The mistrial

When trials break bad

YOUR HONOR WE MOVE FOR A MISTRIAL!

- OH (*&^*(^! WHAT DO I DO NOW?
- DID I SCREW THIS TRIAL UP?
- IF I DID CAN I REDEEM MYSELF?
- WHAT ABOUT DOUBLE JEOPARDY?
- DO I KNOW WHAT DOUBLE JEOPARDY MEANS IN THE CONTEXT OF A MISTRIAL?
- OH *&^*^(*!

What is the worst that could happen?

- Retry the case
- That is pretty bad
- But worse things could happen
- Your case could also be barred from re-file because of double jeopardy

What can cause a mistrial?

- Your comments are welcome.
- Here are few from my vault.

Whose burden to show that a mistrial is needed?

- We don't know, but we will soon.
- Common sense dictates that the moving party must demonstrate the futility of going forward.

Who can ask for a mistrial?

Defense

Prosecutor

Or a Judge

If defense counsel asks

- "Generally, if a defendant seeks a **mistrial**, he waives any defense he might otherwise assert based upon double jeopardy, even though the prosecution or the court provoked the error."
- "However double jeopardy bars retrial where bad faith conduct by a judge or a prosecutor is intended to provoke a **mistrial** so as to afford the prosecution a more favorable opportunity to convict."
- *State v. Suarez*, 1999 UT App 190

Is it really dead or just mostly dead

•Defense says it is dead what is the standard?

"The court cannot arbitrarily discharge a jury, nor should it ever be discharged until it appears from the statements of the jurors, and the facts and circumstances of the case, that every reasonable hope of agreement on a verdict has vanished; unless there is a breakdown in the judicial machinery which renders further orderly and systematic procedure impracticable, such as the illness of the court, or a juror, or the defendant, or in some cases counsel; or reasons which the law will recognize as an absolute necessity, or upon grounds provided by statute."

State v. Whitman, 93 Utah 557 (1937)

•Use this language, it really needs to be dead.

IT IS MORE RISKY FOR US OR THE JUDGE

If judge or prosecutor asks

- "As a general rule, the declaration of a mistrial and discharge of a jury before a verdict has been entered will operate as an acquittal, thereby barring the State from retrying a defendant for the same offense. *Ambrose*, 598 P.2d at 358. There is an exception to this general rule, however, which allows the retrial of a defendant if either "(1) the defendant consents to the discharge of the jury, or (2) 'legal necessity' requires the discharge in the interest of justice." [FN6] *Id."*
- *State v. Harris, 2004 UT 103 ¶ 24*

What is the "legal necessity" doctrine?

•"Utah's "legal necessity" doctrine parallels the federal "manifest necessity" doctrine in that it prohibits a trial court from declaring a mistrial except in those exceptional circumstances where there is a compelling justification for doing so. State v. Harris *2004 UT 103 ¶ 26*

•*Hooray! State constitutional analysis.*

STATE CONSITUTIONAL ANALYSIS

Our "legal necessity" doctrine differs from its federal counterpart, however, in several key respects." State v. Harris *2004 UT 103 ¶ 26*

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No, our state protections do not differ significantly from the federal protections. We do use the words "legal neccessity" instead of the words "manifest neccessity" but other than that it appears to be identical analysis.

And the unique and helpful standard is?

- "Specifically, we have stated that a trial court "must refrain from prematurely discharging the jury unless it determines, after careful inquiry, that discharging the jury is *the only reasonable alternative to insure justice under the circumstances.*" State v. Harris *2004 UT 103 ¶ 26*.
- That sounds easy enough. But wait there is more …

A test with elements!

- "First, a trial court must carefully evaluate all of the circumstances and conclude that legal necessity mandates the discharge of the jury This requires the trial judge to afford the parties adequate opportunity to object to the declaration of a mistrial. State v. Harris *2004 UT 103 ¶ 28*.

STILL STEP ONE

- "It also requires the trial judge to consider possible curative alternatives to terminating the proceeding and to determine that none of the proposed alternatives are reasonable under the circumstances" Id. at ¶ 27.

What are the possible alternatives?

- Curative instructions.
- "[W]e normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." State v. Harmon, 956 P2d 262, 273 (Utah 1998) quoting *Greer,* 483 U.S. at 767 n. 8, 107 S.Ct. at 3109 n. 8.

More alternatives

- New judge
- New juror
- Be creative.
- If judge is moving for mistrial make sure you make a record and ask defense counsel to do the same.

THIS MUST BE DONE OR CASE MAY BE DISMISSED FOR DOUBLE JEOPARDY VIOLATION!

76-1-403. Former prosecution barring subsequent prosecution for offense out of same episode.

Don't get too excited about this code section, our courts ignore it.

STEP TWO

- "Second, the record must adequately disclose both the factual basis for the trial judge's conclusion that a mistrial was necessary and the reasons why the alternatives presented by either party were unreasonable under the circumstances"
- State v. Harris *2004 UT 103* ¶ 28.

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If you follow the test you are in pretty good shape

- "Consequently, where the trial court articulates on the record the factual basis for its decision to declare a mistrial, and explains on the record why any proposed alternatives are unreasonable, we will not disturb that decision unless it is "plainly wrong," id at ¶ 29
- Weird words but good protection.

If you do not follow the steps you will get trouble.

•"Having made a difficult decision, the trial judge is the primary beneficiary of an articulated basis for that decision, inasmuch as in the absence of an explanation of the grounds for legal necessity, the trial judge cedes to us the authority and responsibility to second-guess his judgment by conducting an independent assessment of the reasonableness of the proposed alternatives to a mistrial."

•"Therefore, where a trial judge fails to articulate the factual basis for a mistrial on the record, the mistrial will operate as an acquittal unless the factual basis for the mistrial is readily apparent from the record. Id ¶ 29-31

STUFF TO REMEMBER

- Make a record of every reasonable alternative to mistrial
- Make sure defense counsel has participated in the process.
- Ask the court to make a clear factual findings that includes a discussion of why all the proposed curative instructions are inadequate.

BATSON! BATSON! BATSON!

- *Batson v. Kentucky, 476 US 79, 106 S.Ct 1712, 90 L.Ed.2d 69 (1986)*
- *What is it?*

Who can raise it?

- EITHER PARTY MAY CHALLENGE THE OTHER'S USE OF PEREMPTORY STRIKES.
- There is no requirement that the objecting party belong to the same class (race/gender) as the stricken juror(s). *State v. Span, 819 P.2d 329 (Utah 1991)*
- Batson analysis applies to defense peremptory challenges. *Georgia v. McCollum, US 112 S.Ct 2348 (1992).The same timeliness requirement and same three-part analysis applies no matter who raises the Batson objection.*

CALM DOWN

- **WHEN A *BATSON OBJECTION IS RAISED, DO NOT REACT BY VOLUNTEERING YOUR REASONS FOR THE STRIKES!***
- Volunteering your reasons for the strike before Step Two moots Step One and relieves the burden on the defense to establish a prima facie case.

TIMELINESS

- RAISED?
- A *Batson objection "'must be raised both before the jury is sworn and before the remainder of the venire is dismissed.'" State v. Rosa-Re, 2008 UT 53, ¶ 8 (quoting State v. Valdez, 2006 UT 39, ¶ 25).*

TIMELINESS

- RESOLVED?
- "[T]rial courts *must resolve Batson challenges before the jury is sworn and the remainder of the venire is excused." Rosa-Re, 2008 UT 53, ¶¶ 13-15.*
- o "Defense counsel also has an absolute obligation to notify the court that resolution is needed before the jury is sworn and the venire dismissed. Failure to do so, or acquiescing in the court's inaction, will in the future constitute a waiver of the original objection." *Rosa-Re, 2008 UT 53, ¶ 14.*

STEP ONE: THE PRIMA FACIE SHOWING

•In Step 1, the defense must allege sufficient facts, which if believed, support a factual finding that the prosecutor purposely struck the juror(s) solely based on the juror's race or gender. At this stage, the defense need not prove purposeful discrimination (that occurs in Step 3), but the defense must show "that the totality of the relevant facts gives rise to an inference of discriminatory intent." *Johnson v. California, 545 U.S. 162, 168 (2005). The defense must show a strong likelihood that the potential juror was challenged because of his group association rather than because of any specific bias. State v. Alvarez, 872 P.2d 450, 456 (Utah 1994); State v. Cantu, 778 P.2d 517 (Utah 1998).*

• Incumbent upon counsel to make a record of the group identity of the prospective jurors challenged. *Alvarez, 872 P.2d 450*

COGNIZABLE GROUPS

- A cognizable group is a group that is capable of being singled out for differential treatment. *Batson, 90 L.Ed.2d at 86*
- Race or ethnic origin. *State v. Span, 819 P.2d 329, 342 (Utah 1991)* *Membership in Hispanic group cannot be established by surname alone. State v. Alvarez, 872 P.2d at 457, note 6.*
- Gender, *J.E.B. v. Alabama, 511 US 127 (1994).*

STATISTICS ALONE ARE USUALLY INSUFFICIENT

Simply stating the prosecutor struck 2 or 3 women is usually insufficient to make a prima facie showing required in Step One. *State v. Colwell, 2000 UT 8, ¶ 18, 994 P.2d 177 (citing State v. Alvarez, 872 P.2d at 457). Numerical evidence alone may be sufficient to show a pattern or peremptory strikes against jurors of a cognizable group, but the opponent of the challenges must show that* ***all or most of the members of the cognizable group were struck from the venire or that a disproportionate number of peremptory challenges were employed against the group. Alvarez, 872 P.2d at 457.***

PRIMA FACIE

- Prima facie case established:
- *State v. Pharris, 846 P.2d 454, 462 (Utah Ct.App.1993) Prosecutor used 3 or 4 peremptories to strike Native American potential jurors and didn't ask one of them any questions*

NO PRIMA FACIE

- *State v. Alvarez: a) Prosecutor struck 2 Hispanic potential jurors b) Defendant struck 1 Hispanic potential jurors*
- *State v. Shepherd, 989 P.2d 503, 510 (Utah Ct.App.l999): a) Prosecutor struck 4 white males b) Defendant gave no evidence of the composition of the jury venire*
- *State v. Harrison, 805 P.2d 769 (Utah 1991) Prosecutor struck 2 out of 5 Hispanic panel members*

- **DO NOT VOLUNTEER YOUR REASONS FOR THE STRIKES AT ANY POINT IN STEP ONE.**

IF THE DEFENSE HAS NOT MADE A PRIMA FACIE SHOWING, ASK THE COURT TO OVERRULE THE *BATSON OBJECTION FOR LACK OF A PRIMA FACIE SHOWING.*

- Step 1 is the time to stop further inquiry. Objecting to a lack of prima facie showing requires you to explain why the alleged facts, even if believed, are insufficient to support a finding of purposeful discrimination. Do this without stating your reasons for the strikes.

RIGHT

- Defendant has not made a prima facie showing. He alleges only that two Hispanics were struck, but does not allege any facts supporting that these strikes were done for a discriminatory purpose, especially where the State did not use all its peremptory strikes against other Hispanics on the jury.

WRONG

- Defendant has not made a prima facie showing. He knows that I struck the two Hispanics because one had a drug conviction and the other went to school with the defendant's brother.

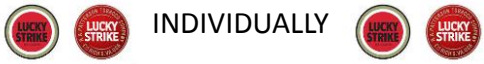
TWO OPTIONS

- **IF THE COURT RULES THAT A PRIMA FACIE SHOWING WAS NOT MADE (STEP ONE NOT SATISFIED), THE *BATSON INQUIRY STOPS.***
- **IF THE COURT RULES THAT THE DEFENSE MADE A PRIMA FACIE SHOWING, THE INQUIRY PROCEEDS TO STEP TWO.**
- **IF NECESSARY, REMIND THE COURT THAT A STEP ONE RULING IS NECESSARY BEFORE PROCEEDING TO STEP TWO.**

STEP TWO: THE FACIALLY-NEUTRAL EXPLANATION

- If the judge finds a prima facie case of discrimination, burden is on the party who struck the potential juror to provide a group-neutral explanation for the challenge. *Cantu, 750 P.2d at 595; State v. Colwell, 2000 UT 8, 994 P.2d 177 The explanation for each strike must be facially race or gender neutral. Step Two involves no assessment of credibility. Consequently, stating a facially neutral explanation satisfies Step Two, even if the explanation is ultimately rejected in Step 3. Purkett v. Elem, 514 U.S. 765, 768 (1995). If the prosecutor provides no reason or a discriminatory reason for the strike, the inquiry does not stop, but still must continue to Step Three, where the lack of a facially neutral explanation may be weighed in favor of a finding of discriminatory intent. Johnson, 545 U.S. at 171.*

RESPOND TO EACH STRIKE INDIVIDUALLY



- The group-neutral explanation must be (*State v. Colwell, 2000 UT 8)*
- *Neutral*
- Related to the case or Juror – may be subjective (*Rice v. Collins, 546 U.S. 333, 343 (2006))*
- Clear & reasonably specific
- Legitimate

- A mere denial of discriminatory intent is not sufficient. *State v. Harrison, 805 P.2d 769, 778 (Utah 1991). However, the explanation need not rise to the level justifying a challenge for cause. Colwell, 994 P.2d at 177*

YOUR EXPLANATION SHOULD BE DETAILED AND RELATE TO THE SPECIFIC JUROR OR CASE.

- Batson does not curtail normal peremptory strikes, but precludes only strikes that "serve as a proxy for bias." *J.E.B. v. Alabama, 511 U.S. 127, 143 (1994). Articulate all reasons for the strike.*

RIGHT

- I struck male juror x because I wanted jurors that were single or around the same age as the victim. I felt they might be less judgmental of the victim's decision to stay at the party after her ride left. I also struck male juror x because he is a social worker and might be sympathetic to defendants. Also, juror x smiled at the defendant and did not smile at me.

WRONG

- I struck male juror x because I wanted women jurors because I think women will convict more often in rape cases.

EXAMPLES OF SUFFICIENT EXPLANATIONS

- *State v. Macial, 854 P.2d 543 (Utah Ct. App. 1993) prosecutor struck only African American on panel because she was unwilling to talk in front of the other potential jurors about a lawsuit in which she was involved.*
- *State v. Higinbotham, 917 P.2d 545 (Utah 1996) prosecutor struck only minority member of panel because she gave the prosecutor a hostile expression.*
- *State v. Merrill, 928 P.2d 401 (Utah Ct. App. 1996) prosecutor struck the only minority on the panel because the potential juror had recently unsuccessfully challenged a speeding ticket.*
- *State v. Bowman, 945 P.2d 153 (Utah Ct. App.1997)prosecutor struck an Asian woman because she did not appear to have command of the English language. Prosecutor also struck Hispanic woman because he was currently prosecuting a defendant with the same name*
- *State v. Colwell - Prosecutor struck only African American on panel because she had a hearing problem*
- *State v. Cannon, 2002 UT App 8 – prosecutor struck only minority on panel because potential juror appeared to not understand or to communicate with the other jurors*

EXAMLPLES OF INSUFFICIENT EXPLANATION

- *State v. Cantu (II), 778 P.2d 517, 519 (Utah 1989) prosecutor used peremptory challenge to remove Hispanic potential juror because prosecutor knew defense attorney wanted that potential juror to sit because she was Hispanic.*
- *Harrison - prosecutor's explanation that he simply liked Hispanic female potential juror less than other potential female jurors was no more than an unsupported denial of racial discrimination.*
- *State v. Chatwin, 2002 UT App. 363, 58 P.3d 867. Three men struck because men are more likely than not respondents to protective orders.*
- *State v. Jensen, 2003 UT App. 273. Struck a minority because he was a man and prosecutor wanted to balance the genders.*

ASK IF THE DEFENSE CHALLENGES YOUR EXPLANATIONS OR YOUR CREDIBILITY.

- The objecting party "at all times" carries the burden of persuasion and risk of non-persuasion. *Johnson, 545 U.S. at 171-172. Do not allow the defense to have the benefit of challenging your explanations for the first time on appeal.*

STEP THREE: THE COURTS DETERMINATION OF INTENT

- **THE COURT MUST DETERMINE IF THE DEFENSE HAS CARRIED ITS BURDEN TO PROVE THE STRIKES WERE EXERCISED SOLELY FOR A DISCRIMINATORY PURPOSE.**
- If the proponent of the peremptory strike's explanation is valid, the court must determine if the opponent of the strike has proved purposeful discrimination. *Colwell, 994 P.2d at 182.*

COURT SHOULD CONSIDER?

- the voir dire questions and answers, including whether there was a failure to examine the potential juror or only a perfunctory examination, or singling the prospective juror out for special questioning designed to invoke a certain response
- the stricken jurors' characteristics and demeanor
- whether a challenge is based on reasons equally applicable to other potential jurors not stricken
- failure to strike other potential jurors of the same group
- the clarity and specificity of the prosecutor's explanations
- the credibility of the prosecutor
- the strength or weakness of the prima facie showing; and
- the court's own observations or notes.
- Totality is the test, this is a non-exhaustive list.

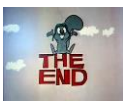
Appellate Review

- The court may rule differently on each strike (find a discriminatory purpose on one and not on another). The ruling is a factual finding and entitled to deference on appeal. *See State v. Rosa-Re, 2008 UT App 472, ¶¶ 24-26, 200 P.3d 670. See also list of cases, especially Purkett, Hernandez, Colwell, Higginbotham, Cantu, & Bowman.*

HELP THE COURT. IF THE COURT SIMPLY DENIES THE *BATSON OBJECTION, EXPLAIN THAT A MORE DETAILED RULING IS NECESSARY TO PROTECT THE RECORD.*

- A denial of a *Batson objection should include, at minimum, a statement that the prosecutor is credible and that the defense failed to prove the strikes were exercised for a discriminatory purpose. The determination may turn upon the credibility of the proponent of the strike. State v. Cannon, 2002 UT App 8. But minimal rulings invite trouble on appeal if the appellate court cannot discern the basis of the court's ruling. See, e.g., Snyder v. Louisiana, 554 U.S. 472, 479 (2008).*

FINAL ANALYSIS



- **IF THE COURT OVERRULES THE *BATSON OBJECTION (FINDS NO DISCRIMINATORY PURPOSE), THE SELECTED JURY IS SWORN.***
- **IF THE COURT SUSTAINS THE OBJECTION (FINDS A DISCRIMINATORY PURPOSE), THE IMPROPERLY STRICKEN JURORS ARE REINSTATED ON THE JURY OR THE ENTIRE PANEL MAY BE DISMISSED.**