a party exercises a peremptory challenge in part for a discriminatory purpose, a trial court must decide whether the party whose conduct is being challenged has demonstrated by a preponderance of the evidence that the strike would have nevertheless been exercised even if an improper factor had not motivated in part the decision to strike); United States v. Darden, 70 F.3d 1507, 1530-32 (8th Cir. 1995) (holding that the trial court's

The dissent also rejected Kesser's alternative argument that if a mixed-motive analysis were proper, "the prosecutor did not show that he would have exercised his challenge solely for race-neutral reasons."[96] Regardless of how the mixed-motive analysis would have come out in *Kesser*, Judge Rymer was not persuaded to reverse or remand on this issue alone because she felt it was not the court's job at this stage to determine whether a mixed-motive analysis was proper under *Batson*.[97] Instead, it was the court's job to determine "whether the California Court of Appeal's decision was an unreasonable application of Batson. Its approach could be incorrect (something which it is unnecessary to decide), yet not be unreasonable."[98]

Instead, Judge Rymer reasoned that "the California Court of Appeal allowed the strike on the basis of a number of racially neutral, non-pretextual reasons that were the primary reasons for the challenge . . . [a]mount[ing] to a finding that the prosecutor would have exercised the challenge even without the race-based reason."[99] Therefore, she felt that for purposes of habeas review, the California court did not unreasonably apply federal law.[100]

Furthermore, the fact that the majority partook in a "comparative juror analysis" for which no evidence was presented and no arguments were offered constituted a highly fact intensive process for a collateral review which Judge Rymer felt was improper.[101] The majority did so despite the fact that a "state court's finding of the absence of discriminatory intent is a 'pure issue of fact' accorded significant deference."[102] The dissent instead reasoned that the California Court of Appeal's finding that the prosecutor's race-based reasons for striking the jurors were not his primary reasons was not without support in the record.[103] Thus Judge Rymer concluded that the Ninth Circuit had no

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decision to allow a strike on the basis of several racially neutral reasons, despite one reason that was not racially neutral, was equivalent to a finding that the prosecutor would have exercised the strike even without the one non-racially neutral motive).

[96] *Kesser*, 465 F.3d at 383 (Rymer, J., dissenting).

[97] Kesser v. Cambra, 465 F.3d 351, 383-84 (9th Cir. 2006) (Rymer, J., dissenting).

[98] *Id.* at 384 (Rymer, J., dissenting).

[99] *Id.* (Rymer, J., dissenting).

[100] *Id.* (Rymer, J., dissenting).

[101] *Id.* at 377 (Rymer, J., dissenting).

[102] *Id.* at 384 (Rymer, J., dissenting) (quoting Miller-El v. Dretke, 537 U.S. 322, 339 (2003)). "'Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding.'" *Id.* (quoting *Miller-El*, 537 U.S. at 340).

[103] Kesser v. Cambra, 465 F.3d 351, 385 (9th Cir. 2006) (Rymer, J., dissenting).

place conducting a comparative juror analysis de novo and therefore the opinion of the California Court of Appeal should have been affirmed.[104]

III. IMPLICATIONS OF THE DECISION

In *Kesser v. Cambra*, the Ninth Circuit reaffirmed the *Batson* test and demonstrated the necessity of all three prongs to prevent impermissible voir dire discrimination. The court confirmed that it would not tolerate racial discrimination during the jury voir dire process and demanded that state courts flush out pretextual excuses that disguise discrimination.[105] The debate presented in *Kesser* between the majority, the concurrences, and the dissent, involves the extent to which race-based reasons for exercising peremptory challenges will be tolerated when race-neutral reasons are also presented. Applying a "comparative juror analysis," the majority concluded that when an attorney presents both race-neutral and race-based reasons for striking a juror, the strike will not violate the Equal Protection Clause as long as the race-neutral reasons would have justified the strike without the presence of the race-based factor.[106]

The most significant aspect of the *Kesser* decision is the Ninth Circuit's recommendation that state courts apply the "comparative juror analysis" during the third step of *Batson* as seen in *Miller-El v. Dretke*.[107] By evaluating the voir dire transcript and comparing an attorney's reasons behind his or her challenges to the characteristics of impaneled jurors, state courts are arguably better equipped to identify pretextual excuses. There is also a strong argument in Judge Wardlaw's concurring opinion that a mixed-motive "but for" analysis should be adopted to properly shift the burden of proving no improper motive to the challenger in mixed-motive cases.[108] Whether California courts will adopt the majority's "comparative juror analysis" or the concurrence's "mixed-motive analysis" remains to be seen. However, what is certain is that racial discrimination cannot be the primary motive behind a peremptory challenge and violations of the Equal Protection Clause will not be tolerated.

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[104] *Id.*

[105] *See supra* notes 28-76 and accompanying text.

[106] *Kesser*, 465 F.3d at 359-71; *see also supra* notes 28-76 and accompanying text.

[107] *Kesser*, 465 F.3d at 360 n.3; *see also supra* notes 41-76 and accompanying text.

[108] *See Kesser*, 465 F.3d at 371-76 (Wardlaw, J., concurring); *see also supra* notes 77-84 and accompanying text.

ANDJE MOROVICH*

* J.D. Candidate, 2007, Golden Gate University School of Law, San Francisco, CA; B.A. Political Science and Law & Society, 2003, University of California Santa Barbara, Santa Barbara, CA. Senior Editor, Golden Gate University Law Review. Special thanks to Erin Frazor for all her editing efforts.