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September 12, 2013

VIA ELECTRONIC FILING

Molly C. Dwyer, Clerk
United States Court Of Appeals for the Ninth Circuit
The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Re: *SmithKlineBeecham Corporation v. Abbott Laboratories*, No. 11-17357,
Citation of Supplemental Authority Under Fed. R. App. P. 28(j)

Dear Ms. Dwyer:

We respectfully submit this Rule 28(j) letter to advise the Court of the attached United States Attorney General's *Guidance on Application of* Batson v. Kentucky *to Juror Strikes Based on Sexual Orientation*, which we received on September 11, 2013. The Guidance is directly relevant to Abbott's argument (Third Br. 18) that "applying *Batson* to sexual orientation would present formidable practical problems." The Guidance states that all DOJ attorneys must "treat sexual orientation like race, gender, and ethnicity for purposes of voir dire: no potential juror should be presumed unqualified for jury service based on their sexual orientation." *Infra* at 4; *accord* Attorney General's Cover Letter. The Guidance further directs that all DOJ attorneys "should consider challenging improper defense strikes based on sexual orientation." *Infra* at 2.

Sincerely,

/s/ Lisa S. Blatt
Lisa S. Blatt

Enclosure
cc: All Counsel of Record (via electronic filing)

Office of the Attorney General
Washington, D. C. 20530

November 14, 2012

TO: ALL DEPARTMENT ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: GUIDANCE ON APPLICATION OF *BATSON V. KENTUCKY* TO JUROR STRIKES BASED ON SEXUAL ORIENTATION

After consideration of the recommendations received from the Deputy Attorney General, the Associate Attorney General, the Solicitor General, the Criminal Division, the Attorney General's Advisory Committee, the Executive Office for United States Attorneys, the Civil Rights Division, the Office of Legal Policy, the Civil Division, the Tax Division, the National Security Division, and the Environment and Natural Resources Division, I have determined, that as a matter of Department policy, the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), should be interpreted to extend to juror strikes based on sexual orientation. This view is consistent with the Department's previous determination that classifications based on sexual orientation are subject to heightened scrutiny. Accordingly, Department attorneys should treat sexual orientation like race, gender, and ethnicity for purposes of voir dire: no potential juror should be presumed unqualified for jury service based on his or her sexual orientation.

The attached document provides guidance to Department attorneys on how to implement this policy. In addition, I am directing the Executive Office for United States Attorneys to prepare more comprehensive training and guidance materials on *Batson*'s application to sexual orientation, and on *Batson* generally.

The Department is committed to protecting the integrity of the judicial system. The purposeful exclusion of jurors on the basis of race, gender, ethnicity, or sexual orientation has no place in that system.

Attachment

Guidance on Application of *Batson v. Kentucky* to Juror Strikes Based on Sexual Orientation

Earlier this year, the Attorney General determined that as a matter of Department policy, the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), should be interpreted to extend to juror strikes based on sexual orientation. This memorandum provides guidance to Department of Justice attorneys to help implement that decision.

The use of peremptory strikes to exclude a potential juror on the basis of actual or perceived race, gender or ethnicity violates the Equal Protection Clause. *Batson v. Kentucky*, 476 U.S. at 84, 89; *see J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994); *Hernandez v. New York*, 500 U.S. 352, 355 (1991). Strikes based on purposeful discrimination violate not only the rights of a defendant, but also the juror's rights and the larger community's interest in ensuring the fairness of the judicial system. *Batson*, 476 U.S. at 87. Discrimination in the use of peremptory challenges is constitutionally impermissible regardless of whether the challenge is used by a government attorney, a private civil litigant, or a criminal defendant. *Georgia v. McCollum*, 505 U.S. 42 (1992); *Powers v. Ohio*, 499 U.S. 400 (1991). A litigant may object to a discriminatory challenge even when the litigant is not a member of the protected class that formed the basis of the challenge. *See, e.g, Powers*, 499 U.S. at 400.

Courts have adopted a three-step process for adjudicating a *Batson* claim. Under this analysis, (1) the party objecting to the strike must make a *prima facie* showing that the peremptory challenge is exercised on an improper basis; (2) the striking party then has the burden to articulate a neutral explanation for striking the jurors in question; and (3) the court must determine whether the objector has carried its burden of proving purposeful discrimination. *Snyder v. Louisiana*, 552 U.S. 472, 476–77 (2008).

The Department of Justice has taken the position that sexual orientation is a classification that should be accorded heightened scrutiny under the Equal Protection Clause, *see* Letter from Attorney General Eric Holder to House Speaker John Boehner, regarding Defense of Marriage Act (February 23, 2011). Although the Supreme Court has not yet ruled on whether *Batson* should extend to sexual orientation,[1] the Attorney General has determined that the interests *Batson* is designed to protect apply in equal force to this protected class as well. Sexual

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[1] The Supreme Court has not addressed this issue, and none of the Circuit Courts of Appeals has definitively ruled whether *Batson* applies to strikes based on sexual orientation. *Compare United States v. Blaylock*, 421 F.3d 758, 769-70 (8th Cir. 2005) (expressing doubt that *Batson* extends to strikes based on sexual orientation but affirming conviction because government offered legitimate, non-discriminatory reason for strike) *with Johnson v. Campbell*, 92 F.3d 951, 953 (9th Cir. 1996) (assuming without deciding that sexual orientation is subject to *Batson* where appellant failed to demonstrate *prima facie* case of purposeful discrimination). The California courts have extended *Batson* to sexual orientation as a matter of state constitutional law, *People v. Garcia*, 92 Cal. Rptr. 339 (Cal. App. 2000), and this issue is currently pending before the Court of Appeals for the Ninth Circuit, *GSK v. Abbott Labs*, Nos. 2011-17357, 2011-17373.

orientation alone provides no insight into an individual's capability of performing the duties of a juror. Moreover, the peremptory strike of a potential juror on the basis of his or her sexual orientation would deny the parties a jury chosen from the whole community, and would undermine the public confidence in the legal system. *See J.E.B.*, 511 U.S. at 140-42; *Batson*, 476 U.S. at 85-88.

Accordingly, the Attorney General provides the following guidance implementing the extension of *Batson* to sexual orientation:

1. Department attorneys shall not strike a member of a venire based on that person's actual or perceived sexual orientation. While nothing in this policy prohibits prosecutors from striking jurors based on their individual beliefs, biases, experiences, attitudes, or feelings, prosecutors may not use the potential jurors' actual or perceived sexual orientation as a proxy for individualized determinations of suitability to sit on a jury.

2. If a Department attorney is accused of striking a juror on the basis of sexual orientation, the attorney should defend the strike as he or she would in the case of race, gender or ethnicity: by proffering a neutral explanation for the contested challenge. To the extent supported by the record and controlling case law, the attorney may also argue that the defendant has failed to make out a *prima facie* case of an improper strike. Attorneys should not, however, defend the strike by arguing that sexual orientation triggers only rational basis scrutiny, or by suggesting that *Batson* does not apply to sexual orientation.

3. Department attorneys should consider challenging improper defense strikes based on sexual orientation, where they believe in good faith that improper discrimination is occurring and a *prima facie Batson* violation can be established (i.e., reverse *Batson*-challenges) based upon the record and the controlling case law in the relevant jurisdiction governing *Batson* challenges generally. A *prima facie* showing may be based on direct and circumstantial evidence regarding the voir dire process, including the manner of selection and strikes of prospective jurors. *Batson*, 476 U.S. at 95-96.

The Attorney General recognizes that applying *Batson* to sexual orientation will present issues not typically associated with race, gender and ethnicity, particularly in the context of reverse *Batson* challenges. Sexual orientation is not readily apparent, and many consider it to be a private matter that they would not wish to discuss in a setting as public as jury selection. These issues should, in practice, arise in only a limited number of cases. The purpose of voir dire is to reveal bias, and rarely will a potential juror's views on matters regarding sexual orientation ever be relevant in our criminal and civil litigation.

While a juror's own sexual orientation may not be used as a proxy for bias, this information – although sensitive – is relevant when a Department attorney suspects that opposing counsel is striking jurors for impermissible reasons. Given the variety of voir dire practice throughout the country, Department attorneys are in the best position to determine the

appropriate manner for obtaining this sensitive information while minimizing any invasion of privacy for purposes of enforcing *Batson*. Private juror questionnaires and *in camera* voir dire are among the methods courts use to ensure privacy when warranted. Because of the privacy considerations that may be involved, Department attorneys should carefully consider whether they have a strong, articulable basis for suspecting that sexual orientation discrimination has occurred when considering a reverse *Batson* challenge on this basis.

Attorneys should also consider relevant *Batson* precedent – and any precedent regarding the level of scrutiny applicable to classifications based on sexual orientation – in their jurisdiction before raising a reverse *Batson* challenge based on sexual orientation. Trial courts may not be willing to entertain *Batson* challenges based on sexual orientation without supporting legal authority, and courts that uphold such challenges as a matter of first impression run the risk of reversal on appeal. In jurisdictions where the law is unsettled, attorneys should exercise their sound discretion in endeavoring to enforce *Batson* against peremptory strikes based on sexual orientation without unduly jeopardizing the ability to defend the verdict rendered by the jury. In those limited cases where sexual orientation is anticipated to be an issue during voir dire, prosecutors are strongly encouraged – prior to trial – to contact the Civil Rights Division, which has significant expertise in this area, for model motions in limine and supporting memoranda regarding *Batson*'s application to sexual orientation.

In summary, Department attorneys should treat sexual orientation like race, gender and ethnicity for purposes of voir dire: no potential juror should be presumed unqualified for jury service based on their sexual orientation.

9th Circuit Case Number(s) 11-17357, 11-17373

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) [ ].

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) [ ]

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CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) [September 12, 2013].

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Matthew A. Campbell
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 200006

Signature (use "s/" format) s/ Andrew Ow