POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Surveillance of Criminal Law Approved for Credit Toward California Criminal Law Specialization: C437 -- The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider.

WEEK OF	Topic	Guest Speakers	General	Ethics
Jan 22, 2001	Jury Selection Issues: Wheeler	Sr DDA Bill Tingle	12	18

Batson v. *Kentucky* (1986) 476 U.S. 79, 88

1. The "Constitution forbids all forms of purposeful racial discrimination in selection of jurors."

People v. *Wheeler* (1978) 22 Cal.3d 258, 276.

1. The use of peremptory challenges to remove prospective jurors on the ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community.

Wade v. *Terhune* (9th Cir. 2000) 202 F.3d 1190 [*Wheeler* versus *Batson*]

1. Evaluation of allegedly discriminatory peremptory challenges to potential jurors in federal and state trials is governed by the standard established by the United States Supreme Court in ***Batson*** v. ***Kentucky*** (1986) 476 U.S. 79.

   Under ***Batson***, the trial court must use a three-step process court to determine whether a peremptory challenge is race-based in violation of the Equal Protection Clause:

   First, the defendant must make a prima facie showing that the prosecutor has exercised a peremptory challenge on the basis of race. That is, ***the defendant must demonstrate that the facts and circumstances of the case "raise an inference" that the prosecution has excluded a juror on account of their race.***

   Second, if a defendant makes this showing, the burden then shifts to the prosecution to provide a race-neutral explanation for its challenge.

   Third, the trial court then determines whether the defendant has established purposeful racial discrimination by the prosecution.

2. California courts evaluate such challenges, under the pre-***Batson*** standard established by the California Supreme Court in ***People*** v. ***Wheeler*** (1978) 22 Cal.3d 258.

   Wheeler also outlined a process that the state trial courts should use to identify discriminatory peremptory challenges. As with ***Batson***, the first step requires the defendant to make a prima facie showing of discrimination.

   However, unlike the ***Batson*** Court, which required only that the defendant "raise an inference" of discrimination, the ***Wheeler*** Court demanded that the ***defendant "show a strong likelihood" that the prosecutor had excluded jurors on account of their race.***

3. The *Wade* court stated that the current standard being used by the California Supreme Court for determining the existence of a prima facie case of discriminatory use of peremptory challenges was inconsistent with the standard required in ***Batson***. The *Wade* court focused on the decision in ***People* v. *Bernard*** (1994) 27 Cal.App.4th 458 where the appellate court distinguished the standards and held that a prima facie case may only be made out by a showing of a strong likelihood - **a higher standard** than just raising an inference. The *Wade* court then noted that the decisions of the California Supreme Court subsequent to ***Bernard*** continually used the "strong likelihood" standard as elucidated in *Bernard*.*

*THE ISSUE BECAME MOOT WITH THE DECISION IN *PEOPLE* V. *BOX* (2000) 23 Cal.4th 1153 -SEE BELOW.

4. Even using the appropriate standard, the court held the defense did not make out a prima facie case and noted the following principles:

A defendant need not show that the prosecution had engaged in a pattern of discriminatory strikes. Striking a single prospective juror for discriminatory reasons is enough. However, the fact that a juror struck is the only member of the panel falling into the group allegedly being discriminated against does not, in itself, raise an inference of discrimination.

Trying to compare the percentage of jurors in the racial group struck against the percentage of the jurors in the racial or ethnic group (i.e., 1/3 jurors struck is African-American when only 5/64 jurors are African-American) as a means of determining whether a prima facie case has been made out is not very fruitful when (i) the sample is so small that the statistical significance of the percentages is limited and (ii) the comparison is done at the time of the challenge rather than at the end of voir dire.

When similarly situated jurors (not belonging to the racial or ethnic group of the dismissed juror) are not bumped despite the fact they appeared to be less favorable to the party doing the bumping, this may allow for an inference of bias.

No inference of bias against African-American jurors arose where one of the jurors bumped had a brother who had been prosecuted for burglary and used drugs, was somewhat familiar with the area in which the alleged crimes occurred, and thought that search warrants "do quite a bit of damage which is unnecessary and the other juror bumped had been a defense witness in a criminal case.

People* v. *Box (2000) 23 Cal.4th 1153, 1185-1190 [***Wheeler*** & ***Batson*** Challenges]

1. The use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial group violates both the state and federal Constitutions. ***People* v. *Wheeler*** (1978) 22 Cal.3d 258 276-277; ***Batson* v. *Kentucky*** (1986) 476 U.S. 79, 89.)

2. Under ***Wheeler*** and ***Batson***, if a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. To make such a prima facie case, the party should do the following:

First, the party should make as complete a record of the circumstances as is feasible.

Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule.

Third, from all the circumstances of the case he must show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association.

3. The ***Box*** court noted the holding in ***Wade* v. *Terhune*** (9th Cir. 2000) 202 F.3d 1190 and made it clear that in California showing a "strong likelihood" ***is the same*** as showing "a reasonable inference." The court specifically disapproved ***People* v. *Bernard*** (1994) 27 Cal.App.4th 458 insofar as it stood for the proposition that there was some difference between these two standards.

4. When a trial court expressly rules that a prima facie case was not made, but allows the prosecutor to state his or her justifications for the record, the issue of whether a prima facie case was made is not moot on appeal.

Editor's Note: If the trial court founds there has been no prima facie evidence of discriminatory use of peremptories, then no justification for the peremptories by the party accused of such use need be (or should be) given. (**See *People* v. *Cervantes*** (1991) 233 Cal.App.3d 323, 335-337; ***People* v. *Ferro*** (1993) 21 Cal.App.4th 1, 7-8.)

5. The court found the prosecutor bumped the jurors for non-race related reasons. These reasons included the following: (i) fact that a juror had previously been arrested; (ii) fact that a juror had a relative who had been shot by police and has a relatively low general opinion of police; and (iii) fact that a juror was reluctant to call the police when her home was burglarized.

6. The court did not give much weight to the fact that similarly situated jurors (not belonging to the racial or ethnic group of the dismissed juror) were not bumped for several reasons.

   (a) A places an 'undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor is one-sided.

   (b) It is not realistic to expect a trial judge to make such detailed comparisons midtrial.

   (c) The same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge.

   (d) The very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror who, on paper, appears to be substantially similar.

Editor's Note: Contrast ***Box***'s relative disdain for comparative analysis with general approval of such analysis in ***Wade***.

People* v. *Ayala (2000) 24 Cal.4th 243, 260-278 [Error to Evaluate DA Explanation for Bumping Jurors in Ex Parte Hearing]

1. Under ***Wheeler***, there is a presumption that a prosecutor uses his peremptory challenges in a constitutional manner.

2. After the defendant has made a prima facie showing of bias and the prosecutor has attempted to provide neutral reasons for the challenge, the trial court must engage in the third step of the ***Wheeler*** challenge process: deciding whether the opponent of the peremptory challenge has proved purposeful racial discrimination--the trial court must consider at least two possibilities.

If the prosecutor acknowledges that he challenged a prospective juror for an impermissible reason then, of course, the Wheeler motion must be granted. If the prosecutor does not so state, but instead offers the court race-neutral reasons, it must still determine whether those stated reasons are untrue and pretextual.

3. Ex parte proceedings following a challenge to the prosecution's exercise of peremptory challenges may create problems similar to those created by ex parte proceedings in general, and, in the main, it is error to conduct them. The court noted the risk that defendant's inability to rebut the prosecution's stated reasons will leave the record incomplete and that adversarial proceedings are the norm.

4. The court left open the slim possibility that certain ex parte proceedings regarding peremptory challenges might be okay if there were compelling reasons for doing so.

5. Even if ex parte proceedings were permitted, it was error to allow a prosecutor to explain challenges in camera where the prosecutor claimed he did not want to reveal a trial strategy but at the in camera hearing simply explained two of the challenges by stating that he was disposed to challenge jurors who were unable to express themselves well, or who appeared to be a nonconformist, and explained a third by describing the prosecution's system of rating and selecting jurors.

6. The court found no reversible error in holding the ex parte hearings because it determined that the jurors were properly excused. Some the non-death penalty related reasons that were considered neutral:

   (i) juror was not responsive to the questioning by counsel and had difficulties in communicating

   (ii) juror was non-conformist with numerous run-ins with the law, was somewhat flippant and misanthropic

   (iii) juror's responses were extremely slow, and prosecutor suspected that she was possibly under the influence of drugs, juror had an empty look in her eyes and was not in tune with what was going, the jurors answers did not make sense

   (v) juror had difficulties in writing, understanding and reading English, had idiosyncratic dress and demeanor, and was aloof from other prospective jurors

   (vi) juror had previously served on a jury and was the holdout juror and had previously applied to be a police officer but was rejected (perhaps for psychological reasons)

   (vii) juror questioned others in his neighborhood who knew the defendant

7. The loss of questionnaires of the non-seated jury pool members did not infringe on the defendant's constitutional right to a meaningful review of his conviction. The loss of questionnaires regarding non-seated jurors who were not the subject of ***Wheeler*** challenges is irrelevant. There was no prejudice regarding the loss of questionnaires of jurors subject to ***Wheeler*** challenge because the record was still sufficiently complete to review the trial court's ruling.

8. The court left open the question of whether peremptory challenges on the basis of age violate the strictures of ***Batson*** or ***Wheeler***, but indicated that age alone would probably not identify a distinctive or cognizable group. **[See Below]**

-TIMELINESS ISSUE-

It is necessary that a ***Wheeler*** objection be made at the earliest opportunity during the voir dire process, and an objection first raised after the jury and alternates have been sworn is untimely. (***People*** **v.** ***Thompson*** (1990) 50 Cal.3d 134, 179, fn. 19; ***People*** **v.** ***Perez*** (1996) 48 Cal.App.4th 1310, 1314; ***People*** **v.** ***Ortega*** (1984) 156 Cal.App.3d 63, 69.) However, an objection made after the jury has been sworn but before the alternates are sworn is timely. (***People*** **v.** ***Rodriguez*** ((1996) 50 Cal.App.4th 1013, 1023; ***People*** **v.** ***Gore*** (1993) 18 Cal.App.4th 692, 703.)

-COGNIZABLE GROUPS-

People v. *England* (2000) 83 Cal.App.4th 772, 782-783 [What is a Cognizable Class]

1. In order for there to be improper exclusion of a cognizable group 'there must be a common thread' shared by the group, 'a basic similarity of attitude, ideas or experience among its members so that the exclusion prevents juries from reflecting a cross-section of the community. These groups are generally distinguished by race, gender, religion or ethnicity.

2. Groups recognized as cognizable classes are generally relatively large and well defined groups in the community whose members may, because of common background or experience, share a distinctive viewpoint on matters of current concern. Generally speaking, the courts have not recognized an otherwise heterogeneous group as cognizable merely because its members agree on one particular matter.

3. Retired people with an aversion or inability to return to their former places of employment are not a cognizable group.

People v. *Williams* 78 Cal.App.4th 1118, 1124-1125 [Men are a Cognizable Class]

1. Peremptory challenges may not be used to exclude male jurors solely because of a presumed group bias.

NOTE: As pointed out by San Francisco ADA Jerry Coleman, much of the case law on cognizable groups involves challenges to the jury pool rather than to a specific juror (see both ***Ayala*** cases cited below). Thus, some of the cases describing non-cognizable or cognizable groups may not be fully on point in the context of a challenge to the bumping of a juror. (**See** Coleman, Jerry "Meeting the Wheeler Challenge: Legal, Ethical, and Tactical Approaches to Jury Selection [Prosecutor's Notebook Vol. XIX].) However, it is unlikely a group will be found cognizable in one context but not another.

People v. *Ayala* (2000) 23 Cal.4th 225, 257 [Youth not Cognizable Class]

1. Leaving open the question of whether peremptory challenges on the basis of age violate the strictures of ***Batson*** or ***Wheeler***, but noting that California courts have not been receptive to the argument that age alone identifies a distinctive or cognizable group within the meaning of the representative cross-section rule. (**See also** ***People*** **v.** ***Ayala*** (2000) 24 Cal.4th 243, 279 [same].)

NEXT WEEK: LAURI WEINER, THE DIVA OF DRUG COURT, DISHES UP DELIGHTFUL DATA ABOUT DIVERSION.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Jeff Rubin at (510) 272-6232. Technical questions should be addressed to Art Garrett at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.